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CONSTITUTIONAL LAW—APPLICATION OF PRIVILEGE AGAINST SELF-INCRIMINATION TO DENATURALIZATION PROCEEDINGS

Defendant became a naturalized citizen in 1925. In 1952 the United States attorney filed a petition to cancel his naturalization on the ground of illegality and fraud in its procurement.[1] From the outset of the trial, government counsel requested the defendant to take the witness stand. Defendant objected to the Government's request on the ground that this would contravene the self-incrimination clause of the fifth amendment of the Constitution.[2] *Held*, objection overruled. A denaturalization proceedings is not a "criminal case" within the meaning of the fifth amendment, and therefore a defendant cannot refuse to take the witness stand by invoking the privilege against self-incrimination. *United States v. Costello*, 144 F. Supp. 779 (S.D.N.Y. 1956).

Where the privilege against self-incrimination is invoked by a party already on the witness stand to avoid answering a particular question, it seems well settled that the form of the proceeding is not decisive in determining whether the privilege will apply.[3] The inquiry is whether a truthful answer to the question asked will tend to incriminate the witness.[4] In this situation the courts have been, for the

1. The pertinent section of the Nationality Act of 1940, under which this proceeding was brought, provides as follows: "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 31 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured." 54 STAT. 1158-59 (1940) (later amended by 68 STAT. 1232, 8 U.S.C.A. § 1451 (Supp. 1956)).

2. "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V

3. "[T]he courts make the prohibition applicable to all sorts of non-criminal judicial proceedings and protect a person who is acting as a witness whether or not he is a party to the litigation and whether or not a formal accusation against him has been made or is contemplated." Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 30 (1949). See also McCarthy v. Arndstein, 266 U.S. 34 (1924) (privilege applied to protect bankrupt in bankruptcy proceeding); 8 WIGMORE, EVIDENCE, §§ 2252, 2257 (3d ed. 1940).

4. See, *e.g.*, McCarthy v. Arndstein, 266 U.S. 34 (1924). In this case Mr. Justice Brandeis said, "The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." *Id.* at 40. See also Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause* (Part 3), 29 MICH. L. REV. 191, 195 (1930).

most part, undisturbed by the presence of the restrictive phrase "in any criminal case" in the fifth amendment, and have applied the privilege in proceedings purely "civil" in form.[5] However, where the privilege is invoked by a party to avoid "taking the stand" the restrictive phrase is given more force and the applicability of the privilege depends primarily upon whether or not the proceeding is a "criminal case" within the meaning of the amendment.[6] The line between those proceedings which may be classified as "criminal cases" and those which may not is a shadowy one. Generally the courts have not confined the phrase to formal criminal prosecutions, but have applied the privilege against taking the witness stand in other types of proceedings which might result in the imposition of penal sanctions.[7] The test seems to be, not whether the proceeding is technically a criminal prosecution, but whether the sanction sought to be imposed is penal or remedial.[8]

Examined in this context denaturalization proceedings are sui generis and extremely difficult of classification.[9] Clearly these proceedings are concerned with a sanction which is, in effect, gravely penal, in that the defendant may be deprived of his right to life in the American community. This argument, however, is weakened by the notion that denaturalization proceedings are not "criminal" and their result not penal because they only deprive the defendant of a right that was never lawfully his.[10] The Supreme Court has not decided

5. A most controversial topic recently has been the status of the privilege in legislative investigations. For excellent discussions in this area, see Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1, 30 (1949); Comment, *Applicability of Privilege Against Self-Incrimination To Legislative Investigations,* 49 COLUM. L. REV. 87 (1949).

6. The distinction between these two situations is lucidly pointed out in the case of State *ex rel.* Poach v. Sly, 63 S.D. 162, 257 N.W. 113 (1934). In this case the court said, "Under our Constitutional provisions, any person testifying anywhere, at any time, in any proceeding, is exempt from answering questions or furnishing testimony which would tend to incriminate him. . . . With reference to *the person charged with crime,* however . . . he is not only exempt from answering incriminating questions, but is exempt from being sworn and interrogated with reference to the matter at all . . . ." 257 N.W. at 116. (Emphasis added.)

7. See, *e.g.,* Lees v. United States, 150 U.S. 476 (1893).

8. *Ibid.* See also 8 WIGMORE, EVIDENCE § 2256 (3d ed. 1940).

9. For general discussions of denaturalization proceedings, see Hambro, *Constitutional Law—Denaturalization Under the Immigration and Nationality Act of 1952,* 51 MICH. L. REV. 881 (1953); Roche, *Pre-Statutory Denaturalization,* 35 CORNELL L.Q. 120 (1949), and *Statutory Denaturalization: 1906-1951,* 13 U. PITT. L. REV. 276 (1952).

10. This was the tenor of the Supreme Court opinion in Johannessen v. United States, 225 U.S. 227 (1912). The defendant challenged the Immigration Act of 1906, under which the Government sought to cancel his naturalization, on the ground that it was *ex post facto.* After pointing out that this prohibition was confined to laws respecting criminal punishments, the Court said, "The Act imposes no punishment on an alien . . . . It simply deprives him of his ill-gotten privileges." *Id.* at 242.

the question presented in the instant case, but an examination of its recent decisions involving denaturalization reveals an attitude favorable to the citizen-defendant.[11] In *United States v. Minker*[12] the question presented was whether the Immigration and Nationality Act of 1952 empowered an immigration officer to subpoena a naturalized citizen to determine if good cause existed for the institution of denaturalization proceedings against him. In holding that the Act granted no such subpoena power, the Court was obviously influenced by the severity of denaturalization.[13] Though the Court expressly declined to decide what protection would be afforded the defendant were he called to testify *after* denaturalization proceedings had been duly instituted against him,[14] it would seem anomalous in that situation to deny him the privilege against taking the witness stand.

The court in the instant case was obviously reluctant to rule on the defendant's objection to taking the stand.[15] It was apparently convinced that its holding was erroneous.[16] Nevertheless the decision puts the burden of appeal on the defendant when appeal would have been just as available to the Government. While denaturalization proceedings are equitable in nature and, in theory, merely deprive a person of a wrongfully procured status to which he was never entitled, the appellate court may be more impressed by their actual *punitive* effect in depriving a person of the priceless benefits of citizenship.

11. See, *e.g.*, Schneiderman v. United States, 320 U.S. 118 (1943) (the Government, by showing that defendant was at the time of his naturalization a member of the Communist Party, had not sustained the burden of proving that defendant was not "attached" to the Constitution and Laws of the United States); Baumgartner v. United States, 322 U.S. 665 (1944); United States v. Minker, 350 U.S. 179 (1956); United States v. Zucca, 351 U.S. 91 (1956) (an affidavit of good cause, not merely a verified complaint, is a jurisdictional pre-requisite to all suits for denaturalization).

12. 350 U.S. 179 (1956). The combined effect of *Zucca* and *Minker* places a heavy burden on the Government in the pre-trial stage of denaturalization.

13. "This may result in 'loss of both property and life; or all that makes life worth living.' " *Id.* at 187.

14. *Id.* at 190.

15. The court requested government counsel to proceed with the trial on other evidence. Counsel declined to do so and the court was faced with the possibility of aborting the Government's case by sustaining the objection.

16. "All that I have said and believe should impel me to the conclusion that the Government should not be permitted to use the defendant as a witness against himself in this action." 144 F. Supp. at 782.

