Fordham Law Review

Volume 29 | Issue 2 Article 5

1960

Case Notes

CASE NOTES

Arbitration—Compliance With Conditions Precedent to Arbitrators' Jurisdiction To be Resolved by the Courts.—Defendant corporation contracted with plaintiff Board of Education to perform all electrical work for a local school construction project. The contract was made pursuant to Section 3813 of the New York Education law[1] and subject to certain annexed general conditions. The conditions provided for settlement by the project architect of all claims and disputes between the parties and all matters pertaining to the execution or interpretation of the contract itself. It further provided that there could be arbitration upon either the architect's decision or his failure to render a decision within ten days after the parties presented their evidence. Notice of demand for arbitration had to be made within ten days after receipt of the architect's decision, or, if he failed to act, within a reasonable time thereafter.

In July and August 1958, defendant invoked the contractual provision for the architect's determination of his claims. When no decision was rendered, he made a demand for arbitration. The Board subsequently moved for a stay, alleging primarily that defendant had failed to comply with the notice provisions of section 3813. Defendant contended that arbitration was not a special proceeding within the meaning of this section,[2] and further that the

1. N.Y. Educ. Law § 3813 provides that no action or special proceeding may be maintained against a school district or board of education unless a written verified claim be presented to the district's governing body within three months after the accrual of such claim.

2. In re Interocean Mercantile Corp., 204 App. Div. 284, 197 N.Y. Supp. 706 (1st Dep't), aff'd mem., 236 N.Y. 587, 142 N.E. 295 (1923), dealt with, for the first time, the question of whether an agreement to negotiate, not acknowledged or proved as required by N.Y. Civ. Prac. Act § 1449, could be classified as a "special proceeding." The court reasoned that the arbitration provided for by the agreement was not a statutory arbitration within N.Y. Civ. Prac. Act §§ 1448-69, and therefore was not a "special proceeding" as referred to in N.Y. Civ. Prac. Act § 308. To offset this determination, N.Y. Civ. Prac. Act § 1459 was enacted, which specifically provided that "arbitration of a controversy under a contract or submission described in section fourteen hundred forty-eight shall be deemed a special proceeding, of which the court . . . shall have jurisdiction." In the instant case, however, defendant argued that a special proceeding within the framework of § 3813 was not to be so broadly construed. Relying on the terminology of the section itself, that "no action or special proceeding . . . shall be prosecuted or maintained against any school district . . . unless it shall appear by and as an allegation in the complaint or necessary moving papers that a written verified claim upon which such action or special proceeding is founded was presented . . . ," defendant contended that "special proceeding" was intended to apply only to the ordinary prosecution in a court of law. Although this narrow position was espoused by the minority, the majority found no basis for limiting the broad language of the statute, and in light of the express terminology of § 1459, it would appear that the majority view is a reasonable one. See Harnick v. Buffalo Brake Beam-Acme Steel & Malleable Iron Works, 127 N.Y.S. 2d 308 (Sup. Ct. 1953), in which the court said that where parties have contracted to submit an issue between them to arbitration, it makes no difference as to the

applicability of the section was to be decided by the arbitrators rather than the court. The motion for stay of arbitration was denied by special term, but was granted by the appellate division.[3] The court of appeals affirmed, in a four-to-three decision, holding that compliance with steps preliminary to arbitration was properly a question to be resolved by the court, involving as it did, a condition precedent to defendant's right to arbitration and to the arbitrators' jurisdiction. *Board of Educ. v. Heckler Elec. Co.*, 7 N.Y.2d 476, 166 N.E.2d 666, 199 N.Y.S.2d 649 (1960).

Whether or not there has been compliance with pre-arbitration procedural matters has long been the subject of jurisdictional dispute and, at first glance, the authorities would appear to be irreconcilable. In the instant case, the court asserted that it was proper for a party to proceed before an arbitrator only if he had agreed to arbitrate, and that compliance with the terms of the arbitration agreement was necessarily a question for the court.[4] In so holding, the majority relied upon the proposition that where specific contractual pre-arbitration provisions are ignored, the arbitration agreements themselves become inoperative. The minority position was based on the general principle enunciated in *In the Matter of Paloma Frocks, Inc.*,[5] that the only issues to be determined by a court on a stay application were those relating either to the making of the contract or submission, or the failure to comply therewith. All acts of the parties subsequent to the making of the contract, raising issues of fact or law, rested exclusively within the jurisdiction of the arbitrators. The minority therefore concluded that the question of timeliness of a demand for arbitration, arising as it did subsequent to the making of the arbitration contract, was properly an issue for the arbitrators to decide.[6] It would appear

jurisdiction of the supreme court whether such contract was imposed upon the parties by statute or by voluntary act, since in either event arbitration is a special proceeding. See also Imbrici v. Madison Ave. Realty Corp., 199 Misc. 244, 245, 99 N.Y.S.2d 762, 763 (Sup. Ct. 1950), where it was stated: "It [arbitration] is, for all purposes, a special proceeding . . ."; Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 204 F.2d 366 (2d Cir.), cert. denied, 346 U.S. 854 (1953), where a similar conclusion was reached in construing the New York law.

3. Board of Educ. v. Heckler Elec. Co., 8 App. Div. 2d 940, 190 N.Y.S.2d 942 (2d Dep't 1959).

4. For cases decided by the courts see Boston Mut. Life Ins. v. Insurance Agents Int'l Union, 258 F.2d 516 (1st Cir. 1958); In the Matter of Levine Bros. Iron Works Corp., 279 App. Div. 912, 110 N.Y.S.2d 912 (2d Dep't 1952) (memorandum decision); In the Matter of Cauldwell-Wingate Co., 262 App. Div. 829, 28 N.Y.S.2d 763 (1st Dep't 1941) (memorandum decision); In the Matter of Mark Cross Co., 15 Misc. 2d 947, 181 N.Y.S.2d 110 (Sup. Ct. 1958); In the Matter of Shine's Restaurant, Inc., 20 Misc. 2d 737, 113 N.Y.S. 2d 315 (Sup. Ct. 1952); In the Matter of Ketchum & Co., 20 Misc. 2d 736, 70 N.Y.S.2d 476 (Sup. Ct. 1947).

5. 3 N.Y.2d 572, 147 N.E.2d 779, 170 N.Y.S.2d 509 (1958).

6. For cases decided by the arbitrators see In the Matter of Terminal Auxiliar Maritima, 6 N.Y.2d 294, 160 N.E.2d 526, 189 N.Y.S.2d 655 (1959); In the Matter of Uraga Dock Co., 6 N.Y.2d 773, 159 N.E.2d 212, 186 N.Y.S.2d 669 (1959) (memorandum decision); In the Matter of Paloma Frocks, Inc., supra note 5; In the Matter of Hatzel & Buehler, Inc., 303 N.Y. 836, 104 N.E.2d 376 (1952) (memorandum decision); In the Matter of

that the majority's conclusion is more sound. However, its initial reasoning is subject to question.

The majority referred to prior decisions wherein the court had used broad language to the effect that the only issues which a court may consider are the making of the contract or the failure to comply therewith.[7] It went on to say that this language did not mean to suggest that the arbitrators possessed "the power to decide whether the conditions precedent to the institution of the arbitration proceeding itself had been fulfilled."[8] The majority referred specifically to *In the Matter of Lipman*,[9] "where the matter of the cancellation of a contract of arbitration was held to be an issue for the arbitrators rather than the court, [and where] we expressly noted that 'a different question would be here . . . if there were any conditions precedent.' "[10] Taken out of context, the implication exists that in *Lipman* the court was making an exception in cases involving conditions precedent to arbitration. The converse is true. What the court actually said was that

> a different question would be here if the issue was whether the contract never came into existence and hence was void, or if, although the contract was made, there arose an issue of fraud, duress or other impediment which rendered the contract voidable, or if there were any conditions precedent. But since appellant in the case at bar admits the making of the contract . . . sufficient has been shown to make applicable that part of section 1450 of the Civil Practice Act which reads as follows: "Upon being satisfied that there is no substantial issue as to the making of the contract . . . or the failure to comply therewith, the court . . . hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract. . . ."[11]

This language appears to imply that all acts of the parties subsequent to the making of the contract which raise issues of law or fact are exclusively within the jurisdiction of the arbitrators. The term conditions precedent was obviously intended to mean conditions precedent to the very existence of a valid contract, and rather than supporting the majority position, *Lipman*, in actuality, supports the dissent. Despite this, however, it would still appear that the majority opinion is correct.

A study of the cases decided by the courts reveals that specific time or notice provisions were involved, which had to be satisfied before arbitration could be commenced.[12] The time or notice provisions were treated as conditions

Western Union Tel. Co., 299 N.Y. 177, 86 N.E.2d 162 (1949); In the Matter of Tugee Laces, Inc., 297 N.Y. 914, 79 N.E.2d 744 (1948) (memorandum decision); In the Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E.2d 493 (1942); In the Matter of Lipman, 289 N.Y. 76, 43 N.E.2d 817 (1942); In the Matter of Tuttman, 274 App. Div. 395, 83 N.Y.S.2d 651 (1st Dep't 1948).

7. In the Matter of Paloma Frocks, Inc., supra note 5.

8. 7 N.Y.2d at 481, 166 N.E.2d at 668, 199 N.Y.S.2d at 652.

9. 289 N.Y. 76, 43 N.E.2d 817 (1942).

10. 7 N.Y.2d at 481-82, 166 N.E.2d at 668, 199 N.Y.S.2d at 652, in reference to In the Matter of Lipman, 289 N.Y. at 79-80, 43 N.E.2d at 818.

11. In the Matter of Lipman, supra note 10 at 79-80, 43 N.E.2d at 818-19.

12. See note 4 supra.

precedent to the right of arbitration. In the cases decided by the arbitrators,[13] however, specific time and notice provisions, with three exceptions,[14] were conspicuous by their absence. The precedents, with the exceptions noted, concerned general disputes in no way involving conditions precedent. While the exceptions did concern such conditions, they did not, in fact, affect the right to arbitration.

In *In the Matter of Uraga Dock Co.*,[15] the buyer was obligated to make his first contract payment within ten days after deposit of specified documents. Although the documents were delivered, the buyer failed to make payment within the prescribed period. The court found that payment was a condition precedent to the duty of subsequent performance by the builder. Thus, it was not a condition precedent to the right of arbitration.

In *In the Matter of Tugee Laces*,[16] the contract of sale provided that claims for defective goods had to be made within ten days of delivery. After lapse of the ten day period, defendant returned defective goods, but plaintiff refused to accept them and brought an action to enforce arbitration. Enforcement was denied by the trial court because the plaintiff, a foreign corporation, had not been certified in New York and therefore did not qualify to maintain an action under Section 218 of the New York General Corporation Law.[17] This decision was reversed by the appellate division[18] and the reversal affirmed by the court of appeals,[19] but the merits of the time and notice provisions were not discussed.

In the Matter of Tuttman[20] presented a similar defective-goods provision, a presentation after the ten day period and a refusal of acceptance. The ten day clause was held not to constitute a statute of limitations barring arbitration, since the language of the contract was sufficiently broad to vest the arbitration tribunal with exclusive jurisdiction of all disputes arising subsequent to the making of the contract. The issue of timeliness of conditions precedent to arbitration was squarely faced and a conclusion contrary to the weight of authority was reached. It would also appear that the authorities cited in

13. See note 6 supra.

14. In the Matter of Uraga Dock Co., 6 N.Y.2d 773, 159 N.E.2d 212, 186 N.Y.S.2d 669 (1959) (memorandum decision); In the Matter of Tugee Laces, Inc., 297 N.Y. 914, 79 N.E.2d 744 (1948) (memorandum decision); In the Matter of Tuttman, 274 App. Div. 395, 83 N.Y.S.2d 651 (1st Dep't 1948). A fourth exception, In the Matter of Hatzel & Buehler, 303 N.Y. 836, 104 N.E.2d 376 (1952) (memorandum decision), was only concerned with the question of incorporation by reference of a contract with arbitration conditions.

15. 6 N.Y.2d 773, 159 N.E.2d 212, 186 N.Y.S.2d 669 (1959).

16. 297 N.Y. 914, 79 N.E.2d 744 (1948).

17. N.Y. Gen. Corp. Law § 218 provides: "A foreign corporation, other than a moneyed corporation, doing business in this state shall not maintain any action in this state upon any contract made by it in this state, unless before the making of such contract it shall have obtained a certificate of authority."

18. 273 App. Div. 756, 75 N.Y.S.2d 513 (1st Dep't 1947).

19. 297 N.Y. 914, 79 N.E.2d 744 (1948).

