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Case Notes

CASE NOTES

Constitutional Law—Eighth Amendment Held Not To Forbid Imprisonment for Self-Administration of Narcotics.—Defendant, a habitual narcotics offender, pleaded guilty to a charge of self-administration of heroin, which under Connecticut law[1] was a criminal violation punishable by imprisonment for not more than five years.[2] After exhausting state appeal procedures,[3] the defendant filed a petition for a writ of habeas corpus in the federal district court,[4] alleging that the penalty inflicted was "cruel and unusual punishment" and, therefore, in violation of the eighth amendment as made applicable to the states by the fourteenth amendment. The district court upheld the constitutionality of the statute insofar as it applied to the self-administration of narcotics,[5] and the court of appeals affirmed. *United States ex rel. Swanson v. Reincke*, 344 F.2d 260 (2d Cir. 1965).

In *Robinson v. California*,[6] the United States Supreme Court declared unconstitutional a California statute which made it a crime for a person to use "or [to] be addicted to the use of narcotics . . . ."[7] In *Robinson*, the trial judge had instructed the jury that the statute involved two distinct concepts: one based on the condition or "status" of being an addict; the other based on the use of narcotics.[8] He then charged that the defendant could be found guilty under a general verdict if the jury agreed that the defendant was either of the "status" of an addict or had committed the "act" specified by the statute.[9] The jury found Robinson guilty and, on appeal, the decision was affirmed by the highest

1. Conn. Gen. Stat. Rev. § 19-265(a) (Supp. 1963).

2. The court did have the authority to commit the accused to a hospital or to the custody of a probation officer. When the defendant appeared for sentencing, he asked for a postponement until he should receive permission to enter the United States Public Health Service Hospital at Lexington, Kentucky. The court denied the request, noting that the defendant had a long record of narcotics violations and that on a previous occasion he had been given permission to enter Lexington and had refused. United States ex rel. Swanson v. Reincke, 344 F.2d 260, 261 (2d Cir. 1965).

3. Id. at 261. Swanson's appeal from a denial of a petition for a Connecticut writ of habeas corpus was dismissed by the state's highest court. Swanson v. Reincke, 151 Conn. 746, 201 A.2d 670 (1964).

4. Lower federal courts have, in the past, discharged state prisoners whose convictions rested on unconstitutional statutes. E.g., In re Ah Chong, 2 Fed. 733 (C.C.D. Cal. 1880); Ex parte Houghton, 7 Fed. 657 (D. Vt. 1881).

5. The statute in question provided: "No person shall manufacture, possess, have under his control, sell, prescribe, * * * dispense, compound, administer to himself or to another person or be addicted to the use of any narcotic drug, except as authorized in this chapter." Conn. Gen. Stat. Rev. § 19-246 (Supp. 1963). (Italics omitted.) The court questioned the constitutionality of that part of the statute dealing with addiction. 344 F.2d at 261-62 (dictum).

6. 370 U.S. 660 (1962).

7. Statutes of Cal. 1957, ch. 1064, § 1.

8. 370 U.S. at 662.

9. Id. at 663.

court in the state to which the appeal could have been taken.[10] The United States Supreme Court held that the statute, as interpreted by the California courts, was unconstitutional because it violated the eighth amendment's prohibition against "cruel and unusual punishment."[11] The majority opinion, written by Mr. Justice Stewart, emphasized the distinction between "status" and "act." Mr. Justice Stewart stated that "a state law which imprisons a person thus afflicted [to narcotic addiction] . . . even though he has never touched any narcotic drugs within the State . . . inflicts a cruel and unusual punishment . . . ."[12]

Although *Robinson* declared unconstitutional only those statutes which allowed imprisonment for the status of addiction,[13] many legal commentaries suggested that the decision might be the first step in the evolution of a doctrine which would also forbid punishment for the incidents of drug addiction, such as the possession and use of narcotics.[14] Indeed, it could be argued that the punishment of a chronic addict for these activities would actually be indirect punishment for addiction itself.[15] However, in the cases since *Robinson*, state courts have agreed with the instant court in holding that, although the status of drug addiction cannot be punished by imprisonment, incarceration for acts which violate state narcotic laws is permissible when these acts were committed within the state.[16] Thus, the states have been uniformly successful in obtaining convictions

10. The decision, by the Appellate Department of the Superior Court of Los Angeles, California, on March 31, 1961, was unreported, but it may be found in the Record, p. 102, Robinson v. California, 370 U.S. 660 (1962).

11. 370 U.S. at 666. However, the Court specifically approved of the use of compulsory medical treatment as a method of rehabilitating addicts. Id. at 664-65 (dictum).

12. Id. at 667.

13. Id. at 667-68.

14. E.g., Neibel, Implications of Robinson v. California, 1 Houston L. Rev. 1, 5-6 (1963); The Supreme Court, 1961 Term, 76 Harv. L. Rev. 54, 146 (1962); 12 Buffalo L. Rev. 605, 620-21 (1963); 51 Calif. L. Rev. 219, 225-26 (1963); 41 Texas L. Rev. 444, 446 (1963). Mr. Justice White stated that the majority opinion created doubt as to a state's power to punish for the use of narcotics. 370 U.S. at 688 (dissenting opinion). However, the majority did state that it would be constitutionally permissible to punish for possession of narcotics. Id. at 664 (dictum).

15. Lloyd v. United States, 343 F.2d, 242, 245 (D.C. Cir. 1964) (per curiam) (Bazelon, C.J., dissenting), cert. denied, 381 U.S. 952 (1965). See Lindesmith, The Addict and the Law (1965), where Dr. Lindesmith, after studying statistical reports from the California State Department of Justice, concluded that "the main effect of the [Robinson] decision has been that addicts who were formerly arrested as users are now arrested on other charges." Id. at 82. (Footnote omitted.)

16. E.g., People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (Dist. Ct. App. 1963), cert. denied per curiam, 377 U.S. 406 (1964) (imprisonment for possession of narcotics by a compulsive addict not violative of the Constitution); Louisiana ex rel. Blouin v. Walker, 244 La. 699, 154 So. 2d 368 (1963), cert. denied sub nom. Watkins v. Walker, 375 U.S. 988 (1964) (holding that use of narcotics is punishable); State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963) (imprisoning defendant for being under the influence of narcotics); Salas v. State, 365 S.W.2d 174 (Tex. Crim. App.), appeal dismissed per curiam, 375 U.S. 15 (1963) (holding that the "act" of being under the influence of narcotics is punishable). Com-

for the use[17] or possession[18] of narcotics. One wonders, however, whether these cases—and perhaps *Robinson* itself—have carried the status-act distinction to its logical conclusion.[19] Mr. Justice Stewart, in *Robinson*, strongly implied that the status of drug addiction is not punishable because it is an involuntary state of illness over which the person afflicted has no control.[20] However, it has been medically proven that an addict's craving for narcotics is also beyond his powers of self-control[21] and, indeed, is caused by the very status which the Court has immunized from criminal sanctions. The addict develops a physical and mental dependence on narcotics[22] which compels him to obtain and use drugs.[23] It is anomalous that these acts, which are as involuntary as the status itself, are punishable under the *Robinson* doctrine.[24] In three recent cases, decided by the Court of Appeals for the District of Columbia Circuit, opinions have been expressed which support this conclusion. Chief Judge Bazelon, dissenting in *Lloyd v. United States*[25] and in a separate opinion in *Hutcherson v. United States*,[26] undertook a penetrating analysis of *Robinson*. In the latter case, the Chief Judge felt that the *Robinson* opinion, or at least the interpretation given to it

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pare State v. Bridges, 360 S.W.2d 648 (Mo. 1962), where a state statute making it a crime to become an addict was held unconstitutional.

17. E.g., Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964), cert. denied, 379 U.S. 1004 (1965). Cf. People v. Davis, 27 Ill. 2d 57, 188 N.E.2d 225 (1963).

18. E.g., State v. James, 246 La. 1033, 169 So. 2d 89 (1964); Martinez v. Texas, 373 S.W.2d 246 (Tex. Crim. App. 1963), cert. denied, 377 U.S. (1964).

19. See Hutcherson v. United States, 345 F.2d 964, 977 & n.27 (D.C. Cir. 1965) (Bazelon, C.J., separate opinion).

20. 370 U.S. at 666-67.

21. An authoritative definition states: Drug addiction's "characteristics include: (1) an overpowering desire or need (compulsion) to continue taking the drug and to obtain it by any means . . . ." World Health Organization, Technical Report No. 21, p. 6 (1950).

22. "Physical dependence refers to the development of an altered physiologic state which requires continued administration of a drug to prevent the appearance of a characteristic illness, termed an 'abstinence syndrome.'" Isbell & White, Clinical Characteristics of Addictions, 14 Am. J. Med. 558 (1953). (Italics omitted.)

23. Physical dependence "forces the addict to seek his drugs by any and all means." Council on Mental Health, Report on Narcotic Addiction, 165 A.M.A.J. 1707, 1713 (1957).

24. Heard v. United States, 348 F.2d 43, 44 (D.C. Cir. 1964) (per curiam), held that "mere showing of narcotics addiction, without more" does not raise the issue of criminal responsibility. It is submitted that to require an addict who is attempting to base his defense on the grounds of compulsion to meet the requirements of any of the traditional tests for criminal insanity is to ignore the fact that an addict suffers from both physical and mental compulsion and, therefore, should be given special consideration.

25. 343 F.2d 242, 245 (D.C. Cir. 1964) (dissenting opinion).

26. 345 F.2d 964, 971 (D.C. Cir. 1965) (separate opinion). The Chief Judge's opinion dissented in part and concurred in part with the majority. On the issue of the defendant's rights under Robinson, he thought that the volition of the defendant should ordinarily be a serious consideration. Id. at 977-78. The majority did not discuss volition. Both opinions agreed that, since no evidence was offered to show that Hutcherson had been compelled by addiction to possess narcotics, the issue of responsibility could not be considered in this particular case.

by some state courts, is somewhat self-contradictory.[27] He expressed the view that volition should be the main consideration in interpreting *Robinson*,[28] and he interpreted the state court cases which have narrowly construed *Robinson* as resting upon a "conclusive presumption" that an addict voluntarily commits the acts for which he is punished.[29] In *Lloyd*, Chief Judge Bazelon also stated that he was "not able to distinguish in any meaningful sense the punishment of an addict for being an addict and the punishment of an addict for buying and possessing the drugs his body compellingly craves."[30] In *Castle v. United States*,[31] the contention that it is a logical contradiction to forbid imprisonment for addiction but yet allow imprisonment for possession or use of narcotics by an addict was acknowledged by the majority of the court to be "neither remote nor insubstantial."[32] The court decided, however, that, in light of the many decisions which have imposed such punishments, it could not do otherwise;[33] but the majority did suggest that the argument might be better served if it were advanced before the Supreme Court.[34]

The issue of volition did not go unnoticed in the *Robinson* decision. Mr. Justice Clark, dissenting,[35] and Mr. Justice White, dissenting,[36] indicated that, in regard to a conviction for addiction or the use of drugs, the volition of the defendant is the most crucial fact.[37] Mr. Justice Douglas, in his concurring opinion, stated that addiction should be treated as a disease rather than a crime because "the addict is under compulsions not capable of management without outside help."[38] While there is much to recommend that protection should be given to the narcotics addict, it must be noted that the granting of such protection will not make punishment for the use of narcotics impossible.[39] Since *Robinson* was concerned with the punishment of a "status," its protection cannot be afforded to the incipient narcotics-user because such a person is still in control

