Fordham Law Review

Volume 31 | Issue 2 Article 6

1962

Case Notes

CASE NOTES

Antitrust—The 1950 Clayton Act Amendment—Its Interpretation and Ramifications.—By a petition filed on November 28, 1955,[1] the United States Government sought to enjoin a proposed merger between the defendants, Brown Shoe Company, G. R. Kinney Company, and G. R. Kinney Corporation, on the ground that the merger would violate Section 7 of the Clayton Act.[2] The Government asked that a temporary restraining order be issued and that Brown be perpetually enjoined from acquiring the stock or assets of Kinney.

Petitioner contended, in part, that the effect of the merger of Brown, the third largest seller of shoes by dollar volume in the United States, and Kinney, the eighth largest, might be to eliminate actual or potential competition between Brown and Kinney both as manufacturers and retailers, to foreclose Brown's competing manufacturers from selling to Kinney's retail outlets, to deprive independent retailers of a fair opportunity to compete with Brown's retail outlets and finally, to increase a tendency towards industry-wide concentration of control of retail outlets. The Government's motion for a preliminary injunction was denied and the companies were permitted to merge on the stipulation that their assets be kept separately identifiable. The merger was effected on May 1, 1956.[3]

After trial, the district court found that the merger might substantially lessen competition and tend to create a monopoly in the "manufacturing-retailing"[4] (throughout the nation as a whole) and in the "retailing-alone" (in every city of 10,000 or more population[5] in which both a Kinney store and a Brown store were located) of men's, women's and children's shoes, separately considered.[6] The court held that the merger violated Section 7 of the Clayton Act and ordered Brown to dispose of its presently owned stock in Kinney. Each company was also enjoined from acquiring any interest in the stock or assets of the other in the future.[7] The Supreme Court affirmed the trial court's decision, holding that the merger violated section 7 since it might tend substantially to lessen competition on both the retail and manufacturing levels in an industry with a clear history of a proclivity towards concentration.[8] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

1. United States v. Brown Shoe Co., 179 F. Supp. 721 (E.D. Mo. 1959).

2. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958), amending 38 Stat. 731 (1914).

3. The district court issued a memorandum denying an injunction to prevent the merger. United States v. Brown Shoe Co., 1956 Trade Cas. ¶ 68,244 (E.D. Mo. 1956).

4. This was the vertical aspect of the case, that is, Brown's manufacturing units were integrated with the retail facilities of Kinney.

5. The immediate and contiguous surrounding areas of these cities were also included. The limitation to cities with a 10,000 population was taken since Kinney operated only in such areas.

6. 179 F. Supp. at 741.

7. Ibid.

8. The majority of the Supreme Court found that the district court's judgment had sufficient finality to support an appeal directly to the Supreme Court under the Expediting Act § 2, 32 Stat. 823 (1903), as amended, 15 U.S.C. § 29 (1958).

On December 29, 1950, after thirty years of intermittent but tedious debate,[9] Congress passed the Celler-Kefauver Act,[10] an amendment to Section 7 of the Clayton Act. As originally enacted, section 7 was intended to discourage concentration and monopoly in American business.[11] The statute, however, had proved almost totally inadequate to achieve its purpose.

In the Federal Trade Commission's Report of 1932, it was stated that,

> by judicial interpretation many limitations other than those inherent to section 7 have been imposed upon the Commission's authority to act thereunder; in fact, it is believed that the effectiveness of this section has been completely emasculated as the result of court decisions.[12]

Arrow-Hart & Hegeman Elec. Co. v. FTC[13] and *International Shoe Co. v. FTC*[14] were the principal causes of this emasculation.

In *Arrow-Hart*, the Court held that even if a corporation used illegally[15] held stock to acquire assets after the Federal Trade Commission had instituted proceedings, but before a final order of divestiture had been issued, the Commission could under no circumstances order the divestiture of the properties acquired.[16] This interpretation of the Commission's statutory powers had the effect of rendering the Government almost helpless when attacking asset acquisitions under section 7.[17] If, however, this limitation against asset-divestiture were the only restriction imposed by the courts, section 7 might still have escaped total emasculation. It might have succeeded in preventing the use of the holding-company device as a method of uniting competing corporations and, hence, eliminated the evils incident thereto. The Supreme Court's interpretation of the section's standard of illegality in the *International Shoe* case, however, insured its final ineffectiveness.

In reversing the Commission's finding of a violation of section 7, the Court,[18] in *International Shoe*, held that a charge of a substantial lessening of competi-

9. See Note, Section 7 of the Clayton Act: A Legislative History, 52 Colum. L. Rev. 766 (1952).

10. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958).

11. See S. Rep. No. 698, 63d Cong., 2d Sess. 1 (1914). See also United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 589 (1957).

12. FTC Report on Monopolistic Practices in Industries, Temporary National Economic Committee Hearings, 76th Cong., 1st Sess., pt. 5-A, p. 2379 (1939).

13. 291 U.S. 587 (1934).

14. 280 U.S. 291 (1930).

15. If the transaction were limited entirely to the stock acquired, it would be illegal under § 7.

16. 291 U.S. at 598-99.

17. A major purpose of Congress in amending § 7 was to plug this loophole. See S. Rep. No. 1775, 81st Cong., 2d Sess. 2 (1950).

18. Mr. Justice Stone, in his dissent, adopted the Commission's finding of a substantial lessening of competition and followed in his determination criteria similar to those used in the instant case, i.e., the two firms were offering for sale products of the same general type, capable of satisfying similar uses and purchased by the same general group of customers.

tion must be based on a showing that the acquired (McElwain Shoe Company) and the acquiring (International Shoe Company) firms had substantially competed *with one another* prior to their merger.[19] This determination had the effect of exempting from section 7 any merger of companies which had previously achieved sufficient monopoly power to foreclose competition among themselves by a location advantage or a product differentiation. Under this standard of illegality, the only acquisition prohibited was that of a relatively large firm by another relatively large firm, where the two companies sold similar products to the same customers and in the same market areas.

The inadequacies of section 7 were further evidenced by the increased number of mergers after 1945 which resulted in the elimination, by large corporations, of independent companies in industries which had traditionally been considered small business areas.[20] The amended section 7 represents the most recent congressional attempt to curb this oligopolistic trend in American industry.

The amended Section 7 of the Clayton Act provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock . . . of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition *may be* substantially to lessen competition, or to tend to create a monopoly.[21]

In the instant case, the Court found the essential question to be whether the Brown-Kinney merger might cause a substantial lessening of competition within the shoe industry.[22] Before the determination of substantiality could be made, however, it was necessary to define the area of "effective competition," based on economic considerations, within the framework of a product market (line of commerce) and a geographic market (section of the country).[23]

In considering *both* the vertical and horizontal aspects of the merger, the majority[24] accepted the district court's finding that there were three separate

19. Only horizontal integrations, therefore, came within the scope of the acquired—acquiring test. The Court further held that to have a substantial lessening of competition, the competition must be to such a degree as will injuriously affect the public (unreasonable restraint of trade). 280 U.S. at 296-97.

20. See Federal Trade Commission, Report on the Merger Movement (1948).

21. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1958). (Emphasis added.) The original § 7 provided in pertinent part: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce." 38 Stat. 731 (1914). It would seem that the basic amendments were the inclusion in the new act of a prohibition against asset acquisition, and the deletion of the acquired-acquiring requirement.

22. 370 U.S. at 324.

23. Ibid.

24. Because of the facile interchangeability of shoe manufacturers' production facilities,

lines of commerce affected: men's, women's and children's shoes. These "submarkets" of the shoe industry were determined by several economic factors. Men's, women's and children's shoe lines had separate manufacturing facilities, public recognition as separate lines, distinct characteristics rendering them generally noncompetitive among themselves and distinct classes of customers.[25] All these factors indicated that among such categories of shoes there could be no "effective competition."[26]

Prerequisite to its definition of the phrase "section of the country" (the geographic market), was the Court's determination of those market areas in which Brown and Kinney represented alternative sources of supply to which their customers (at the vertical and horizontal levels) could reasonably turn.[27] For purposes of studying the anticompetitive effect of the *vertical* aspect of the merger, the Court agreed with the parties and the district court that the relevant geographic market was the entire nation, since shoe manufacturers can, and the parties did, distribute their product nationally.[28]

In considering the *horizontal* combination of the retail facilities of Brown and Kinney, both the Supreme Court and the district court defined the geographic market as those cities with a population exceeding 10,000 and their environs, in which *both* companies retailed shoes through outlets owned or controlled by them.[29] This determination was reached in view of the fact that Brown and Kinney acted as alternative sources (retail level) to consumers not across the nation as a whole, but primarily in cities of this size. Such a norm was fully consonant with the competitive realities that existed with respect to consumer purchasing of shoes in the various sections of the country.[30] Thus, as in its "product submarket" approach to the relevant "line of commerce," the Court characterized a "section of the country" as any "geographic submarket" in which *competition* actually exists between the merging companies.

Mr. Justice Harlan, in his concurring opinion, found the product market, when considered vertically, to be the complete shoe market. 370 U.S. at 367. The majority also recognized the elasticity of the production facilities, but refused to accept the concept of interchangeability because "individual plants generally produced shoes in only one of the product lines the court found relevant." Id. at 325 n.42.

25. 370 U.S. at 326.

26. Although "the outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it," the Court refused to recognize the existence of the more sharply defined "submarkets" which Brown contended had to be charted by "age/sex" and "price/quality" distinctions within the three lines of shoes. Id. at 325-28.

27. See United States v. Bethlehem Steel Corp., 168 F. Supp. 576 (S.D.N.Y. 1958).

28. 370 U.S. at 328.

29. Id. at 339.

30. The Court found that the geographic market, a city of 10,000 or more population, was "large enough to include the downtown shops and suburban shopping centers in areas contiguous to the city, which are the important competitive factors, and yet . . . small enough to exclude stores beyond the immediate environs of the city, which are of little competitive significance." 370 U.S. at 339.

With competition as the ultimate criterion in the determination of both a product market and a geographic market, the Court next had to decide whether the Brown-Kinney merger represented a possibility of a "substantial lessening of competition" within such markets.[31] When considering the *vertical* combination of Brown's manufacturing facilities and Kinney's retail outlets, the Court found that the merger foreclosed from Brown's manufacturing competitors a share (one per cent) of the national retail outlets of neither monopolistic nor *de minimus* proportions.[32] Between these extremes, the percentage of market foreclosure could not be the sole determinative of substantiality. In examining other pertinent economic and historical factors, the Court considered the nature and purpose of the arrangement.[33] The past behavior of Brown towards its newly acquired affiliates, the testimony of Brown's president that Brown would use its ownership of Kinney to force Brown shoes upon Kinney outlets, and the absence of an approved economic purpose for the merger, led to the conclusion that the merger would have an effect analogous to that of a tying clause.[34] Because the use of tying clauses by an established company had been held to be inherently anticompetitive even though only a relatively small amount of commerce was affected,[35] and because Kinney was a large purchaser of shoe products[36] from many small manufacturers whose retail outlets would be extinguished by Brown's control of Kinney, the Court held the *vertical* combination of Brown's manufacturing facilities and Kinney's retail outlets might tend substantially to lessen competition among shoe manufacturers in the wholesale marketing of shoes.[37]

Kinney's outside purchases of shoes in 1955 constituted only about one per cent of the total national shoe production.[38] Foreclosure of competition of an

31. The district court found and the Supreme Court adopted such finding, that in 1955 (prior to the merger) Brown was the fourth largest shoe manufacturer in the country, producing about 25.6 million pairs of shoes, about 4% of the nation's total footwear production. Kinney, on the other hand, although a relatively small manufacturer of men's, women's and children's shoes (0.5% of the national shoe production), operated the largest family-style shoe store chain in the United States. It sold approximately 1.2% of all national retail shoes sold by dollar volume, thus making it the eighth largest retailer in the country. However, while Kinney was making only 1.2% of the total retail sales, that percentage could hardly be considered an accurate reflection of its proportion of nation-wide shoe purchases by retailers since the retail-sales figure was based on a computation that included all retail stores, whether or not they were vertically integrated. In relation to available markets for independent shoe manufacturers, the percentage of Kinney's purchases must have been much higher.

32. 370 U.S. at 329.

33. Ibid.

34. A tying clause is one which forces the customer to take a product he does not necessarily want in order to secure one he does desire. Id. at 330.

35. International Salt Co. v. United States, 332 U.S. 392 (1947).

36. See note 31 supra.

37. 370 U.S. at 334.

38. Brief for Appellant, p. 192, Brown Shoe Co. v. United States, 370 U.S. 294 (1962); see also note 31 supra.

equal percentage had been termed "conservatively speaking, quite insubstantial," in *Tampa Elec. Co. v. Nashville Coal Co.*,[39] a requirements contract case arising under Section 3 of the Clayton Act.[40] Although such a one per cent foreclosure in *dollar volume* (Kinney's outside purchases were $19.4 million in 1957) might well satisfy the quantitative test of *Standard Stations*,[41] the instant Court rejected any absolute quantitative substantiality test. *Tampa Elec. Co.* had held that a one per cent foreclosure did not, absent other factors, amount to such lessening of competition as would violate section 3.[42] Unlike *Tampa*, however, the one per cent foreclosure in the instant merger was accompanied by evidence of economic and historical factors relating to the shoe industry (especially the anticompetitive purpose of the merger and the trend, towards concentration) which, together, indicated the possibility of substantial lessening of competition. Thus, it would seem that when the Supreme Court is called upon to decide the issue of substantiality under either Section 3 or Section 7 of the Clayton Act in vertical arrangements such as exclusive dealing contracts and vertical mergers, it is the proportionate qualitative effect of such arrangement on the market which is to be considered in the first instance; and even though the percentile effect is found to be slight (one per cent in *Brown* and *Tampa*), the device may still be held a violation, if a definite trend towards these anticompetitive arrangements can be found to be prevalent within the relative industry.

In considering the *horizontal* aspect of the merger, the Court held that the combination of Brown's and Kinney's retail facilities[43] and their percentile shares of local markets (over five per cent as to one "line of commerce" in 118 cities and as to all three lines of commerce in forty-seven cities)[44] might also substantially affect competition in the retail sale of shoes.[45] This conclusion was strengthened by the consideration that the merger would have created a nation-wide retail chain of extensive proportions integrated with a substantial

39. 365 U.S. 320, 333 (1961).