20. 274 App. Div. 395, 83 N.Y.S.2d 651 (1st Dep't 1948). In connection with this case see In the Matter of Raphael, 274 App. Div. 625, 86 N.Y.S.2d 421 (1st Dep't 1949).

support of this conclusion were misinterpreted. Of the two cases cited by the court, neither contained conditions precedent to arbitration. One considered whether or not an arbitration clause in a contract was deemed to be part of a second contract which replaced the original,[21] and the other dealt with a loss of goods by fire and earthquake under a contract of purchase and sale.[22] Both cases considered only general issues of performance, and in no way touched upon the question of conditions preliminary to arbitration. The decision thus reached would appear to be out of context with the authorities cited. It is submitted that the last two decisions are in keeping with public policy, but for other reasons.[23]

In *In the Matter of Hatzel & Buehler, Inc.*,[24] the main issue was whether provisions for arbitration were to be included in subcontracts through mere reference to "general conditions" in the main contract, one of which was an arbitration clause. After a lengthy discussion of this point the New York Supreme Court ruled that incorporation by reference was sufficient. The question of whether there had been compliance with the conditions under which arbitration was to be allowed was dismissed in one cursory sentence,[25] rendering this case extremely doubtful authority.

The authorities cited by the minority, therefore, would not appear to conflict with the rationale underlying the majority holding that compliance with time and notice provisions precedent to arbitration is for the courts to determine. It would seem necessary that such issues be decided by the court. These provisions or conditions precedent establish the very validity of arbitration. While the parties to a contract may agree to arbitration, they also assume that there will first be fulfillment of any preliminary steps. If the conditions remain unfulfilled, then the agreement to arbitrate should remain ineffective.

This distinction was accurately summarized in *In the Matter of Ward Leonard Elec. Co.*,[26] a recent decision of the New York Supreme Court. There it was held that:

> the issues before the court on a motion to stay arbitration are limited to those which arise as to the making of the contract and the failure to comply therewith. . . . Every other issue whether of fact or law if it is comprised within the agreement to arbitrate is within the exclusive jurisdiction of the arbitrator. . . . However, whether the dis-

21. In the Matter of Lipman, 289 N.Y. 76, 43 N.E.2d 817 (1942).

22. Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. 199, 146 N.E. 203 (1924).

23. The sellers were trying to protect themselves from possible liability due to defective goods. The general law and the law of New York, in a sale of personal property, is that a seller cannot discharge himself from liability arising from the sale of latently defective goods, although he may do so where the defects are patent, under the doctrine of "caveat emptor." In the two cases at hand, the provisions attempted to bar all claims after ten days. Such provisions are without legal effect and the decisions of these cases are in keeping with the rule.

24. 98 N.Y.S.2d 870 (Sup. Ct. 1950), aff'd mem., 278 App. Div. 647, 103 N.Y.S.2d 122 (1st Dep't 1951), aff'd mem., 303 N.Y. 836, 104 N.E.2d 376 (1952).

25. "The other objections of respondent raise issues which are for the arbitrators." 98 N.Y.S.2d at 872.

26. 12 Misc. 2d 304, 173 N.Y.S.2d 531 (Sup. Ct. 1958).

pute falls within the agreement and is, therefore, arbitrable is for the court to determine in the first instance. . . .[27]

The position of the New York and federal law at present is that interpretation of arbitration agreements is ordinarily for the courts. This is necessary in that the agreement is the foundation of the arbitrators' jurisdiction and their construction of it, with respect to their own powers, would not be conclusive.[28] An agreement may specifically provide that the arbitrators will decide what is to be submitted to them, but this jurisdiction cannot be inferred.[29] The weight of authority holds that arbitrability in general, and compliance with conditions precedent to arbitration in particular, are questions for the courts to determine, while the question of merits is left for the arbitrators.[30]

Clearly, a condition precedent to the very right to arbitrate presents a question of arbitrability rather than one of merits. In the instant case, there was no contractual grant to the arbitrators of the right to determine their own jurisdiction. Nor do the minority's fears that the very purpose of arbitration will be defeated, if the courts are allowed to determine the question of arbitrability,[31] appear justified. The divergent approach to the scope of authority appeared as early as 1929 in *Marchant v. Mead-Morrison Mfg. Co.*[32] Chief Judge Cardozo, writing for the majority, emphasized that the common law did not distinguish between the role of the court and that of the arbitrators. He pointed out that "to limit its [arbitration's] extension is to give it efficacy and power."[33] Judge Crane, however, felt that arbitration should not be impeded by the court but should be given as free a rein as possible.[34] It is submitted that the instant decision has reconciled these opposing views and clarified a

27. Id. at 307, 173 N.Y.S.2d at 534.

28. Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 204 F.2d 366 (2d Cir. 1953).

29. United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); B. Fernandez & Hnos. S. Enc. v. Rickert Rice Mills, Inc., 119 F.2d 809 (1st Cir. 1941).

30. See Radiator Specialty Co. v. Cannon Mills, Inc., 97 F.2d 318 (4th Cir. 1938), where failure to comply with the terms of an arbitration agreement was held to be a waiver of, and a bar to, arbitration; Harrison v. Pullman Co., 68 F.2d 826 (8th Cir. 1934), where an employee's suit to compel arbitration was dismissed where he followed only two of the three appeals specified in the arbitration agreement. See also International Union, UAW v. Benton Harbor Malleable Indus., 242 F.2d 536 (6th Cir. 1957); Koscove v. Peacock, 136 Colo. 371, 317 P.2d 332 (1957); Franklin Needle Co. v. American Fed'n of Hosiery Workers, 99 N.H. 101, 105 A.2d 382 (1954); Sloan v. Journal Publishing Co., 213 Ore. 324, 324 P.2d 449 (1958); Philadelphia Marine Trade Ass'n v. International Longshoremen's Ass'n, 382 Pa. 326, 115 A.2d 733, cert. denied, 350 U.S. 843 (1955); Volunteer Elec. Co-op. v. Gann, 41 CCH Lab. Cas. ¶ 16537 (D.D.C. 1960). For further discussions concerning jurisdiction over question of arbitrability, see 1 B.C. Indus. & Com. L. Rev. 114 (1960); 23 Fordham L. Rev. 352 (1954); 67 Harv. L. Rev. 510 (1954); 28 St. John's L. Rev. 47 (1953).

31. See, e.g., United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

32. 252 N.Y. 284, 169 N.E. 386 (1929).

33. Id. at 303, 169 N.E. at 392.

34. Id. at 307, 169 N.E. at 394 (dissenting opinion).

confused area of law. The limitation advocated by Chief Judge Cardozo has been clearly defined. Matters decisive of the arbitrators' right to act shall be determined by the courts. Resolution of all other disputes shall be left to the arbitrators themselves.

Constitutional Law—Evidence Obtained by State Officers Via Unlawful Seizure Inadmissible in Federal Trial.—Petitioners were indicted in a federal district court for intercepting and divulging telephone communications and for conspiracy to so act. Before trial, petitioners made a motion to suppress certain tape and wire-recording evidence which had been seized originally by state law enforcement officers. Although two Oregon courts had previously determined that the evidence had been seized in violation of state law, the motion was denied.[1] Upon trial the articles were admitted in evidence, and petitioners were subsequently convicted. The court of appeals affirmed.[2] On certiorari, the Supreme Court, four justices dissenting, vacated the judgment and remanded the case to the district court. Evidence obtained by state officers during a search, which, if conducted by federal officers, would have violated the petitioners' immunity from unreasonable search and seizure under the fourth amendment, is inadmissible in a federal criminal trial. The test of an unreasonable search and seizure is one of federal law. *Elkins v. United States, 364 U.S. 206 (1960).*

The fourth amendment[3] was written into our federal constitution as an antidote for the abuses inherent in general search warrants in common usage prior to the American Revolution.[4] Similar guarantees were repeated in state constitutions.[5] Although the right of an individual to be secure from unreasonable search and seizure was guaranteed, the only remedies actually afforded an aggrieved party were a proceeding to reacquire the evidence[6] or an action at

1. "Following an appropriate motion, the Multnomah County District Court held the search warrant invalid and ordered suppression of the evidence. This action came, however, after the return of an indictment by a state grand jury, and the local district attorney challenged the power of the district court to suppress evidence once an indictment was in. Accordingly, the question was later argued anew on a motion to suppress in the Circuit Court for Multnomah County, a court of general criminal jurisdiction. That court held the search unlawful and granted the motion to suppress. The state indictment was subsequently dismissed." Elkins v. United States, 364 U.S. 206, 207 n.1 (1960).

2. Elkins v. United States, 266 F.2d 588 (9th Cir. 1959).

3. U. S. Const. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

4. Writs of assistance, issued by the courts to revenue officers, empowered those officers with unlimited discretion to search private homes for smuggled goods. 1 Cooley, Constitutional Limitations 615 (8th ed. 1927).

5. Ibid.

6. Grant, Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence, 15 So. Cal. L. Rev. 60 (1941).

law for damages.[7] This situation was created by the unvarying rule that a court would receive competent evidence in a criminal trial without inquiring into the way it had been procured.[8] The Supreme Court deviated from the accepted rule, however, in *Boyd v. United States*.[9] The rule advanced in that case remained unquestioned in the Court until *Adams v. New York*,[10] when the Court reverted to its former policy.[11]

The modern federal exclusionary rule was firmly established by the leading case of *Weeks v. United States*.[12] In *Weeks*, the Court also set fourth the basis for the admissibility in federal courts of evidence illegally seized by state officers, stating that fourth amendment protections were not directed toward the conduct of such officials.[13]

In *Wolf v. Colorado*,[14] however, the "core" of the fourth amendment was applied to the states through the due process clause of the fourteenth amendment.[15] If that decision in any way changed the rationale behind *Weeks*, its impact was not immediately reflected in the vast majority of jurisdictions which considered the problem.[16] The Supreme Court in particular left the question open.[17] It is to be noted that, in deciding the instant case, the Court did not determine that all evidence illegally seized by state officers will be

7. Ibid. See also cases cited in Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949).

8. "When papers are offered in evidence, the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question." Commonwealth v. Dana, 43 Mass. (2 Met.) 329, 337 (1841).

9. 116 U.S. 616 (1886). The Court stated that the fruits of a search violative of the fourth amendment would, when received in evidence in a criminal prosecution, violate the privilege against self incrimination found in the fifth amendment. But see Bacon v. United States, 97 Fed. 35, 40 (8th Cir. 1899). Boyd has been criticized as being thoroughly incorrect in its historical assertions. Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A.J. 479, 480 (1922).

10. 192 U.S. 585 (1904).

11. The Court restricted Boyd to its precise facts. Id at 597. Citing with approval Commonwealth v. Dana, 43 Mass. (2 Met.) 329 (1841), the Court in effect reembraced the common law position. Id. at 595.

12. 232 U.S. 383 (1914). The common law rule rested on the premise that the trial would be unnecessarily delayed by the litigation of a collateral issue.

13. Id. at 398.

14. 338 U.S. 25, 27-28 (1949).

15. It is to be noted that this was dictum but has been reaffirmed and is no longer open to question. See Frank v. Maryland, 359 U.S. 360, 362-63 (1959); Irvine v. California, 347 U.S. 128, 132 (1954); Stefanelli v. Minard, 342 U.S. 117, 119 (1951).

16. Costello v. United States, 255 F.2d 89 (8th Cir.), cert. denied, 358 U.S. 830 (1958); Brown v. United States, 255 F.2d 400 (6th Cir. 1958) (per curiam); Gaitan v. United States, 252 F.2d 256 (10th Cir.), cert. denied, 356 U.S. 937 (1958); United States v. Benanti, 244 F.2d 389 (2d Cir.) (dictum), rev'd on other grounds, 355 U.S. 96 (1957); United States v. White, 228 F.2d 832 (7th Cir. 1956); Williams v. United States, 215 F.2d 695 (9th Cir. 1954); Burford v. United States, 214 F.2d 124 (5th Cir. 1954). But see Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958).

17. Benanti v. United States, 355 U.S. 96, 102 n.10 (1957); Lustig v. United States, 338 U.S. 74, 79 (1949).

inadmissible in a federal court, but only that evidence which has been seized in violation of the fourth amendment.[18] Consequently, illegality under state law is not a consideration.

In applying the "core" of the fourth amendment to the states, *Wolf* recognized the distinction traditionally drawn between the protection of the first eight amendments and the protection afforded by the due process clause of the fourteenth amendment. Not every pledge secured by the Bill of Rights is embodied in due process,[19] but only those necessary to the "concept of ordered liberty."[20] Because the statement in *Wolf* was couched in reference to due process, it seems clear that the Court intended that the word "core" be given a construction consonant with that traditionally accorded the concept of due process.[21] It would not appear that the "core" of the fourth amendment was intended to be shorthand for the amendment itself. The language of Mr. Justice Rutledge, in his dissent, made this apparent. Mr. Justice Rutledge, although preferring to have the specific guarantees of the fourth amendment embodied in the fourteenth, welcomed the fact that "the Court, in its slower progress toward this goal, today finds the *substance* of the Fourth Amendment 'to be implicit in the concept of ordered liberty. . . .' "[22] The scope of the protection afforded by each of these amendments is, therefore, not identical. A further distinction was discernible in *Wolf*. While the exclusionary rule was deemed necessary to safeguard the fourth amendment, the substance of that amendment could be safeguarded without it.[23] The remedies available under each amendment, it should also be noted, are not necessarily similar.

The Court in the instant case ignored these distinctions and, in reliance upon *Wolf*, seemed to say that the Constitution now requires the exclusion, in a federal court, of all evidence secured by an unconstitutional search and seizure.[24] How *Wolf* supports this contention is not readily apparent. By making the body of federal law surrounding the fourth amendment the test to be applied to the conduct of state officers,[25] the Court has placed an

18. 364 U.S. at 223.