27. Id. at 977-78 (separate opinion).
28. Ibid.
29. Id. at 977 (separate opinion).
30. 343 F.2d at 245 (dissenting opinion).
31. 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929 (1965).
32. Id. at 495.
33. Ibid.
34. Ibid.
35. 370 U.S. at 679 (dissenting opinion).
36. Id. at 685 (dissenting opinion).
37. Id. at 680-81 (dissenting opinion); Id. at 685 (dissenting opinion).
38. Id. at 671 (concurring opinion).
39. There are many persons who use narcotics more or less regularly, but are not addicted. Peddlers of narcotics have so adulterated pure narcotics with other substances that some persons have used narcotics for two to three years without becoming compulsive addicts. ABA-AMA, Interim & Final Reports of the Joint Comm. on Narcotic Drugs, Drug Addiction: Crime or Disease? 25-26 (1961). It should also be noted that it is the policy of the federal government in the field of narcotics regulation to concentrate its efforts on the imprisonment of importers, dealers, and traffickers of narcotics, and not the mere addicts. Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 88th Cong., 2d Sess., pt. 3, at 836 (1964).

of his actions and has no unique status to be protected.[40] The suggested protection should be given only to defendants who use narcotics as the inevitable result of compulsive addiction.[41]

Unless the law focuses the bulk of its attention on the issue of volition when deciding the responsibility of an addict for his acts, substantial injustice will often result. A singular example of this injustice may be found by a comparison of *Robinson* and the instant case. Although the principle of *Robinson* is that addiction is not punishable,[42] its effect was to set free a non-addict who voluntarily used drugs;[43] while the present court, on the other hand, applying the same principle, imprisoned an addict for his use of narcotics even though that use was compelled by his addiction.[44]

Constitutional Law—Statute Prohibiting Communists From Holding Union Office Held Unconstitutional as Bill of Attainder.—Defendant, a longshoreman and an avowed Communist, was elected to the executive board of his local union for one-year terms in 1959, 1960, and 1961. In 1961, he was convicted of wilfully serving as a member of the executive board of a labor organization while a member of the Communist Party, in violation of Title 29, U.S.C. § 504.[1] The court of appeals reversed and remanded with instructions

40. The argument that a status is not constitutionally punishable has not been limited to the field of narcotics. For instance, the courts seem reluctant to punish a person for having the status of a vagrant unless the vagrancy is coupled with loitering, non-support, or other acts. See Lacey, Vagrancy and Other Crimes of Personal Condition, 66 Harv. L. Rev. 1203, 1219-26 (1953). The distinction has also been employed in the prosecution of an alcoholic. In Easter v. District of Columbia No. 3636, — F.2d — (D.C. Cir. 1965), the court distinguished between the status of being an alcoholic and the act of public intoxication and held that, under Robinson, a conviction for the latter would be permissible. It is submitted that an analysis of the status-act distinction reveals that the issue of volition is at its basis. In the case of a murderer, for example, it appears that neither logic nor justice requires a distinction between imprisoning a person for being a murderer or imprisoning a person for having committed a homicidal act. But in the case of a vagrant, alcoholic, or drug addict, there seems to be a stronger argument for distinguishing between status and act. Perhaps the reason is that in the latter group the status is not necessarily achieved voluntarily, while the murderer voluntarily commits the acts by which he achieves his status.

41. For a distinction between a habitual user and an addict, see People v. O'Neil, — Cal. 2d —, 401 P.2d 928, 44 Cal. Rptr. 320 (1965). The court based its distinction on the definition of addiction provided by the World Health Organization. See note 21 supra.

42. 370 U.S. at 667.

43. Id. at 661-62; id. at 681-82 (dissenting opinion).

44. The defendant had eleven prior narcotics convictions. 344 F.2d at 261.

1. Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) § 504, 73 Stat. 536, 29 U.S.C. § 504 (1964). This section provides, in part:

"(a) No person who is or has been a member of the Communist Party . . . shall serve—

(1) as an officer, director, trustee, member of any executive board or similar governing

to set aside the conviction and to dismiss the indictment, finding that section 504 violated the first and fifth amendments.[2] The Supreme Court granted certiorari[3] and, in a five-to-four decision, affirmed the reversal. The Court held that the statute under which defendant was convicted was a bill of attainder and, thus, in violation of article I, section 9 of the Constitution.[4] The Court did not consider whether the statute violated the first and fifth amendments. *United States v. Brown*, 381 U.S. 437 (1965).

The Supreme Court has defined a bill of attainder as "a legislative act which inflicts punishment without a judicial trial."[5] Originally developed in medieval England to punish enemies of the crown and confiscate their lands,[6] these bills were also used during the American Revolution to punish Loyalists.[7] The early bills of attainder appear to have had three attributes which distinguished them from other legislative acts: (1) the attainted persons were named or identified, (2) legislative intent to punish these persons was evident, and (3) a burden or punishment was imposed by the statute.[8]

Until the present case, the Supreme Court had found only four statutes to be bills of attainder.[9] Three of these statutes were similar in nature. In *Cummings v. Missouri*[10] and *Ex parte Garland*,[11] the Court held as bills of attainder statutes which required members of certain professions, as a prerequisite to further practice, to swear that they never participated in, or gave any support to, the Confederate cause. Because the statutes were intended to punish Confederates for past acts and because the oath bore no relation to the professions specified, the Court found that the bill of attainder prohibition was violated.[12] *Pierce v. Carskadon*[13] reached the same conclusion respecting a similar statute.

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body . . . during or for five years after the termination of his membership in the Communist Party . . . .

"(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

2. Brown v. United States, 334 F.2d 488 (9th Cir. 1964).

3. United States v. Brown, 379 U.S. 899 (1964).

4. U.S. Const. art. I, § 9, specifically states that "no Bill of Attainder or ex post facto Law shall be passed."

5. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866).

6. See generally Somervell, Acts of Attainder, 67 L.Q. Rev. 306 (1951).

7. See generally Reppy, The Spectre of Attainder in New York (pts. 1 & 2), 23 St. John's L. Rev. 1, 243 (1948); Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. L. Rev. 81 (1908).

8. Note, 34 Ind. L.J. 231, 238-39 (1959). See generally Cooley, Constitutional Limitations 536-40 (8th ed. 1927); Miller, Lectures on the Constitution of the United States 584-85 (1891); 2 Story, Commentaries on the Constitution § 1344 (5th ed. 1891).

9. United States v. Lovett, 328 U.S. 303 (1946); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

10. 71 U.S. (4 Wall.) 277 (1866).

11. 71 U.S. (4 Wall.) 333 (1866).

12. 71 U.S. (4 Wall.) at 319-20; 71 U.S. (4 Wall.) at 380.

13. 83 U.S. (16 Wall.) 234 (1872).

The fourth attainder case, *United States v. Lovett*,[14] was quite consistent with the three earlier precedents. In *Lovett*, the Court held unconstitutional a rider to an appropriation bill, which provided that no government funds should be used to pay the salaries of three named individuals. The Court found that the purpose of the rider was to exclude the named individuals from government employment because, in the opinion of Congress, they were guilty of subversive activity.[15]

The present case extends the attainder prohibition. The majority found that Congress, in enacting section 504, did not pass legislation applicable to all persons with certain characteristics or to all participants in certain activities.[16] Rather, by determining that a particular group had characteristics which might lead it to instigate political strikes (the problem that section 504 was intended to reduce), and by naming that group in the statute, Congress had usurped the judicial function.[17] In effect, Congress had found that the Communist Party was likely to cause such strikes and, therefore, Congress ordained a punishment for that group without a judicial trial.[18]

It is to be noted that the majority did not say that any legislative determination of a group's characteristics would violate the attainder clause.[19] The Court has, on past occasions, excluded from the attainder prohibition statutes which could be considered licensing or regulatory in nature. In *Dent v. West Virginia*,[20] the Court approved a statute which prohibited persons from practicing medicine unless licensed. The majority there distinguished the licensing statute from those involved in *Cummings* and *Garland* by stating:

> The constitution of Missouri and the act of Congress . . . in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions . . . *many of which had no bearing upon their fitness to continue in their professions.* The law [here] . . . was intended to secure such skill and learning in the profession of medicine that the community might trust . . . those receiving a license . . . .[21]

This distinction was affirmed in *Hawker v. New York*,[22] where a statute forbidding felons to practice medicine was upheld. On other occasions, the Court, as it did in *Lovett*, has directed its principal attention to an analysis of the

14. 328 U.S. 303 (1946).
15. Id. at 314.
16. 381 U.S. at 449-50.
17. Ibid.
18. Id. at 450.
19. However, it would appear that some forms of legislative determination would definitely violate the clause. The Court stated: "We . . . take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. The point we make is rather that the Constitution forbids Congress from making such determinations." Id. at 450 n.24.
20. 129 U.S. 114 (1889).
21. Id. at 128. (Emphasis added.)
22. 170 U.S. 189, 198-99 (1898).

legislative purpose behind the challenged statute.[23] If the purpose is found to be punitive, then the statute must fall as a bill of attainder.[24]

The Court, on occasion, had even limited *Cummings, Garland,* and *Lovett* to their facts, stating that only legislation involving deprivation of rights for *past* activities will violate the attainder prohibition. Thus, in *American Communications Ass'n v. Douds,*[25] Section 9(h) of the Taft-Hartley Act,[26] which required unions to file an affidavit stating that no member of the executive board was a member of the Communist Party, was found not to be a bill of attainder, even though a punishment of sorts—the denial of recourse to the facilities of the NLRB—was imposed upon any union which failed to file the required affidavit. The Court reasoned that section 9(h) applied only to present and future acts. No one was punished for past membership in the Party.[27]

Finally, there appears in the Supreme Court discussions of the attainder clause a basic recurring test of reasonableness. If the activity or status regulated bore a reasonable relation to a legitimate legislative aim, the Court seemed willing to restrict individual liberty in the interest of community welfare.[28] Absent such a relationship, the restriction became a punishment.[29] In *Douds,* for example, the Court held that Congress could reasonably determine that Communist Party members would be likely to use their positions in unions to instigate political strikes. Therefore, the affidavit requirement, although it infringed on the liberties of certain individuals, was valid.[30]

In the present case, the Court ignored the previous tests of legislative intent[31] and retribution for past acts,[32] but appeared willing to apply the test of reason-

23. See, e.g., Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Flemming v. Nestor, 363 U.S. 603 (1960); De Veau v. Braisted, 363 U.S. 144 (1960).

24. The Court has also established an elaborate set of standards to be used in considering whether a statute was penal in nature, in the absence of conclusive proof of congressional intent to punish. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

25. 339 U.S. 382 (1950).

26. 61 Stat. 146 (1947). This section was the predecessor of § 504 of the Landrum-Griffin Act. Labor-Management Reporting and Disclosure Act of 1959, § 504, 73 Stat. 536, 29 U.S.C. § 504 (1964). Section 9(h) was repealed in 1959.

27. 339 U.S. at 413-14.

28. See, e.g., Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961); Flemming v. Nestor, 363 U.S. 603 (1960); American Communication Ass'n v. Douds, 339 U.S. 382 (1950); Hawker v. New York, 170 U.S. 189 (1898).

29. See, e.g., Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866).

30. 339 U.S. at 390-91. The majority in the present case implicitly rejected the reasoning of Douds by stating that the Constitution forbids Congress from making such a determination about a group. 381 U.S. at 450 n.24.

31. Mr. Justice White, writing the dissent, criticized the majority for its failure to consider this point. 381 U.S. at 462-63. See generally Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330 (1962).