40. "[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). Since § 3, like § 7, is directed against arrangements in restraint of trade, and since its standard of illegality is similar to that contained in § 7, the Court found that the tests of substantiality under § 3 were also pertinent to any merger that might be proscribed by § 7.

41. Standard Oil Co. v. United States, 337 U.S. 293 (1949).

42. 365 U.S. at 334.

43. Since the horizontal combination of Brown's manufacturing facilities with those of Kinney would only slightly affect commerce on a national scale, the district court held that this aspect of the merger could not lead to a substantial lessening of competition. 370 U.S. at 335.

44. Id. at 343.

45. Id. at 344-45.

manufacturing operation, and that this newly created firm would doubtlessly have been able to sell its shoes on a national scale at a profit margin lower than that of its competitors. Moreover, the tendency toward *vertical* concentration in the shoe industry was recognized as having an additional important impact on the *horizontal* level alone by putting "ever greater numbers of retail outlets within fewer and fewer hands."[46] The Court, therefore, also found the merger objectionable on the horizontal retail level.[47]

The Supreme Court has, in the instant decision, given effect to Congress' quite obvious intention to re-establish section 7 as an effective method of restraining the incipient trends toward concentration in American industry. In the future, the Government will be relieved of many of the restrictions hitherto imposed by the courts. Vertical mergers are not to be exempt from section 7's censures,[48] and the acquired-acquiring test is no longer the rule.[49] Substantiality is not to be determined within the bounds of the Sherman Act's standard of illegality.[50] Rather, the trend towards concentration in an industry, and the purposes which the merging firms pursue in consolidation are to be the salient factors under the new section in determining the significance of the percentage of the market foreclosed when, as will frequently be the case, it is neither of monopolistic nor *de minimus* proportions.

The instant case certainly has not established any specific touchstone by which every future case arising under section 7 may be readily decided. In its liberal construction, however, it has established certain guideposts, which will greatly aid the federal government in enforcing the new statute. In rejecting the quantitative substantiality rationale of *Standard Stations*, the present decision has adopted the more flexible approach suggested by *Tampa Elec. Co.*, qualified throughout, however, by the design of section 7, "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding . . . ,"[51] and "to limit future increases in the level of economic concentration resulting from corporate mergers and acquisitions."[52]

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46. Id. at 345.

47. Id. at 346.

48. See notes 19 & 37 supra and accompanying text.

49. See International Shoe Co. v. FTC, 280 U.S. 291 (1930). See also note 21 supra and accompanying text.

50. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958). See United States v. American Tobacco Co., 221 U.S. 106 (1911); Standard Oil Co. v. United States, 221 U.S. 1 (1911). This standard ("rule of reason"), requiring an unreasonable restraint of trade, demanded a greater degree of proof than the "substantial lessening of competition" standard of § 7. It has, however, been applied to § 7 decisions. See International Shoe Co. v. FTC, 280 U.S. 291 (1930). Congress has expressed the desire that the new amendment go beyond the Sherman Act, that is, be more restrictive towards merger proposals and, therefore, require a standard demanding less proof than the "rule of reason." S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

51. S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950).

52. Id. at 3.

Antitrust—Corporate Officer Subject to Penalty of Section 1 of Sherman Act.—Defendant, a corporate officer, was indicted for engaging " 'in a combination and conspiracy to eliminate price competition . . . in the Greater Kansas City market . . . in violation of Section 1' "[1] of the Sherman Act.[2] The Government charged him with having acted " 'solely in his capacity as an officer, director, or agent who authorized, ordered, or did some of the acts' "[3] prohibited by section 1. In the district court, defendant moved for a dismissal on the ground that the indictment, as modified by the bill of particulars, failed to charge a crime. He argued that corporate officers acting solely in their representative capacities were outside the scope of Section 1 of the Sherman Act, since purely representative violations were intended to be governed exclusively by Section 14 of the Clayton Act.[4] The district court dismissed the indictment.[5] On appeal, the Supreme Court reversed and held that a corporate officer violates Section 1 of the Sherman Act whenever he commits, authorizes, or does any of the acts proscribed therein even while acting solely in a representative capacity. *United States v. Wise*, 370 U.S. 405 (1962).

Before the 1955 amendment to section 1 increasing the fine for a violation from five thousand to fifty thousand dollars,[6] the sanctions prescribed by this provision and Section 14 of the Clayton Act had been identical. Consequently, the prosecution of corporate officials exclusively under either section was without practical consequence both to the individual defendant and to the Government. In light of the forty-five thousand dollar increase, however, the restricting of section 14 to representative violations would be of considerable gain to corporate officials.

In holding that section 1 was intended to proscribe purely representative, as well as individual violations, the instant Court determined that the generic "person" of section 1 extends indiscriminately to any officer who "knowingly participates in effecting the illegal contract, combination, or conspiracy . . . regardless of whether he is acting in a representative capacity."[7] The Court

1. United States v. Wise, 370 U.S. 405, 406 (1962).

2. "Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 69 Stat. 282 (1955), 15 U.S.C. § 1 (1958), amending 50 Stat. 693 (1937).

3. 370 U.S. at 406.

4. "[W]henever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court." 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958).

5. United States v. National Dairy Prods. Corp., 196 F. Supp. 155 (W.D. Mo. 1961).

6. See note 2 supra.

7. 370 U.S. at 416.

found no support for defendant's argument that a representative was not a "person" within the meaning of section 1 merely because "the activities of an officer . . . are chargeable to the corporation as the principal. . . ."[8]

Defendant contended that the legislative history[9] of section 1 indicated a possible legislative intent to exempt corporate agents from its penalties. The Court agreed that the deletion of the Reagan Bill's "part owner, agent, or manager"[10] phraseology for the more generic "person," which appeared in section 1 as finally enacted, did lend certain support to defendant's position,[11] but ruled that since there was no indication of a congressional intent to restrict the meaning of "person" as applied to corporate officers, the word should be given its broadest application so as to include any official who "knowingly participates."[12]

Section 8[13] of the Sherman Act extended "person" to include "corporations and associations." On this basis, defendant argued that mere representatives were intended to be excluded from section 1. The Court found, however, that the definition of "person" in section 8 was not meant to be an exhaustive enumeration of those who might be deemed to violate the Sherman Act, but rather an extension of the term so as to include entities whose "corporate criminal responsibility for the acts of the officers was not well established in 1890."[14]

In support of its view of "person" as encompassing corporate officials in their representative capacity, the Court cited *United States v. Dotterweich*.[15] There, the Supreme Court, construing a statute phrased similarly to Section 1 of the Sherman Act, held that a corporate representative was a "person" within Section 301(a) of the Federal Food, Drug and Cosmetic Act[16] because "the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty. . . . [This is] a doctrine given general application in § 332 of the Penal Code. . . ."[17] While following *Dotterweich* in applying section 1 to officers who "have a responsible share in the proscribed transaction,"[18] the instant Court deemed it unnecessary[19] to base its decision upon the aider and abettor principle as *Dotterweich* apparently did,[20] but rather construed

8. Id. at 407.

9. See 21 Cong. Rec. 2731, 3152 (1890).

10. Id. at 2456.

11. 370 U.S. at 407.

12. Id. at 416.

13. "The word 'person,' or 'persons' wherever used in sections 1-7 of this title shall be deemed to include corporations and associations. . . ." 26 Stat. 210 (1890), 15 U.S.C. § 7 (1958).

14. 370 U.S. at 408.

15. 320 U.S. 277 (1943).

16. 52 Stat. 1042 (1938), 21 U.S.C. § 331(a) (1958).

17. 320 U.S. at 281.

18. 370 U.S. at 409.

19. Id. at 412 n.4.

20. See note 18 supra and accompanying text.

section 1 "in its common-sense"[21] meaning to apply to all persons indiscriminately.

The Court found support for this theory in two pre-Clayton Act district court decisions which upheld section 1 indictments of corporate officials: *United States v. MacAndrews & Forbes Co.*[22] and *United States v. Winslow.*[23] Both cases held that a joinder in the same indictment of the corporate defendants and their officers was proper where the agents were charged with "personal participation, direction, or activity,"[24] or where they were named "as actors"[25] in the section 1 violation. Section 1 was extended to corporate officers in their representative capacity on the basis of the well established "principle that . . . all those who personally aid or abet"[26] or are "active in promoting a misdemeanor, whether agents or not,"[27] are indictable as principals. Although these early decisions reached the same result as the instant Court, they did so on the ground that a corporate representative who authorized or participated in a section 1 violation *in his representative capacity* was indictable as a principal for having *aided and abetted* his corporation's conspiracy, a rationale which the present Court considered unnecessary[28] in reaching its determination.

In an attempt to show a congressional awareness of and acquiescence in section 1's supposed exclusion of corporate representatives, defendant relied on the legislative history of post-Sherman Act bills[29] which unsuccessfully attempted to include corporate officers and agents in section 1. The Court regarded such congressional inaction as inconclusive since "several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment . . . including the inference that the existing legislation already incorporated the offered change."[30] But apart from the ambiguity of the legislative history, defendant's argument was rejected for a more fundamental reason, namely, that it was based upon an interpretation of an existing statute by a subsequent group of congressmen and, therefore, was without "persuasive significance."[31]

Defendant further contended that since Section 14 of the Clayton Act imputed the corporate violation to any officer or director who "authorized, ordered, or [did] . . . any of the acts"[32] proscribed in any penal provision of the

21. 370 U.S. at 409.

22. 149 Fed. 823 (C.C.S.D.N.Y. 1906), appeal dismissed, 212 U.S. 585 (1908) (memorandum decision).

23. 195 Fed. 578 (D. Mass. 1912), aff'd, 227 U.S. 202 (1913).

24. 149 Fed. at 832.

25. 195 Fed. at 581.

26. 149 Fed. at 832.

27. 195 Fed. at 581.

28. See note 19 supra and accompanying text.

29. E.g., H.R. 10539, 56th Cong., 1st Sess. (1900); H.R. Rep. No. 1506, 56th Cong., 1st Sess. (1900).

30. 370 U.S. at 411.

31. Ibid.

32. 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958).

antitrust laws,[33] it was intended either to impose a liability not theretofore imposed by any other section, or, if already imposed by section 1, to restrict it exclusively to section 14; otherwise, the enactment of section 14 would have been vain and unnecessary. Although the Court agreed that part of the legislative history of section 14 indicated that some members of the 1914 Congress "feared that the present Sherman Act did not cover officers who merely authorized or ordered the commission of the offense,"[34] it nevertheless found that a congressional interpretation in 1914 of the 1890 act was without weight.[35] Furthermore, it noted that since Section 14 of the Clayton Act was really intended to eliminate any lingering doubts as to the applicability of Section 1 of the Sherman Act, section 14, being neither vain nor unnecessary, was simply a "reaffirmation of the Sherman Act's penal provisions and a mandate to prosecutors to bring all responsible persons to justice."[36] Thus, since in section 14 no change was either intended or affected with respect to the creation of new liability or the withdrawal of existing liability from section 1, the Court rejected the defendant's legislative history argument.

Several cases[37] decided since the passage of the Clayton Act also support this view. In *United States v. Atlantic Comm'n Co.*,[38] a district court held that an indictment of corporate officials charging a section 1 violation was "not duplicitous merely because it discloses in its relevant facts that the defendants have committed an additional [section 14] offense."[39] Implicit in the Court's determination was its recognition that a director's actions could at the same time constitute violations both of Section 1 of the Sherman Act and Section 14 of the Clayton Act, and that representative violations were proscribed by both sections.

In his concurring opinion, Mr. Justice Harlan found little support in *MacAndrews* and *Winslow* for the instant Court's holding. As he read those decisions,

> all that was held . . . was that corporate officers are not shielded from criminal responsibility when they act on their own individual account or when they use a sham corporation as a means of furthering their personal ends.[40]

He found no legislative intent to exempt corporate representatives, and seemingly on this basis, agreed with the Court that representatives were to be governed by section 1's penalties.

33. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-3 (1958); 38 Stat. 730 (1914), as amended, 15 U.S.C. § 13 (1958) (Supp. III, 1959-1961); 38 Stat. 734 (1914), 15 U.S.C. § 20 (1958).

34. 370 U.S. at 413.

35. Id. at 414.

36. Ibid.

37. United States v. Atlantic Comm'n Co., 45 F. Supp. 187 (E.D.N.C. 1942); United States v. General Motors Corp., 26 F. Supp. 353 (N.D. Ind. 1939), aff'd, 121 F.2d 376 (7th Cir. 1941); United States v. National Malleable & Steel Castings Co., 6 F.2d 40 (N.D. Ohio 1924).

38. 45 F. Supp. 187 (E.D.N.C. 1942).

39. Id. at 193.

40. 370 U.S. at 420 n.3.

The firmest ground upon which the present decision might be based would appear to be the legislative history of section 1. Whereas the Sherman Bill, as modified by the Reagan Amendment, had directed its penalties specifically against a "part owner, agent, or manager,"[41] the act, as finally passed, was directed simply against "any person." As Mr. Justice Harlan noted, the use of the generic "person" rather than the more specific language of the Reagan Amendment might be attributed to the "streamlining"[42] of the bill. Such an explanation seems more probable than defendant's argument that the deletion of "part owner, agent, or manager" indicated the concern of the Judiciary Committee for providing an effective deterrent only against corporate and individual violations.

Quite apart from its beneficial effect of resolving what had been an uncertain[43] situation, the instant case seems amply justified for reasons of public policy. Since a corporation may act only through its agents,[44] it would seem that any violation of the antitrust laws should be attributed to the responsible agents in the first instance.[45] Moreover, since no agency may lawfully be created to accomplish an unlawful act,[46] representatives who authorize or participate in a corporate violation of section 1 should not, it would seem, be heard to assert the relationship of agency (which they have abused) as a defense to personal responsibility. It had long been settled—except, perhaps, in the area of antitrust violations—that a corporate agent who commits a crime on behalf of his principal is no less guilty than if he had acted solely in his self interest.[47]

The pecuniary deterrent of Section 1 of the Sherman Act against representative violations is ten times greater than that of Section 14 of the Clayton Act. Section 1's harsher penalty would seem fully justified in cases of "per se"

41. 21 Cong. Rec. 2456 (1890); but see 21 Cong. Rec. 2456-57, 2569 (1890) (remarks of Senator Sherman).