19. Adamson v. California, 332 U.S. 46, 53 (1947); Twining v. New Jersey, 211 U.S. 78, 99 (1908).

20. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

21. As far back as 1877, in Davidson v. New Orleans, 96 U.S. 97 (1877), it was recognized that the administration of justice would best be served by making no attempt to give a rigid definition to due process, but to keep the concept viable by a process of judicial inclusion and exclusion.

22. Wolf v. Colorado, 338 U.S. 25, 47 (1949). (Emphasis added.) It should be noted that Mr. Justice Rutledge's use of "progress" anticipates the implications of the instant case.

23. Id. at 28-33.

24. 364 U.S. at 213-14.

25. "The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Id. at 224. Earlier decisions, in dicta, clearly stated that the federal test was not the test of state due process, Bute v. Illinois, 333 U.S. 640, 649 (1948), and that a state's procedure does not run afoul of the fourteenth amendment merely because to the Court's way of thinking

interpretation on *Wolf* never intended by the Court in that decision.[26] It has also placed a construction on due process at odds with the traditional view of the clause.[27] Not every illegal state search and seizure was branded as repugnant to the fourteenth amendment, but only those which rupture the "core," or substance, of the fourth amendment. It would further appear that the basic premise of the Court that "the foundation upon which the admissibility of state-seized evidence in a federal trial originally rested—that unreasonable state searches did not violate the Federal Constitution—thus disappeared in 1949"[28] is partly erroneous. The federal exclusionary rule was not a mandate of the fourth amendment, but rather a judicially created rule of evidence,[29] through which the courts could indirectly control the investigatory techniques of federal officers. The dissent stressed the logical basis behind the federal exclusionary rule, *i.e.*, its deterrence of future unreasonable searches and seizures.

> [I]t is fanciful to assume that law-enforcing authorities of States which do not have an exclusionary rule will to any significant degree be influenced by the potential exclusion in federal prosecutions of evidence secured by them when state prosecutions, which surely are their preoccupation, remain free to use the evidence.[30]

The logic behind the *Weeks* rule rested in the foundation of deterrence.[31] Even if it be conceded that the state search and seizure in the instant case violated the fourth amendment, *Wolf* hardly furnished support for the Court's conclusion that the evidence was therefore inadmissible. *Wolf* was explicit in holding that even if a state search and seizure violated the Constitution, the evidence secured could still be received at a state trial.[32] The procedural reme-

---

another method may afford better protection. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

26. Mr. Justice Frankfurter, who authored the opinion of the Court in Wolf, dissented in the instant case, stating: "In this use of Wolf the Court disregards . . . what precisely was said there, namely, that only what was characterized as the 'core of the Fourth Amendment,' not the Amendment itself, is enforceable against the States. . . ." 364 U.S. at 237-38. For a different interpretation of the "clear import of that statement," see Ohio ex rel. Eaton v. Price, 364 U.S. 263, 274 (1960) (dissenting opinion). It is significant that, in the instant case, the Court eliminated all reference to the "core of the Fourth Amendment," so strongly insisted upon by Mr. Justice Frankfurter. The Court, in citing Wolf, stated: " 'The security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in "the concept of ordered liberty" and as such enforceable against the States through the Due Process Clause.' " Id. at 213.

27. See, e.g., Adamson v. California, 332 U.S. 46, 53 (1947); Twining v. New Jersey, 211 U.S. 78, 99 (1908); Davidson v. New Orleans, 96 U.S. 97, 105 (1877).

28. 364 U.S. at 213. It is not enough to find that the "core" of the fourth amendment is applicable to the states through the due process clause. It must further be found that the Court has that element of control necessary to render the exclusionary rule effective as a deterrent.

29. Wolf v. Colorado, 338 U.S. 25, 39-40 (1949).

30. 364 U.S. at 241.

31. Id. at 217, 240.

32. Wolf v. Colorado, 338 U.S. 25, 28-33 (1949).

dies available under the fourth and fourteenth amendments remained clearly distinct. It would seem that the application of the exclusionary rule in this context is, therefore, neither warranted nor compelled by prior constitutional interpretations.

Recognizing that the application of the exclusionary rule in the instant case will have little deterrent value in nonexclusionary states, Mr. Justice Frankfurter suggested that federal courts decline to receive illegally seized evidence only in those instances where the state so seizing has itself adopted a rule of exclusion.[33] This, it was felt, would avoid needless conflict between state and federal jurisdictions. Such a solution is as much an innovation as that proposed by the majority and, therefore, subject to the same criticisms he directed to the Court. It is without precedent, and, under either view, federal prosecutors will be deprived of vital evidence. That there is conflict between state and federal jurisdictions in specific areas is a natural result of our federal system of government, but not a sound reason for overturning an evidentiary rule otherwise unobjectionable. The dissent of Mr. Justice Harlan, in which Justices Clark and Whittaker concurred,[34] is strictly in accord with *Wolf* and, as a consequence, is aligned with the weight of precedent. Procedural rules, of course, are not inflexible, but any alteration should be effected in the light of society's needs as well as those of the individual.

The broad language of the Court, seemingly unnecessary inasmuch as its holding ultimately rested upon an application of a federal rule,[35] reflects an inexorable movement of the Court toward the absorption of the Bill of Rights into the due process clause. This progression is further demonstrated by the language in *Ohio ex rel. Eaton v. Price*,[36] where the view that the guarantees of a specific amendment may be enforced with less vigor under the fourteenth amendment was rejected.[37] If the two amendments are not to be distinguished,

33. 364 U.S. at 249-50.

34. Id. at 251-52. Justices Harlan, Clark and Whittaker excepted only to Mr. Justice Frankfurter's innovation.

35. Fed. R. Crim. P. 26, which provides, in part, that "the admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Court "in the light of reason and experience" has decided that in this context federal law is to be the test of admissibility.

36. 364 U.S. 263 (1960). The judgment was affirmed ex necessitate, by an equally divided Court, and is, therefore, without force as precedent. It is significant that Mr. Justice Stewart, who authored the majority opinion in the instant case, disqualified himself from considering the merits of Price, because his father, sitting on the Supreme Court of Ohio, was one of the deciding judges in the case.

37. In discussing the divergence of opinion within the Court as to whether the fourteenth amendment makes the guarantees of the Bill of Rights generally enforceable against the States, Mr. Justice Brennan alluded to recent unsuccessful attempts to challenge the enforcement of individual guarantees of the Bill of Rights in state cases, and attacked any watering-down of these rights: "In Elkins today we have rejected such a view of the affirmative guarantees of the Fourth Amendment." Id. at 276.

it appears that the exclusionary rule will ultimately be impressed upon state courts.[38] The Court, in equating the two, would make federal law the test of a state officer's conduct. By assuming jurisdiction over such conduct, and therefore over state courts, the Court would have the element of control necessary to the "logic" in the application of the exclusionary rule to state courts. It would appear that this result is inevitable.

Constitutional Law—Merchandise Held in Catalogue Store for Delivery to Customers Not Protected From Local Taxation by Interstate Commerce Clause.—Plaintiff corporation operated a catalogue store in Fort Madison, Iowa, at which customers selected articles either from the corporation's general catalogue or a skeleton stock of goods. The orders were then forwarded to the corporation's warehouse in Illinois, from which the purchased articles were shipped to the local store for delivery.[1] The customers retained an option to reject the merchandise if dissatisfied, and if rejected, or if the goods were not picked up within thirty days, the merchandise would be returned to the out-of-state warehouse. An ad valorem property tax,[2] similar to the assessments imposed on the goods of other merchants, was levied on the goods in the store. The assessment was declared void by the trial court on the basis that the merchandise was within the protected stream of interstate commerce and therefore not properly subject to local taxation. The Supreme Court of Iowa reversed. Goods forwarded from outside the state, in response to existing orders from customers, are not immune from local taxation as part of interstate commerce while held at the store awaiting delivery. *Sears, Roebuck & Co. v. City of Fort Madison*, — Iowa —, 102 N.W.2d 916 (1960).

State taxation of interstate commerce exceeds constitutional limitations[3] when such taxation infringes upon the regulatory authority expressly granted Congress.[4] In its attempt to resolve the question of what transactions in or

38. In an analagous situation the Court compared the effect of a federal statute with that of the constitutional restriction. It stated that the exclusion of evidence seized in violation of the former was logically inconsistent with the admission of evidence seized in violation of the latter. 364 U.S. at 215. The difficulty with this argument is that it assumes the very point in issue, i.e., what is the scope of the "core" of the fourth amendment? This is the precise question which so sharply divides the Court.

1. The choice of where the merchandise was to be sent by the warehouse was left to the customer. It could either be delivered directly to the purchaser or a third person, or to the purchaser or whomever he might designate at the catalogue store subsequent to its arrival from the warehouse. The items delivered to the store were identified with the name or number of the individual purchaser, and were placed aside in a storage room until obtained by the respective purchasers. Brief for Appellee, pp. 9-10.

2. The assessment equaled the average daily value of the merchandise held in the store throughout the year. No issue was raised as to the interstate character of the articles forwarded directly to the purchaser, nor was any tax levied upon them.

3. U.S. Const. art. I, § 8, expressly vests Congress with power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

4. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

affecting interstate commerce are legitimate subjects of state taxation, the Supreme Court has adopted numerous tests. Taxes imposed on the sale of goods before they are brought into a state have been deemed undue burdens upon interstate commerce, acting as barriers to the free flow of merchandise between states.[5] States may not tax the privilege of engaging in interstate commerce,[6] nor discriminate against such commerce by providing direct commercial advantage to local business.[7] Taxes on articles in the course of their movement in interstate commerce have been similarly foreclosed;[8] nor may taxes be imposed upon persons passing through a state, or coming into it merely for the temporary purpose of drumming up business.[9] However, where property has come to rest in a state primarily to serve the owner's business advantage, to be later disposed of as his interests dictate, such merchandise has been declared part of the general property within the state and subject to its taxing power.[10] Conversely, where a stoppage was temporary, due to the necessities of the journey or for the purpose of safety and convenience, the property has remained immune from local taxation.[11] In recent decisions, the Supreme Court has indicated a willingness to go further, and has held that where a business engaged in interstate commerce is so organized that its local outlet functions as an integral part of its transactions, state taxes on the local activity are valid.[12]

In upholding the tax in the instant case, the Iowa court based its conclusion on two tests establishing the validity of state taxation—the goods had ceased travelling in interstate commerce and there was sufficient local activity to bring the interstate transaction within state power. The stoppage was deemed more than a mere interruption in the journey to the customer. The delivery at the retail store, the court concluded, was directly beneficial to the plaintiff in carrying on its business, because plaintiff had created a local outlet expressly for the solicitation of orders and had received protection from the state while operating its store.[13] But while the court relied on the maintenance of a local store in applying the theory that the goods had stopped travelling in interstate commerce, it confused the theory of cessation of transit with recent Supreme Court pronouncements relating to local activity.

While it might be argued that the merchandise in question remained in

5. E.g., Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).

6. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

7. Memphis Steam Laundry v. Stone, 342 U.S. 389 (1952).

8. Case of State Freight Tax, 82 U.S. (15 Wall.) 232 (1872).

9. Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 493-94 (1887).

10. E.g., Minnesota v. Blasius, 290 U.S. 1 (1933) (cattle awaiting shipment to undetermined destination in another state).

11. E.g., Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469 (1926) (logs awaiting loading aboard ship).

12. McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940) (operation of local sales office sufficient to sustain sales tax); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (printing and publishing of magazine advertising distinct from its interstate circulation).

13. — Iowa at —, 102 N.W.2d at 916, 919, 920 (1960).

interstate commerce only up to the point of delivery to plaintiff's local store, it is not apparent from the instant decision whether the court considered the transit to have been actually terminated by such delivery. Nowhere did the court expressly mention that the shipment had come to an end. Rather, it spoke in terms of a "break in interstate transportation"[14] and "goods being at rest."[15] Under the cessation of transit theory, it would appear that the mere holding of goods awaiting delivery to a purchaser has not been sufficient to justify a state tax.[16] The benefit accruing to the owner from the discontinuance had to be direct, not a mere stoppage due to the necessities of the journey.[17] While cessation in the instant case was necessary to the interstate sale, it was merely incidental to a final distribution of the goods. Under the Supreme Court decisions applying the cessation theory something more had always been necessary. When goods had been stored for an indefinite period, and the owner could subsequently channel the goods where he wished, the benefit was held direct.[18] Where the purpose of the break in transit was to process the goods,[19] or to change their original form,[20] the goods were held subject to state taxation. The question has always been one of substance. In each case it has been necessary to consider the particular occasion or purpose of the interruption. It seems clear that the facts of the instant case have never before, in themselves, been sufficient to justify a tax on the theory that the goods had ceased their interstate travel. The only benefit here attributed to plaintiff was the maintenance of a local retail outlet conveniently centered in the business district, easily accessible to prospective customers.