32. 381 U.S. at 458.

ableness.[33] The Court would appear, however, to use this test only after first determining that the legislation dealt with an activity or status, not with mere association.[34]

The Court has revitalized this once dormant section of the Constitution. By extending it to include punishment not only for retributive reasons, but also for preventive reasons, and by broadening it to include, apparently, another guarantee of the freedom of association, the Court has made the attainder prohibition a powerful weapon in the civil liberties arsenal. On the other hand, the decision seems to have made the task of Congress and the executive in the area of subversive activities control legislation considerably more difficult.[35]

We thus have a re-reading and re-emphasis of the *Lovett* language. But, now, neither named groups nor named individuals can be condemned by legislative adjudication. The function of Congress is to specify the *activities* which it deems unlawful. The judicial function is to determine whether the individual is subject to the legislated forfeiture or disability by reason of his engaging in the proscribed activities subsequent to the legislative enactment.

Constitutional Law—Televising Criminal Trial of Widespread Public Interest Inherently Deprives Defendant of Due Process of Law.—Petitioner was convicted of swindling by a Texas district court. Over his objections, portions of his trial and pretrial hearing had been televised to the public. Upon review, the Texas Court of Criminal Appeals upheld the trial court. Certiorari was granted by the United States Supreme Court,[1] and the conviction was subsequently reversed on the premise that the televising of the trial violated the constitutional guaranty of due process, even in the absence of any showing of "isolatable prejudice." *Estes v. Texas*, 381 U.S. 532 (1965).

In 1937, largely as a result of the sensational publicity and disruptive radio broadcasting of the Bruno Hauptmann trial,[2] the American Bar Association drafted Canon 35 of its Canons of Judicial Ethics. This Canon expressed the Association's opinion[3] that the broadcasting of trials should be prohibited, and

33. See id. at 453-56.

34. The majority distinguished conflict-of-interest statutes from bills of attainder by apparently using this new order of priorities. The Court examined Section 32 of the Banking Act of 1933, 48 Stat. 194, as amended, 12 U.S.C. § 78 (1964). This statute prohibited underwriters from serving as officers of certain banks. The Court first noted that this statute did not involve members of political groups or associations. The Court then stated that Congress could reasonably find that an underwriter would be tempted to use his position in ways contrary to the general welfare. Furthermore, in the Banking Act, Congress was legislating with regard to general characteristics, not with regard to a specific group. Id. at 453-56.

35. See id. at 471-72 (dissenting opinion).

1. Estes v. Texas, 379 U.S. 928 (1964).

2. State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (Ct. Err. & App.), cert. denied, 296 U.S. 649 (1935).

3. The Canon has no binding effect on the courts.

a 1952 amendment expressly included television within this prohibition.[4] The Federal Rules of Criminal Procedure similarly forbid the broadcasting of trials,[5] and a salient portion of the pertinent articles also recommends that television should be barred from the courtroom.[6] Nonetheless, the states have not been unanimous in their treatment of this question. Although many have adopted or closely followed Canon 35,[7] several have left the determination of whether to allow television to the discretion of the judge in each case,[8] while others have yet to consider the problem.

The primary question[9] posed in the present case, whether petitioner was deprived of due process when he was required to submit to a televised state trial, was one of first impression in the Supreme Court.[10] Since petitioner alleged no isolable, identifiable prejudice, the Court's decision had to turn on whether or not the televising of any highly publicized trial, *per se*, prevents the trial from being a fair one. The breadth of this question necessitated that, if the Court were to find any unfairness, it must predicate this finding not on the incidentals of this petitioner's trial, but, rather, on prejudicial factors inherent in all televised trials; only then would the holding be commensurate with the extent of petitioner's claim.

In adopting a theory of inherent prejudice,[11] the Court supported its approach by referring to several cases[12] in which "a showing of actual prejudice [was]

4. "Proceedings in court should be conducted with fitting dignity and decorum. . . . [T]elevising of court proceedings detract[s] from the essential dignity of the proceedings, distract[s] participants and witnesses in giving testimony, and create[s] misconceptions with respect thereto in the mind of the public and should not be permitted." ABA, Canons of Judicial Ethics, Canon 35. For a brief history of the Canon, see the appendix to Mr. Justice Harlan's concurring opinion. 381 U.S. at 596.

5. Fed. R. Crim. P. 53.

6. E.g., Doubles, A Camera in the Courtroom, 22 Wash. & Lee L. Rev. 1 (1965); Yesawich, Televising and Broadcasting Trials, 37 Cornell L.Q. 701 (1952); Note, Canon 35: Cameras, Courts and Confusion, 51 Ky. L.J. 737 (1963). Contra, e.g., Blashfield, The Case of the Controversial Canon, 48 A.B.A.J. 429 (1962); Quiat, The Freedom of Pressure and the Explosive Canon 35, 33 Rocky Mt. L. Rev. 11 (1960).

7. Mr. Chief Justice Warren, in his concurring opinion, listed twenty states which he claimed have "clearly adopted Canon 35, or its equivalent." 381 U.S. at 581 n.39. New York was included within this list but should not have been, since in New York the final determination of whether to allow television is left to the discretion of an appellate court judge, whereas Canon 35 contains no discretionary provision.

8. As Mr. Chief Justice Warren correctly pointed out, of the states that had considered the question, Texas, Colorado, and, possibly, Oklahoma left the determination to the discretion of the trial judge. Id. at 580-81 n.38 (concurring opinion). See note 7 supra.

9. A lesser point discussed was the State's contention that, by banning cameras from the trial, the Court would be violating the sixth amendment requirement that a trial must be "public." The Court noted that this was a guaranty for the benefit of the accused, not for the public. Id. at 538-39. See United Press Ass'ns v. Valente, 308 N.Y. 71, 123 N.E.2d 777 (1954).

10. 381 U.S. at 615-16 (dissenting opinion).

11. Id. at 544.

12. Ibid. The cases referred to by the Court are: Turner v. Louisiana, 379 U.S. 466

. . . not a prerequisite to reversal."[13] Of these cases, the one relied on most extensively was *Rideau v. Louisiana*,[14] which involved the filming and subsequent televising of a confession by the defendant. In reversing a state murder conviction, the Supreme Court in *Rideau* stated:

> For anyone who has ever watched television the conclusion cannot be avoided that [the televised confession] . . . to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. . . .
>
> [W]e do not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."[15]

Thus, the *Rideau* Court did not require a showing of actual prejudice, but presumed that prejudice was inherent under the circumstances. Consequently, the defendant in that case won a reversal of his conviction although he was unable to demonstrate an actual relationship between his trial and the televised interview which he claimed resulted in his being adversely prejudiced. On this point the instant Court commented:

> [I]n this case the application of [the *Rideau*] . . . principle is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced.[16]

The "variety of areas" listed by the Court included the following probable psychological effects: (1) the conscious or unconscious effect that the camera's presence is likely to exert on a juror's judgment, especially in view of his realization that he must return to his neighbors who saw the trial themselves;[17] (2) the possibility that a juror's mind, as well as his eyes, may be on the camera rather than on the witness stand;[18] (3) the possibility that the judge's attention and judgment will be unduly influenced;[19] and (4) the possibility that testimony will be hindered because witnesses will be frightened or, at the other extreme, given to over-dramatization.[20]

A basic contention before the Court was that to ban television from the courtroom would be to discriminate against one segment of the press.[21] In

(1965) (use of deputy sheriff, also a witness in the case, as a shepherd for the jury); Rideau v. Louisiana, 373 U.S. 723 (1963) (defendant's pretrial confession televised to the public); In re Murchison, 349 U.S. 133 (1955) (judge who served as one-man grand jury later adjudged two witnesses guilty of contempt); Tumey v. Ohio, 273 U.S. 510 (1927) (judge received a fee only if defendant was convicted).

13. 381 U.S. at 542.
14. 373 U.S. 723 (1963).
15. Id. at 726-27.
16. 381 U.S. at 544.
17. Id. at 545, 546.
18. Id. at 546.
19. Id. at 548-49.
20. Id. at 547.
21. The Court rejected the claim that "the freedoms granted in the First Amendment

response, the Court noted that only the camera, and not the television reporter, is barred by the present decision.[22] In reaffirming general reportorial privileges, the Court cited two cases[23] that directly concerned the oft-raised conflict between the rights of a free press and the necessity of a fair trial.[24] In these cases, the controlling principle was that the activities of the press were not to be interfered with in the absence of a showing that such activities created a clear and present danger to the administration of justice.[25] While these cases involved reversals of state court contempt convictions for out-of-court publications concerning a pending case,[26] the clear and present danger principle appears to have had a parallel in a number of Supreme Court cases in which a reversal of a conviction was sought on the ground that unfavorable press activity deprived the defendant of due process.[27] In this line of cases, the Supreme Court's approach was, as noted by the instant Court, to make "a careful examination of the facts in order to determine whether prejudice resulted."[28] Thus, in each case, the Court demanded, as a requisite for reversal, "clear and convincing"[29] proof that actual prejudice existed.

Rideau constituted the initial departure from this requisite, and the instant case followed by also reversing a conviction without requiring a showing of actual prejudice. Although both cases involved the television medium, there is an obvious distinction between them. In *Rideau*, inherent prejudice was predicated on the probable adverse effects that television would exert on the viewing audience, while in the present case the emphasis was on television's probable

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extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television." Id. at 539. That television is a division of the press and within the scope of the first amendment guaranty of a free press has been implied by prior Supreme Court decisions. E.g., Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 499-502 (1952).

22. 381 U.S. at 540.

23. Id. at 542. The cases cited are: Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

24. See generally Comment, 33 Fordham L. Rev. 61 (1964).

25. Accord, Wood v. Georgia, 370 U.S. 375 (1962); Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (cert. denied) (opinion of Frankfurter, J.); Craig v. Harney, 331 U.S. 367 (1947).

26. That is, the issue in each case was the permissible scope of press comment on a pending trial.

27. In this group of cases, the press medium was not a litigant, as it was, of course, in the contempt group of cases. Nonetheless, the press publications are central in both groups. Whether the Court reverses a defendant's conviction because it feels press publicity rendered the conviction unfair, or directly attacks the publisher by means of a contempt proceeding, it in either case imports a future restriction on the press. For an interesting analysis of the two groups of cases, separately discussed, see Haimbaugh, Free Press Versus Fair Trial, 26 U. Pitt. L. Rev. 491 (1965).

28. 381 U.S. at 543. See, e.g., Irvin v. Dowd, 366 U.S. 717 (1961); Stroble v. California, 343 U.S. 181 (1952); Sheperd v. Florida, 341 U.S. 50 (1951) (per curiam) (concurring opinion).

29. Irvin v. Dowd, 366 U.S. 717, 725 (1961).

impact upon those being televised. Nonetheless, apparently common to both decisions is the Supreme Court's notion that television, by its very nature, has a greater tendency to prejudice the rights of a defendant than does ordinary newspaper coverage.[30] Thus, the present Court stated that "while some of the dangers . . . are present as well in newspaper coverage . . . the . . . extraneous influences intruding upon . . . court procedure in the televised trial are far more serious than in cases involving only newspaper coverage."[31]

While it is certain that recognition of the great impact of television was largely responsible for the Court's acceptance of the inherent prejudice approach, it does not appear that this was the only ground for that assent. Rather, the Court's awareness that the particular manifestations of the camera's impact would often be difficult to detect and prove[32] apparently constituted an important reason for dispensing with the showing of actual prejudice. Thus, the Court stated: "[W]e cannot afford the luxury of saying that, because these factors are difficult of ascertainment . . . they must be ignored."[33]

Based as it is on a theory of inherent prejudice, the instant case, as already indicated, must be understood to stand for the rule that the televising of any widely publicized criminal trial is, per se, contrary to due process of law. As a logical consequence of this, it would appear that any facts peculiar to a particular trial would be pertinent only as an "illustration of the inherent prejudice of televised criminal trials"[34] generally. The Court did not appear to be consistently aware of this, however, as is readily evidenced by the disagreement that arose as to the relevancy of the fact that the pretrial hearing was televised. In his dissent, Mr. Justice Stewart contended that, in view of the limited question[35] before the Court, the hearing should not have been considered in deciding the case.[36] However, the majority specifically rejected Mr. Justice Stewart's con-

30. See Haimbaugh, supra note 27, at 515, where it was stated: "It may be that in recognition of the stunning impact of television, the Court is setting up 'trial by television' as a variant of 'trial by newspaper' with regard to which it will require less demonstration of effect on the community."