42. 370 U.S. at 420 (concurring opinion).

43. The uncertainty is most cogently evidenced by the fact that since the instant case was first decided in the district court, five district courts reached a contrary result to the Supreme Court's disposition in United States v. Wise. United States v. Engelhard-Hanovia, Inc., 204 F. Supp. 407 (S.D.N.Y.), rev'd sub nom. United States v. Brown, 31 U.S.L. Week 3107 (U.S. Oct. 9, 1962); United States v. General Motors Corp., Trade Reg. Rep. (1962 Trade Cas.) ¶ 70203 (S.D. Cal. Jan. 17, 1962), rev'd sub nom. United States v. Staley, 370 U.S. 719 (1962) (memorandum decision); United States v. Milk Distribs.' Ass'n Inc., 200 F. Supp. 792 (D.C. Md. 1961); United States v. A. P. Woodson Co., 198 F. Supp. 582 (D.D.C. 1961), rev'd, 31 U.S.L. Week 3107 (U.S. Oct. 9, 1962); United States v. American Optical Co., 1961 Trade Cas. ¶ 70156 (E.D. Wis. 1961), rev'd sub nom. United States v. Kniss, 370 U.S. 719 (1962) (memorandum decision). On the other hand, one decision reached the same result as the Supreme Court. United States v. North Am. Van Lines, Inc., 202 F. Supp. 639 (D.D.C. 1962).

44. Cf. 1 Wharton, Criminal Law & Procedure § 52 (12th ed. 1957).

45. The Court noted, in this regard, that to hold officers exempt from the fines of section 1 would mean that those fines would "become mere license fees for illegitimate corporate business operations." 370 U.S. at 409.

46. Cf. 1 Mechem, Agency § 118 (2d ed. 1914).

47. See 1 Wharton, op. cit. supra note 44, § 54.

violations,[48] or in other than "per se" cases where the evidence strongly indicates that a representative harbored a conscious intent to violate section 1.[49] In the area of "per se" offenses, harsher penalties against representatives have obviously been warranted. Accordingly, the present decision has the justified effect of imposing upon those primarily responsible for corporate activity a penalty for wrongdoing commensurate with such responsibility.

Constitutional Law—Congress May Provide for Expatriation as a Consequence of Service in the Armed Forces of a Foreign State.—Petitioner, born an American citizen,[1] left the United States during the Cuban revolution and there joined the insurgent forces. He remained in the rebel army performing military functions after the existing regime had been overthrown. As a consequence of these activities, he was served with a certificate of loss of citizenship under Section 349(a)(3) of the Immigration and Nationality Act of 1952.[2] Shortly thereafter, petitioner re-entered the United States without documents and was held by the Attorney General pending deportation.[3] The order of deportation was affirmed by the Board of Immigration Appeals, and petitioner instituted a habeas corpus proceeding in which he challenged the constitutionality of the statute under which he was deprived of his United States citizenship,[4] as being beyond the legislative power of Congress and as constituting "cruel and unusual" punishment.[5] The district court found the act to be a legitimate exercise of Congress' power to pass laws regulating foreign relations[6]

48. In the past, the Government has pursued a policy of restricting criminal prosecutions to "per se" violations. Cf. Att'y Gen. Nat'l Comm. Antitrust Rep. 350 (1955). In a 1961 report to the Attorney General, Assistant Attorney General Lee Loevinger noted that "'of the 60 antitrust cases brought in 1961, 28 dealt with price-fixing. The Department brought action against officers as well as corporations themselves in the continuing attempt to fasten responsibility for such clear-cut violations to those responsible. . . .'" 5 Trade Reg. Rep. ¶ 50121.

49. See Whiting, Antitrust and the Corporate Executive, 47 Va. L. Rev. 929, 939 (1961).

1. U.S. Const. amend. XIV, § 1.

2. This section provides that "entering, or serving in, the armed forces of a foreign state" unless by written permission of the Secretary of State and the Secretary of Defense, shall result in loss of nationality. 66 Stat. 267 (1952), as amended, 8 U.S.C. § 1481(a)(3) (1958).

3. The grounds for deportation under the Immigration and Nationality Act of 1952 were: § 241(a)(1), 66 Stat. 204 (1952), as amended, 8 U.S.C. § 1251(a)(1) (1958); § 212(a)(9), 66 Stat. 182 (1952), as amended, 8 U.S.C. § 1182(a)(9) (Supp. III, 1959-1961); § 212(a)(20), 66 Stat. 182, 8 U.S.C. § 1182(a)(20) (1958). These sections provide that entering the United States without valid entry documents, and conviction of a crime involving moral turpitude are grounds for the exclusion and deportation of an alien.

4. See note 2 supra. The court's finding as to petitioner's citizenship status was necessary to establish the Attorney General's jurisdiction over him, since only an alien may be deported. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

5. U.S. Const. amend. VIII.

6. U.S. Const. art. I, § 8, cl. 18.

and, therefore, constitutional, but held that the grounds for deportation were inapplicable to petitioner.[7] *United States ex rel. Marks v. Esperdy*, 203 F. Supp. 389 (S.D.N.Y. 1962).

Under the early English common law the allegiance of a native-born citizen was considered immutable.[8] This doctrine of perpetual allegiance was accepted by the courts in the United States at the beginning of the nineteenth century.[9] The question in these early cases was not whether the Government could relieve a native-born citizen of his nationality, but rather, whether a citizen could, without the permission of the state or federal government, voluntarily surrender his citizenship.[10] It was not until 1868 that the right of a citizen to expatriate himself was generally recognized.[11] Historically, therefore, "expatriation was the act of the citizen, not the state."[12]

The first statute requiring the forfeiture of citizenship for specific acts committed by an individual was the Expatriation Act of 1907.[13] The constitutionality of this act was challenged unsuccessfully in *Mackenzie v. Hare*.[14] There, an American woman who had married an English national was denied the right to vote on the ground that she had lost her citizenship. The Court, while ad-

7. Prior to the time he joined the Cuban army, petitioner had been convicted in Wisconsin of a crime involving moral turpitude. Citing Mangaoang v. Boyd, 205 F.2d 553 (9th Cir.), cert. denied, 346 U.S. 876 (1953), the court ruled that, under the statute, the Government must prove that petitioner was an alien at the time of his conviction, which in this case clearly could not be done. Further, he could not be deported for entering the United States without the entry documents required of an alien since, at the time of his entry, his alienage had not been competently determined and his birth in the United States gave him a colorable claim to citizenship. 203 F. Supp. at 396-97.

8. "Seeing then that faith, obedience, and ligeance are due by the law of nature, it followeth that the same cannot be changed or taken away. . . ." Calvin's Case, 7 Co. Rep. 1a, 13a, 77 Eng. Rep. 377, 392 (Ex. 1608).

9. "The general doctrine is, that no persons can, by any act of their own, without the consent of the government, put off their allegiance, and become aliens." Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 246 (1830). See also Ainslie v. Martin, 9 Mass. (8 Tyng) 454, 461 (1813).

10. See Inglis v. Sailor's Snug Harbor, 28 U.S. (3 Pet.) 99, 125 (1830).

11. In order to protect naturalized American citizens from claims upon them by their native countries, Congress passed an act in 1868, 15 Stat. 223, explicitly recognizing the right of an individual to renounce his nationality. Treaties soon followed releasing American citizens from allegiance to the United States as a result of naturalization in a foreign state. See, e.g., Convention With Great Britain, May 13, 1870, 16 Stat. 775, T.S. No. 130; Treaty With the King of Prussia, Feb. 22, 1868, 15 Stat. 615, T.S. No. 261. The right of expatriation was not thereby made absolute, but was construed to extend only to those who had become naturalized in a foreign country. Comitis v. Parkerson, 56 Fed. 556, 559 (C.C.E.D. La. 1893).

12. Boudin, Involuntary Loss of American Nationality, 73 Harv. L. Rev. 1510, 1515 (1960).

13. 34 Stat. 1228 (1907). This act declared that foreign naturalization, taking an oath of allegiance to a foreign state and marriage by an American woman to a foreign national would result in loss of citizenship.

14. 239 U.S. 299 (1915).

mitting that the power to divest an individual of citizenship was not *expressly* granted to the federal government by the Constitution, said, for the first time, that it was an *implied* power necessary to avoid embarrassment in the conduct of foreign affairs.[15] Mr. Justice McKenna, however, carefully avoided holding that Congress could denationalize a person without at least a presumption of an intent on the part of the individual to surrender his citizenship.[16] He conceded that "a change of citizenship cannot be arbitrarily imposed, that is, imposed without the concurrence of the citizen."[17] But because of the then accepted doctrine that a wife is the alter ego of her husband, the court *presumed* that, by voluntarily marrying the foreigner, an *intent* on the part of the petitioner to divest herself of citizenship existed.[18] The same intent existed in the case of the other acts specified in that statute, *i.e.*, becoming naturalized in a foreign state and taking an oath of allegiance to a foreign sovereign. Apparently, the act of 1907 was consistent with the common-law view of expatriation, *i.e.*, a voluntary act of the individual.[19] This statute merely described conduct which, when viewed objectively, displayed an *unequivocal* intent on the part of an individual to sever his relationship with the United States.

In the Nationality Act of 1940[20] Congress expanded the list of expatriatory acts to include service in the armed forces of a foreign state and voting in a foreign election.[21] For the first time, acts which might or might not manifest an intent to renounce allegiance, *i.e.*, *equivocal* acts, were made the basis for depriving a citizen of his nationality. Not until 1958,[22] however, did the Supreme Court squarely face the problem of involuntary expatriation. In *Perez v. Brownell*[23] the Court held that the section of the Nationality Act relating to voting was a proper exercise of legislative power.[24] It accepted the suggestion

15. Id. at 311.

16. See Savorgnan v. United States, 338 U.S. 491 (1950) in which the Supreme Court interpreted the act of 1907 as requiring, if not an actual, at least a presumptive intent to surrender citizenship.

17. 239 U.S. at 311.

18. Id. at 311-12.

19. See Perkins v. Elg, 307 U.S. 325 (1939); Note, 66 Harv. L. Rev. 643, 732-33 (1953).

20. 54 Stat. 1137 (1940).

21. "Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state." Nationality Act of 1940 § 401(c), 54 Stat. 1169.

22. Prior to this time, the provision relative to service in a foreign army was declared unconstitutional by a district court in Kiyokuro Okimura v. Acheson, 99 F. Supp. 587 (D. Hawaii 1951), vacated on other grounds, 342 U.S. 899 (1952) (remanded for specific findings as to the voluntariness of petitioner's service in foreign armed forces). There, the district court held that Congress was devoid of any power to deprive a native-born citizen of his nationality, since this status had been created by the fourteenth amendment. However, on remand to the district court, it was found that petitioner's actions were performed under duress. 111 F. Supp. 303, 305 (D. Hawaii 1953). Thus, the constitutional issue was rendered moot.

23. 356 U.S. 44 (1958).

24. Id. at 60.

of *Mackenzie* that the regulation of such activity legitimately comes within Congress' power to pass laws regulating foreign affairs, and added that as long as there was a "*rational nexus*" between expatriation and the exercise of this governmental function, the provision must be declared constitutional. In applying this rule the Court found that the termination of Perez' citizenship would obviate any potential political incident which might result from his conduct.[25]

In the instant case, Judge Cashin, relying on *Perez*, held that "Congress' enactment of the section is a legitimate and reasonable exercise of its power to regulate the relations of the United States with foreign countries,"[26] since, if voting in a foreign election is potentially injurious to the United States, as in *Perez*, then the conduct involved in this case "carries with it even greater danger. . . ."[27] It follows, therefore, if *Perez* was correctly decided, the instant decision is correct; but note the converse is also true.

As the Supreme Court stated in *Mackenzie*, the Constitution does not explicitly give Congress the power to deprive a native American of his nationality.[28] The *Perez* Court relied on the necessary and proper clause[29] of the Constitution.[30] But this standard applies to every enactment of Congress, whether or not substantial constitutional rights are affected thereby.[31] This basis for the decision, then, would appear to be too vague to be valid. Furthermore, even under the necessary and proper clause, an alternative to expatriation can be found. Congress could achieve the same result by simply declaring that such conduct shall be a criminal offense.[32] Accordingly, it would seem unnecessary to divest an individual of his citizenship, which Chief Justice Warren defined as "the right to have rights,"[33] in order to preserve international tranquillity.

25. Note, however, the decision was five to four. Mr. Justice Frankfurter delivered the opinion of the court, with Mr. Chief Justice Warren and Justices Black, Douglas and Whittaker dissenting.

26. 203 F. Supp. at 395. With respect to service in the armed forces of a foreign state, the act of 1952 substantially re-enacted the Nationality Act of 1940. However, it is no longer necessary that the individual have or acquire the nationality of the foreign state. See notes 2 & 21 supra.

27. 203 F. Supp. at 395.

28. The most logical source of an implied power would seem to be the provision which allows Congress to establish a uniform rule of naturalization. U.S. Const. art. I, § 8, cl. 4. However, because the authorization does not extend to native-born citizens, the courts have never accepted this theory. See United States v. Wong Kim Ark, 169 U.S. 649, 703 (1898) (dictum).

29. U.S. Const. art. I, § 8, cl. 18.

30. 356 U.S. at 60.

31. See 107 U. Pa. L. Rev. 118, 121 (1958).

32. "While it may be desirable to deny that the individual is still a citizen, if it is assumed that the foreign nation will accept such a disclaimer, responsibility can be disavowed as effectively by branding the act as illegal under the laws of the United States." Id. at 122. See Boudin, Involuntary Loss of American Nationality, 73 Harv. L. Rev. 1510, 1527 (1960).