However questionable the decision might be on this theory, the result reached can nevertheless be validated on the basis that plaintiff was engaged in sufficient local activity to warrant the imposition of a tax. This view is more in line with recent Supreme Court decisions indicating that interstate commerce can be taxed if the excise is conditioned on the carrying on of local business,[21] while such taxes will be invalid if applied to a business exclusively interstate in character without sufficient local activity.[22] These principles were

14. Id. at —, 102 N.W.2d at 919.

15. Id. at —, 102 N.W.2d at 919, 923-24.

16. See Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929) (oil stored in tanks on dock pending foreign shipment).

17. Champlain Realty Co. v. Town of Brattleboro, 260 U.S. 366 (1922). See also Kelley v. Rhoads, 188 U.S. 1 (1903).

18. Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947). A shipment of coal had come to rest but without any definite order. The fact that most of the coal would eventually be shipped to other states was found to be irrelevant.

19. Bacon v. Illinois, 227 U.S. 504 (1913).

20. General Oil Co. v. Crain, 209 U.S. 211 (1908). This case was subsequently limited by Carson Petroleum Co. v. Vial, 279 U.S. 95 (1929), where continuity of journey was liberally construed by the Court.

21. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (net income tax on portion of foreign corporation's income earned from local business held reasonable); McGoldrick v. Berwind-White Co., 309 U.S. 33 (1940) (operation of sales office sufficient to sustain sales tax).

22. Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951) (tax on franchise

recently reiterated in *Norton Co. v. Department of Revenue*.[23] There the Supreme Court applied the doctrine of local activity and upheld a tax based on orders made to a foreign corporation. A Massachusetts mail-order firm operated a local store in Illinois at which direct sales to customers were made from merchandise in stock. Orders were also solicited on the basis of display samples and catalogues. As to the latter type of transactions, some of the goods were sent directly to the purchasers from Massachusetts while others were forwarded to the local agency for delivery to the purchaser. The majority found that the goods sent directly to the purchaser were not subject to an Illinois tax because the transactions were clearly interstate in character, but the goods involved in the other type of transactions were taxable.[24] The issue of whether the goods had come to rest in the taxing state was not discussed. Rather, the Court relied upon a general proposition that the local activity was sufficient to bring the sales under state taxation. Mr. Justice Jackson, speaking for the majority, stated: "Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers."[25] The local agency was found to be decisive in holding the market. However, both interstate and intrastate sales were intertwined in *Norton*, and it would seem logical to conclude, because of the language of the Court[26] and a past Supreme Court determination in an analagous situation,[27] that the conduct of the local sales was the decisive reason for the holding.[28] The Supreme Court has since extended this decision. Two state courts have likewise expressed approval of the general holding in *Norton*, applying that doctrine to situations which did not embrace local sales. In

doing business exclusively interstate invalid); McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) (solicitation of orders without sales office or branch plant insufficient local activity to sustain tax).

23. 340 U.S. 534 (1951) (five-to-four decision).

24. However, Mr. Justice Clark, dissenting, advanced the theory that the local activity was sufficient to bring those goods sent directly from the Massachusetts vendor to the Illinois vendee within the scope of a state tax. He felt that the majority should not distinguish between goods forwarded directly to the purchaser and those delivered through the local agency. Id at 541. Mr. Justice Reed, dissenting in part, found that even when the local store acted as an intermediary and delivered the goods, the transactions were in interstate commerce and therefore immune from state taxation. Id. at 539.

25. Id. at 538-39.

26. "This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two .... [A]ttributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment." Norton Co. v. Department of Revenue, 340 U.S. at 538.

27. Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918). The Court held that the local office and the display samples used in soliciting and taking orders were essential to the furtherance of the company's interstate business. "[T]hey are among the means by which that business is carried on and share its immunity from state taxation." Id. at 153. It should be noted, however, that the goods in Cheney were sent directly to the purchaser.

28. See Strecker, "Local Incidents" of Interstate Business, 18 Ohio St. L.J. 69, 74 (1957).

Field Enterprises, Inc. v. Washington,[29] the Supreme Court approved a license tax on a foreign corporation operating a local agency, but conducting no local sales. The Court cited *Norton* as binding. Indiana sustained a personal property tax on goods stored in a foreign corporation's warehouse,[30] and New York upheld a general business and financial tax on a foreign corporation which operated only a local agency to facilitate business.[31] It seems reasonable that *Norton*, as interpreted by the courts, would also apply to situations involving only interstate sales.

The local activity in the principal decision clearly fits within the pattern established by the *Norton* and *Field* decisions. It seems apparent that where there are local contacts or activities wthin a state, the courts will find a reasonable relation between the taxed transaction and the taxing state. Local authorities may validly tax the privilege of doing business, if the business operations, though related to the interstate movement of goods, include local incidents sufficient to bring the transaction within the state's jurisdiction. If this be correct, then the many definitions of interstate commerce heretofore formulated are no longer applicable. Sufficient local business within the state will validate a tax though the transaction itself be interstate in character.

Eminent Domain—Use of Balance of Convenience Doctrine To Deny Part of an Injunction.—Plaintiff, an incorporated village in Ohio, purchased twenty-three acres of land on June 25, 1956, to be used for municipal buildings, park grounds, and recreational facilities. On November 4, 1958, the village voters approved the issuance of $175,000 in bonds to finance the construction of municipal buildings. Defendant, the Board of County Commissioners, filed an action on January 30, 1957, to appropriate 123 acres of land for county airport purposes. This land included the twenty-three acres purchased by the plaintiff on June 25, 1956. In an action by the plaintiff to enjoin the appropriation, the Ohio Court of Appeals affirmed the decision of the lower court. The defendant was enjoined from appropriating that part of the twenty-three acres necessary for the construction of municipal buildings but was allowed to appropriate the part to be used for park and recreational purposes. *Village of Richmond Heights v. Board of County Comm'rs*, — Ohio App. —, 166 N.E.2d 143 (1960).

The right of eminent domain is an inherent attribute of sovereignty vested solely in the legislature[1] and related only to property necessary for a public

29. 352 U.S. 806 (1956) (per curiam), affirming 47 Wash. 2d 852, 289 P.2d 1010 (1955).

30. Arthur Walter Seed Co. v. McClure, 236 Ind. 666, 141 N.E.2d 847 (1957).

31. Berkshire Fine Spinning Associates v. City of New York, 5 N.Y.2d 347, 157 N.E.2d 614, 184 N.Y.S.2d 623 (1959).

1. City of Cincinnati v. Louisville & N.R.R., 223 U.S. 390 (1912). See generally 1 Lewis, Eminent Domain § 3 (3d ed. 1909), and cases cited in nn.12 & 13. Contra, Todd v. Austin, 34 Conn. 78 (1867), where it is stated in a concurring opinion that "the right . . . of eminent domain, is a reserved right. . . ." Id. at 88.

use.[2] The exercise of the power may be delegated by the legislature,[3] though statutes delegating it will be strictly construed.[4] Although no impediment exists to the taking of land privately owned, property already devoted to a public use cannot be taken for another public use which will destroy or materially interfere with the existing use, unless the right to do so has been conferred by statute either expressly or by necessary implication.[5] It is immaterial whether the property was acquired by condemnation or purchase.[6]

In the instant case, both plaintiff[7] and defendant[8] had statutory authority to appropriate property. They did not have coequal rights to the twenty-three acres in question, however, because the plaintiff had previously purchased the property and had devoted it to a public use. Consequently, to establish a right in the defendant to any part of the twenty-three acres, it was incumbent upon

2. Georgia v. City of Chattanooga, 264 U.S. 472 (1924). See generally 2 Lewis, op. cit. supra note 1, § 411.

3. Fulton Ferry & Bridge Co. v. Blackwood, 173 Ark. 645, 293 S.W. 2 (1927) (dictum); People ex rel. Horton v. Prendergast, 248 N.Y. 215, 162 N.E. 10 (1928).

4. United States v. Rauers, 70 Fed. 748 (S.D. Ga. 1895); Ontario Knitting Co. v. State, 205 N.Y. 409, 98 N.E. 909 (1912); Pontiac Improvement Co. v. Board of Comm'rs, 104 Ohio St. 447, 135 N.E. 635 (1922). But see Greenwood County v. Watkins, 195 S.C. 51, 12 S.E.2d 545 (1940), citing Leitzsey v. Columbia Water Power Co., 47 S.C. 464, 479, 25 S.E. 744, 749 (1896), which stated that strict construction is not applied as stringently to public bodies as it is in construing powers given to private corporations.

5. Adirondack Ry. v. New York, 176 U.S. 335 (1900); City of Norton v. Lowden, 84 F.2d 663 (10th Cir. 1936); Board of Educ. v. Proprietors of Akron Rural Cemetery, 110 Ohio St. 430, 144 N.E. 113 (1924); Vermont Hydro-Elec. Corp. v. Dunn, 95 Vt. 144, 112 Atl. 223 (1921). But see United States v. Sixty Acres, 28 F. Supp. 363 (E.D. Ill. 1939) (rule inapplicable where the power is exercised by the sovereign); Pacific Postal Tel. Co. v. Oregon & C.R.R., 163 Fed. 967 (C.C.D. Ore. 1908) (rule inapplicable where the second use is not inconsistent with the existing use); State Highway Comm'n v. City of Elizabeth, 102 N.J. Eq. 221, 140 Atl. 335 (1928) (rule inapplicable where the power is exercised by the sovereign). The existence of power to appropriate by necessary implication is a question of legislative intent which is arrived at by applying the enactment to its subject matter, Vermont Hydro-Elec. Corp. v. Dunn, supra, or from a state of facts showing such taking to be necessary for a beneficial enjoyment of the rights granted, Rutland-Canadian R.R. v. Central Vt. Ry., 72 Vt. 128, 47 Atl. 399 (1899). Where the only property available for an expressly authorized public work has already been devoted to a public use, the power to appropriate exists by necessary implication. See Pittsburgh, Ft. W. & C. Ry. v. Sanitary Dist., 218 Ill. 286, 75 N.E. 892 (1905); Old Colony R.R. v. Framingham Water Co., 153 Mass. 561, 27 N.E. 662 (1891). As to the requisite degree of necessity, compare Western Union Tel. Co. v. Pennsylvania R.R., 123 Fed. 33 (3d Cir. 1903), and Vermont Hydro-Elec. Corp. v. Dunn, supra, with Denver Power & Irr. Co. v. Denver & R.G.R.R., 30 Colo. 204, 69 Pac. 563 (1902) (dictum), and Butte, Anaconda & P. Ry. v. Montana Union Ry., 16 Mont. 504, 41 Pac. 232 (1895). See generally 2 Lewis, op. cit. supra note 1, § 440.

6. New Haven Water Co. v. Borough of Wallingford, 72 Conn. 293, 44 Atl. 235 (1899); In the Matter of Saratoga Ave., 226 N.Y. 128, 123 N.E. 197 (1919).

7. Ohio Rev. Code Ann. §§ 717.01(A),(B),(N),(S); 719.01(B),(C),(L) (Page 1953).

8. Ohio Rev. Code Ann. §§ 307.20, 717.01(V), 719.01(O) (Page 1953).

the court to find a grant by the state legislature.[9] The problem was one of statutory construction. Instead, the court found a right in the defendant through a balance of the conveniences, reasoning that injunctive relief is addressed to the discretion of the court. Although it is generally true that injunctive relief lies in the discretion of the court based on all the circumstances of the particular case,[10] it is not discretionary when questions of law are presented.[11] In the present case, since the municipal corporations could exercise the right of eminent domain only if the legislature had delegated such power,[12] the question before the court was solely a question of law, *i.e.*, did the defendant possess statutory authority to appropriate land already devoted to a public use.[13] Therefore, the court's determination in favor of the defendant, in the absence of a finding that the land held by plaintiff was not devoted to a public use, or that plaintiff had abused its discretion, or that the defendant had the power by necessary implication, was an invasion of a legislative function.[14]

The majority, while ostensibly recognizing the doctrine of prior use and its exceptions, would swallow the rule in its entirety by applying the equitable doctrine.[15] Though no unfavorable decision has resulted in this case,[16] the

9. — Ohio App. at —, 166 N.E.2d at 153, where Judge Guernsey, concurring, stated: "Had the majority . . . concluded that a legislative grant of the power to appropriate property for the operation of an airport, implies, by reason of the nature of an airport, the right . . . to appropriate all land . . . reasonably necessary to such operation, whether or not first devoted to another public use, I might have found more common ground for agreement."

10. Alabama v. United States, 279 U.S. 229 (1929). See 1 High, Injunctions § 11 (4th ed. 1905).

11. Kilburn v. Childers, 86 S.W.2d 832 (Tex. Civ. App. 1935), citing Tyree v. Road Dist. No. 5, 199 S.W. 644 (Tex. Civ. App. 1917).

12. Oklahoma City v. Local Fed. Savs. & Loan Ass'n, 192 Okla. 188, 134 P.2d 565 (1943). The court stated that the power of eminent domain is dormant in the absence of some form of legislation. A fortiori, for a municipal corporation to exercise such power, it must be delegated by the legislature.