31. 381 U.S. at 548.

32. Id. at 545; see text accompanying note 16 supra.

33. 381 U.S. at 550.

34. Id. at 552 (concurring opinion).

35. The question on which the Court granted certiorari was "whether the petitioner . . . was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial." Id. at 534-35. The Court refused to grant certiorari on the issue of whether "pretrial publicity had a prejudicial effect upon the jurors . . . ." Id. at 610 (dissenting opinion).

36. Ibid. Although Mr. Justice Stewart's contention as to the relevancy of the pretrial hearing appears to be correct, his dissent as a whole was not responsive to petitioner's claim. Rather than addressing himself to the issue of whether a televised trial, per se, constituted an inherent denial of due process, Mr. Justice Stewart merely pointed out that no actual prejudice was shown in the present case, and that he was "unable to escalate [his] . . . personal view [that televising a trial is unwise] into a per se constitutional rule." Id. at 601-02. (Italics omitted.) Since petitioner did not allege actual prejudice, any discussion of its absence begs the real issue of whether prejudice might properly be presumed, though not actually shown.

tention,[37] and clearly the hearing and its possible effect on the "community opinion as to guilt or innocence"[38] constituted one determining factor in the decision. This is indeed unfortunate, for it at once detracts from the essence of the Court's reasoning and the forcefulness of its "inherent prejudice" approach. That the hearing was relevant to the question of whether this petitioner was deprived of due process is certain; that it was irrelevant to a consideration of inherent prejudice at any trial seems equally clear. As the rule of the case necessarily applies to any trial, allowing facts peculiar to the present case to constitute even a partial basis for the decision, ironic though this may seem, serves only to display inconsistent reasoning by the Court. The consequence is a departure from the essence of the holding, which is grounded primarily on general psychological probabilities rather than on specific physical circumstances.[39]

Justices White and Brennan concurred with Mr. Justice Stewart's dissent, and themselves joined in another dissenting opinion in which they objected to the fact that the Court's holding "discourages further meaningful study of the use of television at criminal trials" although "the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage." Id. at 616.

37. "It is contended that [the] . . . pretrial hearing cannot be considered in determining the question before us. We cannot agree." Id. at 536.

38. Ibid.

39. Although the Court discussed, at considerable length, the physical presence of the cameras at petitioner's trial, it would seem erroneous to presume that such considerations constituted a determining factor in the decision. Rather, absent any contrary indication by the Court (as, for example, the Court's statement that the pretrial hearing was a determining factor in the decision), it is probable that any physical particulars were offered merely to demonstrate that the trial participants undoubtedly must have been acutely and continually aware of the presence of the cameras.

The absence of an explicit statement to this effect creates unnecessary possibilities for confusion. For example, the Court stated: "It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today." Id. at 551-52. Here, the Court apparently did not mean to suggest that, when electronic developments are such as to render the physical presence of the camera inconspicuous, the present decision should be reconsidered; to attribute such an interpretation to the Court's language would unduly create an inexplicable departure from the psychological considerations that lie at the foundation of the decision. Apparently, it is the probable human psychological adjustment (to the cameras' presence) likely to follow such mechanical innovations that, the Court suggested, might eventually form a basis upon which to overturn its present holding. This was aptly stated by Mr. Justice Harlan in his concurring opinion, when he noted that if and when "television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. . . . the constitutional judgment called for now would of course be subject to re-examination . . . ." Id. at 595-96.

It should be noted that some recent articles have advocated a rewording of Canon 35,

Mr. Justice Harlan concurred in the present decision only with the explicit reservation that it apply solely to "courtroom proceedings of a criminal trial of widespread public interest."[40] Due to a close division of the Court,[41] this reservation, as a practical matter, defines the limits of applicability of the holding. In other words, the present decision does not exclude the camera from all trials, but only from notorious trials. This restriction raises the obvious problem of what criterion will be employed to determine at what point a trial is or is not "of widespread public interest." Also, necessarily implied by the restriction is a specific relation between the effects of the camera's presence and the notoriety of the case. That is, implicit in the very existence of the restriction is the notion that, below some point on a scale of case notoriety, the psychological effects of the camera's presence are so slight as to be justifiably ignored, whereas above this elusive point these effects are so great as to warrant a constitutional prohibition excluding the camera's presence. Since the effects by themselves are admittedly difficult to detect, it would appear unwise to suggest that they vary predictably with the notoriety of a case; it would appear ludicrous to suggest a point at which they change from negligible significance to a position of controlling importance. Indeed, Mr. Justice Harlan himself must have been at least slightly troubled by these considerations, as is evidenced by his remark that "when the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions."[42] These considerations aside, however, it would appear that the restriction will be of little practical significance, for the television industry is unlikely to display interest in a non-notorious trial.[43]

"Due process," a constitutional phrase wanting a referent within the Constitution,[44] is necessarily defined by a method of "inclusion and exclusion."[45] As this method affords great discretion to the courts, they should proceed cautiously in applying it, lest they be accused of abusing their discretion. Indeed, accusations of such abuse are all the more likely when a "due process" decision is based on "inherent" principles rather than on more tangible support,

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in order to have it emphasize psychological factors as the reason for barring the broadcasting of trials, rather than the Canon's present emphasis on physical factors. E.g., Doubles, supra note 6; Note, 51 Ky. L.J. 737 (1963).

40. 381 U.S. at 587 (concurring opinion).

41. The Court's opinion was unreservedly joined in by only four justices, and, since four justices dissented, Mr. Justice Harlan's concurring opinion, as restricted, represents the practical holding of the case.

42. Id. at 590 (concurring opinion).

43. This proposition has been advanced in support of the contention that those seeking to bring television into the courtroom are not seeking freedom of the press, but rather an extension of the television business as a business. E.g., Doubles, supra note 6, at 15.

44. Brockelbank, The Role of Due Process in American Constitutional Law, 39 Cornell L.Q. 561, 568 (1954).

45. Davidson v. New Orleans, 96 U.S. 97, 104 (1877).

for the very absence of tangible support necessitates a greater use of discretion. Consequently, the present Court should have sought corroboration for its discretion; the Court should have offered psychological authority to corroborate its claim of inherent prejudice. Such authority was conspicuously absent from the opinion. That psychology would support this opinion does not vindicate the Court's failure to seek this support. The inherent prejudice approach is clearly in danger of over-application if what is inherently prejudicial is always to be determined by the unsupported notions of a majority of the Supreme Court.

Insurance—Conditional Receipt—Life Insurance Company Held Liable for Death Benefits Where Applicant Reasonably Believed That a Contract for Temporary Insurance Had Been Negotiated.—Plaintiff's husband agreed to purchase from the defendant-insurance company a 12,000 dollar life insurance policy naming the plaintiff as the beneficiary. Immediately after the husband signed the application, he prepaid the first annual premium in return for delivery by the company of a so-called "conditional receipt,"—called a "binder" by the agent—which recited that the insurance involved was effective as of the signing date if the company's home office approved the policy either before or after the death of the *cestui que vie*. Prior to such approval, but after a medical examination had been conducted, the husband died. The defendant, aware of the death, declined to accept the application and disclaimed liability. The company's offer to return the premium was refused by the plaintiff-beneficiary who, thereupon, instituted an action seeking recovery for the face amount of the policy. It was her contention that the applicant reasonably believed that the transaction was one for temporary insurance and that the approval term was a condition subsequent. The defendant did not insist that the receipt must be read literally, but rather argued that no coverage had attached since the applicant was uninsurable by company standards at the time the binder was given.[1] The Supreme Court of New Jersey, in reversing the decision of the appellate division[2] and ordering that the judgment of the law division in favor of the plaintiff be reinstated, held that a life insurance company will be liable for death benefits to a policy applicant, even where the company would have rejected the application if the applicant had lived, if he had paid the first premium on filing the application and reasonably believed that a contract for temporary insurance had been negotiated. *Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965).

1. Allen v. Metropolitan Life Ins. Co., 44 N.J. 294, 304, 208 A.2d 638, 643 (1965). The insurance company, in formulating its theory of defense, was no doubt aware of decisions which followed the landmark case of Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir.), cert. denied, 331 U.S. 849 (1947), including Life Ins. Co. of No. America v. De Chiaro, 68 N.J. Super. 93, 172 A.2d 30 (Ch. 1961), in which the courts refused to read the receipts involved literally. These two cases and the related decisions are discussed at notes 18-36 infra and accompanying text.

2. Allen v. Metropolitan Life Ins. Co., 83 N.J. Super. 223, 199 A.2d 254 (App. Div. 1964).

A signed application for insurance, unless the instrument provides to the contrary, represents an outstanding offer which must be accepted before coverage attaches.[3] Primarily in an attempt to minimize the possibility of applicants withdrawing their offers prior to acceptance, the insurance industry developed the procedure of issuing binding receipts upon payment of the first premium.[4] This practice led to considerable litigation over the nature of the coverage afforded by these instruments. The language employed in particular binding receipts is often unique, and, thus, many cases must be considered as essentially sui generis.[5] The great majority of binders, however, employ sufficiently similar terminology to require classification as either an insurable risk satisfaction binder or as an approval binder.[6] The former states that, if the applicant is subsequently found to be insurable under the company's rules, coverage commences with the payment of the first premium.[7] The approval binder, which is the most common type, provides that, if the application is approved by the home office, the policy becomes effective as of the date that the premium is prepaid and the application is signed.[8]

Where an applicant who holds an insurable risk satisfaction binder dies before he has been issued a policy, the courts normally permit recovery, unless the insurer establishes the applicant's non-insurability as of the date the binder was given.[9] Where an approval binder was in effect, some courts implied an

3. Salter v. Security Benefit Life Ins. Co., 235 F. Supp. 901, 902 (E.D. Mich. 1964); citing Gorham v. Peerless Life Ins. Co., 368 Mich. 335, 341-42, 118 N.W.2d 305, 308-09 (1962); see Annot., 2 A.L.R.2d 943, 946 n.2 (1948). See generally Comment, 44 Yale L.J. 1223-24 (1935).

4. Simpson v. Prudential Ins. Co. of America, 227 Md. 393, 399-400, 177 A.2d 417, 421 (1962); Annot., 2 A.L.R.2d 943, 946 (1948). The industry's interest is predicated on the fact that the cost of the medical examination, in addition to the expense of the agent's activities relating to the policy application, is borne by the insurance company.

5. Allen v. Metropolitan Life Ins. Co., 83 N.J. Super. 223, 233, 199 A.2d 254, 259 (App. Div. 1964), rev'd, 44 N.J. 294, 208 A.2d 638 (1965); Stonsz v. Equitable Life Assur. Soc'y of the United States, 324 Pa. 97, 100, 187 Atl. 403, 405 (1936); Annot., 2 A.L.R.2d 943, 959-960 (1948); cf. Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir.), cert. denied, 331 U.S. 849 (1947), where the court stated: "Situations very close aboard have arisen not infrequently, although the actual words have necessarily varied, so that it is hardly fair to say that any decision is quite on all fours. However, the important question is how far the condition of subsequent approval shall prevail over the promise of immediate coverage . . . ."

6. Vance, Insurance § 40, at 239-40 (3d ed. 1951).

7. An example of this type of receipt follows: "'[C]ontract shall take effect as of the date of this receipt, provided the applicant is on this date in the opinion of the society's authorized officers in New York, an insurable risk under its rules . . . .'" State ex rel. Equitable Life Assur. Soc'y of United States v. Robertson, 191 S.W. 989, 990 (Mo. 1916).