CONSTITUTIONAL LAW—IMPLIED IMMUNITY—FEDERAL CONTRACTOR NOT SUBJECT TO STATE LICENSING REQUIREMENTS

The defendant, a private contractor engaged solely in the construction of an air force base for the federal government on land over which the United States had not acquired exclusive jurisdiction,[1] was charged with violation of an Arkansas statute requiring that a contractor obtain a state license. Defendant contended that the statute as applied to it was a direct interference with the performance of a federal function and, under the doctrine of implied governmental immunity, could not be constitutionally enforced. On appeal from the decision of the Supreme Court of Arkansas holding that the defendant was not a federal instrumentality and thus subject to the requirements of the statute, *held,* reversed. A state cannot require a license of a private contractor engaged solely in the performance of work for the federal government because this, in effect, would permit state control of the selection of federal contractors. *Leslie Miller, Inc. v. Arkansas,* 352 U.S. 187 (1956).

The immunity of the federal government from regulations of the states, whether the regulations be in the form of "pure" regulations or in the form of taxes, has been recognized since the early case of *McCulloch v. Maryland.*[2] This immunity is implied from the supremacy clause of the federal constitution, and is explained as a requisite of our dual form of government.[3] While relatively well defined in the last few years,[4] the area of immunity of the federal government from taxes levied by the states seems to depend largely on matters of form rather than substance.[5] In the area of purely regulatory state statutes, on the other hand, a state regulation which operates solely and directly upon a federal function which is a valid exercise of federal power is generally held to be invalid. The federal government may choose any of several means to effectuate the powers granted to it, in the exercise of which it is supreme. Means that have been used, and

1. Pursuant to 54 STAT. 19 (1940), 40 U.S.C.A. § 255 (1952).
2. 17 U.S. (4 Wheat.) 316 (1819).
3. This immunity is not reciprocal in the sense that it is applied to the same extent to state and federal governments. See, *e.g.,* Case v. Bowles, 327 U.S. 92 (1946) (application of federal price control act to sales of timber from school lands by state); California v. United States, 320 U.S. 577 (1944) (state operated wharfs and water terminals subject to federal regulations); United States v. California, 297 U.S. 175 (1936) (state operated railroad subject to federal safety regulations); University of Illinois v. United States, 289 U.S. 48 (1933) (application of import duties to property imported by state).
4. See, *e.g.,* Esso Standard Oil Co. v. Evans, 345 U.S. 495 (1953); Alabama v. King and Boozer, 314 U.S. 1 (1941); Metcalf & Eddy v. Mitchell, 269 U.S. 514 (1926); Baltimore Shipbuilding and Drydock Co. v. Baltimore, 195 U.S. 375 (1904); Van Brocklin v. Tennessee, 117 U.S. 151 (1886); Telegraph Co. v. Texas, 105 U.S. 460 (1881). See also Powell, *The Remnant of Intergovernmental Tax Immunities,* 58 HARV. L. REV. 757 (1945).
5. Powell, *supra* note 4, at 787.

on which direct state regulations have been held to be invalid, are a federally created corporation,[6] a post office employee,[7] a United States marshall,[8] and a member of the armed forces.[9] Such regulation is an attempt by a state to exact requirements from a subject which does not exist within the state by the state's own authority and, consequently, to which state sovereignty does not extend.[10] It is an implied denial of the sovereignty of the federal government over the means used to carry its powers into effect. However, there are areas in which specialized state interests are necessarily paramount to the general federal interest in being free of state restriction, and in which a degree of indirect state regulation is permitted.[11] It has been held by state courts that federal vehicles must observe state traffic regulations,[12] that state vehicle license requirements apply to private mail trucks,[13] and that a federal contractor whose operations extended on to the sidewalks is subject to state license requirements;[14] and by the United States Supreme Court that state safety regulations may be applicable to a federal contractor.[15]

The instant case presents the problem of the validity of a general state license requirement upon the performance of a federal function at a place over which the United States has not acquired exclusive jurisdiction.[16] The reasoning of the Court seems to be that, were this regulation allowed, it would in effect circumscribe the group from which the federal government could choose its contractors and impose a virtual power of veto over the federal government's choice. Under this view the regulation sought to be applied was direct and

6. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
7. Johnson v. Maryland, 254 U.S. 51 (1920).
8. *In re* Neagle, 135 U.S. 1 (1890).
9. State v. Burton, 41 R.I. 303, 103 Atl. 962 (1918). On the other hand, it has been held by a state court that a corporation which had a contract for the operation of concessions in a national park was subject to state regulations. Ranier Nat'l Park Co. v. Henneford, 182 Wash. 159, 45 P.2d 617, *cert. denied*, 296 U.S. 647 (1935).
10. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 429 (1819).
11. United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868) (federal postal employee not immune from service of state criminal process while in the performance of his duties); United States v. Harvey, 26 Fed. Cas. 206, No. 15,320 (C.C. Md. 1845); United States v. Hart, 25 Fed. Cas. 193, No. 15,316 (C.C. Pa. 1817) (constable authorized to prevent breach of peace by driver of federal mail carriage in driving recklessly); United States v. Bean, 24 Fed. Cas. 1049, No. 14,550 (D.C. Me. 1876) (mail carrier exempt from arrest on state civil process while on duty); Penny v. Walker, 64 Me. 430 (1874) (arrest of mail carrier while in the performance of his duties for liquor law violation).
12. Commonwealth v. Closson, 229 Mass. 329, 118 N.E. 653 (1918).
13. State v. Wiles, 116 Wash. 387, 199 Pac. 749 (1921).
14. Ralph Sollitt & Sons Constr. Co. v. Commonwealth, 161 Va. 854, 172 S.E. 290 (1934).
15. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).
16. Acquisition of exclusive federal jurisdiction over the place of application is a factor militating against the sufficiency of the interest of the state to regulate. Oklahoma City v. Sanders, 94 F.2d 323 (10th Cir. 1938); Ralph Sollitt & Sons Constr. Co. v. Commonwealth, 161 Va. 854, 172 S.E. 290 (1934) (dictum).

operated upon a subject over which the sovereignty of the state did not extend. The Court concluded that, since there was no special state interest paramount to the federal interest, the doctrine of implied immunity rendered the regulatory statute invalid.

The trend seems to be for the courts to look for some quantitative state interest, independent of the federal interest, to which the regulation can attach. In the instant case it could be reasoned that the state had some interests to protect, such as the interests of creditors of the contractor or citizens of the state who might be employed by the contractor. However, the case shows that the Supreme Court has not as yet found such an interest of the state to be a sufficient basis on which to found regulations of federal functions, in view of the more important interest of the federal government in being free to choose its contractors from those which it deems to be properly qualified.

EVIDENCE—CONFESSION OF CO-CONSPIRATOR ADMISSIBLE UNDER PROPER INSTRUCTIONS IN JOINT TRIAL

During the course of a trial of petitioner and five co-defendants for conspiring to deal unlawfully in alcohol[1] the district court admitted into evidence a confession made by one of the co-defendants after the conspiracy had ended. The jury, however, was instructed to disregard the confession in determining the guilt or innocence of petitioner. Petitioner appealed from the subsequent conviction contending that it was error to admit the confession unless the references to him were deleted. The court of appeals affirmed the conviction,[2] and the Supreme Court granted certiorari. *Held,* affirmed. It is not error to admit a confession made after the conspiracy has ended which incriminates co-defendants, if the jury is instructed to consider the confession only in determining the guilt of the confessor and to disregard it as to other defendants. *Paoli v. United States,* 352 U.S. 232 (1957).