13. Chicago, M. & St. P. Ry. v. Incorporated Town of Lost Nation, 237 Fed. 709, 713 (S.D. Iowa 1916), where the court, in determining whether the municipality had power to condemn property already devoted to a public use, stated that "if this case involved a question of equities between the parties, we might well consider the conduct of the railway. . . . But it is not a question of equities; it is a question of legal rights." The court granted an injunction enjoining the municipality from condemning the property.

14. — Ohio App. at —, 166 N.E.2d at 154 (1960), where Judge Guernsey, concurring, stated that this "results in the party seeking appropriation being granted on equitable principles alone, the right to continue an action to appropriate property which right is not bestowed on such party by the Constitution or laws of Ohio." Cf. Butler v. Wilson, 237 Ala. 312, 186 So. 687 (1939), stating that an equity court may not create new substantive rights under the guise of doing equity.

15. See United States v. Carmack, 329 U.S. 230 (1946); United States v. 1096.84 Acres, 99 F. Supp. 544 (W.D. Ark. 1951); Emery v. City of Toledo, 121 Ohio St. 257, 167 N.E. 889 (1929); Sargent v. City of Cincinnati, 110 Ohio St. 444, 144 N.E. 132 (1924). Contra, Township of Weehawken v. Erie R.R., 20 N.J. 572, 120 A.2d 593 (1956), which said that when the doctrine of prior use comes into play, the question is for the courts.

use of the equitable approach in other cases could have the same effect as a literal application of each grant of a general power of condemnation.[17] In a situation where B has appropriated property for a municipal parking lot and A desires the same property for a county hospital, a court of equity, balancing the conveniences, could allow condemner A to take from B. Subsequently, it could develop that B needs the property to expand its municipal airport. Following the reasoning of the instant case, unless A could show a greater need, a court of equity would balance the conveniences and allow B to retake from A.[18] Recurring litigation concerning the same property could result. Further, a small political subdivision holding property for the use of its people could be subjected to constant condemnation proceedings by a larger political subdivision lacking statutory authority, unless the former could show a greater need. To avoid appropriation without statutory authority, and to avoid inequity and endless litigation, equitable principles should not be invoked in this purely statutory field.

Evidence—Admissions Made After Indictment in Absence of Counsel Not Admissible.—Police were summoned to the scene of a homicide where they encountered the defendant. He was questioned and then released, with a warning to remain available. Subsequently, the defendant was indicted for murder, but could not be found. After seven years absence he surrendered, by arrangement of his attorney, to answer the indictment. His attorney then departed, whereupon defendant, in response to questions, made statements which were damaging admissions as to motive, flight from arrest and general untruthfulness.[1] At the trial, these statements were admitted in evidence over the

16. — Ohio App. at —, 166 N.E.2d at 157, where it was stated that while the property was declared to be held for a public use, it was not in fact devoted to a prior public use. Consequently, that portion of the property is not within the reason or operation of the doctrine of prior use. See In the Matter of Rochester, H. & L.R.R., 110 N.Y. 119, 17 N.E. 673 (1888) (doctrine of prior use inapplicable). In Cincinnati, S. & C.R.R. v. Village of Belle Centre, 48 Ohio St. 273, 27 N.E. 464 (1891), the court held that property not used or necessary for a public purpose, whether acquired by purchase or appropriation, was outside the protection of the doctrine of prior use. See Vermont Hydro-Elec. Corp. v. Dunn, 95 Vt. 144, 112 Atl. 223 (1921), for a test to determine if property is in fact devoted to a public use.

17. See Village of Ridgewood v. Borough of Glen Rock, 15 N.J. Misc. 65, 188 Atl. 693 (1936). See generally Ball, Intergovernmental Conflicts in Land Acquisition: Adjustment for Maximum Public Benefit, 10 Ohio St. L.J. 30, 33 (1949).

18. — Ohio App. at —, 166 N.E.2d at 151. Although the court purported to reject the doctrine that equity will compare and weigh the more paramount necessity of the conflicting appropriations, it nonetheless relied on necessity to balance the conveniences.

1. The defendant admitted, inter alia, that he previously had a misunderstanding with the deceased, that he was at the scene of the crime and saw the victim, and that he did not attend the wake or funeral of the deceased. He also admitted flight when he learned the police were looking for him. The majority considered the admissions damaging since they provided a possible motive for the killing and corroborated the prosecution's claim of

defendant's objection. Defendant was convicted of murder in the first degree. The New York Court of Appeals, three judges dissenting, reversed. The interrogation of defendant in the absence of counsel, after his voluntary surrender to be arraigned upon the indictment, was a violation of his constitutional rights, and the admission in evidence of these statements was reversible error. *People v. DiBiasi,* 7 N.Y.2d 544, 166 N.E.2d 825, 200 N.Y. S.2d 21 (1960).

As a general rule, statements in the nature of confessions or admissions are admissible in New York[2] in a criminal prosecution even though they are illegally obtained.[3] Traditionally, there have been only two bases for exclusion of evidence of this type. A coerced confession is not admitted in evidence[4] on the theory that it is untrustworthy.[5] There is also a category of coerced testimony in New York referred to as "testimonial compulsion,"[6] in which the coercion is a restricted concept in that "force is not the test, but rather force accompanied by process aimed against a witness and compelling action on his part."[7] The cases of "testimonial compulsion" have involved situations where a suspected witness, under oath, has been forced to testify against himself in a preliminary hearing or inquest. The courts have found such to be a violation of the constitutional right against self incrimination and have ruled that the evidence must be excluded from the subsequent trial of the witness.[8]

The Supreme Court of the United States has generally refrained from

---

flight. People v. DiBiasi, 7 N.Y.2d 544, 550, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 24-25 (1960).

2. In determining admissibility, confessions and admissions are treated alike in the construction of N.Y. Code Crim. Proc. § 395. See People v. Gioia, 286 App. Div. 528, 145 N.Y.S.2d 495 (1st Dep't 1955).

3. People v. Alex, 265 N.Y. 192, 194-95, 192 N.E. 289, 290 (1934); People v. Mummiani, 258 N.Y. 394, 397-98, 180 N.E. 94, 95 (1932).

4. Whenever the issue of voluntariness presents a fair question of fact, New York leaves the issue with the jury, under instructions to disregard the confession if they find it to be involuntary. Stein v. New York, 346 U.S. 156, 172 (1953); People v. Weiner, 248 N.Y. 118, 161 N.E. 441 (1928).

5. "It is because it is in its nature unreliable, and not on account of any impropriety in the manner of obtaining it, that the evidence is excluded. In this all authorities agree." People v. McMahon, 15 N.Y. 384, 386 (1857). This is the reason why facts obtained from facts disclosed in an involuntary confession are not themselves inadmissible. Ibid. The exclusionary policy has been codified in N.Y. Code Crim. Proc. § 395: "A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the district attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

6. People v. McMahon, supra note 5.

7. People v. Defore, 242 N.Y. 13, 27, 150 N.E. 585, 590, cert. denied, 270 U.S. 657 (1926).

8. People v. Mondon, 103 N.Y. 211, 8 N.E. 496 (1886). Cf. Teachout v. People, 41 N.Y. 7 (1869); People v. McMahon, 15 N.Y. 384 (1857).

interfering with state rules concerning admissibility of evidence in criminal actions, and has refused to impose on the states the strict federal rules regarding the exclusion of evidence illegally obtained.[9] The significant exception to the noninterference policy has occurred in cases of confessions obtained in violation of due process. *Brown v. Mississippi*,[10] involving a confession extracted by physical torture, was the first case of this type to reach the Supreme Court. In upsetting the conviction,[11] the Court held that a confession obtained without a minimum standard of fairness was violative of due process and inadmissible in evidence regardless of its truth or falsity. Subsequent cases have extended the concept of due process to situations where means other than physical coercion are used to obtain the confession. In *Watts v. Indiana*,[12] the Court found that the interrogation of the accused for six nights amounted to force. And where an accused was kept incommunicado for three days, with little food and in fear of mob violence, the confession was held to have been obtained in violation of due process.[13] *Crooker v. California*[14] is the only case in which there has been a majority holding by the Supreme Court on the question of whether a confession made in absence of counsel is inadmissible because violative of due process.[15] In that case, a confession had been obtained from a suspect while he was under arrest and after his request for counsel had been denied. In affirming the conviction, the Court found that under the circumstances no violation had been shown.[16]

9. The federal rule excludes any evidence obtained illegally. Thus, a confession obtained during an illegal detention is not admissible. Mallory v. United States, 354 U.S. 449 (1957); Upshaw v. United States, 335 U.S. 410 (1948); McNabb v. United States, 318 U.S. 332 (1943). In Wolf v. Colorado, 338 U.S. 25 (1949), however, the Supreme Court held that evidence obtained by an illegal search and seizure could be used at the trial of a defendant in a state court.

10. 297 U.S. 278 (1936).

11. The Supreme Court can reverse a conviction in a state court where a confession is submitted to a jury, if it finds on the undisputed facts that the confession, as a matter of law, violates the due process clause of the fourteenth amendment. Payne v. Arkansas, 356 U.S. 560 (1958); Thomas v. Arizona, 356 U.S. 390 (1958) (dictum); Watts v. Indiana, 338 U.S. 49 (1949) (opinion of Frankfurter, J.).

12. 338 U.S. 49 (1949).

13. Payne v. Arkansas, 356 U.S. 560 (1958).

14. 357 U.S. 433 (1958) (five-to-four decision).

15. The concurring opinions in Spano v. New York, 360 U.S. 315, 324, 326 (1959), however, were concerned with the right to counsel during interrogation by the police. See note 29 infra and accompanying text.

16. The Court considered the fact that the defendant was an intelligent person who had shown during questioning an awareness of his rights. Four Justices dissented, saying that the federal rule should be applied to the states in capital cases. This rule rigidly applies the sixth amendment. See, e.g., Glasser v. United States, 315 U.S. 60, 76 (1942), wherein the Court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Cf. State v. Murphy, 87 N.J.L. 515, 530, 94 Atl. 640, 646 (1915), where the court said: "It is to be observed that the constitution does not provide that the defendant shall have the right to . . . counsel from the time of his arrest, but for his

While the advent of the due process test has imposed an additional area of inquiry on the state courts,[17] the requirement apparently has had no effect on any holding in New York prior to the instant case. The dissent in the recent case of *People v. Spano*,[18] however, indicated that at least three New York Court of Appeals judges were prepared to apply due process rigidly.[19] In that case, the defendant, a somewhat uneducated immigrant with a history of mental instability, surrendered with an attorney to a bench warrant issued upon an indictment for murder. Instead of immediate arraignment, he was questioned persistently during the night by the police, who denied his repeated requests for counsel. He was also urged to confess by a policeman, a friend pretending to be in trouble with his superiors. As a result, he made a confession which was admitted in evidence at his trial. The conviction was affirmed on the ground the jury had a sufficient basis to find that the confession was made without coercion.[20] The dissent, however, argued that the indictment commenced the legal proceedings against the accused and therefore the time for police investigation had terminated. Consequently, the confession extracted from the defendant after the indictment amounted to "testimonial compulsion." The dissent also asserted that the denial of defendant's request for counsel was a violation of his right to counsel under due process. A majority of the Supreme Court, in reversing the conviction,[21] held that the confession was obtained in violation of the traditional principles of the fourteenth amendment, and therefore found it unnecessary to rule on the right-to-counsel aspect

defence. Obviously, the word defence, as here used, means that a defendant is entitled to be represented and defended by counsel when put in jeopardy on his trial, and that his counsel shall have reasonable access to the prisoner for the purpose of preparing his defence. . . . By no stretch of the imagination can the provision be construed to mean that one accused of crime shall have the benefit of counsel to advise him as to whether or not he shall confess. Confession is a thing entirely apart from defence upon a trial."

17. Previously in New York, the test of admissibility of statements in the nature of confessions or admissions was based on voluntariness alone. See note 5 supra and accompanying text. "The test of admissibility has been, until now, voluntariness." People v. DiBiasi, 7 N.Y.2d 544, 552, 166 N.E.2d 825, 829, 200 N.Y.S.2d 21, 27 (1960) (dissenting opinion). See People v. Leyra, 302 N.Y. 353, 363, 98 N.E.2d 553, 558 (1951), where the court recognized the necessity for the application of the due process test but nevertheless held "this interview . . . was tantamount to a form of mental coercion." See also Comment, 27 Fordham L. Rev. 396, 402-03 (1958).

18. 4 N.Y.2d 256, 264, 150 N.E.2d 226, 231, 173 N.Y.S.2d 793, 800 (1958), rev'd, 360 U.S. 315 (1959). See Note, 27 Fordham L. Rev. 435 (1958).

19. In the instant case, the majority consisted of the three dissenting judges in People v. Spano (Desmond, C.J., Van Voorhis and Fuld, J.J.), in addition to a fourth judge (Foster, J.) appointed since then. There was a concurring opinion by Judge Fuld who said, without citing authority, that since defendant surrendered voluntarily to be arraigned on the indictment, the fact that he made no request for counsel or objection to being questioned was of no importance. 7 N.Y.2d 544, 551, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 26 (1960).

20. The court found no denial of defendant's constitutional right to counsel. 4 N.Y.2d at 264, 150 N.E.2d at 230, 173 N.Y.S.2d at 799 (1958).