8. This type of receipt often states: "'Said policy of insurance to take effect and be in force from and after the date hereof, provided the said application shall be accepted by the said company . . . .'" Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 81, 82 (8th Cir. 1902).

9. See, e.g., Warren v. New York Life Ins. Co., 128 F.2d 671 (5th Cir. 1942); Wolfskill v. American Union Life Ins. Co., 237 Mo. App. 1142, 172 S.W.2d 471 (1943).

insurability requirement and treated the instrument in the same manner as an insurable risk satisfaction binder.[10] Other courts, even where the applicant was an acceptable risk, denied recovery on the ground that the *condition precedent* to the company's obligation, namely approval, did not occur.[11] This latter result placed the insurance company in the enviable position of receiving the premium payment from the applicant without granting any interim life insurance coverage.

The decisions upon which the instant court relied[12] pursued a different approach in the treatment of approval binders. Common to the holdings in these cases is a finding of ambiguity, which allowed the courts to invoke the established rule that, if a binding receipt is ambiguous, it will be construed against the insurer.[13]

The receipt involved in the present case provided, in pertinent part:

> If the amount received on this date is equal to the full first premium on the policy applied for and (1) the application as originally submitted is approved at the Company's Home Office for the policy applied for, either before or after the death of the Life Proposed, then in such circumstances the policy applied for will be issued effective as of this date . . . .[14]

10. E.g., Indiana Nat'l Life Ins. Co. v. Maines, 191 Ky. 309, 230 S.W. 54 (1921); Northwestern Mut. Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S.W. 1026 (1911); Allen v. Metropolitan Life Ins. Co., 83 N.J. Super. 223, 199 A.2d 254 (App. Div. 1964), rev'd, 44 N.J. 294, 208 A.2d 638 (1965).

11. See, e.g., Bellak v. United Home Life Ins. Co., 211 F.2d 280 (6th Cir. 1954); Cooksey v. Mutual Life Ins. Co., 73 Ark. 117, 83 S.W. 317 (1904); Beaty v. SouthLand Life Ins. Co., 28 S.W.2d 895 (Tex. Civ. App. 1930).

12. 44 N.J. at 306-07, 208 A.2d at 645. The decisions were: Metropolitan Life Ins. Co. v. Grant, 268 F.2d 307 (9th Cir. 1959); Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599 (2d Cir.), cert. denied, 331 U.S. 849 (1947); Wood v. Metropolitan Life Ins. Co., 193 F. Supp. 371 (N.D. Cal. 1961), aff'd per curiam, 302 F.2d 802 (9th Cir. 1962); Ransom v. Penn Mut. Life Ins. Co., 43 Cal. 2d 420, 274 P.2d 633 (1954); Life Ins. Co. of No. America v. De Chiaro, 68 N.J. Super. 93, 172 A.2d 30 (Ch. 1961).

13. See, e.g., Gaunt v. John Hancock Mut. Life Ins. Co., supra note 12, at 601-02; Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio St. 441, 447, 31 N.E.2d 88, 91 (1940); Stonsz v. Equitable Life Assur. Soc'y of the United States, 324 Pa. 97, 108, 187 Atl. 403, 408 (1936).

14. 44 N.J. at 297, 208 A.2d at 639. (Emphasis omitted.) While the quoted portion of the receipt, which in fact was relevant to the present case, is not ambiguous, the receipt in its entirety would certainly be difficult for the average layman to fully comprehend. The remaining part of the receipt provided: " 'or (2) if the Life Proposed dies within 30 days from this date as a result of accidental bodily injury caused by external violence, then, provided that a death benefit does not become payable under a policy issued pursuant to (1) above or under a policy other than the one originally applied for, the Company will pay the amount of life insurance applied for (not including any additional accidental means death benefit) subject to the following conditions: (a) the aggregate amount payable under this provision and similar provisions of all conditional receipts issued by the Company in connection with applications on the Life Proposed shall not exceed $25,000, (b) payment will be made in one sum to whoever would have been entitled to payment if a policy had been issued, (c) no such payment will be made if death occurs as the result of suicide.' " Ibid.

As the present court indicated, the trial court found the receipt to be ambiguous and thus received parol evidence in an attempt to uncover the intention of the parties.[15] The testimony of the beneficiary and her brother, both present when the *cestui que vie* signed the application, established that the agents told the applicant that coverage would commence upon prepayment of the premium. On appeal, the present court admitted that a literal reading of the receipt disclosed "no interim protection at all in the absence of an approval by the company at its home office either before or after death . . ."[16] thereby agreeing, in this regard, with the appellate division.[17] What caused the reversal of the latter court's decision was its failure to go beyond the four corners of the instrument in its search for the ambiguity found by the trial court. The instant court extended the scope of its inquiry and found that, while the terminology involved indicated a lack of coverage, the surrounding circumstances suggested an opposite conclusion.

> Indeed, the very acceptance of the premium in advance tends naturally towards the understanding of immediate coverage though it be temporary and terminable; any collateral advantage other than interim coverage is insubstantial and is not what the lay applicant is generally seeking by his advance payment.[18]

The court, having found ambiguity, legitimately selected the interpretation most favorable to the *cestui que vie*,[19] and held that the receipt provided temporary insurance unrelated to the actual insurability of the applicant.

The court, in support of its reasoning, cited the landmark decision of *Gaunt v. John Hancock Mut. Life Ins. Co.*[20] In *Gaunt*, the applicant, after signing the application and paying the premium on August 3, underwent a series of

15. Id. at 304, 208 A.2d at 643. Having found ambiguity, the trial court's admission of parol evidence as an interpretative aid was entirely proper. See, e.g., Fox Midwest Theatres, Inc. v. Means, 221 F.2d 173, 181 (8th Cir. 1955); Rotberg v. Dodwell & Co., 152 F.2d 100, 101 (2d Cir. 1945); Wadsworth v. New York Life Ins. Co., 349 Mich. 240, 258, 84 N.W.2d 513, 519 (1957).

16. 44 N.J. at 304, 208 A.2d at 643.

17. Allen v. Metropolitan Life Ins. Co., 83 N.J. Super. 223, 235, 199 A.2d 254, 261 (App. Div. 1964).

18. 44 N.J. at 302, 208 A.2d at 642. In Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 601 (2d Cir. 1947), the court listed the advantages which the defendant insurance company claimed accrued to the holder of a binding receipt, even though coverage was not afforded until the company accepted the application. These were: "(1) The policy would sooner become incontestable. (2) It would earlier reach maturity, with a corresponding acceleration of dividends and cash surrender. (3) It would cover the period after 'approval' and before 'issue.' (4) If the insured became uninsurable between 'completion' and 'approval' it would still cover the risk. (5) If the insured's birthday was between 'completion' and 'approval,' the premium would be computed at a lower rate. (6) When the policy covers disability, the coverage dates from 'completion.'" Not withstanding the above "advantages," "early coverage was probably the only advantage of early payment which the applicant even thought of." Simpson v. Prudential Ins. Co. of America, 227 Md. 393, 403, 177 A.2d 417, 423 (1962).

19. See cases cited note 13 supra and accompanying text.

20. 160 F.2d 599 (2d Cir.), cert. denied, 331 U.S. 849 (1947).

medical examinations from that date until August 25. On August 26, two matters of importance occurred: First, the examination results indicated insurability, and, second, the company learned of the applicant's death on the previous day at the hands of an assailant. The application was rejected and the company disclaimed liability.[21] The important section of the receipt read:

> [I]f the Company is satisfied that on the date of the completion of Part B of this application I was insurable . . . and if this application . . . is, prior to my death, approved by the Company at its Home Office, the insurance applied for shall be in force as of the date of completion of said Part B . . . .[22]

The receipt used the words "approved" and "insurable." Since a literal reading of the receipt suggested that the applicant could be insurable and still not approved, the court in *Gaunt* apparently considered the instrument as falling within the classification of approval binders.[23] An applicant, confronted by a receipt couched in terms similar to those in *Gaunt*, might well fail to understand the exact nature of the sequence of events which must occur before coverage attaches. However, an applicant's lack of awareness that the company must act in some manner, either by a finding of insurability and/or approval of the policy, before insurance comes into effect is not strictly attributable to the language used in the receipt. The confusion would appear to be traceable to the fact that, even if the receipt is carefully read, the surrounding circumstances make it difficult for the applicant to appreciate the fact that, in the event of his death prior to approval, the "binder" for which he has given advance payment is wholly without effect.

Judge Learned Hand, writing for the majority in *Gaunt*, noted that, "if the clause as a whole be read literally, the insured was not covered if he died after 'completion of Part B,' but before 'approval' . . . ."[24] Rather than predicating the decision for the *cestui que vie* on the basic inequity which pervades the factual pattern in *Gaunt*, the court chose to state that the receipt in question was meaningful only to an "underwriter,"[25] and not "to persons utterly unacquainted with the niceties of life insurance . . . ."[26] Considering the insurance company's conduct, and the particular wording of the conditional receipt, it is difficult to take serious issue with the result of the case. Nonetheless, as so prophetically noted by Judge Clark in his concurring opinion, the court, by basing its holding "not squarely upon inequity, but upon interpretation [produced] . . . continuing uncertainty in the law of insurance contracts."[27]

The broad interpretation approach used by Judge Hand disregarded the question of Gaunt's insurability. This has permitted the California Supreme

21. 160 F.2d at 600.

22. Id. at 599-600 n.1.

23. Id. at 602. Commentators generally agree with Judge Hand's classification of the receipt. See, e.g., 2 A.L.R.2d 943, 967 (1948); Comment, 63 Yale L.J. 523, 531 (1954).

24. 160 F.2d at 601.

25. Ibid.

26. Ibid.

27. Id. at 603 (concurring opinion).

Court, on three occasions, to virtually adopt the *Gaunt* holding in essentially different factual contexts. The first of the three cases, all of which were explicitly relied upon by the instant court,[28] is *Ransom v. Penn Mut. Life Ins. Co.*[29] There, the applicant, in return for payment of the first premium, was issued a receipt which stated that the insurance became operative when the application was signed, provided that the prospective *cestui que vie* was found by the company to be acceptable.[30] Certain information contained in the application caused the company to request that the applicant submit to a second physical examination. Before such an examination could be conducted, the applicant died. The company, aware of the death, rejected the application, thereby disclaiming liability.[31] The conduct of the insurance company was certainly less unconscionable than that involved in the *Gaunt* case. Nonetheless, the *Ransom* court, in sustaining a verdict for the plaintiff-beneficiary, relied on *Gaunt*,[32] and held that in the event of ambiguity the ordinary person's under-

28. 44 N.J. at 307-11, 208 A.2d at 645-47.

29. 43 Cal. 2d 420, 274 P.2d 633 (1954).

30. Id. at 423, 274 P.2d at 634.

31. Id. at 422, 274 P.2d at 634.

32. Id. at 424, 274 P.2d at 635. In addition to Gaunt, the Ransom court cited several decisions as authority for the proposition that "a number of courts have held that the provision to the effect that the insurance shall be in force from the date of the application if the premium is paid gives rise to a contract of insurance immediately upon receipt of the application and payment of the premium, and that the proviso that the company shall be satisfied that the insured was acceptable at the date of the application creates only a right to terminate the contract if the company becomes dissatisfied with the risk before a policy is issued." Ibid.