Once the conspiracy has been established, certain declarations made by one conspirator may fall within an exception to the hearsay rule and be admissible against all co-conspirators for the truth of the matter asserted.[3] The basis of this exception to the hearsay rule is founded in the theory of "vicarious admissions,"[4] and each conspirator

1. 18 U.S.C.A. § 371 (1950).

2. United States v. Paoli, 229 F.2d 319 (2d Cir. 1956).

3. Lutwak v. United States, 344 U.S. 604, 617 (1953); Clune v. United States, 159 U.S. 590, 593 (1895); Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926).

4. A classic work on this subject is Morgan, *The Rationale of Vicarious Admissions,* 42 HARV. L. REV. 461 (1929).

is treated as the agent of the co-conspirators for certain purposes.[5] Corresponding to the "scope of employment" rule in the law of agency, the declaration must have been made in furtherance of the conspiracy in order to be admissible against co-conspirators.[6] The declaration must also have been made during the existence of the conspiracy.[7] In *Krulewitch v. United States*,[8] the Supreme Court, refusing to accept the view that inherent in every conspiracy is an implied continuing conspiracy to conceal,[9] held that once the main objective of the conspiracy has either failed or succeeded, a declaration by one conspirator is inadmissible hearsay as against co-conspirators.[10] Thus, a confession by one of the conspirators made after apprehension though admissible against the confessor, would be inadmissible to prove the guilt of co-conspirators.[11] In event of a joint trial, if the confession incriminates the co-conspirators, the question arises as to whether or not the confession should be admitted.[12] While the courts have recognized the inherent danger to co-conspirators in admitting such evi-

5. Van Riper v. United States, 13 F.2d 961, 967 (2d Cir. 1926); 4 WIGMORE, EVIDENCE § 1079 (3d ed. 1940). That this is the true basis for the exception has been questioned. One author feels that the only real basis is necessity. Levie, *Hearsay and Conspiracy*, 52 MICH. L. REV. 1159 (1954). This author feels that if this is true, the declaration remains subject to all the dangers of hearsay, and suggests that corroboration of the declaration be required.

6. Fiswick v. United States, 329 U.S. 211, 217 (1946); United States v. Goodman, 129 F.2d 1009, 1013 (2d Cir. 1942); People v. Davis, 56 N.Y. 95, 103 (1874). This requirement has been dispensed with in several jurisdictions by statute, the only requirement being that the declaration must relate to the conspiracy. *E.g.*, CAL. CODE CIV. PROC. § 1870(b) (Deering 1953); MONT. REV. CODES ANN. § 93-401(27)(6) (1947); ORE. REV. STAT. § 41.900(6) (1953). This is the view taken by the American Law Institute. MODEL CODE OF EVIDENCE rule 508(b) (1942). If this is not required the exception cannot be based on agency principles. Professor Morgan suggests the possibility of a new exception to the hearsay rule. Morgan, *supra* note 4, at 466. Even without the agency rationale this exception can be justified on the basis of trustworthiness. Such a declaration, if made during the conspiracy, is made by one who has special knowledge and is usually against the interest (penal) of the defendant. MCCORMICK, EVIDENCE 522 (1954).

7. Krulewitch v. United States, 336 U.S. 440 (1949); Rimmer v. United States, 172 F.2d 954 (5th Cir. 1949); People v. Davis, 56 N.Y. 95, 103 (1874). Acts committed after the conspiracy has ended, but not intended to be a means of expression are admissible, however, even against co-conspirators. Lutwak v. United States, 344 U.S. 604, 618 (1952).

8. 336 U.S. 440 (1949).

9. This theory had been accepted by the lower court. Although the main conspiracy had ended the court felt that the declaration was admissible as being made during the existence of the conspiracy because "We think that implicit in a conspiracy to violate the law is an agreement among the conspirators to conceal the violation. . . . Thus the conspiracy continues, at least for purposes of concealment, even after its primary aims have been accomplished." Krulewitch v. United States, 167 F.2d 943, 948 (2d Cir. 1948).

10. See also Allen v. Melton, 20 Tenn. App. 387, 99 S.W.2d 219 (M.S. 1936); Willard v. Whitaker, 153 S.W.2d 878 (Tex. Civ. App. 1941).

11. Rimmer v. United States, 172 F.2d 954 (5th Cir. 1949).

12. While this problem could be eliminated by trying the conspirators separately, this lies within the discretion of the trial judge, FED. R. CRIM. P. 14, and his ruling will not be disturbed unless that discretion has been abused. Duke v. United States, 233 F.2d 897 (5th Cir. 1956); Corcoran v. United States, 229

dence,[13] the orthodox rule is that admission of the confession lies in the discretion of the trial judge so long as the jury is properly instructed that the confession is to be used only in determining the guilt of the confessor.[14]

The confession involved in the instant case was objectionable hearsay under the rule of the *Krulewitch* case[15] if used to prove the guilt of the petitioner. The majority of the Court, however, followed the orthodox rule and held that it was not reversible error to admit the confession. This holding was based on the fact that the trial judge had clearly and emphatically instructed the jury that the confession was to be restricted to the determination of the confessor's guilt and was to be disregarded in determining the guilt of the petitioner.[16] There was no indication that the jury had been confused as to these instructions.[17] Four of the Justices, however, in a persuasive dissenting opinion, contended that the instructions given to the jury did not adequately safeguard the petitioner from the prejudicial effects of the confession. They thought the confession so incriminated[18] the petitioner that its effect could not be wiped from the minds

F.2d 295 (5th Cir. 1956); Johns v. United States, 227 F.2d 374 (10th Cir. 1955). It has been held to be an abuse of this discretion to deny a motion for severance where part of the evidence, admissible to one defendant, was inadmissible and highly prejudicial to some of the defendants and the judge knew of this at the time of the motion. Hale v. United States, 25 F.2d 430 (8th Cir. 1928). "We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants." United States v. Haupt, 136 F.2d 661, 672 (7th Cir. 1943). That the tendency is to allow joint trials in conspiracy cases—see, *e.g.*, cases cited notes 3 & 6 *supra*.

13. *E.g.*, Blumenthal v. United States, 332 U.S. 539, 559 (1947); United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932); Hale v. United States, 25 F.2d 430, 438 (8th Cir. 1928); Van Riper v. United States, 13 F.2d 961, 968 (2d Cir. 1926).

14. Blumenthal v. United States, 332 U.S. 539 (1947); United States v. Leviton, 193 F.2d 848 (2d Cir. 1951); United States v. Gottfried, 165 F.2d 360 (2d Cir. 1948); Nash v. United States, 54 F.2d 1006 (2d Cir. 1932); United States v. Rose, 31 F. Supp. 249 (W.D. Ky. 1940). See United States v. Kelinson, 205 F.2d 600 (2d Cir. 1953), holding it error to admit the declaration without cautioning the jury.

15. The confession was made after the conspiracy by another defendant and was not in furtherance of the conspiracy. 352 U.S. at 233.