21. Spano v. New York, 360 U.S. 315 (1959).

of the case.[22] In two concurring opinions,[23] however, four Justices contended that the denial of counsel alone, under these circumstances, was enough to require a reversal.

In the principal case, the court, reversing the conviction, relied chiefly on the concurring opinions in *Spano v. New York*. The court held that defendant's right to counsel at this stage of the criminal proceeding was absolute and that the admissions obtained by questioning in absence of counsel violated due process. In holding that the admissions were inadmissible in evidence, the majority referred to them as "testimonial compulsion," taking up the contention of the dissenting judges in *People v. Spano*. The instant dissent argued that there was no denial of due process and that the admissions, since voluntary, were properly admitted in evidence at the trial.

The instant decision represents a distinct step beyond prior cases.[24] The Supreme Court has traditionally excluded confessions because of the presence of the element of coercion in one form or another.[25] In the sole case in which exclusion of a confession was sought by reason of denial of counsel under due process, the Court held adversely to petitioner and affirmed the conviction.[26] The majority justified its holding on the basis of the concurring opinions in *Spano v. New York*. But that case involved different facts, the most significant of which is that the defendant made repeated requests for counsel. The concurring Justices, although they broadly stated that the indictment of the accused commenced the legal proceedings and gave him an absolute right to counsel, had these particular facts in mind.[27] The basic similarity between

22. Id. at 323-24.

23. Id. at 324, 326.

24. The court held that defendant had an absolute right to counsel under the circumstances of the case. Traditionally, the concept of due process required an investigation of all the facts and circumstances in the case. In Powell v. Alabama, 287 U.S. 45 (1932), the Supreme Court considered the age, experience, background, mental alertness and the hostile atmosphere surrounding the defendants' incarceration, before deciding that the absence of counsel amounted to a denial of due process. The defendant, in Avery v. Alabama, 308 U.S. 444 (1940), had counsel appointed only three days before trial. The denial of a motion for a continuance was upheld by the Supreme Court which examined the circumstances and concluded that three days was sufficient time for preparation. See notes 15-17 supra and accompanying text.

25. See, e.g., Payne v. Arkansas, 356 U.S. 560 (1958); Rochin v. California, 342 U.S. 165 (1952) (use of stomach pump to secure evidence of narcotics); Watts v. Indiana, 338 U.S. 49 (1949); Haley v. Ohio, 332 U.S. 596 (1948) (fifteen-year-old boy questioned in relays for five hours); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (incommunicado for thirty-six hours; questioned in relays without rest). See also Comment, 27 Fordham L. Rev. 396 (1958).

26. Crooker v. California, 357 U.S. 433 (1958), where the defendant was not under indictment. The majority, inter alia, conceded that a circumstance, such as denial of request for counsel could show a violation of due process in procuring a confession. This dictum may well have opened the door for the instant decision.

27. Mr. Justice Douglas, concurring, said that "the question is whether after the indictment and before the trial the Government can interrogate the accused in secret when he asked for his lawyer and when his request was denied." Spano v. New York, 360 U.S.

the instant decision and *Spano v. New York* is that in both cases the defendants voluntarily surrendered to an indictment through counsel. Although the majority here did not amplify its conclusion that the defendant's right to counsel was violated, the reasoning of the dissent in *People v. Spano*[28] and of the concurring opinions in *Spano v. New York*[29] indicate that the holding here is predicated upon the desire of the court to afford an accused the procedural safeguards which follow upon an arraignment.[30] Since an indictment is based upon a finding of probable cause which supports a belief that defendant committed the crime,[31] he deserves to be in the custody of the court and is entitled to initiate his defense unhampered by police interrogation. For this reason, it is apparent that the decision does not extend to an individual who is simply under arrest without an indictment.

Although a reversal in the instant case could have been predicated solely on a due process violation, the majority, by stating that the admissions constituted "testimonial compulsion," have also extended the meaning of that term beyond its previous limits. Two of the three cases cited by the court for its finding involved sworn testimony by a witness under constraint of legal process.[32] In the third,[33] the court affirmed the conviction, finding that there was no "testimonial compulsion."

Both in its interpretation of due process and extension of "testimonial compulsion," the instant decision represents new law in New York. It is the first decision to exclude admissions of this type from evidence other than on the basis of voluntariness. The result of the majority holding will be an effective curtailment of any questioning of an accused by authorities once there has been

315, 325 (1959). In the second concurring opinion, Mr. Justice Stewart said, "What followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office. . . . [T]he petitioner repeatedly asked to be allowed to send for his lawyer, and his requests were repeatedly denied." Id. at 327.

28. "Before a magistrate or a coroner or other judicial officer a defendant may under no circumstances be forced to make admissions of his guilt. . . . Yet the same defendant in the same criminal cause held under the process of the same court, can (it is now decided) be subjected to secret midnight questioning out of reach of any lawyer, till he confesses." 4 N.Y.2d at 266, 150 N.E.2d at 232, 173 N.Y.S.2d at 801 (1958).

29. "This representation by counsel is not restricted to the trial. As stated in Powell v. Alabama [287 U.S. 45 (1932)] . . . 'during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial . . . they were as much entitled to [counsel] . . . during that period as at the trial itself.'" 360 U.S. at 325 (1958).

30. At the arraignment an accused must be informed of his right to counsel, N.Y. Code Crim. Proc. § 308, and of his right not to testify against himself, N.Y. Code Crim. Proc. § 196. Thereupon, he is taken from police custody and placed in the custody of the court. N.Y. Code Crim. Proc. §§ 208-09.

31. See N.Y. Code Crim. Proc. § 275. See also Beavers v. Henkel, 194 U.S. 73, 85 (1904).

32. People ex rel. Kenney v. Adams, 292 N.Y. 65, 54 N.E.2d 10 (1944); People ex rel. Ferguson v. Reardon, 197 N.Y. 236, 90 N.E. 829 (1910).

33. People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

an indictment.[34] Any confession or admission obtained in absence of counsel will no longer be admissible over objection of defendant, regardless of any lack of coercion.

Labor Law—Unlawful Intent of Informational Picketing Not To Be Inferred Solely From Prior Union Objectives.—Appellants picketed the Stork Club continuously from January 1957, until January 1960, protesting the discharge of several employees and protesting the Club's refusal to recognize or bargain with the unions. Both the Club and the picketing unions sought relief in the New York State courts and before the New York State Labor Relations Board. The New York proceedings continued until January 1959, when, because of federal pre-emption, the State Board dismissed both the unfair labor practice charges brought by the unions and the Club's petition for an election.[1] In January 1960, the Club filed a complaint with the National Labor Relations Board, alleging that the unions were engaged in unfair labor practices under the recently enacted Section 8(b)(7)(C) of the Taft-Hartley Act.[2] At the time the charges were filed, recognition and bargaining were admitted objectives of the picketing. Soon after the filing, however, the unions announced a change in their picketing objectives and made appropriate changes in their picket signs. At the instance of the National Labor Relations Board, a temporary injunction was subsequently granted by the district court.[3] The court found that the Regional Director had reasonable cause to believe that the picketing was for recognitional and bargaining purposes, and also that an effect of the picketing was to dissuade employees of other employers from servicing the Club. On appeal, the circuit court modified the injunction, finding no "substantial independent evidence" to indicate that the picketing continued to be for unlawful purposes. The court upheld the injunction so far as it was based upon the refusal of neutral employees to service the Club, but modified it to restrain the picketing during only those hours in which deliveries would be expected. *McLeod v. Chefs Union*, 280 F.2d 760 (2d Cir. 1960).

34. Although the decision in the instant case involved a voluntary surrender through counsel, the indictment was the deciding element against the defendant. Therefore, the same protection should be extended, whether a defendant surrenders voluntarily or through counsel.

1. The unions were then precluded from preferring charges before the National Labor Relations Board in view of the provisions of § 10(b) of the Labor Management Relations Act, 61 Stat. 146 (1947), 29 U.S.C. § 160(b) (1953) (commonly called the Taft-Hartley Act), which provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing . . . with the Board. . . ."

2. This section was added to the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C. 141 (1958), by the Labor-Management Reporting and Disclosure Act of 1959, § 704(c), 73 Stat. 542, 29 U.S.C. § 158(b)(7)(C) (Supp. I, 1959).

3. McLeod v. Chefs Union, 181 F. Supp. 742 (S.D.N.Y. 1960).

Section 8(b)(7) was added to the Taft-Hartley Act of 1947 by the Labor-Management Reporting and Disclosure Act of 1959.[4] The section makes picketing for recognitional, organizational, or bargaining purposes by an uncertified union an unfair labor practice if: (1) the employer has already lawfully recognized another union in accordance with the act and a valid question of representation cannot be raised under the act; (2) a valid election has been held under section 9(c)[5] of the act within the past twelve months; (3) an election petition under section 9(c) of the act has not been filed within a reasonable period of time not to exceed thirty days. The section specifically stipulates that subsection (c) shall not be construed to prevent picketing or other publicity aimed at advising the public that the employer does not employ union members or have a union contract, unless such picketing should induce employees of other employers not to service the picketed employer.

The ruling of the United States Supreme Court in the *Curtis Bros.*[6] case that section 8(b)(1)(A)[7] did not apply to peaceful picketing, whether organizational or recognitional in nature, placed the regulation and control of peaceful picketing solely within the ambit of Sections 8(b)(4)[8] and 8(b)(7) of the Taft-Hartley Act.

The latent ambiguities present in section 8(b)(7)(C) have been the source of considerable speculation[9] both in regard to the section's application by the National Labor Relations Board and its eventual interpretation by the courts.[10] The instant case is the first appellate ruling on the section. Decisions rendered by the lower courts in the new enactment's brief lifetime, however,

4. 73 Stat. 542, 29 U.S.C. § 158(b)(7)(C) (Supp. I, 1959).

5. 61 Stat. 144 (1947) (amended by 73 Stat. 542, as amended, 29 U.S.C. § 159(c) (Supp. I, 1959)).

6. NLRB v. Drivers Union, 362 U.S. 274 (1960), affirming 274 F.2d 551 (D.C. Cir. 1958), reversing 119 N.L.R.B. 232 (1957) (popularly known as Curtis Bros.). The Curtis controversy, which arose prior to the enactment of § 8(b)(7)(C), revolved around the question as to whether or not the words "to restrain or coerce" in § 8(b)(1)(A) could be interpreted to apply to peaceful picketing. The NLRB interpreted the section as applying to peaceful picketing and entered a cease-and-desist order against a picketing union. On review, the Court of Appeals for the District of Columbia set aside the order, ruling that the section had no application to peaceful picketing, whether "organizational or recognitional" in nature, and the Supreme Court affirmed.

7. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958), which provides in pertinent part: "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ."

8. 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (Supp. I, 1959). Section 8(b)(4) deals primarily with the problem of "secondary boycotts" and is beyond the scope of the present analysis.

9. See, e.g., Wyle, The New Law of Picketing, 10 Lab. L.J. 889 (1959); Symposium—The Labor-Management Reporting and Disclosure Act of 1959: Interpretations and Implications, 48 Geo. L.J. 205 (1959); Fanning, The New Taft-Hartley Amendments: A Preliminary Look, 10 Lab. L.J. 763 (1959); Comment, Title VII of the Labor-Management Reporting and Disclosure Act of 1959, 28 Fordham L. Rev. 737, 767 (1960).

10. Sometimes, as in the instant case, the initial interpretation will be by the courts.

created a background of conflicting interpretations. In *Getreu v. Bartenders Union*,[11] the United States District Court for the Northern District of Indiana denied the Regional Director an injunction, holding that the section did not ban recognitional picketing if done in conjunction with informational picketing. A contrary conclusion was reached in three other cases where the district courts granted temporary injunctions to restrain picketing intended both to gain recognition and to publicize the fact that the company was nonunion.[12] The battle lines were quickly drawn. The most noteworthy of the latter cases was decided in the Eastern District of New York.[13] In this decision, the picketing was admittedly begun for recognitional purposes. Subsequently, upon the advice of attorneys, changes were made in the picket signs in an apparent attempt to bring the picketing within the prescriptions of the act. The district court nevertheless granted a temporary injunction, holding that a mere unilateral declaration of policy did not necessarily change the objective of the picketing.[14]

The circumstances of the instant case were quite similar. The unions admittedly picketed for recognitional and bargaining purposes from 1957 until the charges were filed in January 1960. This period encompassed a two-month period of admitted illegal activity under section 8(b)(7)(C).[15] Subsequent to the filing of the charges, letters were sent to the Club and the National Labor Relations Board, informing them that the unions "decided to cease picketing the Stork Restaurant, Inc. for the purpose of obtaining recognition and to withdraw their demand therefor."[16] Changes were simultaneously made in the picket signs. The United States district court granted the Regional Director a temporary injunction, reasoning that inasmuch as the changed picket signs stated that the Club did not have a contract with the labor unions, the ultimate purpose of the picketing was to pressure the Club into recognizing and bargaining with the unions.[17] The court also reiterated a prior ruling that a unilateral declaration in policy will not necessarily change the purposes of the picketing.[18]

---

11. 181 F. Supp. 738, 741 (N.D. Ind. 1960). Subsection (C) was construed to mean that "although 'an object' of picketing may be bargaining, as it admittedly is in this case, it is immunized from the statute if 'the purpose' of such picketing is also truthfully to inform the public that the employer does not have a contract with the union and further if the picketing does not curtail picking up, delivery or transportation of goods or the performance of services."