Presupposing an initial finding of ambiguity, as was present both in Gaunt and Ransom, this proposition is consistent with Judge Hand's opinion. However, the other cases cited by the court do not appear to support the statement. In Occidental Life Ins. Co. v. Lame Elk White Horse, 74 A.2d 435 (D.C. Munic. Ct. 1950) and Western & So. Life Ins. Co. v. Vale, 213 Ind. 601, 12 N.E.2d 350 (1938), the courts indicated that an applicant, who was in sound health on the date that the application was signed, was insured as of that date under an insurable risk satisfaction binder. Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio St. 441, 31 N.E.2d 88 (1940); Stonsz v. Equitable Life Assur. Soc'y of the United States, 324 Pa. 97, 187 Atl. 403 (1936); Albers v. Security Mut. Life Ins. Co., 41 S.D. 270, 170 N.W. 159 (1918), all turn on their particular facts. In Duncan, the court specifically directed its attention, and predicated its holding, on the rather unique language "'but if death occurs after the date of the application . . . and prior to the date of issue of such policy, payment . . . shall be made . . . .'" 137 Ohio St. at 445-46, 31 N.E.2d at 89. (Emphasis omitted.) In Albers, the dispute concerned a provision that the promissory note which the applicant executed in return for the binder was due within thirty days, regardless of whether the company subsequently elected to issue the policy. The court, after seeking consideration to support the applicant's promise, held that "it is only upon the theory of present insurance that the validity of the above clauses can be sustained. Therefore . . . the parties must have contemplated present insurance." 41 S.D. at 274-75, 170 N.W. at 160. The cestui que vie in Stonsz had already been issued a policy before he submitted his claim for disability benefits based upon injuries sustained in the interim period between the application date and the date on which the policy was issued. The court, in holding

standing was controlling, and that "such a person upon reading the application would believe that he would secure the benefit of immediate coverage by paying the premium in advance of delivery of the policy."[33] Consequently, the defendant's argument that *Ransom* was unacceptable under company rules for the particular plan applied for was irrelevant.

The other two decisions cited by the instant court as embodying the California rule, *Metropolitan Life Ins. Co. v. Grant*[34] and *Wood v. Metropolitan Life Ins. Co.*,[35] are essentially restatements of the law as expounded in *Ransom*.[36]

for the claimant, stated: "The decisions most strongly relied upon by appellant differ from the present case in that in each of those cases the applicant for insurance died before the policy was delivered to him. Under those circumstances, of course, no contract was ever formed . . . . Here appellee had accepted the policy as issued and the contract by its terms then related back to . . . [the date on which the application was signed]." 324 Pa. at 109, 187 Atl. at 408. In Reck v. Prudential Ins. Co. of America, 116 N.J.L. 444, 184 Atl. 777 (Ct. Err. of App. 1936), as discussed in note 36 infra, the court apparently considered the approval term as a condition precedent to the company's obligation to provide coverage.

33. 43 Cal. 2d at 425, 274 P.2d at 636. The same thought was stated in Gaunt v. John Hancock Mut. Life Ins. Co., 160 F.2d 599, 602 (2d Cir.), cert. denied, 331 U.S. 849 (1947) as follows: "[T]he ordinary applicant who has paid his first premium . . . would not by the remotest chance understand the clause as leaving him uncovered until the insurer at its leisure approved the risk; he would assume that he was getting immediate coverage for his money." Cf. Albers v. Security Mut. Life Ins. Co., supra note 32, where it was said that the practice of issuing ambiguous receipts to obtain a full first year premium, without a corresponding intention to grant coverage, is not "dealing honestly with the insured." 41 S.D. at 275, 170 N.W. at 160.

34. 268 F.2d 307 (9th Cir. 1959). It should be mentioned that the Grant court seems to have grafted an unsound addition onto the Ransom holding, by suggesting that differences in the terminology employed in binding receipts are without significance. Id. at 310. Implicit in the wording of the Ransom decision is the principle that an unequivocally drafted instrument will be construed in accordance with its terms. See Ransom v. Penn Mut. Life Ins. Co., 43 Cal. 2d 420, 425, 274 P.2d 633, 636 (1954). The language of a receipt cannot be legitimately dismissed as of no moment. See Gaunt v. John Hancock Mut. Life Ins. Co., supra note 33 at 601; Duncan v. John Hancock Mut. Life Ins. Co., 137 Ohio St. 441, 446, 31 N.E.2d 88, 91 (1940). The present court, in carefully considering the terms of the receipt, impliedly rejected this portion of the Grant holding.

35. 193 F. Supp. 371 (N.D. Cal. 1961), aff'd per curiam, 302 F.2d 802 (9th Cir. 1962).

36. After adopting the California rule, the present court stated that its approach is not inconsistent with prior New Jersey decisions, citing Reck v. Prudential Ins. Co. of America, 116 N.J.L. 444, 184 Atl. 777 (Ct. Err. & App. 1936), and Life Ins. Co. of No. America v. De Chiaro, 68 N.J. Super. 93, 172 A.2d 30 (Ch. 1961). 44 N.J. at 310-11, 208 A.2d at 647. De Chiaro is a trial court decision, the holding of which is identical with that in the instant case. The decision in Reck is not infrequently cited for the proposition that an insurer's rejection of an application is a condition subsequent and, consequently, the issuance of a binding receipt provides interim insurance. E.g., Ransom v. Penn. Mut. Life Ins. Co., 43 Cal. 2d 420, 424, 274 P.2d 633, 635 (1954); Life Ins. Co. of No. America v. De Chiaro, supra at 105-06, 172 A.2d at 38-39. However, in Reck, in addition to the usual terms embodied in an approval binder, the instrument further recited that the insurer would return the premium if it declined to grant the policy. The court predicated its holding on the failure of the company to return the premium within a reasonable time. By finding that this omission constituted "approval," the application of which was retroactive to the date that the "binder" was given, the court indicated that the term was deemed to be a condition

While the instant holding, as well as those of *Gaunt* and *Ransom*, ostensibly rests on principles of contract interpretation, the opinions all emphasize the unfairness inherent in many of these binding receipt transactions. The insurance industry uses the device to discourage an applicant's revocation of his offer prior to acceptance, but no comparable benefit accrues to the applicant. A literal reading of the binders usually indicates that coverage must await approval, and thus, if death intervenes, the company can decline to accept the offer. However, an applicant, who cannot realistically be expected to appreciate the minor subsidiary benefits of the arrangement, such as an earlier application of the incontestability clause,[37] believes that when he pays for insurance he receives insurance. The present court has joined the California courts in attempting to make his expectations a reality. By holding that a binder which is not completely clear as to its terms is ambiguous, and that in such a situation the actual insurability of the applicant is irrelevant, these courts, it might be argued, have changed the target of injustice from the prospective *cestui que vie* to the insurer. In effect, the courts have fashioned what was meant to be, at least from the company's standpoint, an agreement for contingent coverage into an unconditional policy of insurance which remains operative until the company acts on the policy application. However, insurance agreements are drawn by persons skilled in insurance law and acting within the employ, and for the interests, of the insurer. Even if a reasonable man on close scrutiny can understand the nature of the coverage afforded by a typical binder, there can be no doubt that the instruments do not suffer from excessive clarity. To avoid the impact of these decisions in California and New Jersey, and to prevent their possible emergence in other jurisdictions, the insurance industry need only draft its receipts in more simple terms, specifically detailing the benefits involved, thus making it unmistakably clear that if death occurs prior to approval the named beneficiary will not collect. The receipt should then be separately signed by the applicant. Whether agents could effectively market such conditional binders is another question, and one which apparently has deterred the industry from writing receipts in language which prospective customers can readily understand.[38]

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precedent to the insurer's liability. 116 N.J.L. at 446, 184 Atl. at 778. Therefore, the holding in Reck is contrary to that of the instant case, where the approval term was found to be a condition subsequent.

37. See note 18 supra.

38. Since the industry has indicated no intention to effectuate the needed changes, it is the province of the respective state legislatures to fill the void. It is undisputed that by legislative enactment the state can prescribe the use of standard clauses when such are necessary to protect the public from deception. 1 Couch, Insurance 2d, § 3:7 (1959).

California, rather than enacting a standard form, has promulgated a statute which imposes liability on the insurer if the applicant dies before the policy is issued but after the company has approved the application, regardless of the terms of the receipt. Cal. Ins. Code § 10115. It is obviously difficult, if not impossible, to draft a statute to cover the variety of interpretative problems which can be expected to result from the practice of each insurance company issuing its own uniquely worded binding receipt. To promote an element of uniformity in this area of uncertainty, the use of a standard clause would appear to be desirable in the event that legislative action proves to be necessary.

Jurisdiction—New York "Long-Arm" Statute—Tortious Injury Within New York Held Not Tantamount to Tortious Act—Transacting Business Provision Held To Cover Out-of-State Manufacturer Soliciting Mail Orders in New York.—In one omnibus opinion, the court of appeals decided three separate cases on appeal[1] dealing with the first two subdivisions of Section 302 of the New York Civil Practice Law and Rules (hereinafter referred to as CPLR).[2] In the first case, *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*,[3] the respondent, a New York corporation, purchased machinery from the appellant, an Illinois corporation. The respondent commenced an action for breach of warranty and served the appellant in Illinois pursuant to section 302(a)(1).[4] The appellant moved to dismiss the action for want of jurisdiction,[5] and the supreme court denied the motion. The appellate division[6] and the court of appeals affirmed, holding that appellant's alleged activities within New York were sufficient to be considered transacting business, and that appellant's contacts with New York were sufficient so that due process was not violated by the exercise of jurisdiction.[7]

In the second case, *Feathers v. McLucas*,[8] the appellant was a Kansas corporation which had manufactured a tank for liquified propane gas. The appellant sold the tank to a Missouri corporation, presumably knowing that it would be placed on a wheelbase and sold to a Pennsylvania corporation which operated in New York and several other states. The respondents brought suit against all three corporations for personal injuries sustained when the tank exploded on a

1. For a comprehensive discussion of all three cases, and collateral matters, see McLaughlin, Supplementary Practice Commentary, McKinney's N.Y. Civ. Prac. § 302.

2. "Personal jurisdiction by acts of non-domiciliaries

"(a) Acts which are the basis of jurisdiction. A court may exercise personal jurisdiction over any non-domiciliary . . . as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

"1. transacts any business within the state; or

"2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act . . . ." N.Y. Civ. Prac. § 302(a)(1)-(2).

3. 21 App. Div. 2d 474, 251 N.Y.S.2d 740 (1st Dep't 1964).

4. See note 2 supra.

5. N.Y. Civ. Prac. § 3211(a)(8).

6. 21 App. Div. 2d 474, 251 N.Y.S.2d 740 (1st Dep't 1964).

7. Appellants in all three cases claimed that the CPLR could not be applied to them, since in each case the cause of action accrued before the effective date. Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., 15 N.Y.2d 443, 452, 209 N.E.2d 68, 72, 261 N.Y.S.2d 8, 15 (1965). The court had previously stated that this section will be applied retroactively. Simonson v. International Bank, 14 N.Y.2d 281, 289, 200 N.E.2d 427, 431, 251 N.Y.S.2d 433, 439-40 (1964) (dictum). This is the presumed intent of the legislature, and is constitutional since "section 302 is clearly of a procedural and remedial nature . . . ." Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc., supra at 453, 209 N.E.2d at 73, 261 N.Y.S.2d at 15. In some special circumstances, however, § 302 might not be applied retroactively. See 1 Weinstein, Korn & Miller, New York Civil Practice ¶ 302.04 (1964) [hereinafter cited as Weinstein, Korn & Miller].

8. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964).

highway near their home in New York. The appellant Kansas corporation was served in its home state pursuant to section 302(a)(2).[9] The supreme court granted appellant's motion to dismiss for lack of jurisdiction, and the appellate division reversed.[10] The court of appeals reinstated the order of the supreme court and held that the requirement of a tortious act committed within New York was not satisfied simply because the injury occurred in New York.