16. The trial court's instructions read thus: "This affidavit or admission [the confession] will be considered by you solely in connection with your determination of the guilt or innocence of the defendant Whitley [the confessor]. It is not to be considered as proof in connection with the guilt or innocence of any of the other defendants." *Id.* at 239-40.

17. The majority placed much emphasis on the fact that there was sufficient evidence to sustain the conviction of the petitioner without the confession. Is this any assurance that the jury believed the other evidence and convicted petitioner on the basis of it rather than on the basis of the inadmissible confession? The dissenting justices thought not. *Id.* at 248.

18. The confession named Paoli, the petitioning defendant, expressly and gave minute details of how he handled the alcohol. See appendix to the instant case. *Id.* at 243. The petitioner's original contention seemed to be more that it was error not to delete his name than that it was error to admit the confession. The trial court and the circuit court of appeals both found that deleting petitioner's name would have been impractical. *Id.* at 237.

of the jury by a mere instruction to disregard it.[19] These Justices agreed in substance with the dissenting judge in the court below.[20] There it was stated that as the instructions were wholly inoperative—in that it was impossible for the jury to follow them—admission of the confession was prejudicial error as to the petitioner.[21] Pointing out that the prosecution could have avoided the unfairness to the petitioner and at the same time could have used the confession against the confessor by having separate trials, the dissenting Justices thought that in this case precedent should give way to justice and the lower court should be reversed.[22]

It is impossible, of course, to determine whether or not juries are capable of following instructions similar to those in the instant case, and if so whether or not they actually do. Where the evidence is so highly prejudicial it is certainly doubtful.[23] If in fact the instructions are ineffective the co-conspirators are many times convicted on a highly prejudicial bit of hearsay evidence in which there

19. In Krulewitch v. United States, 336 U.S. 440, 453 (1949), Justice Jackson said in concurring, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." That prosecution attorneys are also aware of this may well explain the large proportion of joint trials in such cases.

20. United States v. Paoli, 229 F.2d 319, 322 (2d Cir. 1956) (dissenting opinion).

21. Judge Frank felt that as the instructions were inoperative the jury used the confession against pertitioner for the truth of the matter asserted therein. Therefore the confession was inadmissible hearsay and admission of it constituted reversible error under the rule of the *Krulewitch* case. United States v. Paoli, *supra* note 20, at 323.

22. See the statement of Judge Frank in the court below that precedent should give way to justice. *Ibid.*

23. The courts have doubted this many times. "This testimony was not admitted against Lutwak, and the jury was adequately warned not to use it against him. But does anyone believe that the jury could forget [the facts in the testimony] . . . . The salutary rule that evidence of acts which occurred long after the conspiracy terminated is admissible only against particular defendants should be observed in spirit as well as in letter." Lutwak v. United States, 344 U.S. 604, 623 (1953) (dissenting opinion). "The danger rested rather in the risk that the jury, in disregard of the court's direction, would transfer, consciously or unconsciously, the effect of the excluded admissions from the case as made against Goldsmith and Weiss across the barrier of the exclusion to the other three defendants. . . . Perhaps even at best the safeguards provided by clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions, are insufficient to ward off the danger entirely." Blumenthal v. United States, 332 U.S. 539, 559 (1947). "Indeed, in a case of this kind it is extremely doubtful whether such admonitions have any serious importance. . . . since in nine cases out of ten it is impossible for any one, lay or legal, to divide his mind into proof-tight compartments, and forget at one moment what he must use at another." Van Riper v. United States, 13 F.2d 961, 968 (2d Cir. 1926). "[T]he confession of Ramsey was incompetent to bind Hale. The court so stated when it was admitted, and again in its charge; but it is inconceivable that the impression made upon the minds of the jurors could have been removed by these formal remarks of the court." Hale v. United States, 25 F.2d 430, 438 (8th Cir. 1928). See also United States v. Gottfried, 165 F.2d 360, 367 (2d Cir. 1948); Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

is no guaranty of trustworthiness whatsoever.[24] It is believed that because of the doubtful effectiveness of the instructions, and the lack of trustworthiness of the confession, the danger of injustice is so great that some steps should be taken to afford protection to the co-conspirators. The following suggestion is believed to offer some solution to the problem.[25] Upon motion for a separate trial by one of the co-conspirators the trial judge should hold a pre-trial hearing. Here he should determine if the prosecution intends to offer in evidence declarations by one of the conspirators which cannot be used against others, and if so, whether or not its reception would be highly prejudicial[26] to the defendants against whom it is inadmissible. If both questions are answered affirmatively, the judge should order separate trials. If the judge refuses to grant separate trials[27] then the highly prejudicial declarations should not be admitted in evidence. Should the trial judge in his discretion deny the motion for a separate trial and admit the prejudicial evidence,[28] such action should be considered an abuse of discretion and, as such, reversible error. It is believed that this plan will afford adequate protection to the co-conspirators and at the same time not contravene any existing rules of law.[29]

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24. Not only is the confession untrustworthy, in that it may be highly self-serving when made, but also there is no assurance of the the right to cross-examine the declarant, as he may set up the privilege against self-incrimination.

25. These suggestions are somewhat similar to those of Judge Frank in the court below. United States v. Paoli, 229 F.2d 319, 324 (2d Cir. 1956).

26. The dissenting Justices in the instant case stated that where the confession only "glancingly" affects the defendant against whom it is inadmissible there is no great danger. This distinction is adopted here. "Highly prejudicial" as used herein means that there is some doubt that the jury will be able to disregard the evidence when deciding the guilt or innocence of the party against whom it is inadmissible.

27. That this alone may constitute reversible error, see note 12 *supra*. Some courts have held, however, that it is not error to deny severance in such circumstances. See, *e.g.*, Sharp v. United States, 195 F.2d 997 (6th Cir. 1952); Hall v. United States, 168 F.2d 161 (D.C. Cir. 1948), *cert. denied*, 334 U.S. 853 (1948).

28. The instant case and cases cited in note 14 *supra* stand for the proposition that admission of the evidence alone, if under proper instructions, do not constitute such an abuse of discretion as will amount to reversible error.

29. Care should be taken to distinguish between the situation in the instant case and that set out in the suggestions. The Petitioner did not move for a separate trial in the instant case. It is not contended here that under such circumstances the admission of the evidence alone should constitute abuse of discretion and reversible error. Nor is it contended that denial of a separate trial alone should constitute such error. It is contended, however, that if the trial judge *both* denies a motion for separate trial *and* admits the highly prejudicial evidence, this should be considered such an abuse of discretion as to constitute *reversible* error. Should the courts choose to follow these suggestions, a great blow will have been dealt to the evils and injustices which surround the offense of "conspiracy."

FEDERAL JURISDICTION—INJUNCTIONS—JUDICIAL CODE SECTION 2283 IS INAPPLICABLE TO INJUNCTIONS SOUGHT BY THE UNITED STATES

In a state court action petitioner sought to have itself declared owner of mineral rights in land owned by the United States, as against the latter's lessee of these rights. The United States brought action in a federal district court to quiet title to the mineral rights and to enjoin further proceedings in the state court. The injunction was granted despite section 2283 of the Judicial Code,[1] which provides that "a court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." On certiorari from the decision of the court of appeals affirming this decree, *held,* affirmed. Section 2283 does not apply when the United States is the party seeking the injunction. *Leiter Minerals, Inc. v. United States,* 352 U.S. 220 (1957).