12. McLeod v. Local 239, Int'l Bhd. of Teamsters, 179 F. Supp. 481 (E.D.N.Y. 1960); Elliott v. Sapulpa Typographical Union, — F. Supp. — (45 L.R.R.M. 2460) (N.D. Okla. Dec. 9, 1959); Phillips v. ILGWU — F. Supp. — (45 L.R.R.M. 2363) (M.D. Tenn. Dec. 18, 1959).

13. McLeod v. Local 239, Int'l Bhd. of Teamsters, supra note 12.

14. Id. at 486.

15. Section 8(b)(7) was passed on Sept. 14, 1959, and became effective on Nov. 13, 1959. 73 Stat. 546 (1959), 29 U.S.C. § 153(b) (Supp. I, 1959).

16. 280 F.2d at 762 n.2.

17. McLeod v. Chefs Union, 181 F. Supp. 742 (S.D.N.Y. 1960).

18. Id. at 747, citing McLeod v. Local 239, Int'l Bhd. of Teamsters, 179 F. Supp. 481 (E.D.N.Y. 1960).

The Court of Appeals for the Second Circuit rejected both aspects of the lower court's reasoning. The appellate court held that section 8(b)(7)(C) specifically permitted the unions to inform the public that the employer did not have a union contract, and therefore an illegal inference could not be drawn from picket signs which purported to make use of that provision. The district court's use of the unions' unlawful objectives prior to their change in policy as an indication of the unions' intentions thereafter, was also held error. Citing its own opinion in the *Arnold Baker* case,[19] the court reiterated that it "rejected the application of a presumption of the continuity of a state of affairs in construing the legality of picketing where there is no independent evidence to support such a presumption."[20] In *Arnold Baker,* however, the Board had spoken in terms of, and apparently did attempt to apply, such a presumption.[21] In the instant case, though, the district court considered the unions' objectives prior to the filing of charges along with other evidence, and reached its conclusion that the Board had reasonable cause to believe that an unfair labor practice was taking place based upon an evaluation of all the evidence, without expressly or impliedly referring to any presumption. The distinction is worthy of note. In its role as an administrative fact-finding body, the National Labor Relations Board has been permitted to scrutinize prior union practices in determining subsequent union intent.[22] In the past, the Board has, in fact, been permitted to consider union activities prior to the enactment of a labor act in evaluating subsequent union motives.[23] If the circuit court's opinion can be interpreted to remove union activity prior to a declared change in policy from serious consideration by the district court, a curious anomaly could result. It is foreseeable that the Board will continue to consider prior union objectives and activities when ultimately passing as a question of fact on an unfair labor charge filed pursuant to section 8(b)(7)(C). Such evidence undoubtedly will be of major importance in enabling the Board to reach its finding. And yet, for all practical purposes, such evidence will be denied the Board when attempting to prove before a district court that it has but reasonable cause to believe that an unfair labor practice is taking place. While still admissible, such evidence would apparently be accorded little, if any, weight by the court.

The circuit court upheld the temporary injunction based upon the second proviso of section 8(b)(7)(C) which renders even informational picketing an unfair labor practice if "an effect" thereof is "to induce" an employee of

19. NLRB v. Bakers Union, 245 F.2d 542, 547 (2d Cir. 1957) (popularly called the Arnold Baker case).

20. 280 F.2d at 764.

21. Bakers Union, 115 N.L.R.B. 1333, 1336 (1956).

22. See, e.g., American Life & Acc. Ins. Co., 123 N.L.R.B. 529 (1959); McCulloch Motors Corp., 120 N.L.R.B. 1709 (1958); Consolidated Chem. Indus., 120 N.L.R.B.. 1625 (1958); Coast Aluminum Co., 120 N.L.R.B. 1326 (1958); News Printing Co., 116 N.L.R.B. 210 (1956).

23. See, e.g., Newport News Shipbuilding & Dry Dock Co. v. NLRB, 101 F.2d 841, 847 (4th Cir. 1939); Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 7 (1935), enforced, 303 U.S. 261 (1938), reversing 91 F.2d 178 (3d Cir. 1937).

another employer not to render services to the picketed establishment. The court felt the injunction was warranted under this clause, based upon the testimony of three truck drivers who testified before the district court that they refused to make deliveries to the Stork Club when they saw that it was being picketed. The concurring opinion agreed with the results of the majority decision. In construing the second proviso, however, the concurring opinion suggested that the inducing of employees of other employers not to cross the picket lines must be an intended result of the picketing. The majority opinion, without expressly stating so, apparently looked only to the results of the picketing, whether intended or not, in determining the legality of the informational picketing. The latter interpretation gains heavy support from the legislative history of the section.[24] The decision of the circuit court to modify the injunction[25] is an indication that the second proviso of section 8(b)(7)(C) may receive a liberal application by the courts. In this instance, at least, the refusal to deliver did not immediately render the informational picketing an unfair labor practice in its entirety. This result, foreseen by some,[26] is discussed but rejected in the concurring opinion.

In the final analysis, the instant case provides few, if any, definite answers to the complex questions raised by possible divergent interpretations of section 8(b)(7)(C). The case would, at least temporarily, resolve the aforementioned conflict of interpretations in the district courts and reject the construction of the United States District Court for the Northern District of Indiana[27] that recognitional picketing, if coupled with informational objectives, is not illegal under section 8(b)(7)(C).[28]

24. The Senate Committee's Analysis stated that informational picketing would be allowed "providing the effect of the picketing is not to induce a disruption of services at the employee's place of business." Subcommittee on Labor of the Committee on Labor and Public Welfare, 86th Cong., 1st Sess., Section-by-Section analysis of the Labor-Management Reporting and Disclosure Act of 1959 (Comm. Print 1959). The remarks of Senator Kennedy of Massachusetts also lend weight to this interpretation: "You can start picketing with anything you have, with any members you have; but if the picketing results in stopping deliveries or service employees from entering the premises, then there must be an immediate election." 105 Cong. Rec. 15500 (daily ed. Aug. 28, 1959). The Senator's remarks on September 3, 1959, are also pertinent: "When the picketing results in economic pressure through the refusal of other employees to cross the picket line, the bill would require a prompt election." 105 Cong. Rec. 16413 (daily ed. Sept. 3, 1959).

25. The case was remanded to the district court for a determination as to the hours during which deliveries would be expected. After a hearing at which conflicting evidence was introduced by both parties, the court, by "balancing the equities of the parties," determined that picketing should not be carried on during the hours of 1 p.m. to 3 p.m., or from 7 p.m. to 8 p.m. McLeod v. Chefs Union, — F. Supp. — (46 L.R.R.M. 2914) (S.D.N.Y. Aug. 10, 1960).

26. See, e.g., Dunau, A Preliminary Look at Section 8(b)(7), 48 Geo. L.J. 371, 373 (1959).

27. Getreu v. Bartenders Union, 181 F. Supp. 738 (N.D. Ind. 1960).

28. Subsequent district court decisions have recognized that information, recognition, or bargaining cannot be concurrent purposes or immediate objectives of the picketing. However, these decisions modified this interpretation by refusing to grant injunctions

The case poses an additional problem for the NLRB. Just what the courts will now construe as "substantial independent evidence" in ascertaining what are grounds for "reasonable cause to believe" that an unfair labor practice is taking place is not clear. However, until further elucidation is forthcoming, it would appear that a union's announced change in policy is tantamount to a self-administered general absolution removing all taint of prior union transgressions. It would, therefore, be incumbent upon the NLRB, in order to obtain injunctive relief to enforce its orders, to present evidence to the court that the picketing for recognitional, organizational, or bargaining purposes was activated or continued active after the "informational" campaign had begun.

Taxation—Application of Constructive Receipt Doctrine to Shares of Stock and the Dividends Payable on Them.—Plaintiffs owned stock[1] in a public utility holding company which was liquidating its assets in accordance with a judicially confirmed reorganization plan.[2] Under the reorganization plan the plaintiffs could exchange their stock in the liquidating company for a new common stock to be issued by its subsidiary company.[3] Instead of exchanging

even though the ultimate "hope" or purpose of the unions was recognition or bargaining. These cases looked solely to the "immediate" rather than the ultimate purposes in determining the legality of the picketing. Graham v. Retail Clerks Ass'n, 47 L.R.R.M. 2009 (D. Mont. Oct. 25, 1960); Penello v. Retail Store Employees Union, 46 L.R.R.M. 3021 (D. Md. Sept. 23, 1960); Cavers v. Teamsters "General" Local 200, 46 L.R.R.M. 2829 (E.D. Wis. Aug. 18, 1960); Greene v. International Typographical Union, 186 F. Supp. 630, (D. Conn. 1960). In theory, these decisions agree with the interpretation of Stuart Rothman, General Counsel of the National Labor Relations Board, advanced in a speech made before the Missouri State Bar Association, in which he stated that § 8(b)(7)(C) was intended to allow picketing which had an immediate informational objective "albeit the hope of the picketing union is that such tactics will carry it closer to ultimate recognition." News and Background, 46 Lab. Rel. Rep. 449 (Oct. 10, 1960).

1. Plaintiffs, husband and wife, owned 3,633 shares of 7% cumulative prior preference stock of Portland Electric Power Company, herein referred to as "Portland." These shares were acquired during the years 1944-1946 at a cost of $140,031.

2. Petition of Portland Elec. Power Co., 162 F.2d 618 (9th Cir.), cert. denied, 332 U.S. 837 (1947).

3. The reorganization plan provided that Portland General Electric Company (herein referred to as "PGE"), a wholly owned operating subsidiary of Portland, was to reclassify and increase its authorized common stock and to issue to Portland 998,996 58/60 shares of such new common stock in exchange for the previously oustanding common stock held by Portland. PGE was also to transfer to Portland a dividend of $1,600,000 in cash and $93,000 principal amount in Portland's own bonds. Portland was then to distribute cash and common stock of PGE to holders of Portland's bonds and prior preference and first preferred stock in exchange for the Portland securities held by them. The holder of each share of prior preference stock was to receive 6⅓ shares of common stock of PGE. Under the plan the holders of prior preference stock were given ten years after entry of the final decree in the reorganization within which to exchange such prior preference stock for common stock of PGE. At the end of ten years, whatever Portland stock had not

their stock, the plaintiffs sold it and received in the sales price an additional consideration which was attributable to the value of the dividends[4] then payable on the subsidiary stock. They reported the difference between the cost of the stock and the sales price as long term capital gain. The Internal Revenue Service contended that part of the sales price reported by plaintiffs as long term capital gain was constructively received by plaintiffs as a dividend and should have been reported as dividend income. Plaintiffs' taxable income was adjusted accordingly and they paid a deficiency[5] based on the adjustment. The United States district court denied plaintiffs' claim for a refund. The court of appeals affirmed, one judge dissenting, and held that the constructive receipt principle[6] was applicable, and that the proceeds of the stock sale were taxable as ordinary income as to that part of the sales price which represented accrued dividends on the subsidiary company's common stock. *Brundage v. United States*, 275 F.2d 424 (7th Cir.), cert. denied, 81 Sup. Ct. 48 (1960).

The doctrine of constructive receipt has been a part of Treasury Regulations

been exchanged would be valueless. The effective date of the reorganization plan was February 2, 1948. Brundage v. United States 275 F.2d 424, 425-26 (7th Cir.), cert. denied, 81 Sup. Ct. 48 (1960).

4. On July 7, 1947, the directors of PGE declared a special dividend of three dollars per share to be paid to the holders of the new common stock when, and if, such stock should be issued pursuant to the plan. Additional special dividends were declared in both November and December of 1947, each of forty-five cents per share. In March and June of 1948, further dividends of forty-five cents per share were declared, to be paid to holders of the common stock of PGE. With respect to those Portland shares which were outstanding, the proper dividends were set aside until such time as the exchange should be made for PGE common stock. Id. at 426.