33. Trop v. Dulles, 356 U.S. 86, 102 (1958).

In the instant case, since petitioner had neither applied for nor become a Cuban citizen, it necessarily followed that the enforcement of the act of 1952 left him a stateless person.[34] This constitutes perhaps the greatest evil of such legislation. The condition of statelessness has been universally discountenanced. In 1948, the "right to a nationality" was adopted by the United Nations General Assembly as part of its "Universal Declaration of Human Rights," to which the United States was a signatory.[35] Even under the act of 1940 this right was recognized, and service in the armed forces of a foreign state did not result in loss of citizenship unless the individual had or acquired the nationality of the foreign state.[36] The stigma attached to statelessness moved the Supreme Court in *Trop v. Dulles*[37] to declare another provision of the act of 1940[38] (which made desertion from the United States armed forces expatriatory) unconstitutional as a cruel and unusual punishment prohibited by the eighth amendment. Judge Cashin, in the present case, distinguished *Trop* on the ground that punishment was not the purpose behind the enactment of the provision of the act of 1952 relating to service in a foreign army.[39] Even so,[40] in both cases statelessness resulted and the effect of expatriation was equally severe on the petitioners. At least a "dual-national" can fall back upon his "secondary nationality" and has a claim upon another state for protection, an alternative not available to a stateless person.[41]

We have here, then, a logical extension of *Perez* in that Congress may decree expatriation as a result of acts which may reasonably endanger the conduct of foreign affairs or other legitimate governmental functions. Yet the facts of the instant decision were basically different from those of *Perez*. Perez, on two occasions, had declared his allegiance to a foreign government by applying for admission to the United States as a native-born citizen of Mexico, which

34. 203 F. Supp. at 397.

35. Art. 15 states: "1. Everyone has the right to a nationality. 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." U.N. Doc. No. A/810 (1948). This document, of course, is not law, but a "declaration of basic principles of human rights and freedoms, . . . to serve as a common standard of achievement for all peoples of all nations." Roosevelt, General Assembly Adopts Declaration of Human Rights, 19 Dep't State Bull. 751 (1948).

36. See note 21 supra.

37. 356 U.S. 86 (1958).

38. Nationality Act of 1940, § 401(g), 54 Stat. 1169.

39. 203 F. Supp. at 395-96.

40. The legislative history of the act is inconclusive. The purpose behind the expatriation provisions of the act of 1940 seems to have been "to put an end to dual citizenship and relieve this country of the responsibility of those who reside in foreign lands and only claim citizenship when it serves their purpose." 86 Cong. Rec. 11944 (1940). However, since the provision involving dual citizenship was deleted from the section of the 1952 act in which service in a foreign army is declared expatriatory, this purpose may no longer be predicated of the section. See note 26 supra. The purpose behind the change was not enunciated by Congress.

41. Maxey, Loss of Nationality: Individual Choice or Government Fiat?, 26 Albany L. Rev. 151, 180 (1962).

he so considered himself. His intention was clearly not to be or remain a citizen of the United States.[42] Therefore, the decision, if limited to its facts, is consistent with the doctrine that expatriation results from acts which *unequivocally* manifest an intent to renounce allegiance. It is true, as the Court in *Perez* said, that "it would be a mockery of this Court's decisions to suggest that a person, in order to lose his citizenship, must intend or desire to do so."[43] The courts have not spoken in terms of subjective intent since the act of 1907.[44] Perez, however, by his acts, manifested an objective intention to renounce his citizenship and, in effect, expatriated *himself*.

In the instant case, petitioner never renounced his citizenship nor declared his allegiance to any foreign state. His serving in the Cuban army was, like voting in a foreign election, at best *equivocal*. Therefore, the better view would seem to be that petitioner does not come within the expatriatory provision, and that the act should be interpreted as referring only to that conduct which manifests an *unequivocal* intention to transfer allegiance.

Criminal Law—Federal Writ of Habeas Corpus Granted to Prisoner Despite Failure To Appeal Conviction in State Courts.—Relator was convicted of murder in 1942.[1] In 1962 the United States Court of Appeals for the Second Circuit granted him a writ of habeas corpus, on the ground that his confession had been unconstitutionally obtained by coercion, despite the fact that he had never appealed his original conviction. *United States ex rel. Noia v. Fay*, 300 F.2d 345 (2d Cir. 1962).

Two codefendants preceded relator in obtaining their freedom, but in each case the proper procedural steps were resorted to in effecting the release.[2] Since relator had never appealed his original conviction in the state courts, the avenue of reargument used by the other defendants was not open to him. Instead, he moved to set aside his conviction and sentence by a proceeding in Kings County Court, where he contended that his allegedly coerced confession was inadmissible. The court ordered the conviction vacated,[3] but it was re-

42. Perez v. Brownell, 356 U.S. 44, 46-47 (1958).

43. Id. at 61.

44. See note 18 supra and accompanying text.

1. United States ex rel. Noia v. Fay, 300 F.2d 345, 347 (2d Cir. 1962); see also 107 N.Y.L.J. 919 (1942) (sentencing). The murder was committed in connection with a burglary, and the defendants were sentenced to life imprisonment as authorized by the N.Y. Pen. Law § 1045-a.

2. The instant court traced the tedious process by which the codefendants accomplished their release. See United States ex rel. Noia v. Fay, 300 F.2d 345, 347-48 (2d Cir. 1962).

3. People v. Noia, 3 Misc. 2d 447, 158 N.Y.S.2d 683 (Kings County Ct. 1956). Perhaps prophetically, Judge Joyce said: "On any conception of constitutional law, it would be unthinkable to condemn petitioner to serve out a life sentence on a palpably illegal conviction by foreclosing the only available avenue of judicial review." Id. at 450, 158 N.Y.S.2d at 686.

instated on appeal to the appellate division.[4] After affirmance of this decision by the court of appeals,[5] certiorari was denied by the Supreme Court.[6] Relator then petitioned the federal district court for a writ of habeas corpus, claiming he was convicted without due process of law.[7] The petition was denied on the ground that relator had not satisfied the requirement precedent to the granting of such a writ, namely, the exhaustion of state remedies.[8] The instant court reversed and granted the writ.

What makes this case so difficult is the injustice—recognized by every court before which it had been brought—of relator's continued confinement after the release of his codefendants. The unconstitutionally obtained confessions were wrung from each of the defendants—yet of the three, only relator, because of a failure to make a timely appeal, would be obliged to serve out his life sentence. This is balanced, on the other hand, by what would appear to be the settled, if not clear, law on the question. Underscoring the words of Mr. Justice Frankfurter, who called the matter of federal writs of habeas corpus "an untidy area of our law,"[9] the majority in the instant case was required to indulge in some gossamer distinctions to reach what they considered the desired result.

The question the federal courts must face is whether to grant the writ, in the interests of "fairness" to the prisoner, and thus disturb the delicate balance between state and federal courts by rejecting the state's procedural rules. It is not easy of resolution. Professor Reitz viewed the conflict in these terms:

4. People v. Noia, 4 App. Div. 2d 698, 163 N.Y.S.2d 796 (2d Dep't 1957).

5. People v. Caminito, 3 N.Y.2d 596, 148 N.E.2d 139, 170 N.Y.S.2d 799 (1958). The court held that the revitalization of the extraordinary writ of error coram nobis (see Matter of Lyons v. Goldstein, 290 N.Y. 19, 47 N.E.2d 425 (1943)) did not enlarge the purpose for which it was initially designed "of calling up facts unknown at the time of the judgment." Id. at 601, 148 N.E.2d at 143, 170 N.Y.S.2d at 804. Since the coerced confessions were the bulwark of the defense at the original trial, it is clear that coram nobis was properly denied. See also People v. Rizzo, 246 N.Y. 334, 339-40, 158 N.E. 888, 890 (1927).

6. Noia v. New York, 357 U.S. 905 (1958).

7. United States ex rel. Noia v. Fay, 183 F. Supp. 222 (S.D.N.Y. 1960).

8. See 28 U.S.C. § 2254 (1958) which states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." Judge Cashin held the "abortive" coram nobis proceeding did not satisfy the requirements of the statute as to exhaustion of state remedies, and that prior decisions on the question dictate "that the relator has availed himself of at least one corrective process available in the courts of the state if there be such a process. . . . [I]t is clear that the constitutional question presented here was not passed upon by the state appellate courts in either the coram nobis proceeding, because the court would not consider the question, nor in direct appellate proceedings because the relator took no appeal." 183 F. Supp. at 225.

9. Sunal v. Large, 332 U.S. 174, 184 (1947) (dissenting opinion).

The question posed for the federal courts is whether the application for federal habeas corpus of a prisoner who has suffered an abortive state proceeding shall be treated the same as that of one whose federal contentions have been ruled upon by the state courts. And, if such applications shall be handled differently, what shall the difference be? This is the core of the problem of the abortive state proceeding.[10]

By an "abortive" state proceeding, Professor Reitz means that an avenue open for a prisoner by way of appeal in a state court is, because of some procedural rule in the state, no longer open to him. Clearly, relator's situation would fit this definition.

Historically, the writ of habeas corpus lay to determine whether a person under custody was restrained in accordance with law.[11] The first federal habeas corpus statute relating to state prisoners was passed in 1867.[12] Prior to that time, habeas corpus was available in the federal courts, barring limited exceptions, only for those in federal custody.

Exhaustion of state remedies is a requirement of early origin. The first Supreme Court decision on the question was *Ex parte Royall*,[13] where it was held that the federal courts, having discretion as to the time and manner in which to exercise the power conferred by Congress, must wait until the court of original jurisdiction has been given the opportunity to consider the federal question. This was followed by *Ex parte Fonda*[14] and a line of cases in all of which the Court strengthened the requirement of exhaustion of state remedies.[15] This line of cases culminated in the decision in *Ex parte Hawk*[16] on which the present statute is based.[17]

I. WAIVER

The instant court, however, because of certain cases decided since the statute requiring exhaustion of state remedies was first passed,[18] found it expedient to discuss two other doctrines as well—waiver and "independent and adequate state ground of decision." Had relator, by failing to appeal, waived his constitutional right to be tried without the burden of a coerced confession? This is a particularly difficult question, since the court was forced to concede that the Supreme Court had defined waiver as "an intentional relinquishment or abandonment of a known right or privilege."[19] The majority also acknowl-

10. Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1316 (1961).

11. See Hart & Wechsler, The Federal Courts and the Federal System 1238-40 (1953).

12. 14 Stat. 385 (1867).

13. 117 U.S. 241 (1886).

14. 117 U.S. 516 (1886).

15. Chief among them were Mooney v. Holohan, 294 U.S. 103 (1935); Urquhart v. Brown, 205 U.S. 179 (1907); Tinsley v. Anderson, 171 U.S. 101 (1898).

16. 321 U.S. 114 (1944) (per curiam). See also Darr v. Burford, 339 U.S. 200, 211 (1950).

17. See note 8 supra.

18. See Brown v. Allen, 344 U.S. 443 (1953); Irvin v. Dowd, 359 U.S. 394 (1959).

19. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

edged—and even quoted[20]—the words of Mr. Justice Frankfurter in *Brown v. Allen*:[21]

> Normally rights under the Federal Constitution may be waived at the trial, *Adams v. United States ex rel. McCann*, 317 U.S. 269, *and may likewise be waived by failure to assert such errors on appeal.* . . . When a State insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on State habeas corpus, he may be deemed to have waived his claim and thus have no right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that *habeas corpus should not do service for an appeal.*[22]

The further statement that

> this does not touch one of those extraordinary cases in which a substantial claim goes to the very foundation of a proceeding, as in *Moore v. Dempsey*, 261 U.S. 86[23]

was suggested by the court to refer to a nonwaivable right, in which category it was ready to place the right to be free from a coerced confession. But the majority was apparently in error when it analogized the instant case with *Moore v. Dempsey*.[24] In *Moore*, a trial for murder in a state court, where the accused individuals were convicted under mob domination without regard for their rights, was held to be without due process of law and absolutely void. However, the federal habeas corpus was granted without requiring an exhaustion of state remedies because *the state corrective process was wholly inadequate* to secure the constitutional rights of the defendants.[25]

The instant court ignored the adequacy of the New York "corrective process" —specifically, its provisions for appeal. This is precisely what distinguishes the two cases, and clearly what was waived in the present case was relator's *right to claim* that a coerced confession was used against him. "The rights which a defendant may waive are those which establish procedures designed to insure fairness, but which a particular defendant may deem it advantageous to forego."[26] Whether relator deemed it advantageous to forego his right to appeal, as has been hinted,[27] or whether he did not have the funds to appeal, as he contended,[28] was a question of fact not passed upon below.[29] And as Judge Moore pointed out in his incisive dissent, this question should have been resolved before the writ was granted, regardless of any other factor in the case.[30]

20. 300 F.2d 345, 351 (2d Cir. 1962).
21. 344 U.S. 443 (1953).
22. Id. at 503. (Emphasis added.)
23. Ibid.
24. 261 U.S. 86 (1923).
25. Id. at 91.
26. Reitz, supra note 10, at 1333.
27. United States ex rel. Noia v. Fay, 183 F. Supp. 222, 225 n.4 (S.D.N.Y. 1960).
28. Id. at 225.
29. Id. at 225 n.4.
30. United States ex rel. Noia v. Fay, 300 F.2d 345, 367 (2d Cir. 1962) (dissenting opinion).

The majority's efforts to impugn the New York corrective process are couched in the defenseless terms, "it was not at all clear that Noia could convince an appellate court of the unconstitutionality of his treatment."[31] Obviously, that misses the point—whether he could convince such a tribunal or not is immaterial. He certainly had a better chance of righting any wrong by employing the proper and reasonable vehicle of appeal than by remaining silent.

In the final analysis, the court's finding on the issue of waiver was based solely on the Supreme Court's instruction to indulge all reasonable inferences against the waiver of a fundamental constitutional right.[32] It is submitted that the indulgence here overstepped the bounds of reason.