The Act of 1793[2] which first expressly authorized the federal courts to grant injunctions also placed upon this power certain limitations, one of which was: "nor shall a writ of injunction be granted to stay proceedings in any court of a state."[3] The recognized purpose of this limitation was to eliminate a likely source of conflict between the judicial powers of the federal and state governments.[4] Though the limitation seemed to prohibit all injunctions to restrain state court proceedings, the history of its application is marked by the development of several judicially-created exceptions.[5] From unnecessarily broad language employed in several early cases[6] the notion developed that a federal court, despite the Act of 1793, might enjoin state court ac-

1. 28 U.S.C.A. § 2283 (1950).

2. REV. STAT. § 720 (1875).

3. This limitation has been held to prohibit not only injunctions directed to state courts and their officers but also those restraining party-litigants from further prosecution of state court actions. Hill v. Martin, 296 U.S. 393 (1935). The statutory bar extends not only to the staying of actual suits but also to the restraining of steps taken to enforce judgments in state courts. *Ibid.* The limitation does not go to the jurisdiction of the court, but merely relates to the propriety of exercising jurisdiction. Smith v. Apple, 264 U.S. 274 (1924). *But cf. Ex parte* Schwab, 98 U.S. 240, 242 (1878).

4. See Oklahoma Packing Co. v. Oklahoma Gas & Elec. Co., 309 U.S. 4, 8-9 (1939), where the Court describes the predecessor of section 2283 as "a limitation of the power of the federal courts . . . expressing an important Congressional policy—to prevent needless friction between state and federal courts." See also Warren, *Federal and State Court Interference,* 43 HARV. L. REV. 345, 347 (1930).

5. For a thorough discussion of all these judicially-created exceptions, see Comment, 35 CALIF. L. REV. 545 (1947). See also Warren, *supra* note 4.

6. See, *e.g.,* Freeman v. Howe, 65 U.S. (24 How.) 450 (1860); Peck v. Jenness, 48 U.S. (7 How.) 612 (1849). "[W]here the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." *Id.* at 625.

tions where necessary to protect its jurisdiction. This idea apparently had its inception in the rule of comity that one court should not interfere with another court's possession of a res involved in litigation.[7] Relying upon the language rather than the holdings of these earlier cases, the Supreme Court later indicated that a federal court, in order to protect its jurisdiction, might enjoin state court actions involving any litigation the *subject matter* of which was pending before a federal court, even though the federal court action was in personam.[8] Furthermore, in cases which had been properly removed to a federal court, injunctions were often upheld on the ground that, upon removal, the state court lost all jurisdiction of the action and the federal court could protect its jurisdiction by enjoining further proceedings in the state court.[9] Another exception was created by cases in which the Court upheld injunctions to protect prior decrees of the federal courts by restraining relitigation of the same issues in state courts.[10] Still other cases upheld injunctions to prevent state court enforcement of fraudulently obtained judgments[11] and to restrain the institution of state court actions to enforce allegedly unconstitutional state statutes.[12]

Though these judicially-created exceptions were clearly irreconcilable with the language of the Act of 1793, the Court apparently felt that they aided its purpose in avoiding friction between the court systems[13] and were essential to the continued supremacy of the federal judicial power.[14] The recognition of these exceptions continued well into the present century, but in *Kline v. Burke Constr. Co.*,[15] decided in 1922, the Court revealed a change in its attitude toward them. There it was

7. See Comment, 35 CALIF. L. REV. 545, 547 (1947).

8. Looney v. Eastern Texas R.R., 247 U.S. 214 (1918); French v. Hay, 89 U.S. (22 Wall.) 250 (1874).

9. Madisonville Traction Co. v. St. Bernard Mining Co., 196 U.S. 239 (1905); French v. Hay, 89 U.S. (22 Wall.) 250 (1874). *Cf.* Dietzsch v. Huidekoper, 103 U.S. 494 (1880).

10. Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921). *Cf.* Local Loan Co. v. Hunt, 292 U.S. 234 (1934); Julian v. Central Trust Co., 193 U.S. 93 (1904); Dietzsch v. Huidekoper, 103 U.S. 494 (1880). *Contra,* Dial v. Reynolds, 96 U.S 340 (1877).

11. Simon v. Southern Ry., 236 U.S. 115 (1915); Marshall v. Holmes, 141 U.S. 589 (1891).

12. *Ex parte* Young, 209 U.S. 123 (1908). Does section 2283 ever prohibit enjoining the *institution* of a state court proceedings?

13. "The use of the writ of injunction, by federal courts first acquiring jurisdiction over the parties or the subject matter of a suit, for the purpose of protecting and preserving that jurisdiction until the object of the suit is accomplished and complete justice done between the parties, is familiar and long established practice .... So important is it that unseemly conflict of authority between state and federal courts should be avoided by maintaining the jurisdiction of each free from the encroachments of the other, that [the predecessor of section 2283] ... has repeatedly been held not applicable to such an injunction." Looney v. Eastern Texas R.R., 247 U.S. 214, 221 (1918).

14. "If it [the injunctive relief sought] could not be given in this case the result would have shown the existence of a great defect in our Federal jurisprudence ...." French v. Hay, 89 U.S. (22 Wall.) 250, 253 (1874).

15. 260 U.S. 226 (1922). See also Southern Ry. v. Painter, 314 U.S. 155 (1941).

held that a federal court was prohibited to enjoin a state court suit under the guise of protecting its jurisdiction of an in personam action because jurisdiction of such an action is not impaired by a suit in another court on the same issues.[16] A far more severe restriction of the judicially-created exceptions was brought about in 1941 in *Toucey v. New York Life Ins. Co.*,[17] in which it was held that a federal court could not protect its decree by enjoining relitigation of the same issues in a state court. In extensive dictum, purporting to discuss the entire history of the application of the Act of 1793, the Court showed great disfavor for all judicially-created exceptions to the limitations contained in the Act. Aside from certain "statutory exceptions,"[18] it indicated approval of an exception only for injunctions necessary to protect jurisdiction of an in rem action or of an action properly removed to a federal court, the latter solely on the ground that the various removal acts were, by implication, amendments to the Act of 1793. Congress, however, by the enactment of section 2283 in 1948, has apparently nullified the holding of the *Toucey* case with the incorporation of an express exception for injunctions necessary to protect or effectuate federal court judgments[19] and has also for the first time expressly provided an exception for injunctions necessary in aid of jurisdiction.

The obvious effect of section 2283 is to deprive federal court litigants, except in specified situations, of the remedy of enjoining state court proceedings. In the instant case the Court held that this statutory limitation would not be applied to divest the federal government

16. The Court in the *Kline* case concluded that an injunction would be upheld where the federal court action is in rem but not where it is in personam. Since it is sometimes difficult to determine whether a particular action is in rem or in personam, this statement should be regarded as a convenient guide rather than a strict rule of law. The true rationale of the case would appear to be that if a state court action actually threatens to impair the jurisdiction of the federal court the injunction should issue, even though the federal court action is not strictly in rem.

17. 314 U.S. 118 (1941). Reed and Roberts, J.J., and Stone, C.J., dissented on the ground that since the practice of enjoining state court proceedings to protect federal decrees had been established prior to the 1911 reenactment of the statutory limitation, Congress, by failing to make any substantial change, indicated its approval of the practice. *Id.* at 141-54.