5. I.e., $39,076.12, plus $7,731.07 in interest. Id. at 425.

6. Treas. Reg. 111, § 29.42-2 (1939), which provides: "Income not reduced to possession.—Income which is credited to the account of or set apart for a taxpayer and which may be drawn upon by him at any time is subject to tax for the year during which so credited or set apart, although not then actually reduced to possession. To constitute receipt in such a case the income must be credited or set apart to the taxpayer without any substantial limitation or restricion as to the time or manner of payment or condition upon which payment is to be made, and must be made available to him so that it may be drawn at any time, and its receipt brought within his own control and disposition. . . ." Treas. Reg. 111, § 29.42-3 (1939), provides: "Examples of constructive receipt. —If interest coupons have matured and are payable, but have not been cashed, such interest, though not collected when due and payable, shall be included in gross income for the year during which the coupons mature, unless it can be shown that there are no funds available for payment of the interest during such year. The interest shall be included in gross income even though the coupons are exchanged for other property instead of eventually being cashed. The amount of defaulted coupons is income for the year in which paid. Dividends on corporate stock are subject to tax when unqualifiedly made subject to the demand of the shareholder. If a dividend is declared payable on December 31 and the corporation intended to and did follow its practice of paying the dividends by checks mailed so that the shareholders would not receive them until January of the following year, such dividends are not considered to have been unqualifiedly made subject to the demand of the shareholders prior to January, when the checks were actually received. . . ."

since 1918.[7] It was conceived as a preventive measure which would eliminate the avoidance and possible evasion of income taxes by taxpayers who, at that time, could choose the year in which to report income by choosing the year in which to reduce it to possession.[8] The doctrine, although not spelled out expressly in the Internal Revenue Code, has been a familiar concept in Treasury Regulations and has been accorded the force of law.[9] The basic principle of the doctrine is that income subject to the unfettered command of a taxpayer, which he is free to enjoy at his own option, may be taxed to him as his income, whether or not he sees fit to enjoy it.[10] Although originally designed as a tool to be used by the Commissioner, the doctrine has recently been recognized as an aid which may be relied on to benefit the taxpayer as well.[11]

The application of the constructive receipt doctrine has been wide and varied.[12] Typical items to which the doctrine has been applied are salary credited in a given year but not withdrawn by the employee,[13] interest on bank deposits[14] and bond coupons which are payable but not collected.[15] Taxability turns on whether the income is subject to the taxpayer's unhampered

7. Treas. Reg. 45, § 213 (1918).

8. Weil v. Commissioner, 173 F.2d 805 (2d Cir.), cert. denied, 338 U.S. 821 (1949); Ross v. Commissioner, 169 F.2d 483 (1st Cir. 1948). The doctrine mitigates the requirement that income must be actually received to be taxable. By complementing the actual receipt doctrine with the doctrine of constructive receipt, it is no longer possible for the taxpayer to take advantage of the shifting scale of tax rates by reporting deferred income in a poor year.

9. Boehm v. Commissioner, 326 U.S. 287, 291-92 (1945); Helvering v. Winmill, 305 U.S. 79, 83 (1938).

10. Corliss v. Bowers, 281 U.S. 376, 378 (1930).

11. Weil v. Commissioner, 173 F.2d 805, 807 (2d Cir.), cert. denied, 338 U.S. 821 (1949); Ross v. Commissioner, 169 F.2d 483, 491-92 (1st Cir. 1948). The Ross decision presents the taxpayer with an opportunity to avoid taxes by allowing him the use of the constructive receipt doctrine as a defense by asserting that present income was constructively received and therefore is taxable only in years which are now barred by limitations. Mr. Justice Frankfurter recognized this possibility, but stated in his opinion that he did not consider that this holding would result in any increase in tax violation because the Government had the ability to collect taxes at any time in the event of fraudulent evasion. Int. Rev. Code of 1939, ch. 1, § 276(a), 53 Stat. 87 (now Int. Rev. Code of 1954, § 6501(c)).

For an early approach to taxpayers' use of constructive receipt doctrine as a defense, see Bailey v. Commissioner, 103 F.2d 448 (5th Cir. 1939).

12. For a general discussion of the concept and applications of the doctrine, see Comment, 45 Ill. L. Rev. 77 (1950); 3 CCH 1960 Stand. Fed. Tax Rep. ¶ 2834; 2 Mertens, Federal Income Taxation §§ 10.01 to .18 (Zimet & Stanley rev. 1955), 2 RIA Federal Tax Coordinator ¶ F-1103; Kutz, Constructive Receipt Re-examined, N.Y.U. 12th Inst. on Fed. Tax 497 (1954).

13. Schoenheit v. Lucas, 44 F.2d 476 (4th Cir. 1930).

14. Edward Mallinckrodt, Jr., 38 B.T.A. 960 (1938), appeal dismissed mem., 106 F.2d 999 (8th Cir. 1939), cert. denied, 311 U.S. 672 (1940).

15. Loose v. United States, 74 F.2d 147 (8th Cir. 1934).

control.[16] The doctrine is properly applied when the party in control can designate another as beneficiary merely to satisfy a donative impulse.[17] But where complete control over a share of the income from a trust is assigned for life, the doctrine does not apply and the donee is taxable on the income.[18]

The principle of constructive receipt has been applied to dividend income to make it taxable before it is actually received, where such dividend income is made unqualifiedly subject to the demand of the shareholder.[19] This has been true even where the corporation declaring the dividend did not have sufficient cash on hand to pay the dividend declared.[20] Dividends have been held to be constructively received when a dividend check was received but not cashed[21] and where such checks were deposited by the shareholders in their respective accounts but the amounts of the checks were subsequently returned to the corporation.[22] It is possible for dividends to be constructively received before they are payable[23] and even before they are declared[24] as dividends. It has been held that earnings not yet declared as dividends, but nonetheless credited to shareholders, are constructive dividends and are taxable as such when they are made unqualifiedly subject to the demand of the stockholders.[25]

In the instant case, the plaintiffs were vested through the reorganization plan with rights to the shares of the subsidiary corporation. As equitable owners of the subsidiary's shares, the plaintiffs had a right to the dividends payable on those shares. The parent corporation's shares, which were of little or no value in and of themselves, acquired a new value as the means of evidencing the right to the subsidiary's shares and to the dividends accrued on the latter. The court reasoned that the sale of the parent's stock carried with it the right to collect the dividends which were payable on the subsidiary's shares. The value of the dividend rights was part of the consideration which the plaintiffs received for the parent's shares. For tax purposes, the amount of the subsidiary's dividends was constructively received by the plaintiffs and they were accountable for the dividends as ordinary income. The court, stating that the dominant purpose of revenue laws is the taxation of income to those who

16. See, e.g., Helvering v. Rankin, 295 U.S. 123 (1935); Weil v. Commissioner, 173 F.2d 805 (2d Cir.), cert. denied, 338 U.S. 821 (1949).

17. Harrison v. Schaffner, 312 U.S. 579 (1941).

18. Blair v. Commissioner, 300 U.S. 5 (1937).

19. See International Bedaux Co. v. Commissioner, 204 F.2d 870 (2d Cir. 1953); Bennett v. Commissioner, 139 F.2d 961 (8th Cir. 1944); A.D. Saenger, Inc. v. Commissioner, 84 F.2d 23 (5th Cir.), cert. denied, 299 U.S. 577 (1936); Baker v. United States, 17 F. Supp. 976 (Ct. Cl. 1937).

20. A. D. Saenger, Inc. v. Commissioner, supra note 19; Baker v. United States, supra note 19.

21. J. Arthur Currey, P-H Tax. Ct. Mem. 858 (1941).

22. Edgar M. Soreng, 4 T.C. 870, aff'd, 158 F.2d 340 (7th Cir. 1946).

23. Leon S. Herbert, 32 B.T.A. 372, aff'd, 81 F.2d 912 (3d Cir. 1936); Patterson v. Anderson, 20 F. Supp. 799 (S.D.N.Y. 1937).

24. I.T. 1872, II-2 Cum. Bull. 80 (1923).

25. Hadley v. Commissioner, 36 F.2d 543 (D.C. Cir. 1929); Chattanooga Sav. Bank v. Brewer, 17 F.2d 79 (6th Cir.), cert. denied, 274 U.S. 751 (1927).

enjoy the benefits of it when paid,[26] found that the character of the dividends would not be changed from ordinary income to capital gains income because they were received as part of a sales price of a capital asset.[27]

In his dissent, Judge Major argued that the plaintiffs merely had an option to exchange their stock for the new common stock of the subsidiary. The dissenting opinion reasoned that since the plaintiffs could not collect the dividends on the subsidiary's shares until they exchanged the shares of the parent company, they did not have an unfettered right to the dividends. As the dissent pointed out, the instant case is unique because one constructive receipt was imposed upon another.[28] But the fact that it is un-

26. 275 F.2d at 427, citing Helvering v. Horst, 311 U.S. 112, 116 (1940), and Fisher v. Commissioner, 209 F.2d 513, 515 (6th Cir.), cert. denied, 347 U.S. 1014 (1954).

27. 275 F.2d at 427, citing United States v. Snow, 223 F.2d 103 (9th Cir.), cert. denied, 350 U.S. 831 (1955): "The general rule is that a right to receive ordinary income, produced by a capital asset, is not transmuted into a capital asset by the sale or assignment of the capital asset together with the right to receive the ordinary income. . . ." 223 F.2d at 108. The court here is referring to the contention of the Government that the instant case falls within the scope of the provisions of Treas. Reg. 111, § 29.42-3 (1939), to the effect that items constructively received shall be included in gross income even though exchanged for other property. Here the dividends were sold to the purchaser along with the stock, and it is well settled that a taxpayer cannot shift the incidence of income tax nor convert ordinary income into capital gain by the simple expedient of assigning and transferring the right to such income. In support of their position, the defendants cited in their brief Commissioner v. P. G. Lake, Inc., 356 U.S. 260 (1958); Helvering v. Eubank, 311 U.S. 122 (1940); Helvering v. Horst, 311 U.S. 112 (1940); Burnet v. Leininger, 285 U.S. 136 (1932); Lucas v. Earl, 281 U.S. 111 (1930); Idaho First Nat'l Bank v. United States, 265 F.2d 6 (9th Cir. 1959); Commissioner v. Slagter, 238 F.2d 901 (7th Cir. 1956). Brief for Appellee, p. 11.

In its discussion of the plaintiff's argument, the court dismissed the contention of the taxpayers that even if they had actually received the declared PGE dividends, such payments would have given rise to capital gain as cash received in liquidation of Portland. The court relied on the provisions of the reorganization plan to show that no provision was made for the dividends to be liquidating distributions. As a result, Int. Rev. Code of 1939, § 115 (c) (now Int. Rev. Code of 1954, § 331), does not apply. This section provides: "Distributions in liquidation. Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock. . . ."

28. Judge Major further states that the application of the constructive receipt doctrine to cases similar to the instant case could produce the incongruous result of numerous taxpayers being held accountable for the same dividends. This would be so if the Portland shares were sold many times before being exchanged for the PGE shares and dividends. It is admitted that more than one person could conceivably be taxed on PGE dividends before the Portland stock was exchanged for the PGE shares, but it would not follow that more than one person would be taxed on the same dividends on PGE shares. This is so because the dividends are income only to the one who owns the shares at the time the dividends are payable. Int. Rev. Code of 1939, ch. 1, § 22(a), 53 Stat. 9 (now Int. Rev. Code of 1954, § 61). The dividends would be taxable to that owner whether or not he collected them. And, if he transferred the stock with the dividends still uncollected, the transferee would merely receive an extra value with the shares. As to the transferee, the dividends would not be ordinary income, since it is property sold or exchanged, falling within the definition of capital asset in Int. Rev. Code of 1954, § 1221.

usual does not make the application of the doctrine any less correct or just. There is no question that the plaintiffs, as holders of the stock in the parent corporation, had a right to the income represented by the dividends on the shares in the subsidiary corporation. It was on the issue of whether or not this was an unqualified right that the majority and dissent disagreed. The dissent reasoned that the necessity for an exchange of the parent corporation shares for the subsidiary corporation shares precluded the existence of any unqualified right to the income. But this position, however correct as a matter of corporate law, is not consistent with principles of taxation. It is submitted that the constructive receipt doctrine applies where the actual possession of the income can be obtained by some action which is of no detriment to the taxpayer, and which of itself has no effect on the production of the income.[29] Since the action required of the taxpayers was a simple exchange of their stock, the holding of the majority that the income was unqualifiedly subject to the taxpayers' command was clearly correct.

The plaintiffs received their unqualified right to the subsidiary's shares from the provisions of the reorganization plan. This right carried with it an unqualified right to the dividends accrued on the shares. Since the right to the new common stock of the subsidiary belonged to the plaintiffs at the time that the declared dividends became payable, the plaintiffs were accountable for those dividends as ordinary income, regardless of how the dividends were eventually received. One who has an unqualified right to an income-producing asset is properly taxable on the income produced by that asset.[30]

29. See, e.g., Loose v. United States, 74 F.2d 147 (8th Cir. 1934). Income from matured bonds was held to have been constructively received even though the owner of the coupons was unable to cash them. "[T]he strongest reason for holding constructive receipt of income to be within the statute is that for taxation purposes income is received or realized when it is made subject to the will and control of the taxpayer and can be, except for his own action or inaction, reduced to actual possession." Id. at 150. See also Hedrick v. Commissioner, 154 F.2d 90 (2d Cir.), cert. denied, 329 U.S. 719 (1946).

30. Helvering v. Horst, 311 U.S. 112 (1940). The court, in the instant case, points out that the plaintiffs received the value of the dividends in the sales price of their Portland stock. It almost appears from the court's remarks that the receiving of the sales price along with the added value is what makes the constructive receipt doctrine applicable. Of course, this is not so. It is the unqualified command over income which is controlling, so that the doctrine may be applied regardless of whether the income is reduced to possession in any way. An interesting and unusual situation could have arisen had the parties taken no action until the right to exchange the shares had lapsed. It would seem that the Government might bring an action for taxes on dividends constructively received during the ten year period, although never collected, and at the same time the taxpayer would no longer be able to collect the income for which he was taxed.