II. Exhaustion of State Remedies

The second question presented was whether relator's failure to appeal precluded the issuance of the federal writ of habeas corpus on the ground that he had not exhausted his state remedies. It was argued for relator, with reasoning that appealed to the court, that the present tense phrasing of the statute indicates that the prisoner is required to exhaust only those state remedies presently open to him.[33] This is supported by Professor Hart who noted:

> In origin, the judicially developed doctrine of exhaustion of state remedies was indisputably a doctrine of exhaustion only of remedies presently available. It simply told the prisoner, with entire reasonableness, that if the doors of the state courts and of the federal courts were both currently open to him, he ought to try the state doors first.[34]

On the other hand, the district attorney in the present case contended:

> That appellant cites not a single case which supports the argument is understandable since there is no such case. The constant—and consistent—current of authority since the enactment of the original Habeas Corpus Act in 1867 has (with rare exceptions and in a limited class of cases) insisted upon the basic and absolute necessity of exhaustion of State remedies as a necessary condition precedent to the invocation of the writ of habeas corpus.[35]

There is merit in each of these seemingly contradictory statements. Professor Hart is correct as to the early cases decided, but as previously noted, a gradual shift resulted in a change of policy whereby the prisoner was required to carry forward a state appeal before seeking habeas corpus,[36] and eventually it came

31. Id. at 351.

32. Ibid.

33. Id. at 355-56.

34. Hart, Foreword: The Time Chart of the Justices, the Supreme Court 1958 Term, 73 Harv. L. Rev. 84, 113 (1959).

35. Brief for Appellee, p. 8, United States ex rel. Noia v. Fay, 300 F.2d 345 (2d Cir. 1962).

36. See note 15 supra.

to be required that collateral remedies still open to the prisoner, such as state habeas corpus, be similarly exhausted.[37]

But the district attorney was also correct in his contention that no Supreme Court decision has ever explicitly held that only present remedies must be exhausted. In fact, two recent cases, *Brown v. Allen*[38] and *Irvin v. Dowd*[39] are acknowledged by the majority in the instant case to require the exhaustion of past remedies as well. *Brown* would seem to be particularly harmful to relator's contentions. There, the Court denied the issuance of a federal writ of habeas corpus where the petitioner had every intention of appealing his conviction (on the dual ground that Negroes had been systematically excluded from the jury and that his confession was coerced), but his appeal had been held untimely in that the necessary papers were filed *one day* late. The Court noted, in terms which when applied to the instant case can only be dispositive of it, that:

> Failure to appeal is much like a failure to raise a known and existing question of unconstitutional proceeding or action prior to conviction or commitment. Such failure, of course, bars subsequent objection to conviction on those grounds.[40]

It can be seen from these words how the rule of exhaustion of state remedies ties in with the doctrine of waiver—and from either point of view, relator is left with very little to go on in the way of precedent. In *Irvin v. Dowd*,[41] for instance, the Court reversed the denial of a federal writ, but said:

> We therefore hold that the case is governed by the principle that the doctrine of exhaustion of state remedies embodied in 28 U.S.C. § 2254 does not bar resort to federal habeas corpus *if the petitioner has obtained a decision on his constitutional claims from the highest court of the State. . . .*[42]

This statement, of course, carries with it the implication that without satisfaction of the conditional or "if" clause, the federal writ should be denied.

Perhaps the most formidable precedent facing the court, and certainly one of the most difficult to distinguish was *United States ex rel. Kozicky v. Fay*,[43] in which Judge Waterman, who wrote the majority opinion in the instant case, said for a unanimous bench, "A federal court may not grant a writ of habeas corpus to a state prisoner, save in exceptional circumstances, unless the prisoner has availed himself of one of the corrective processes available in the courts of the state."[44] The court went on to say that mere indigence alone, which was Kozicky's defense, just as it was Noia's, is not such an exceptional circumstance

37. Ex parte Hawk, 321 U.S. 114 (1944) (per curiam); Ex parte Davis, 317 U.S. 592 (1942) (per curiam); Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam).

38. 344 U.S. 443 (1953).

39. 359 U.S. 394 (1959).

40. 344 U.S. at 486.

41. 359 U.S. 394 (1959).

42. Id. at 406. (Emphasis added.)

43. 248 F.2d 520 (2d Cir. 1957).

44. Id. at 521.

as would justify the abandonment of the right. Failure to appeal on that ground then, the court held, was a failure to exhaust state remedies.

The majority attempted to distinguish *Kozicky*, and the case of *United States ex rel. Williams v. LaVallee*,[45] from the instant case.

> In the Williams case the relator alleged a coerced confession, but it was no more than allegation in his petition when Williams sought federal habeas corpus. In Kozicky, similarly, the allegation was a coerced confession, but, likewise, there was no certainty at the outset of the habeas corpus proceeding, as there is in the present case, that the relator there had truly been coerced.[46]

III. Independent and Adequate State Ground

This brings us to the third point of the court's opinion, the question of whether there was an independent and adequate state ground for the continued confinement of Noia. If there were one, the court conceded, the federal writ should not have been issued. While this is an old doctrine,[47] it was first seriously applied with respect to federal habeas corpus in the *Brown*[48] and *Irvin*[49] cases.

The crux of the doctrine, as here employed, is whether the New York procedural rules for appeal are adequate in the present situation—for they certainly are independent—to justify the federal courts in refusing to entertain the federal question. While admitting that procedural rules are as adequate and important as substantive rules, the court still answered the question in the negative, finding the state grounds in the present case inadequate because:

> [T]he federal court should consider the clarity and the magnitude of the substantive federal right violated. The reasonableness, and hence the adequacy, of the state procedural bar, is inversely proportionate to the importance of the federal right and the clarity of its violation.[50]

The majority opinion is a rhetorically flawless apologia based on the court's conception of the justice and equities involved, and emanating from the premise that where a significant federal right has been clearly violated, and only a state procedural bar prevents correction of the wrong, the federal courts should use Herculean—not to say unreasoned—efforts to find the state grounds inadequate.

IV. Conclusion

There is the dilemma. Settled law opposes the relator, yet even the least impassioned observer can sense some perversion of justice in his continued confinement. It is a most unique case, raising a multitude of questions, among which is the primary one of why relator never appealed—and the equally disturbing one of where would he be had there been no codefendants? The

45. 276 F.2d 645 (2d Cir. 1960).
46. 300 F.2d at 363.
47. See Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 634-36 (1875).
48. 344 U.S. 443 (1953).
49. 359 U.S. 394 (1959). See Reitz, supra note 10, at 1338.
50. 300 F.2d at 360.

court admitted that had there been no clear cut determination of the constitutional violation in the collateral cases, the federal writ would have been properly denied on the very ground which the court now puts forward for granting it. It is submitted that the court should have heeded the words of Mr. Justice Frankfurter:

> Something that thus goes to the very structure of our federal system in its distribution of power between the United States and the States is not a mere bit of red tape to be cut, on the assumption that this Court has general discretion to see justice done. Nor is it one of those "technical" matters that laymen, with more confidence than understanding of our constitutional system, so often disdain.[51]

The Supreme Court has granted certiorari[52] in the present case. It should take the opportunity to clarify the rules governing the issuance of the Great Writ in federal courts; rules which are presently so ill-defined. It may be meritoriously argued that some latitude should be allowed in this area, but certainly better guidelines are possible, and indeed demanded, so that in our unique federalism there will exist the uniformity necessary to maintain the proper balance between state and federal courts.

Defamation—Simulation of Entertainer's Voice in Television Commercial Gives Rise to Cause of Action for Defamation and Unfair Competition.—Defendant, Adell Chemical Company, used an animated "talking duck" in advertising its product "Lestoil." Bert Lahr, a professional entertainer, alleged that the duck's voice, used without Mr. Lahr's permission, was so similar to his own that it confused the public. A tort action was brought in the United States District Court for Massachusetts,[1] but was dismissed for failure to state a cognizable cause of action. On appeal, the plaintiff contended that he had three distinct causes of action—defamation, unfair competition and invasion of privacy. The circuit court reversed, sustaining the complaint as to defamation and unfair competition, but dismissing it as to invasion of privacy. *Lahr v. Adell Chem. Co.*, 300 F.2d 256 (1st Cir. 1962).

The issue appears to be one of first impression in the United States.[2] Mr. Lahr contended that the mimicry injured his reputation in the entertainment field both by indicating that he had been reduced to giving anonymous television commercials, and because the simulation, though recognizable, was of a quality and character inferior to his own. The court agreed that it might

51. Irvin v. Dowd, 359 U.S. 394, 408 (1959) (dissenting opinion).

52. 369 U.S. 869 (1962); see also 370 U.S. 907 (1962).

1. Lahr v. Adell Chem. Co., 195 F. Supp. 702 (D. Mass. 1961).

2. Remarkably similar facts have appeared before an English court however. In Sim v. H. J. Heinz Co., [1959] 1 Weekly L.R. 313 (C.A.), a famous British actor sought an injunction, on the grounds of libel and "passing off," against a food manufacturer who had used a simulation of his voice in conjunction with a cartoon advertising a product. The court of appeals denied the injunction as the proceedings were interlocutory and refused to exercise its discretion in advance on an issue that would ultimately be decided by a jury.

be defamatory to say of an entertainer that he had stooped to perform below his class,[3] but refused to recognize plaintiff's contention that an inferior imitation damaged his reputation. The court noted that if the imitation of plaintiff's voice was so inferior as to constitute defamation, Mr. Lahr would have to produce some stronger evidence of identification.[4]

The court recognized the possibility that the statute of limitations for libel in New York[5] and Massachusetts[6] might provide the defendant with an affirmative defense to that cause of action. Without stating at what date the publication ceased, the court indicated that the defendant, in order to avail himself of the defense, would have to establish the applicability of the "single publication" rule to repeated television broadcasts.[7] The rule was originally formulated to prevent a multiplicity of lawsuits,[8] and to avoid difficult venue problems.[9] Since each republication of a libel gives rise to a new cause of action,[10] the courts could but conjecture as to the number of lawsuits and legal problems presented by a single edition of a newspaper or periodical.[11] The inequities of the rule, as presently applied to books and periodicals, have been frequently assailed.[12] The usual arguments in favor of it—that memories fade, evidence is lost and forgotten and witnesses disappear or die—are, when applied to television broadcasting, completely inappropriate.[13] It is further noted that the "single publication" rule has never been carried beyond one entire edition, and when substantially the same article has been republished by the same newspaper at a later date, it has given rise to a new cause of action.[14] *A fortiori,*

3. The court cited Louka v. Park Entertainments, Inc., 294 Mass. 268, 1 N.E.2d 41 (1936), a case involving the appearance of a likeness of a dramatic actress on the marquee of a burlesque theatre, and Sim v. H. J. Heinz Co., supra note 2.

4. 300 F.2d at 259.

5. N.Y. Civ. Prac. Act § 51.

6. Mass. Ann. Laws ch. 260, § 4 (1956) (Supp. 1961).

7. 300 F.2d at 260. On the subject of the "single publication" rule see Prosser, Interstate Publication, 51 Mich. L. Rev. 959 (1953). See also Leflar, The Single Publication Rule, 25 Rocky Mt. L. Rev. 263 (1952); Note, The Single Publication Rule in Libel: A Fiction Misapplied, 62 Harv. L. Rev. 1041 (1949).

8. The first occasion of a multiplicity of suits occurred in 1849, when the Duke of Brunswick and Luneberg, upon discovering that an eighteen-year-old libel was still circulating, ordered his servant to buy it, and promptly brought suit. Duke of Brunswick v. Harmer, 14 Q.B. 185, 117 Eng. Rep. 75 (1849).

9. Forman v. Mississippi Publishers Corp., 195 Miss. 90, 14 So. 2d 344 (1943); Julian v. Kansas City Star Co., 209 Mo. 35, 107 S.W. 496 (1907).

10. Lubore v. Pittsburgh Courier Publishing Co., 101 F. Supp. 234 (D.D.C. 1951), aff'd, 200 F.2d 355 (D.C. Cir. 1952); Fisher v. New Yorker Staats-Zeitung, 114 App. Div. 824, 100 N.Y. Supp. 185 (2d Dep't 1906).

11. E.g., Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir. 1947).

12. See note 7 supra.

13. For an excellent criticism of the existing law as it applies to books, see the dissenting opinion by Desmond, J., in Gregoire v. G. P. Putnam's Sons, 298 N.Y. 119, 126, 81 N.E.2d 45, 49 (1948).

14. Woodhouse v. New York Evening Post, Inc., 201 App. Div. 9, 193 N.Y. Supp. 705 (1st Dep't 1922).

when the same advertisement appears on a different broadcast, a new cause of action should arise.

Having sustained plaintiff's allegations of defamation, the court deemed it unnecessary to consider the tort of unfair competition. By way of dictum, however, it noted that defendant's behavior might be found to have "saturated plaintiff's audience to the point of curtailing his market,"[15] and that the defendant in " 'stealing his [Mr. Lahr's] thunder' "[16] enhanced the value of its commercial.

Relief for the appropriation of theatrical talent is not without precedent. The instant court cited *Chaplin v. Amador*,[17] a case which involved a motion picture starring Charlie Aplin, in a role closely simulating a character made famous by Charlie Chaplin. There the court noted:

> The question of monopoly is in no way involved in this action. Plaintiff is not seeking to prevent the appellant, Charles Amador, from appearing in motion pictures, but only seeks to prevent him from imitating the plaintiff in such a way as to deceive the public and work a fraud upon the public and plaintiff. The case of plaintiff does not depend on his right to the exclusive use of the rôle, garb, and mannerisms, etc. [*e.g.*, Mr. Lahr's unique voice]. . . . The right of action in such a case arises from the *fraudulent purpose and conduct of appellant and injury caused to the plaintiff*. . . .[18]

Courts have enjoined, on the ground of unfair competition, imitations of a cowboy star,[19] a cartoon character[20] and a magic act.[21] The *Amador* court noted the importance of defendant's fraudulent intent. This is not a *sine qua non* to the maintenance of a cause of action for unfair competition,[22] however, and if the defendant's behavior has resulted in confusion of source, that is sufficient, whether or not he acted in good faith.[23]

It is significant that in the cases involving the theatrical industry, the usual relief sought is by way of injunction.[24] The problem of awarding damages in an unfair competition action has often plagued the courts,[25] and several

15. 300 F.2d at 259.

16. Ibid.

17. 93 Cal. App. 358, 269 Pac. 544 (Dist. Ct. App. 1928).

18. Id. at 362-63, 269 Pac. at 546.

19. Lone Ranger, Inc. v. Cox, 124 F.2d 650 (4th Cir. 1942); Jones v. Republic Prods. Inc., 112 F.2d 672 (9th Cir. 1940); Lone Ranger, Inc. v. Currey, 79 F. Supp. 190 (D. Pa. 1948).

20. Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133 (1921).

21. Goldin v. Clarion Photoplays, Inc., 202 App. Div. 1, 195 N.Y. Supp. 455 (1st Dep't 1922).

22. 2 Nims, Unfair Competition and Trade-Marks § 377 (4th ed. 1947).

23. Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459, 7 N.Y.S.2d 845 (1st Dep't 1938).