18. In the *Toucey* dictum the Court listed certain statutes which were said to constitute implied amendments to the limitation contained in the Act of 1793. See 314 U.S. at 132-34. Notice that some of these statutes expressly authorize the enjoining of state court actions while others merely grant exclusive jurisdiction to the federal courts. Does section 2283, by the words "except as expressly authorized by Act of Congress," limit the exception to statutes which expressly authorize injunctions?

19. "The exceptions specifically include the words 'to protect or effectuate its judgments,' for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation of cases and controversies fully adjudicated by such courts. (See Toucey v. New York Life Insurance Co. . . .)" Revisor's Note, 28 U.S.C.A. § 2283 (1950). The view of the dissenters in the *Toucey* case has thus met with congressional approval. It appears, furthermore, that the intended result has been accomplished. See, *e.g.*, Berman v. Denver Tramway Corp., 197 F.2d 946 (10th Cir. 1952).

of this remedy. In reaching this result, the Court relied upon the rule of construction, adopted from English law,[20] that a statute which deprives persons of rights and remedies should not be applied to divest the sovereign of these rights and remedies unless required by the words of the statute.[21] Although recognizing that section 2283 was designed to avoid friction between federal and state judiciaries, the Court felt that this policy was less compelling when the United States, rather than a private litigant, was seeking to enjoin state court proceedings and concluded that the general language of the section did not justify its application in this situation in view of "the frustration of superior federal interests that would ensue . . . ."[22]

Although several lower court decisions have reached this same result,[23] the instant case is the first holding by the Supreme Court that section 2283 does not apply to injunctions sought by the United States.[24] In view of the attitude of the Court in the *Kline* and *Toucey* cases, this holding is somewhat surprising and may mark the beginning of another period in which injunctions to stay state court proceedings will be more frequently upheld, either through liberal interpretation of the express exceptions or through judicial creation of further exceptions irreconcilable with the plain provisions of section 2283. The refusal to apply the limitation in the instant case was clearly not warranted by the terms of section 2283; furthermore, the Court relied upon no evidence of legislative intent other than the slight indication to be derived from the failure to provide expressly that the limitation should extend to injunctions sought by the United States. Since the Court itself has previously stated that the rule of construction relied upon in the instant case is merely an "aid to consistent construction of statutes

20. See 31 HALSBURY, LAWS OF ENGLAND 503, 523 (2d ed. 1938). For a discussion of this English rule of construction, see Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 238-39 (1873).

21. For cases applying this rule of construction in this country, see United States v. United Mine Workers, 330 U.S. 258 (1947); United States v. Herron, 87 U.S. (20 Wall.) 251 (1873); Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227 (1873). The Court in the instant case relied heavily upon United States v. United Mine Workers, *supra*, in which it was held that the provision of the Norris-LaGuardia Act, 47 STAT. 70 (1932), 29 U.S.C.A. § 101-15 (1950), limiting the power of federal courts to issue injunctions in cases involving labor disputes, did not apply to injunctions sought by the United States. It is interesting to note that there the Court placed little reliance upon this rule of statutory construction, devoting its attention primarily to other evidence of legislative intent and to the question of whether the United States was an "employer" within the meaning of the act.

22. 352 U.S. at 226.

23. See, *e.g.*, Brown v. Wright, 137 F.2d 484 (4th Cir. 1943); United States v. McIntosh, 57 F.2d 573 (E.D. Va. 1932); United States v. Inaba, 291 Fed. 416 (E.D. Wash. 1923). *Contra,* United States v. Land Title Bank & Trust Co., 90 F.2d 970 (3d Cir. 1937).

24. In the few cases involving this question which have reached the Supreme Court other reasons have been found for granting or denying the injunction. See, *e.g.*, Fleming v. Rhodes, 331 U.S. 100 (1947); Porter v. Dicken, 328 U.S. 252 (1946); Bowles v. Willingham, 321 U.S. 503 (1944); United States v. Parkhurst-Davis Co., 176 U.S. 317 (1900).

when their purpose is in doubt,"[25] this rule would not appear to justify the holding, as the purpose of section 2283 is clear. The only apparent explanation is that in this particular situation the Court felt that the policy of maintaining federal supremacy should prevail. While this may well be a desirable result, should it not have been reached by legislative action rather than by judicial decision?

JUDGMENTS—RES JUDICATA—VOLUNTARY ABSENCE OF INSURED CONSTITUTES EXTRINSIC FRAUD

Upon the seven-year absence of the insured, the beneficiary of policies on his life sued for and collected the full proceeds of the policies after a finding that the insured was dead.[1] Twenty years later the insured was located alive, and the insurance company immediately brought suit to recover the proceeds remaining in a trust fund. The beneficiary's demurrer to the complaint on the ground of res judicata was sustained in the trial court. On appeal to the Tennessee Supreme Court, *held* (3-2), reversed. An insured's voluntary absence constitutes extrinsic fraud, which prevents the defense that the insured was alive from being adequately presented by the insurer; hence, this is an independent action and does not involve the retrial of the issues disposed of in the former case. *New York Life Ins. Co. v. Nashville Trust Co.*, 292 S.W.2d 749 (Tenn. 1956).

The power of equity to grant relief in an independent action against a civil judgment obtained through fraud, accident or mistake was conceded by the courts of chancery long ago[2] and is today well established.[3] However, the general desire that a valid judgment should be binding upon the parties as to matters that have been litigated prompted the Supreme Court, in *United States v. Throckmorton*,[4] to

25. United States v. California, 297 U.S. 175, 186 (1936). See also Green v. United States, 76 U.S. (9 Wall.) 655 (1869).

1. New York Life Ins. Co. v. Nashville Trust Co., 178 Tenn. 437, 159 S.W.2d 81 (1942). The principal case is popularly known as "The Buntin Case."

2. Anonymous, Litt. 37, 124 Eng. Rep. 124 (Ch. 1626).

3. Bolden v. Sloss-Sheffield Steel & Iron Co., 215 Ala. 334, 110 So. 547, 49 A.L.R. 1206 (1925); Purinton v. Dyson, 8 Cal. 2d 322, 65 P.2d 777, 113 A.L.R. 1230 (1937); Caldwell v. Taylor, 218 Cal. 471, 23 P.2d 758, 88 A.L.R. 1194 (1933); Pico v. Cohn, 91 Cal. 129, 25 Pac. 970 (1891); FREEMAN, JUDGMENTS §§ 1178-1253 (5th ed. 1925); GIBSON, SUITS IN CHANCERY § 1271 (5th ed. 1956); RESTATEMENT, JUDGMENTS §§ 112-30 (1942).