In the third case, *Singer v. Walker*,[11] jurisdiction was again sought under section 302(a)(2) after the respondent's aunt had purchased a geological hammer in New York, given it to the respondent in New York, and the respondent was injured on a field trip in Connecticut when a chip from the hammer flew into his eye. The appellant, an Illinois corporation, had manufactured the hammer in Illinois and sold it to a New York retailer. This breach of warranty action was begun by service upon the appellant in Illinois, but the supreme court refused to allow the exercise of jurisdiction. The appellate division reversed,[12] and the court of appeals found, on the basis of its opinion in *Feathers*, that no tortious act had been committed in New York; the order of the appellate division was, nevertheless, affirmed on the ground that the sale by appellant to the New York retailer constituted a transaction of business in New York. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8 (1965).

Prior to the enactment of the CPLR, residents of New York often had to pursue out-of-state defendants in their home states.[13] There were a number of statutes that allowed New York to exercise jurisdiction in specific cases.[14] Under the *Tauza* rule,[15] a foreign corporation could not be subjected to personal jurisdiction unless it was "doing business" in New York.[16] Subdivision (a)(1) of section 302 broadened this rule to include corporations[17] transacting any business

9. See note 2 supra.

10. 21 App. Div. 2d 558, 251 N.Y.S.2d 548 (3d Dep't 1964).

11. 21 App. Div. 2d 285, 250 N.Y.S.2d 216 (1st Dep't 1964).

12. Ibid.

13. See Comment, 33 Fordham L. Rev. 671 (1965).

14. E.g., N.Y. Nav. Law § 74 (dealing with torts arising from use of motor boats by nonresidents); N.Y. Vehicle and Traffic Law §§ 253-54 (dealing with torts arising from use of motor vehicles by nonresidents). For other examples see Comment, 33 Fordham L. Rev. 671, 681-82 (1965).

15. Tauza v. Susquehanna Coal Co., 220 N.Y. 259, 115 N.E. 915 (1917).

16. "Doing business" requires activities so systematic and regular that the corporation can be considered "present" in the forum state. Ibid. Later cases, however, have construed this requirement very broadly. See, e.g., Bryant v. Finnish Nat'l Airline, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965). However, § 302(a)(1) still represents an extension of New York's jurisdictional power.

17. The use of the word "his" in § 302 does not limit the statute's application to natural persons. The Advisory Committee's notes seem to be written on the assumption that corporations are included. Second Preliminary Report of the New York Advisory Committee on Practice and Procedure, N.Y. Leg. Doc. No. 13, p. 38 (1958) [hereinafter cited as Second Preliminary Report]. See also N.Y. Gen. Constr. Law § 22; 1 Weinstein, Korn & Miller ¶ 302.05.

in New York, so long as the cause of action arose out of the transactions.[18] The section was derived from an Illinois statute[19] and has been enacted in a number of other states.[20]

In *Longines-Wittnauer Watch Co.*, appellant's activities in New York were substantial. Preliminary contract negotiations were carried on by mail, and officers of the appellant came to New York to further discuss terms. A contract was drawn up by appellant in Chicago,[21] and further negotiations led to a modification of the contract. The machines were shipped under the contract to New York, f.o.b. Chicago, and were installed in New York under the direction of two of appellant's engineers over a period of several months. When considering whether these contacts amounted to a transaction of any business in New York, the instant court pointed out that the drafters of the CPLR chose the broad Illinois language rather than other, more restrictive, tests which had been proposed.[22] The court did not consider whether any of appellant's activities in themselves would have been sufficient to meet the test, for, taken together, they were more than sufficient.[23] This is true regardless of whether the contract was actually made in New York, since, as the court held, "the statutory test may be satisfied by a showing of other purposeful acts performed by the appellant in this State in relation to the contract, albeit preliminary or subsequent

18. If the defendant is a foreign corporation, and the plaintiff is also a nonresident or a foreign corporation, then the requirements of N.Y. Bus. Corp. Law § 1314 must also be met. This section is applicable regardless of whether the defendant is served within or without New York. It enumerates five broad categories of subject matter within which the action must come if plaintiff is to be allowed access to the New York courts.

19. Ill. Rev. Stat. ch. 110, § 17 (1963).

20. 1 Weinstein, Korn & Miller ¶ 302.01 at 3-28.

21. The contract itself stated that it was made in New York and was governed by the laws of New York. The court did not, however, attach much importance to this fact, merely mentioning it in a footnote. 15 N.Y.2d at 457 n.6, 209 N.E.2d at 76 n.6, 261 N.Y.S.2d at 19 n.6. This indicates that the court desired more definite contacts than the mere making of the contract in New York. See McLaughlin, supra note 1, at 48-50.

22. 15 N.Y.2d at 456-57, 209 N.E.2d at 75, 261 N.Y.S.2d at 18. For examples of narrower wording, see Md. Ann. Code art. 23, § 92(d) (1957) (contracts "made within this State"); Minn. Stat. § 303.13(1)(3) (Supp. 1964); N.C. Gen. Stat. § 55-145(a)(1) (1965) (contracts "made in this State or to be performed in this State"); Tex. Rev. Civ. Stat. art. 2031(b), § 4 (1964); Vt. Stat. Ann. tit. 12, § 855 (1959) (contracts "to be performed in whole or in part by either party in [this State]").

23. 15 N.Y.2d at 458, 209 N.E.2d at 76, 261 N.Y.S.2d at 19. The court has been criticized for not giving greater analysis to the appellant's individual acts in New York so as to make a determination of what types of conduct are more significant. See McLaughlin, supra note 1, at 47. Cases applying the Illinois act have found significantly fewer activities to be sufficient. See, e.g., National Gas Appliance Corp. v. AB Electrolux, 270 F.2d 472 (7th Cir. 1959), cert. denied, 361 U.S. 959 (1960), where jurisdiction was upheld when negotiations and conferences between the parties had led up to the making of a contract, and "a substantial part [of the conferences] . . . occurred in the state of Illinois." 270 F.2d at 475.

to its execution."[24] The exercise of jurisdiction was also held to be constitutional.[25]

The court's opinion in *Longines-Wittnauer Watch Co.* did not indicate to what extent appellant could have had less activity within New York and still come within section 302. Whatever the limits might be, they are approached in the *Singer* case. After pointing out that appellant did not commit a tortious act within New York,[26] the court considered whether jurisdiction was obtainable under subdivision (a)(1) of section 302.[27] The New York retailer had ordered the hammer, which eventually caused respondent's injury, from a catalogue which had been sent to him in New York by the appellant. The hammer was then shipped to New York, f.o.b. Illinois. The court noted: "[T]he appellant has shipped substantial quantities of its products into this State as the result of solicitation here through a local manufacturer's representative and through catalogues and advertisements and . . . the injury-causing hammer, purchased

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24. 15 N.Y.2d at 457, 209 N.E.2d at 75, 261 N.Y.S.2d at 18. (Footnote omitted.)

25. Id. at 458, 209 N.E.2d at 76, 261 N.Y.S.2d at 19. Unfortunately, it is not clear to what extent the fourteenth amendment limits the states' power to exercise jurisdiction over nonresidents. Pennoyer v. Neff, 95 U.S. 714 (1877), the first Supreme Court case dealing with this problem, required that nonresidents must be served within the forum state. This rigid rule was reconsidered in International Shoe Co. v. Washington, 326 U.S. 310 (1945), and the Court substituted the flexible requirement that allowed a state to exercise personal jurisdiction over nonresidents not present in the forum state when they "have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316. This test was held to have been met in McGee v. International Life Ins. Co., 355 U.S. 220 (1957), on the basis of contacts that were indeed minimal. However, the Supreme Court has recently indicated that the limits of state power are not as broad as they might appear. In Hanson v. Denckla, 357 U.S. 235 (1958), the Court stated that, before jurisdiction may be exercised, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Id. at 253. It is a decision that has been criticized, and perhaps should be limited to its particular facts, but "in any event, the close division of the Court in Hanson v. Denckla reveals dramatically that uncertainties still abound in the area of judicial jurisdiction . . . ." Reese & Galston, Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction, 44 Iowa L. Rev. 249, 258 (1959). For a more extensive discussion of the constitutional issues, see Currie, The Growth of the Long Arm: Eight Years of Extended Jurisdiction in Illinois, 1963 U. Ill. L.F. 533; Reese & Galston, supra at 249-65; Note, 73 Harv. L. Rev. 909 (1960).

26. 15 N.Y.2d at 465-66, 209 N.E.2d at 81, 261 N.Y.S.2d at 25. The court's reasoning in reaching this conclusion is discussed at text accompanying notes 55 & 56 infra.

27. Id. at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 25. The court had no difficulty in concluding that causes of action other than in contract may be based upon subdivision (a)(1). Id. at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 25-26. The Advisory Committee's report stated that an action in slander, for example, can be brought under subdivision (a)(1) if the test is met. Second Preliminary Report 39. There is nothing to indicate that subdivision (a)(1) is limited to any specific actions; presumably, therefore, any action can be based upon it.

from a New York dealer, was one of such products."[28] The court held that the sum of all these activities constitutionally permitted the exercise of jurisdiction.[29] However, section 302 is intended to be a single-act statute,[30] and defendant's activities in excess of the one transaction out of which the cause of action arose do not necessarily enter into a consideration of the statutory test. The court was not clear on this point. Did the court recite the additional contacts with New York as an indication that more than a single act is to be required under section 302? Or did the court merely strengthen its holding without limiting the scope of the statute?

If the latter, it would appear that very little indeed is required to meet the statute. It is not clear, however, if the minima under the statute would meet the minimum due process requirements. In *Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc.*,[31] plaintiff North Carolina corporation placed an order with defendant New York corporation. The contract was made in New York, and defendant's only connection with North Carolina was his act of shipping the goods there. The court of appeals affirmed the district court's holding that the exercise of jurisdiction[32] in this case would be unconstitutional. Assuming only the relevant facts of *Singer, i.e.*, sending the catalogue, receiving the order, and shipping the goods, the only feature distinguishing the case from *Erlanger Mills, Inc.* would be the mailing of the catalogue. It is likely that this added element sufficiently augments the contacts with the forum state so as to make the exercise of jurisdiction constitutional. The *Erlanger* decision has been criticized,[33] and perhaps would not be extended to cover a situation where the holding would be weaker still; furthermore, the sending of the catalogue is purposeful solicitation in the forum state, and, therefore, the defendant's contacts are more established.

In the *Feathers* case, the court of appeals had a more difficult task of interpretation. The court apparently felt that the phrase "commits a tortious act

28. 15 N.Y.2d at 466, 209 N.E.2d at 81, 261 N.Y.S.2d at 26.

29. Id. at 467, 209 N.E.2d at 81-82, 261 N.Y.S.2d at 26.

30. See 1 Weinstein, Korn & Miller ¶ 302.06; McLaughlin, supra note 1, at 47-48.

31. 239 F.2d 502 (4th Cir. 1956).

32. The statute conferring jurisdiction was N.C. Gen. Stat. § 55-145(a) (1965), which provides, in part: "Every foreign corporation shall be subject to suit in this State . . . whether or not such foreign corporation is transacting or has transacted business in this State . . . on any cause of action arising as follows:

". . . .

"(3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers . . . ."