24. See notes 19-21 supra. Lone Ranger, Inc. v. Cox, and Jones v. Republic Prods., supra note 19, while upholding plaintiff's right to damages, made no attempt to ascertain the amount.

25. See Walter Baker & Co. v. Slack, 130 Fed. 514 (7th Cir. 1904); 1 Nims, op. cit. supra note 22, §§ 118-19; Note, Monetary Awards for Unfair Competition in New York, 35 N.Y.U. L. Rev. 1068 (1960); Restatement, Torts, Introductory Note 541 (1938).

different methods of computation are presently in use.[26] In the instant case, the court described two distinct types of injury: (1) "defendant's commercial had greater value because its audience believed it was listening to him [Bert Lahr]"[27]—defendant's profits; and (2) " 'appellant's loss of opportunity in the entertainment field' "[28]—plaintiff's damages. It is submitted that since the theory of an award of defendant's profits[29] is usually found in cases where plaintiff can show a definite diversion of sales;[30] and awards of plaintiff's damages[31] are usually reserved for situations where more tangible evidence of lost profits have been presented than is available in the present case,[32] a monetary award might well be denied in a situation such as the instant one, regardless of the test applied. If such is the case, unfair competition would hardly prove the most efficacious cause of action for plaintiff to pursue, for, the "Lestoil Duck" campaign having been completed, injunctive relief would be an empty victory for Mr. Lahr.[33]

Professor Mathieson, commenting on the case of *Sim v. H. J. Heinz Co.*,[34] maintained that one's identity might be as easily appropriated by a simulation

26. "There seem to be at least four elements which are now used in making up an award: (a) the profits of the defendant; (b) the profits lost by plaintiff; (c) plaintiff's losses, aside from profits; (d) conduct by defendant which is malicious, willful or wanton or recklessly indifferent to plaintiff's rights." 2 Nims, op. cit. supra note 22, § 419, at 1331.

27. 300 F.2d at 259.

28. Ibid.

29. An award of defendant's profits has its basis in the equitable theory that when the defendant uses the plaintiff's mark he creates a trust relationship and is responsible to the plaintiff for the profits. 2 Nims, op. cit. supra note 22, § 419, at 1327.

30. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916); Underhil v. Schenck, 238 N.Y. 7, 143 N.E. 773 (1924); cf. Straus v. Notaseme Hosiery Co., 240 U.S. 179 (1916) (accounting for profits denied due to inability to show diversion of sales).

31. An action for damages has its basis in law, the theory being to compensate the plaintiff for that which he has lost. For an interesting discussion of the difference between an award for "plaintiff's damages," and an award for "defendant's profits," see the opinion of Mr. Justice Cardozo in Duplate Corp. v. Triplex Safety Glass Co., 298 U.S. 448, 450-51 (1936).

32. " 'When a plaintiff in a trade-mark or unfair competition case seeks to recover damages, the burden is on him to prove by competent and sufficient evidence his lost sales [i.e., employment opportunities]. . . . There is no presumption of law or of fact that a plaintiff would have made the sales [i.e., public appearances]. . . .' " Michel Cosmetics, Inc. v. Tsirkas, 282 N.Y. 195, 202, 26 N.E.2d 16, 18 (1940). See Ludington Novelty Co. v. Leonard, 127 Fed. 155 (2d Cir. 1903); Coca-Cola Co. v. Christopher, 37 F. Supp. 216 (E.D. Mich. 1941); H. E. Allen Mfg. Co. v. Smith, 224 App. Div. 187, 229 N.Y. Supp. 692 (4th Dep't 1928); Kreisberg v. Wakefield Co., 7 Misc. 2d 1036, 165 N.Y.S.2d 769 (Sup. Ct. 1957); Lerner v. Sportsmaster Co., 4 Misc. 2d 478, 103 N.Y.S.2d 990 (Sup. Ct. 1951).

33. It has been suggested, however, that where there has been injury, inability to prove damages with certainty should not preclude recovery. Amusement Sec. Corp. v. Academy Pictures Distrib. Corp., 162 Misc. 608, 631, 294 N.Y. Supp. 279, 304-05 (Sup. Ct. 1936), aff'd mem., 250 App. Div. 710, 294 N.Y. Supp. 305 (1st Dep't 1937), aff'd mem., 277 N.Y. 557, 13 N.E.2d 471 (1938).

34. [1959] 1 Weekly L.R. 313 (C.A.).

of one's voice as by imitation of one's appearance.[35] He intimated that the most appropriate relief in that English case might well have been sought under the American tort of invasion of privacy.[36]

In denying redress for any invasion of appellant's privacy, the instant court noted that "the Massachusetts court has avoided recognizing such a right,"[37] and that the New York statute[38] does not afford relief for the appropriation of one's *voice*.[39] Because the statute is in derogation of the common law,[40] and is, at least in part, penal,[41] it has been strictly construed by New York courts. Its prohibition against the use of a person's name, photograph or picture for "advertising purposes or for the purposes of trade"[42] has been extended, however, to include an embellished portrait,[43] a manikin,[44] and a motion picture of an actor made to appear as plaintiff.[45] In light of the statute's remedial aspects, it is submitted that the further extension, to include the simulation of the voice of one whose vocal qualities are as distinctive as his face, would do no violence to its judicially-imposed narrow compass.

The instant case presented some new and interesting problems, not the least of which was the conflict of laws situation which the court dismissed by pressing the plaintiff to agree that, though the commercial was seen throughout the United States and Canada, only the law of New York (plaintiff's domicile) and Massachusetts (defendant's domicile) applied.[46]

The tort encompassed three separate causes of action, and served to present

35. Mathieson, Comment, 39 Can. B. Rev. 409, 411 (1961). In this article the author presented three methods of invading reputation: "(i) The defendants display a photo of the plaintiff without his consent, the commentator speaking in his (own) natural voice. (ii) The defendants display a cartoon, but the distortion is not so great as to prevent the 'reasonable viewer' identifying the plaintiff's distinctive stage appearance (assuming that he can prove that he has got one!) . . .(iii) The defendants act as in (i) or (ii) except that they make use of an imitation of the plaintiff's voice."

36. Mathieson discusses the case in the light of invasion of privacy. Id. at 427-31.

37. 300 F.2d at 258.

38. N.Y. Civ. Rights Law §§ 50-51. Apart from this statute, no right of privacy exists in New York. See Kimmerle v. New York Evening J., Inc., 262 N.Y. 99, 186 N.E. 217 (1933); Schumann v. Loew's Inc., 135 N.Y.S.2d 361 (Sup. Ct. 1954); Vogel v. Hearst Corp., 116 N.Y.S.2d 905 (Sup. Ct. 1952).

39. 300 F.2d at 258.

40. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 556, 64 N.E. 442, 447 (1902). But cf. id. at 557, 64 N.E. at 448 (dissenting opinion).

41. N.Y. Civ. Rights Law § 50 (misdemeanor).

42. N.Y. Civ. Rights Law § 51.

43. Loftus v. Greenwich Lithographing Co., 192 App. Div. 251, 182 N.Y. Supp. 428 (1st Dep't 1920).

44. Young v. Greneker Studios, Inc., 175 Misc. 1027, 26 N.Y.S.2d 357 (Sup. Ct. 1941).

45. Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913).

46. The problem is treated extensively by Prosser, supra note 7. Pragmatically speaking, however, the problem has been partially obviated by N.Y. Civ. Prac. Act § 338-a and Mass. Ann. Laws ch. 231, § 94 (1956). Both statutes allow introduction of evidence of prior actions based on substantially the same set of facts in order to mitigate damages.

in sharp relief the rigidities of each. It is hoped that the courts will adapt to the new situation and, after having found a wrong, will not be blocked by technicalities in awarding affirmative relief.

Evidence—Information Obtained by Private Party Through Unlawful Entry Admissible in Civil Action.—Plaintiff in a divorce action attempted to introduce, as proof of his wife's adultery, evidence gained by his unlawful entry into her apartment.[1] The New York Supreme Court at Special Term granted defendant's motion to suppress,[2] holding that this evidence, obtained in violation of the state statute[3] which protects against unreasonable searches and seizures,[4] is inadmissible in civil suits.[5] The appellate division reversed, holding that New York's statutory protection did not require the exclusion of such evidence in a civil action. *Sackler v. Sackler,* 16 App. Div. 2d 423, 229 N.Y.S.2d 61 (2d Dep't 1962).[6]

The federal constitutional prohibition[7] protecting individuals from unreasonable searches and seizures originally precluded actions only of the federal government or its agents,[8] and was enforced by the exclusion in a federal criminal action[9] of evidence so obtained.[10] Subsequently, *Wolf v. Colorado*[11] held "the Fourth Amendment . . . enforceable against the States through the Due Process Clause,"[12] but refused to apply to state courts the federal ex-

1. The apartment was separately maintained by plaintiff's legally separated wife.

2. Sackler v. Sackler, 33 Misc. 2d 600, 224 N.Y.S.2d 790 (Sup. Ct. 1962).

3. N.Y. Civ. Rights Law § 8.

4. People v. Loria, 10 N.Y.2d 368, 373, 179 N.E.2d 478, 482, 223 N.Y.S.2d 462, 466 (1961) has defined a "reasonable" search as one "conducted pursuant to a legal search warrant, by consent, or incident to a lawful arrest." See also Johnson v. United States, 333 U.S. 10 (1948).

5. 33 Misc. 2d at 606, 224 N.Y.S.2d at 796. The special term admitted the direct inapplicability of federal and state constitutional protections. Id. at 602, 224 N.Y.S.2d at 792.

6. 16 App. Div. 2d 950, — N.Y.S.2d — (2d Dep't 1962) (memorandum decision) (motion for reargument or leave to appeal denied), 17 App. Div. 2d 663, — N.Y.S.2d — (2d Dep't 1962) (memorandum decision) (motion for leave to reargue motion for leave to appeal denied).

7. U.S. Const. amend. IV.

8. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833) (dictum). This principle is reiterated throughout the development to be discussed. In these cases the common factual pattern is an illegal search and seizure resulting in the discovery of evidence. The common issue is whether, if the search and seizure were in violation of defendant's constitutional rights, the evidence is admissible against him in a federal criminal trial.

9. Boyd v. United States, 116 U.S. 616 (1886).

10. Weeks v. United States, 232 U.S. 383 (1914). Here the search was by a federal marshal. Similarly, the Court refused to condemn an ancillary search by state officers not acting under any claim of federal authority.

11. 338 U.S. 25 (1949).

12. Id. at 27-28.

clusionary rule.[13] Recently, *Mapp v. Ohio*,[14] overruling *Wolf* in part, extended the exclusionary rule to the states.

Prior to *Mapp*, but subsequent to *Wolf*, *Elkins v. United States*[15] had overturned the "silver platter" doctrine under which federal use of evidence gained by an unreasonable *state* search and seizure was considered admissible.[16] *Elkins* reasoned that the "silver platter" doctrine must be rejected to "compel respect for the constitutional guaranty. . . ."[17] It held that

> evidence obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures . . . is inadmissible . . . in a federal criminal trial.[18]

Long before *Wolf*, the Supreme Court had ruled in *Burdeau v. McDowell*[19] that an unauthorized search and seizure by a private party, or the use by the Government in a criminal trial of evidence obtained thereby, was not violative of the fourth amendment. The Court said that the fourth amendment was applicable only to governmental action, and not to "the act of individuals in taking the property of another."[20]

Prior to *Mapp*, Judge Cardozo in *People v. Defore*[21] declared that the policy of New York excluded any inquiry in a criminal trial as to the lawfulness of the procurement of evidence.[22] He interpreted Section 8 of the New York Civil Rights Law[23] as placing official and private trespass "on an equality,"[24] and argued that since "evidence is not excluded because the *private* litigant who offers it has gathered it by lawless force,"[25] it should not be excluded when offered by the *state*.

The majority of the instant court reasoned that the constitutional prohibitions, even under *Mapp*, pertain only to evidence gained by governmental invasions of privacy.[26] It suggested that no implication in either *Elkins* or *Mapp*

13. Id. at 33.
14. 367 U.S. 643, 655 (1961).
15. 364 U.S. 206 (1960).
16. Lustig v. United States, 338 U.S. 74 (1949).
17. 364 U.S. at 217.
18. Id. at 223.
19. 256 U.S. 465 (1921).
20. Id. at 475.
21. 242 N.Y. 13, 150 N.E. 585 (1926).
22. Id. at 23, 150 N.E. at 588.
23. This section remains in the Civil Rights Law, and its wording has been subsequently incorporated into the N.Y. Const. art. I, § 12, the latter having been held to apply solely to the state and its agencies. People v. Appelbaum, 277 App. Div. 43, 97 N.Y.S.2d 807 (2d Dep't), aff'd mem., 301 N.Y. 738, 95 N.E.2d 410 (1950). The incorporation has not affected the interpretation of § 8 enunciated by Judge Cardozo. People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E.2d 690 (1943). Both the N.Y. Const. art. I, § 12 and the N.Y. Civ. Rights Law § 8 contain the wording of U.S. Const. amend. IV.
24. 242 N.Y. at 22, 150 N.E. at 588.
25. Ibid. (Emphasis added.) Cf. Bloodgood v. Lynch, 293 N.Y. 308, 56 N.E.2d 718 (1944).
26. 16 App. Div. 2d 423, 425, 229 N.Y.S.2d 61, 63 (2d Dep't 1962).

indicates an implicit overruling of *Burdeau v. McDowell*,[27] and that the *Defore* equation regarded only attendant "liabilities and penalties,"[28] and could not be used to make an analogous application of the new exclusionary rule of *Mapp* to evidence gained by private trespass.[29]

The dissent argued that *Burdeau* had been overruled,[30] and that once private and official trespass were equated they should remain so. Consequently, evidence gained from private trespass should now be suppressed in view of *Mapp*.[31]

It is possible to analogize the "silver platter" doctrine to a criminal prosecution wherein the state seeks to introduce evidence gained by private trespass, and thereby argue that the use of the evidence is implicitly condemned by *Elkins* and *Mapp*. The argument would be that in cases of private trespass unconstitutionality and attendant inadmissibility attach by the governmental "appropriation"[32] of the evidence.[33] However, even subject to this restriction, *Burdeau* would still support the rule that evidence garnered by private trespass is not obtained unconstitutionally, and is, therefore, admissible in civil actions.