4. 98 U.S. 61 (1878).

rule that in an independent action relief should not be granted for intrinsic fraud, limiting equitable relief only to cases of extrinsic fraud. This distinction between extrinsic and intrinsic fraud[5] has been recognized, at least in statement, by both state and federal courts.[6] Extrinsic or collateral fraud is that fraud practiced in the very act of obtaining the judgment which prevented the agrieved party from making a full and fair presentation of his case or defense.[7] Relief is granted on the theory that there has never been a real contest on the issue before the court.[8] Thus, extrinsic fraud is some act or thing which is extrinsic or collateral to the facts, questions, or issues presented, considered and determined in the former case which prevented an adequate presentation of the case.[9] Recognized instances of extrinsic fraud occur where the unsuccessful party was kept in ignorance of suit, was kept away from court by false promise of compromise, was betrayed by his attorney, or was kept in ignorance of a defense available to him.[10] Intrinsic fraud, on the other hand, involves matters which were actually in issue, or might have been litigated in the original proceeding, such as perjury, fraudulent instruments, or any other matter presented and decided upon in rendering the judgment.[11] It is considered that in the case of intrinsic fraud

5. "Where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,— these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." 98 U.S. at 65-66. *But see* Marshall v. Holmes, 141 U.S. 589 (1891); Publicker v. Shallcross, 106 F.2d 949 (3d Cir.), *cert. denied*, 308 U.S. 264 (1939).

6. 7 MOORE, FEDERAL PRACTICE ¶ 60.37 (2d ed. 1955). See also Hogan v. Scott, 186 Ala. 310, 65 So. 209 (1914); Fawcett v. Atherton, 298 Mich. 362, 299 N.W. 108 (1941), 40 MICH. L. REV. 598 (1942); Keith v. Alger, 114 Tenn. 1, 85 S.W. 71 (1905); Thomas v. Dockery, 33 Tenn. App. 695, 232 S.W.2d 594 (W.D. 1950); cases cited note 3 *supra*. The *Restatement* disapproves of the use of the terms extrinsic and intrinsic fraud and does not use them. The rule there depends upon whether or not the party injured by the judgment had a "reasonable opportunity to have determined impartially a meritorious claim or defense which he had." RESTATEMENT, JUDGMENTS § 118 (1942).

7. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

8. Kennedy v. Dickie, 34 Mont. 205, 85 Pac. 982 (1906).

9. Bullard v. Zimmerman, 82 Mont. 434, 268 Pac. 512 (1928). See also Annot., 88 A.L.R. 12 (1934).

10. Flood v. Templeton, 152 Cal. 148, 92 Pac. 78 (1907); Frisbie v. Chase, 161 Iowa 133, 140 N.W. 842 (1913).

11. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, (1891); Eaton v. Koontz, 138 Kan. 267, 25 P.2d 351 (1933); Reed v. Bryant, 291 S.W. 605 (Tex. Civ. App. 1926); 49 HARV. L. REV. 327 (1935). *But see* Marshall v. Holmes 141 U.S. 589 (1891) (relief granted for intrinsic fraud); Publicker v. Shallcross, 106 F.2d 949 (3d Cir.), *cert. denied*, 308 U.S. 264 (1939) (relief granted for intrinsic fraud). See also Annot., 126 A.L.R. 390 (1940).

the unsuccessful litigant has had his full day in court, at which time he had an opportunity to meet all issues and counteract any fraudulent testimony, and that the case was nevertheless decided upon its merits.[12] If judgments were open to attack on the ground of intrinsic fraud, each defeated party might in turn charge the other with fraud, so that litigation might never terminate.[13] A majority of the courts have felt that the apparent hardships found in particular cases involving intrinsic fraud should not outweigh the principle of res judicata.[14] The tendency, however, to adhere strictly to the *Throckmorton* rule, even in extraordinary cases,[15] has been subject to severe criticism.[16] As some cases clearly indicate, the distinction between extrinsic and intrinsic matter is in many instances irrational, leading several commentators to advocate abrogation of the rule.[17]

The instant case exemplifies the confusion concomitant with distinguishing extrinsic and intrinsic fraud in a case of appealing equities. Each of the five justices had separate comments upon the application of the law to the facts; two justices, speaking for the majority and granting recovery, declared the fraud extrinsic, a concurring justice considered it both extrinsic and intrinsic, deciding the issue on the basis of the equities involved.[18] Two of the justices dissented on the ground that the fraud was intrinsic, and therefore not a valid ground for recovery. The majority opinion, recognizing the doctrine that a court will not set aside an adjudication of issues previously pre-

12. Greene v. Greene, 68 Mass. 361 (1854).

13. Pico v. Cohn, 91 Cal. 129, 25 Pac. 970 (1891); Meeker v. Waddle, 83 Wash. 628, 145 Pac. 967 (1915). The fear of repeated litigation has apparently been foundless as shown by the experience in Wisconsin, which rejected the *Throckmorton* rule in Laun v. Kipp, 155 Wis. 347, 145 N.W. 183, (1914), and will grant relief for both extrinsic and intrinsic fraud. See Weber v. Weber, 260 Wis. 420, 51 N.W.2d 18, 36 MARQ. L. REV. 198 (1952); Note, 23 CALIF. L. REV. 79 (1935); 3 ALA. L. REV. 224 (1951); 36 ILL. L. REV. 894 (1942).

14. Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923). See Annot., 88 A.L.R. 1201 (1934) (criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgments on ground of fraud.)

15. See, *e.g.*, Pico v. Cohn, 91 Cal. 129, 25 Pac. 970 (1891).

16. See Note, 4 VAND. L. REV. 338 (1951) (sharply critical of *Throckmorton*); Comment, 23 CALIF. L. REV. 79 (1934); 21 COLUM. L. REV. 268 (1921); 12 CORNELL L.Q. 385 (1927); 22 HARV. L. REV. 600 (1909); 49 HARV. L. REV. 327 (1951); 40 MICH. L. REV. 598 (1942) (describes rule as harsh and artificial).

17. 21 COLUM. L. REV. 268 (1921). See Chicago, R.I. & P.R.R. v. Callicotte, 267 Fed. 799 (8th Cir. 1920), *cert. denied*, 255 U.S. 570 (1921) (relief granted for perjury); Stenderup v. Broadway State Bank, 219 Cal. 593, 28 P.2d 14 (1933).

18. "[B]ecause the money *is not theirs to retain as a matter of legal or equitable right. . . . 'Justice is the constant and perpetual will to allot to every man his due.'* . . . It is upon this principle that I rest my decision in this case." 292 S.W.2d at 759.

The majority opinion also included the following: "Is it right that he can now come in court, years later, and say: 'Well, I've got your money, do what you want to about it, there is nothing you can do with me about it or anything else.' Is it right then that someone else, [the beneficiary] . . . . should keep this money? It certainly seems to us that it should go back where it belongs, that part which is left and that those who are not entitled to it should not be allowed to participate in it." 292 S.W.2d at 754.

sented and considered, held this an independent action not involving retrial of the issues of the former case. The issue in the former case was whether the insured was dead; the issue in the instant case is whether the intentional disappearance of insured constitutes extrinsic fraud.

This opinion may be criticized for confusing the traditional concept of extrinsic fraud by stating that the insured's disappearance constitutes "fraud on the court."[19] "Fraud on the court," an equitable concept having reference to the use of such influence upon the court that its judicial machinery does not perform in an impartial manner, has uniformly been given a different meaning from extrinsic fraud. There appears to have been no fraud on the court in this sense but only fraud in the evidence available for presentation. Hence, although the court cites cases of genuine fraud on the court,[20] it would seem that extrinsic fraud is the basis of the court's decision. Furthermore the value of this opinion as precedent is depreciated by the rather apparent penchant of the court to grant relief to the insurance company. While this decision may be meritously criticized as confusing the established classifications of fraud, it should be emphasized that equity's discretion requires justice rather than rigidity.[21]

LABOR LAW—UNEMPLOYMENT INSURANCE—DOUBLE AFFIRMATION CLAUSE HELD UNCONSTITUTIONAL

Employees of the Westinghouse Corporation in Pennsylvania struck the plant in a labor-management dispute. After the strike had been in progress for some time, the Governor suggested to both parties that their differences be arbitrated and that the employees return to work during the arbitration. The union accepted the proposal, but the company did not. On the basis of this action the Director of Employment

19. 292 S.W.2d at 753.

20. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). This case was cited by the Advisory Committee for the Federal Rules as an example of fraud on the court. See 7 MOORE, FEDERAL PRACTICE ¶¶ 60.15, 60.33 (2d ed. 1955) for a thorough discussion of the *Hazel-Atlas* case, fraud on the court and the applications to rule 60(b).

21. New York Life Ins. Co. v. Chittenden & Eastmen, 134 Iowa 613, 112 N.W. 96 (1907) had a fact situation nearest to the one involved here. There the insurance company had paid the money to the beneficiary upon a presumption of death without litigation, and when the insured was later located, sued for a return of the funds. In denying recovery for the insurance company the Supreme Court of Iowa said: "Had a judgment been secured in an action by the administrator with authority to represent the rights of all persons interested in the proceeds of the policies, such judgment would have been conclusive as to the death of Jarvis, and the company could not, after paying the amount of such judgment, have recovered back the money paid on discovering that the essential fact in issue in the case, to wit, the death of Jarvis, had been erroneously adjudicated. The judgment would have been conclusive as to that fact." 112 N.W. at 98.

Security ruled that the work stoppage was now a lock-out, which under the Pennsylvania statute made the employees eligible for unemployment compensation. Claims filed for such unemployment compensation by twenty-seven employees were allowed by the Commissioner. On appeal to the Board of Review, all the claims were affirmed. Payment was then ordered pursuant to the double affirmative clause of the Pennsylvania statute.[1] The company sought to enjoin payment of the claims, alleging that payment before judicial review violated the due process clauses of the federal and state constitutions. *Held,* injunction granted. "[A] statutory provision which directs that unemployment compensation in large amounts shall be made to claimants before the validity of their claims to such payments are or may be determined by a Court . . . is a violation of the due process of law requirements of § 1 of the Fourteenth Amendment of the Constitution of the United States and also § 9 of Article I of the Constitution of Pennsylvania . . . ."[1a] *Pennsylvania State Chamber of Commerce v. Torquanto,* 386 Pa. 306, 125 A.2d 755 (1956).

The level of tax contributions under the unemployment insurance laws of all states depends upon a method of rate differential based on the employer's experience with unemployment.[2] Closely connected with this experience rating is non-charging with its double affirmative provision.[3] If the claim is sustained by a double affirmation[4] (usually a referee or trial examiner, confirmed by an administrative appeals board or department) then it will be paid regardless of the outcome of the appeal to the court. The usual statutory language is to the effect that the claim will not be superseded by appeal, but if reversed on appeal the employer will be non-charged.[5] Some of the frequent statutory grounds for non-charge involve benefits paid for unemployment resulting from conduct of the worker, *e.g.,* voluntary quits, discharge for misconduct or refusal of suitable work.[6] Thus the experience rating of the employer will not be altered by the payment of such claims, and his contribution rate will in no way be affected.

In addition to the experience rating method of measuring the employer's rate of contribution some states establish a set amount for the

1. PA. STAT. ANN. tit. 43, § 830 (1952).

1a. Instant case, 125 A.2d at 765.

2. See Teple & Nowacek, *Experience Rating: Its Objeetives, Problems, and Economic Implications,* 8 VAND. L. REV. 376 (1955); Arnold, *Experience Rating,* 55 YALE L.J. 218 (1945); Rubinow, *State Pool Plans and Merit Rating,* 3 LAW. & CONTEMP. PROB. 65 (1936).

3. Teple & Nowacek, *supra* note 2, at 395. Some 34 states have adopted the double affirmation clause. See RISENFELD & MAXWELL, MODERN SOCIAL LEGISLATION 512 (1950).

4. "This occurs whenever two successive favorable decisions on the worker's claim are made." Teple & Nowacek, *supra* note 2, at 396 n.49.

5. For a typical statute dealing with the double affirmative and non-charge, see TENN. CODE ANN. § 50-1325 (1956). This code section was amended by the 80th General Assembly (1957), discussed *infra* note 13 and related text.

6. See Teple & Nowacek, *supra* note 2, at 397.

fund, and if it falls below such amount the contribution rate of all employers increases.[7] Hence the employer is concerned not only with his individual experience rating, but also with the general experience of other employers, since a substantial change in their experience may eventually affect his rate of contribution.[8]

Insofar as the effect of individual experience rating upon rate of contribution is concerned,[9] the non-charge provision has apparently overcome the constitutional objections to payment of claims without regard to the outcome of the appeal to the courts. Such non-charge provisions, however, do not alleviate the effect of payment of mass claims upon the employer's contribution rate, caused by a substantial fall in the level of the state fund. Three states have concluded that this effect upon the contribution rate renders the statute a violation of due process, irrespective of the existence of a non-charge provision.[10] On the other hand, three states have reached contrary decisions.[11]

The Pennsylvania statute involved in the instant case does not have a non-charge provision. However, it would appear that such non-charge provisions would not answer the objection raised by the employers, since mass claims were involved.[12] The theory upon which the company relied in seeking injunctive relief, and the theory upon which the decision was based, was that the individual employer's contribution rate would be increased by a drop in the level of the state fund and that the statute was thus a violation of due process of law as judicial review could give the employer no relief.

It is submitted that the objections to the mass claim situations could be met by the adoption of an amendment similar to the one adopted in Tennessee by the 1957 General Assembly.[13] The Tennessee amendment kept the non-charge provision, but provided further that the claimant shall be charged with any benefits so paid, and in the discretion of the commissioner, shall be liable for such payments by deduction from future claims, or by repayment to the commissioner in a statutory manner. This in effect gives the department an asset in calculating the level of the fund, and awards later reversed by the courts do not result in a change in the level.

7. Other states protect the solvency of their fund by ratio methods. *Id.* at 386 n.27.

8. For a typical statute dealing with the solvency of the fund and contributions by employers, see TENN. CODE ANN. § 50-1328(8) (1956).

9. For excellent arguments pro and con on experience rating, see excerpts in RISENFELD & MAXWELL, *op. cit. supra* note 3, at 498-507.

10. State *ex rel.* Campbell v. State, 223 Ind. 59, 57 N.E.2d 433 (1944) (no provision for non-charge); Chrysler Corp. v. Smith, 297 Mich. 438, 298 N.W. 87 (1941); Dallas Fuel Co. v. Horne, 230 Iowa 1148, 300 N.W. 303 (1941).

11. Todd Shipyards Corp. v. Texas Employment Comm'n, 245 S.W.2d 371 (Tex. Civ. App. 1952); State *ex rel.* Aikens v. Davis, 131 W. Va. 40, 45 S.E.2d 486 (1947); Abelleira v. District Court of Appeals, 17 Cal. App. 2d 280, 109 P.2d 942 (1941).

12. It was pointed out in the decision that successful process of some 276,000 claims, from approximately 23,000 claimants, would total over $9,000,000. 125 A.2d at 765.

13. Tenn. Pub. Acts 1957, c. 146.