In the present case the dissenting judges emphasized a group of New York decisions which were said to have held Section 8 of the Civil Rights Law applicable to civil litigation. Although civil in character, every case cited dealt with the statutory propriety of official acts of governmental agencies[34] and, what is more important, the legislative history of the provision is to the contrary.[35] Decisions marshaled by the dissent from other jurisdictions contain only favorable dicta, and are also weakened by a self-confessed lack of authority on point.[36] On the other hand, there is direct support for the majority in the

27. 256 U.S. 465 (1921).

28. 17 App. Div. 2d at 425, 229 N.Y.S.2d at 64.

29. Ibid.

30. Partial reliance was placed upon dictum in Williams v. United States, 282 F.2d 940, 941 (6th Cir. 1960).

31. 16 App. Div. 2d at 429-30, 229 N.Y.S.2d at 67-68 (dissenting opinion).

32. Lustig v. United States, 338 U.S. 74, 78 (1949).

33. Elkins spoke of the federal courts as being "accomplices in the wilful disobedience of a Constitution they are sworn to uphold." 364 U.S. at 223.

34. Sanford v. Richardson, 176 App. Div. 199, 161 N.Y. Supp. 1026 (2d Dep't 1916) (court order for search of safe deposit box held unconstitutional); Matter of Foster, 139 App. Div. 769, 124 N.Y. Supp. 667 (2d Dep't 1910) (powers of commissioners of account circumscribed by N.Y. Civ. Rights Law § 8); Ehrich v. Root, 134 App. Div. 432, 119 N.Y. Supp. 395 (1st Dep't 1909) (court order for the search of safe deposit box held unconstitutional); In re Lehr, 175 Misc. 914, 24 N.Y.S.2d 653 (Sup. Ct. 1940) (court order for search of insane person's safe deposit box precluded by N.Y. Civ. Rights Law § 8 until committee appointed).

35. 1 Revised Record of the Constitutional Convention of 1938 of the State of New York 358-602 (1938); 2 Revised Record of the Constitutional Convention of 1938 of the State of New York 820-27 (1938).

36. City of Chicago v. Lord, 3 Ill. App. 2d 410, 122 N.E.2d 439 (1954), aff'd, 7 Ill. 2d 379, 130 N.E.2d 504 (1955) (search was made by police officer); Lebel v. Swincicki, 354 Mich. 427, 93 N.W.2d 281 (1958) (other evidence held sufficient); Hartman v. Hartman, 253 Wis. 389, 34 N.W.2d 137 (1948) (entry by consent).

Oregon case of *Walker v. Penner*,[37] where, with an identical legal issue,[38] the court, finding the search unlawful, held that the exclusionary rule "refers largely, if not entirely, to criminal and quasi-criminal proceedings. It does not apply in civil cases between individuals."[39]

It was essential to Judge Cardozo's argument in *Defore* to equate public and private trespass.[40] Such an equation, however, could hardly be drawn under the fourth amendment as interpreted by the Supreme Court,[41] and even if such a construction were accepted as valid, it does not follow that evidence gained by its violation must be excluded in civil actions. The majority in *Wolf* had left to the states the protection of the right of privacy granted by the federal constitution,[42] while the dissent protested that such safeguards would be illusory.[43] *Mapp*, in overruling this aspect of *Wolf*, considered those safeguards provided by the states to "have been worthless and futile."[44]

None of the disabilities attendant upon the enforcement of the right of privacy against governmental officials, which provided the impetus in *Mapp* for the extension of the exclusionary rule, apply in a civil action where the trespasser is a private individual. There should be no hesitation on the part of a prosecutor to enforce the pertinent Penal Law provisions[45] against the trespasser. Even though the civil action against him would produce no significant pecuniary sanction,[46] as in the instant case, it cannot be said that more is deserved. Whatever crimes[47] the plaintiff-husband committed here should not be punished by the possible extinguishment of his right to a divorce[48] through the suppression of the evidence in question.[49] Thus, there appears to be no reason for altering what remains of the policy announced in *Defore*, that in a civil action evidence gained by private trespass is competent and admissible.

37. 190 Ore. 542, 227 P.2d 316 (1951).

38. The facts here were parallel, differing only in that the entry and search involved a private car.

39. 190 Ore. at 547-48, 227 P.2d at 318.

40. 242 N.Y. at 22, 150 N.E. at 588.

41. This interpretation is summarized by the dissent in Brinegar v. United States, 338 U.S. 160, 180 (1949), cited with approval in Elkins. The dissent in Brinegar said: "[T]he Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source." Id. at 181.

42. 338 U.S. at 30.

43. Id. at 41 (dissenting opinion).

44. 367 U.S. at 652.

45. N.Y. Pen. Law §§ 2034, 2036.

46. See McIntyre v. State, 18 Misc. 2d 302, 190 N.Y.S.2d 178 (Ct. Cl. 1959) (trespass by state surveyor resulted in award of six cents where no actual damage was shown). N.Y. Pen. Law § 1433 gives a right of civil redress but demands some injury or destruction. See also 2 McAdam, Landlord & Tenant § 272 (5th ed. 1934).

47. N.Y. Pen. Law §§ 2034, 2036.

48. Plaintiff here would be forced to rely on whatever circumstantial evidence he could muster.

49. 8 Wigmore, Evidence § 2183 (3d ed. 1940).

Right of Privacy—Use of Newsworthy Photograph in Incidental Advertising of Magazine Held No Invasion of Privacy.—Plaintiff, a well-known movie actress, was photographed in a leisurely pose by a photographer from *Holiday Magazine*,[1] who was gathering material for an article describing the hotel at which she was vacationing. In February, 1959, the article appeared in the magazine, and plaintiff's photograph, which had been taken without objection, was given prominent display. In June of that year, defendants published the same photograph in full-page advertisements in the *New Yorker Magazine* and *Advertising Age*, a trade journal, as a sample of *Holiday's* contents. An action under the New York "Right of Privacy" statute[2] was brought in the supreme court where a jury trial resulted in an award of damages to plaintiff. The appellate division reversed, holding that incidental—as distinguished from collateral—advertising did not amount to an invasion of privacy. *Booth v. Curtis Publishing Co.*, 15 App. Div. 2d 343, 223 N.Y.S.2d 737 (1st Dep't 1962).

Prior to 1900, aside from the limited relief afforded by actions for libel and slander, and the indirect relief accorded a litigant in the guise of protecting a property or contract right, a person whose private life was exposed by journalistic gossip-mongers, or whose name, photograph or talents were appropriated to advertise the goods of crafty merchants, had no recourse at law for the "difficult-to-prove" injury to his sensibilities. In 1890, an article by Warren and Brandeis[3] dealt with this problem at length, and suggested that the right of privacy be recognized as a distinct legal right with its own cause of action.

At first, New York seemed to be a disciple of this new philosophy, when, in *Schuyler v. Curtis*,[4] the nephew of a deceased philanthropist sought an injunction, based on an invasion of privacy, against the erection of a statue in the deceased's honor by a group of admirers. Although the lower courts granted the injunction, the court of appeals, while seeming to accept the common-law existence of the right, decided that in any event, the right would be personal to the deceased, and, therefore, the plaintiff had no cause of action.[5]

However, in 1902, the four-to-three decision of the court of appeals in

1. Holiday Magazine is a publication of defendant, Curtis Publishing Co.

2. "Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without . . . written consent . . . may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by . . . [Section 50 of the New York Civil Rights Law] the jury, in its discretion, may award exemplary damages." N.Y. Civ. Rights Law § 51.

3. Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

4. 147 N.Y. 434, 42 N.E. 22 (1895).

5. See Marks v. Jaffa, 6 Misc. 290, 26 N.Y. Supp. 908 (Super. Ct. 1893); Mackenzie v. Soden Mineral Springs Co., 27 Abb. N. Cas. 402, 18 N.Y. Supp. 240 (Sup. Ct. 1891).

Roberson v. Rochester Folding Box Co.,[6] held that no common-law right of privacy existed in New York. In *Roberson*, the offending act was the unauthorized use and circulation of a lithographic print, the composition of which consisted of the plaintiff's picture framed by the defendant's advertising copy. Despite the plaintiff's plea of mental distress due to embarrassment and loss of reputation, the court rejected the philosophy of the Warren-Brandeis article and the dicta in the *Schuyler* case, and denied both the existence of the right at common law and the feasibility of incorporating the principle into the law because of the resulting morass of "absurd" litigation.[7] The court noted, however, that the champions of the right might achieve its establishment through the legislature.[8]

This decision was followed by a "torrent of criticism,"[9] and in 1903, the New York Legislature enacted the first American "right of privacy" statute.[10] The legislation encompassed a narrow commercial view, however, ignoring most of the Warren-Brandeis philosophy.

Under Section 50 of the New York Civil Rights Law, a violation of the "right of privacy" can give rise to criminal liability, while secton 51 of that law provides for relief by way of injunction and damages.[11] The statute created a qualified right, and the courts, by their strict interpretation of the phrases "for advertising purposes" and "for purposes of trade," have not expanded the protection which it meant to give the individual from commercial exploitation of his personality. The fact that the statute is penal, at least in part, has also been advanced as a reason for strict construction.[12]

The question involved in the instant case was:

> [W]hether a person's photograph originally published in one issue of a periodical as a newsworthy subject (and, therefore, concededly exempt from the statutory prohibitions) may be republished subsequently in another medium as an advertisement for the periodical itself, illustrating the quality and content of the periodical, without the person's written consent.[13]

In cases of this type, the courts are confronted with the conflict created by the constitutional right of freedom of the press, on the one hand, and the individual's statutory right of privacy on the other. The courts have allowed a certain amount of commercialization of the personality as long as such treat-

6. 171 N.Y. 538, 64 N.E. 442 (1902).

7. Id. at 545, 64 N.E. at 443.

8. Ibid.

9. See Note, 24 Notre Dame Law. 383, 385 (1949).

10. N.Y. Sess. Laws 1903, ch. 132, §§ 1-2.

11. See note 2 supra.

12. See, e.g., Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Goelet v. Confidential, Inc., 5 App. Div. 2d 226, 228, 171 N.Y.S.2d 223, 225 (1st Dep't 1958); Humiston v. Universal Film Mfg. Co., 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919).

13. Booth v. Curtis Publishing Co., 15 App. Div. 2d 343, 344, 223 N.Y.S.2d 737, 738-39 (1st Dep't 1962).

ment is not distinct from the dissemination of news or information.[14] Nevertheless, there had been no previous New York cases so factually similar to the case at bar as to present an immediate answer as to whether or not the subsequent commercial use in this case was distinct or not.

The majority found its answer in the "incidental-collateral" test proposed by the court in *Humiston v. Universal Films Mfg. Co.*[15] There, plaintiff, a woman lawyer, was catapulted into prominence because of her part in the solution of a murder mystery. Pictures of her investigation were taken by defendant and prepared in newsreel form for distribution to various theatres. The defendant subsequently reproduced the plaintiff's picture on posters to advertise the production. The court first stated the rule that the news disseminator was entitled to display such posters for the purpose of attracting patrons and promoting its product. Then, despite the obviously commercial nature of the subsequent use of these reproductions, the court held it to be merely *incidental* to the exhibition of the film and thus not violative of the statute.[16]

A less appropriate example of an incidental use relied on by the majority is *Dallesandro v. Henry Holt & Co.*,[17] where the defendant publisher displayed a picture on the cover of a book, *Waterfront Priest*, which showed Father Corridan, the subject of the book, conversing with the plaintiff, a longshoreman and union member. The court held, citing *Humiston*, that a picture illustrating an article on a matter of public interest is not considered as being used for the purpose of trade or advertising within the meaning of the statute unless it has no real relationship to the article or unless it is an "advertisement in disguise." The court quoted *Oma v. Hillman Periodicals, Inc.*,[18] which said: "It is immaterial that its manner of use and placement was designed to sell the article so that it might be paid for and read."[19]

Similarly, in *Wallach v. Bacharach*,[20] the defendant's offending advertisement

14. See Gautier v. Pro-Football, Inc., 304 N.Y. 354, 107 N.E.2d 485 (1952); Redmond v. Columbia Pictures Corp., 277 N.Y. 707, 14 N.E.2d 636 (1938) (memorandum decision); Binns v. Vitagraph Co. of America, 210 N.Y. 51, 103 N.E. 1108 (1913) (dictum); Lahiri v. Daily Mirror, Inc., 162 Misc. 776, 295 N.Y. Supp. 382 (Sup. Ct. 1937).

15. 189 App. Div. 467, 178 N.Y. Supp. 752 (1st Dep't 1919).

16. Id. at 477, 178 N.Y. Supp. at 759.

17. 4 App. Div. 2d 470, 166 N.Y.S.2d 805 (1st Dep't 1957), appeal dismissed, 7 N.Y.2d 735, 162 N.E.2d 726, 193 N.Y.S.2d. 635 (1959).

18. 281 App. Div. 240, 118 N.Y.S.2d 720 (1st Dep't 1953).

19. Id. at 244, 118 N.Y.S.2d at 724. In Oma, note 18 supra, a magazine published an article on corruption and degradation in professional boxing, entitled "Let's Abolish Boxing." The back cover of the magazine featured the name and picture of the plaintiff, a professional boxer, together with the caption, "Tycoon—this man can make $25,000 on a single deal, but it might cost him his life. Why?" Although the fighter was not named or referred to individually in the article, the court, in a three-to-two decision, with a strong dissent by Judge Peck, held that the use was for public interest purposes and not for trade or advertising.

20. 192 Misc. 979, 80 N.Y.S.2d 37 (Sup. Ct.), aff'd mem., 274 App. Div. 919, 84 N.Y.S.2d 894 (1st Dep't 1948).

consisted of an independent news report, containing the plaintiff's name, in physical juxtaposition to the advertising copy. Recognizing that the use of the news report was geared to attract the public's attention to the copy, the court nevertheless held that the mere incidental mention of the plaintiff's name under these circumstances was not a prohibited use "for advertising purposes."

A *collateral* use was found in *Flores v. Mosler Safe Co.*,[21] where the defendant manufacturer and seller strategically inserted in his ads a news photo of the plaintiff's property ablaze together with the original news account containing the plaintiff's name. Appended to this was advertising copy exhorting potential customers to avoid a similar demise of their records by buying the protection of defendant's product. The court held for the plaintiff on the ground that the advertising had no news purpose at all because due to the lapse of time, the republication was not newsworthy, and thus not connected with the news medium.

The instant court pointed to a similar lapse of time, but stated that the matter is different when the sponsor of the subsequent republication is the news medium which had originally printed it. The court reasoned

> that a publication can best prove its worth and illustrate its content by submission of complete copies of or extraction from past editions. Nor would it suffice to show stability of quality merely to utilize for that purpose a current issue. Moreover, the widespread usage over the years of reproducing extracts from the covers and internal pages of out-of-issue periodicals of personal matter relating to all sorts of news figures, of public or private stature, is ample recognition that the usage has not violated the sensibilities of the community or the purport of the statute.[22]

The court acknowledged that there is a practical necessity for publishers to advertise in other public media and held, as a matter of law, that

> it suffices here that so long as the reproduction was used to illustrate the quality and content of the periodical in which it originally appeared, the statute was not violated, albeit the reproduction appeared in other media for purposes of advertising the periodical.[23]

The court added that a question of fact may be presented in subsequent similar cases as to whether or not a news publisher is doing more than merely selling a news medium, or indeed, whether the news medium is a genuine one. Further, the "incidental-collateral" test is retained, in that the advertising matter must be incidental to the dissemination of news, not merely an ill disguised attempt to advertise something other than a news medium.

The dissent argued that there is no distinction between this case and *Flores v. Mosler Safe Co.*,[24] and decried the conferral of an exempt status upon adver-

21. 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

22. 15 App. Div. 2d at 349, 223 N.Y.S.2d at 743.

23. Id. at 350, 223 N.Y.S.2d at 744.

24. 7 N.Y.2d 276, 164 N.E.2d 853, 196 N.Y.S.2d 975 (1959).

tising by a news medium on the ground that it was a judicial interpolation of an exception not written into the statute.[25]

This view seems to reject the "incidental-collateral" test, which, it is submitted, is a quite adequate method of determining the extent to which a news medium may go to advertise itself.

Workmen's Compensation—Coverage Under the Federal Longshoremen's and Harbor Workers' Compensation Act Not Prohibited by the "Maritime but Local" Doctrine.—Claimant was injured while completing construction of a vessel afloat on navigable waters.[1] Compensation awarded under the Federal Longshoremen's and Harbor Workers' Compensation Act[2] was confirmed by the United States District Court for the Western District of Louisiana,[3] but reversed by the Court of Appeals for the Fifth Circuit.[4] In reversing the court of appeals and reinstating the judgment of the district court, the Supreme Court held that coverage under the federal act does not depend on whether state compensation laws apply or might constitutionally apply.[5] *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962).

The development of workmen's compensation law in those areas of employment which are indirectly related to purely maritime activity has long been a source of confusion and frustration to courts and legislatures, both state and federal. In 1917, the Supreme Court held in *Southern Pac. Co. v. Jensen*[6] that an injury to an employee sustained while working on the gangplank of a ship that lay in navigable waters was noncompensable under state workmen's compensation laws because of the constitutional pre-emption by Congress[7] of the maritime power. Although the *Jensen* ruling has been seriously questioned[8] as an unwarranted restriction upon the power of the states to protect adequately their working citizens, that decision, with certain subsequent judicial modification, still remains the law. Just to what extent the *Jensen* doctrine has retained its vigor can best be measured by the subsequent legislative and judicial attempts to obviate its effects.

Recognizing the harsh results consequent upon a strict application of *Jensen*,

25. 15 App. Div. 2d at 355-56, 223 N.Y.S.2d at 749 (dissenting opinion).

1. Injuries to laborers which occurred during work on construction of vessels are compensable under state workmen's compensation acts. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922).

2. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1958) (Supp. III, 1959-1961).

3. Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962).

4. Travelers Ins. Co. v. Calbeck, 293 F.2d 52 (5th Cir. 1961).

5. In the same decision, the Court reinstated a district court's award of compensation to another claimant injured in a similar situation, whose award of compensation had also been reversed by the court of appeals. Avondale Shipyards, Inc. v. Donovan, 293 F.2d 51 (5th Cir. 1961).

6. 244 U.S. 205 (1917).

7. U.S. Const. art. I, § 8.

8. See Gilmore & Black, Admiralty § 6-45 (1957).

the Court subsequently formulated the "maritime but local" rule.[9] This doctrine allows recovery under state compensation laws for an injury which occurred on navigable waters, so long as such recovery would "work no material prejudice to the general maritime law."[10] Due to the uncertainty of its application in many specific cases[11] and the total lack of remedy which would follow from a finding that a specific injury was not "local" in character,[12] this rule proved inadequate to circumvent the denial of compensation to harbor workers which *Jensen* had effected.

In an attempt to bypass these difficulties, Congress, prior to 1927, passed two acts[13] designed to allow workers injured on navigable waters to recover through state compensation proceedings. Both statutes, however, were declared unconstitutional[14] by the Supreme Court as attempts to delegate to the states prerogatives which were exclusively federal. With the possibility of effective state coverage thus foreclosed, Congress, in 1927, enacted the Longshoremen's and Harbor Workers' Compensation Act,[15] providing federal compensation for all workers (with the exception of seamen) injured on navigable waters. Section 3(a) of this act provided that compensation would be recoverable only "if recovery . . . through workmen's compensation proceedings may not validly be provided by State law."[16] Since an injury of "local" character was the only one open to state compensation laws before the passage of the federal act,[17] it was said that the restriction of section 3(a) was intended to prohibit federal coverage precisely in the "maritime but local" situation.[18] Consequently, if a worker, whose injury was in fact "local," sought compensation under the federal

9. This doctrine was formulated by Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), though the beginning of the theory is traceable to Western Fuel Co. v. Garcia, 257 U.S. 233 (1921).

10. 257 U.S. at 477.

11. The Court, in the instant case, recognized this uncertainty: "No dependable definition of the area described as 'maritime but local' . . . ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of 'local concern,' depending upon its peculiar facts." 370 U.S. at 119.

12. See, e.g., Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923).

13. 40 Stat. 395 (1917); 42 Stat. 634 (1922).

14. The first statute was declared unconstitutional in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). The Court, in Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924) declared the second unconstitutional.

15. 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1958) (Supp. III, 1959-1961).

16. 44 Stat. 1426 (1927), as amended, 33 U.S.C. § 903(a) (1958).

17. See note 9 supra and accompanying text.

18. See Morrison, Workmen's Compensation and the Maritime Law, 38 Yale L.J. 472, 500 (1929). There Morrison states: "It seems clear that the provision for the payment of compensation, only if recovery for the disability through workmen's compensation proceedings may not validly be provided by state law, is intended to leave the state acts in full possession of the field open to them under the . . . decisions of the Supreme Court."

act, he would be denied recovery.[19] Correspondingly, the claim of one whose injury was outside the "maritime but local" category would be dismissed if he sought recovery in state compensation proceedings.[20] Although the federal act now insured that some protection existed for *all* injuries occurring on navigable waters, the impossibility of determining, except on a case by case basis,[21] which injuries were "local" in character, resulted in claims being pursued in the wrong jurisdiction[22] with ensuing delay and expense.

Parker v. Motor Boat Sales, Inc.,[23] by extending federal coverage to facts which were "maritime but local" on their face,[24] appeared to designate the forum in which any claim for an injury on navigable waters might be sought. But this caused additional doubt because the language used intimated that state coverage would have been foreclosed to the claimant.[25] In *Davis v. Department of Labor & Indus.*,[26] the problem of bringing a claim in the wrong forum was seemingly resolved by the Court's promulgation of a new doctrine, that of the "twilight zone."[27] Under this approach, where it was not clear, in the light of past decisions, whether a given situation was "local," the rule of presumptive constitutionality of a state act prevailed.[28] Thus, as *Parker* had seemed to allow federal recovery in *all* cases, *Davis* permitted a state award in any *doubtful* situation.[29] Subsequently, the "twilight zone" was extended beyond the mere area of doubt to situations which had been under exclusive federal coverage,[30] thus approaching concurrent jurisdiction over injuries occur-

19. United States Employees' Compensation Comm'n, Opinion No. 7, Sept. 2, 1927, interpreted § 3(a) of the act in this way. It has been assumed in numerous later cases and by the writers that this has continued to be the law. See Davis v. Department of Labor & Indus., 317 U.S. 249, 254 (1942); Rodes, Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone, 68 Harv. L. Rev. 637 (1955).

20. E.g., Robins Dry Dock & Repair Co. v. Dahl, 266 U.S. 449 (1925).

21. See note 11 supra and accompanying text.

22. E.g., Nogueira v. New York, N.H. & H.R.R., 281 U.S. 128 (1930); Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928).

23. 314 U.S. 244 (1941).

24. "A clearer case of 'maritime but local' could not have been imagined: a nonmaritime employee, with no maritime duties, who went on a short run in a boat . . . ." Gilmore & Black, Admiralty § 6-49, at 347-48 (1957).

25. "[H]abitual performance of other and different duties on land cannot alter the fact that at the time of the accident he [the claimant] was riding in a boat on a navigable river. . . ." 314 U.S. at 247.

26. 317 U.S. 249 (1942).

27. "There is . . . clearly a twilight zone in which the employees must have their rights determined case by case. . . ." Id. at 256.

28. Id. at 257.

29. Id. at 257-58.

30. Workers injured while repairing vessels have continually been held not to be under state coverage. E.g., John Baizley Iron Works v. Span, 281 U.S. 222 (1930); Gonsalves v. Morse Dry Dock & Repair Co., 266 U.S. 171 (1924). But in Bethlehem Steel Co. v. Moores, 335 U.S. 874 (1948), the Court affirmed per curiam a judgment of a Massachusetts court permitting state recovery to a worker injured while repairing a vessel. Then, in Baskin v. Industrial Acc. Comm'n, 338 U.S. 854 (1949), the Court reversed per curiam a California

ring on navigable waters,[31] and almost wholly obscuring the *Jensen* rule.

The Court of Appeals for the Fifth Circuit disapproved of this situation in *Flowers v. Travelers Ins. Co.*[32] Judge Brown wrote:

> we now see about us in this Circuit . . . the unfortunate sight of conflicts in formerly clear areas. . . . Thus, in the field of the actual making of repairs on an existing vessel, heretofore always considered clearly under the Federal Act . . . the employee is apparently the one to make the choice.[33]

Accordingly, *Flowers* held that a worker injured while repairing a vessel was not in the "twilight zone" because there was no doubt whatever that such an injury was not local in character.[34] It followed that his recovery must be exclusively federal. In denying certiorari,[35] the Supreme Court left the conflict unresolved.

In the instant case, the court of appeals adopted the *Flowers* rationale that where state compensation is clearly permissible, the state remedy under section 3(a) must be exclusive.[36] Mr. Justice Brennan, writing for the majority of the Supreme Court, seemingly ignored the "twilight zone" doctrine. The Court rested its decision solely on its interpretation of section 3(a)[37] as not precluding federal coverage even where state recovery could be granted under both the "twilight zone" and the "maritime but local" rules. The Court reasoned that to give to section 3(a) its apparent meaning "would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies."[38]

The majority found that section 3(a) was not intended to exclude "local" injuries from federal compensation.[39] Rather, since *Jensen* had been the line of demarcation between state and federal coverage, Congress intended to bring under the federal act all those injuries occurring on navigable waters as to which *Jensen* had rendered questionable the availability of a state compensation remedy.[40] The difficulty with this reasoning is its failure to recognize that the "maritime but local" doctrine was really an extension and modification of *Jensen*.[41]

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court's denial of state compensation to a worker injured during the repair of a vessel, citing Davis v. Department of Labor & Indus., 317 U.S. 249 (1942), thus indicating that such a situation is in the "twilight zone."

31. "Thus the combined effect of these [Moores and Baskin] none too enlightening decisions was to convey the impression that the twilight zone was exceedingly broad. . . ." MacDonald, Flowers and Noah: New Developments in Conflicting Remedies Afforded Amphibious Employees, 13 U. Fla. L. Rev. 83, 100 (1960).

32. 258 F.2d 220 (5th Cir. 1958), cert. denied, 359 U.S. 920 (1959).

33. Id. at 226-28.

34. Id. at 228.

35. 359 U.S. 920.

36. Travelers Ins. Co. v. Calbeck, 293 F.2d at 59.

37. 370 U.S. at 124.

38. Id. at 126.

39. Id. at 125-26.

40. Id. at 126.

41. See note 9 supra and accompanying text.

Although the instant situation was clearly "maritime but local,"[42] the majority did not consider this a bar to recovery under the Longshoremen's and Harbor Workers' Compensation Act. Consequently, section 3(a) will not in the future foreclose recovery from any worker injured on navigable waters regardless of his state remedy. In this respect, the instant case has the beneficial effect of repudiating both the "maritime but local" rule and the "twilight zone" doctrine insofar as they imply any restriction upon federal coverage. Federal coverage is no longer foreclosed to *any* worker injured on navigable waters.

In his dissent, Mr. Justice Stewart reasoned that since Congress had inserted section 3(a) in order to leave the greatest possible number of cases to the states,[43] that section was intended to preclude recovery for claimants who could validly obtain state compensation under the "maritime but local" doctrine, and accordingly, should preclude recovery for the claimants in the instant case.[44]

Since the instant decision did not require reconsideration of the *Jensen* rule, it would seem that, although weakened by the "maritime but local" doctrine, *Jensen* is still the law. Accordingly, a worker injured on a vessel under repair would be precluded from state recovery.

By ignoring the modifications of *Jensen* in later cases, the instant Court has perpetuated the unnecessary concurrence of federal and state coverage in every situation arising in the "maritime but local" and "twilight zone" areas, with all the administrative expense which this involves. Finally, in referring to *Jensen* in its pristine state as the *raison d'être* of the federal act, the instant decision may well represent the first step toward the overruling of the judicial modifications which embody the "maritime but local" and "twilight zone" doctrines. The express overruling of these vague concepts would seem justified if only to eliminate the situation which they perpetuate, *i.e.*, concurrent federal and state compensation for longshoremen and harbor workers.

42. Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922) held work on construction of a vessel to be "maritime but local." That recovery could be obtained by the claimant in the instant case was admitted by the majority. 370 U.S. at 119.

43. Id. at 134.

44. Id. at 138.