33. 1 Weinstein, Korn & Miller ¶ 302.07, where it is pointed out that similar provisions in other states have been held constitutional; Currie, supra note 25, at 558, where the author states that he is "convinced" that the North Carolina law is constitutional even when applied to weaker cases; Reese & Galston, supra note 25, at 262, where it is stated that the authors feel that "common sense" dictates the opposite result.

within this State"[34] admits of two meanings: Either the statute is intended to give to New York jurisdiction whenever it is constitutionally possible, or the use of the word "within" requires the actual tortious conduct to occur within New York State boundaries.[35] The court chose the latter, and, therefore, in *Feathers*, where the alleged negligent manufacture took place in Kansas and only the injury occurred in New York, it was held that the statute did not confer jurisdiction.[36]

The court had a number of persuasive reasons for its holding. First, the language used "is too plain and precise to permit it to be read . . . as if it were synonymous with 'commits a tortious act *without* the state which causes injury within the state.' "[37] The court also felt that the legislative history of the act supported its position. The Advisory Committee's comments on the proposal state that their intention is to confer "personal jurisdiction over a non-domiciliary whose act in the state gives rise to a cause of action,"[38] and "to subject non-residents to personal jurisdiction when they commit acts within the state."[39] Finally, the court argued that, if the legislature had intended to give the courts jurisdiction over cases like *Feathers*, they could easily have done so by using broader language.[40]

The aids to interpretation, however, are not quite so one-sided. As has been indicated, the section in point was taken from an Illinois act. The Advisory Committee appended the Illinois act and its commentary to their own report.[41]

34. As Judge Van Voorhees stated in his concurring opinion, the use of this phrase does not require an actual finding that a tort has been committed. That is, the question of liability does not have to be determined in order to decide the question of jurisdiction. 15 N.Y.2d at 469-70, 209 N.E.2d at 83, 261 N.Y.S.2d at 29. This has a number of advantages. If the plaintiff loses his case, it does not mean that the exercise of jurisdiction was improper and that the judgment was, therefore, void. If the rule were otherwise, plaintiff could avoid the doctrine of res judicata and commence a new suit elsewhere. 1 Weinstein, Korn & Miller ¶ 302.09 at 3-41. Also, "the defendant, merely by defaulting, can not force a full trial of the issue of liability in his own state, under the guise of a trial of the jurisdictional facts." Id. at 3-41. (Footnote omitted.)

35. 15 N.Y.2d at 459-60, 209 N.E.2d at 77, 261 N.Y.S.2d at 20-21.

36. Id. at 464, 209 N.E.2d at 80, 261 N.Y.S.2d at 24.

37. Id. at 460, 209 N.E.2d at 77, 261 N.Y.S.2d at 21. (Emphasis in original.)

38. Second Preliminary Report 37.

39. Id. at 39. Another feature of the legislative history also supports the court's view. The Advisory Committee's statement of objectives says that the act is intended "to take full advantage of the state's constitutional power . . . ." Id. at 37. The word "full" was later omitted. Id. at 39; see 1 Weinstein, Korn & Miller ¶ 302.01 at 3-29.

40. 15 N.Y.2d at 461-62, 209 N.E.2d at 78, 261 N.Y.S.2d at 21-22. The court cited a number of examples of proposals that would cover the facts in Feathers; e.g., the proposal of the Law Revision Commission (N.Y. Leg. Doc. No. 65(c), p. 3 (1961)). 15 N.Y.2d 461-62 nn. 9, 11-13, 209 N.E.2d at 78 nn. 9, 11-13, 261 N.Y.S.2d at 22 nn. 9, 11-13. The fact that New York did not enact the Law Revision Commission's proposal is not significant since it was proposed as an amendment to the Civil Practice Act, and there was opposition to enacting such amendments while the work on the CPLR was in progress. See 1 Weinstein, Korn & Miller ¶ 302.10 at 3-44.

41. Second Preliminary Report 469. One of the two authors of the "Historical

This commentary begins by declaring that "Illinois has expanded the in personam jurisdiction of its courts *to the limits* permitted under the Due Process clause of the Fourteenth Amendment."[42] Further, in *Gray v. American Radiator & Standard Sanitary Corp.*,[43] the Supreme Court of Illinois gave its statute a very broad interpretation. The facts in that case were, at best, as strong as the facts in *Feathers*,[44] and the court upheld jurisdiction. The court, in *Gray*, argued that injury is an integral part of a tort, and, therefore, of a tortious act. When that part of a tort occurs in Illinois, the courts have jurisdiction. It is easy, of course, to distinguish between out-of-state *acts* and within-state *consequences*; and perhaps realizing the weakness of its argument, the court stated that it relied less upon the nuances of the words used than upon the broad intent of the statute.[45] However, regardless of the reasoning behind the *Gray* decision, the case expressed the law of Illinois, and "when our Legislature adopted the language of the Illinois Legislature it presumably adopted with it the construction given the statutory language by the Illinois courts in *Gray* . . . ."[46]

Chief Judge Desmond, in his concurring opinion in the instant case,[47] proffered arguments similar to those in *Gray*. He asserted that "tortious act" has the same meaning as other statutory language, such as "tortious conduct"[48] or "part of a tort."[49] "All reflect the idea that various separate acts or omissions may together make out a tort."[50] If any of the parts of a tort occur in New York, he maintained, the statute is satisfied.[51] He concluded by stating that the narrow interpretation in the majority opinion frustrated the intent of the

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and Practice Notes" to the Illinois statute, Albert Jenner, was vice chairman of the Illinois committee which drafted the act. In 1 Weinstein, Korn & Miller ¶ 302.01, at 3-28, it is stated that these notes "are significant because the New York Advisory Committee relied upon them . . . ."

42. Jenner & Tone, Historical and Practice Notes, in Second Preliminary Report 471. (Emphasis added.)

43. 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

44. The Gray case may have been weaker in that it was not established that defendant could foresee the eventual use of his product in the forum state.

45. Id. at 434, 176 N.E.2d at 762.

46. 15 N.Y.2d at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30 (concurring opinion). (Citation omitted.) Cf. Shapiro v. United States, 335 U.S. 1 (1948).

47. Chief Judge Desmond dissented in the result in Feathers, and concurred in the other two cases.

48. See, e.g., Conn. Gen. Stat. Rev. § 33-411(c) (1958); N.C. Gen. Stat. § 55-145(a)(4) (1965).

49. 15 N.Y.2d at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 30 (concurring opinion). See, e.g., Minn. Stat. § 303.13(1)(3) (1964); Tex. Rev. Civ. Stat. art. 2031(b), § 4 (1964); Vt. Stat. Ann. tit. 12, § 855 (1959); W. Va. Code Ann. § 3083 (1961).

50. 15 N.Y.2d at 470, 209 N.E.2d at 84, 261 N.Y.S.2d at 30 (concurring opinion).

51. Id. at 471, 209 N.E.2d at 84, 261 N.Y.S.2d at 30 (concurring opinion). The appellate division expressed a similar idea in their argument that the legislature did not intend a distinction between forum consequences and out-of-forum acts. Feathers v. McLucas, 21 App. Div. 2d 558, 559, 251 N.Y.S.2d 548, 550-51 (3d Dep't. 1964).

statute and prevented New York citizens from taking advantage of its goals.[52]

One last argument for a broad interpretation of the tortious act provision arises from the exclusion of defamation cases. It has been stated that the reason for the exception is "the likelihood that offending material would enter the State despite its remote origin [and, therefore, it is] implied that other New York injuries resulting from acts outside the State were intended to be included."[53]

The arguments for and against the exercise of jurisdiction in *Singer v. Walker* under the tortious act provision are basically the same as those in *Feathers*. The appellate division, in upholding jurisdiction in *Singer*, could not, of course, argue, as did the appellate division in *Feathers*, that the statute is satisfied when the injury occurs in New York, since here the injury occurred in Connecticut. The appellate division in *Singer* did argue that the "defendant was responsible for a continuous tortious act, namely, the circulation in New York of a defective hammer [and therefore] . . . a tortious act occurred in this State from which the cause of action arose . . . and the occurrence of the harm in Connecticut was incidental for jurisdictional purposes."[54] The court of appeals disagreed, basing its holding on its reasoning in *Feathers*, and commented that the marketing and sale of the hammer in New York did not change the fact that the alleged tortious act took place where the hammer was manufactured.[55]

The arguments and authorities, thus considered, indicate that there is ample support for either a broad or restrictive interpretation of section 302. The instant court chose restriction, whereas one commentator has stated that "with the enactment of this statute, New York has decided to exploit the fullest jurisdictional potential permissible under federal constitutional restraints."[56] However, the choice is not necessarily restricted to the two extremes. It has also been noted that the CPLR permits "New York courts . . . to exercise some restraint in avoiding excessive burdens on citizens of our federated nation whose center of activity is outside the state."[57] In other words, the courts may exercise discretion in determining which standards shall apply to the question of jurisdiction. This the instant court failed to do. The problem was stated as a choice between two positions, and the middle ground was ignored.

What factors might the court have considered in reaching a more moderate decision? One possibility would be to require that the defendant should have foreseen the eventual sale or use of his product in New York. This would allow the courts to exercise jurisdiction over manufacturers with national markets, but not over those whose product, absent any intent on the manufacturer's part, finds itself in New York.[58]

52. 15 N.Y.2d at 472, 209 N.E.2d at 85, 261 N.Y.S.2d at 31 (concurring opinion).

53. Currie, supra note 25, at 547 n. 96. Cf. 1 Weinstein, Korn & Miller ¶ 302.11 at 3-46-47.

54. 21 App. Div. 2d at 286, 250 N.Y.S.2d at 218.

55. 15 N.Y.2d at 465-66, 209 N.E.2d at 81, 261 N.Y.S.2d at 25-26.

56. McLaughlin, Practice Commentary, McKinney's N.Y. Civ. Prac. § 302, at 428.

57. 1 Weinstein, Korn & Miller ¶ 302.01, at 3-30.

58. See id. ¶ 302.10, at 3-45. This standard would be beneficial in that it would avoid having the facts of a case like Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956), meet the statutory standard. See text accompanying notes 28-33 supra.

It has also been recommended that, rather than treat all forum consequences of out-of-forum acts on the same basis, the courts might interpret the CPLR so as to incorporate the distinction made in the Uniform Interstate and International Procedure Act.[59] In the situation under consideration, the court would have jurisdiction over the defendant only "if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state."[60]

The court in the instant case did not discuss any of these criteria. Perhaps it could be said that the basic purpose of section 302(a)(2) has been frustrated.[61] As one commentator, discussing the Illinois statute, remarked:

> It would be odd if in a federal system Illinois could not enter a judgment against a man who stands in Indiana firing his gun at people in Illinois; the man who ships in unwholesome food is in no different situation. Nor does his position differ materially from that of [one] . . . whose servant is sent into the State and causes injury there. In either case, having set into motion a force which he intends to send into the State, he may fairly be required to defend an action there.[62]

While the merits of these situations require that they should be treated similarly, the present court's decision leads to the anomalous result of applying section 302(a)(2) only to the employer whose servant causes injury in the state.

Real Property—Statute Requiring Recording of Declaration of Intention To Preserve Forfeiture Restrictions on Land Held To Be Unconstitutional When Retroactively Applied.—The trustees of Walton Academy acquired land by an 1854 deed, subject to a provision that the premises would be used only for an academy and that, if the premises ceased to be so used, the property would revert to the grantor or his heirs. The land was used for educational purposes by Walton Academy and the successor Board of Education until April 1, 1962. The defendants, sole heirs at law and devisees of the now deceased grantor, filed their declaration of intention to preserve the restriction on April 13, 1962, more than six months after the expiration of the period allowed by Section 345 of the New York Real Property Law for the preservation of such restrictions created before September 1, 1931.[1] The court of appeals,

59. 1 Weinstein, Korn & Miller ¶ 302.10 at 3-45-46.

60. Uniform Interstate and International Procedure Act § 1.03(4).

61. Not all the fault can be placed on the court. As has already been made clear, the wording of the statute and its history are vague. This is partially a result of the problems faced in drafting. Reese & Galston, supra note 25, at 265-67, which demonstrates the difficulty in drafting a broad statute that is not unconstitutional, or a constitutional statute that is not too narrow. The Illinois provision is cited as an easily misinterpreted act.

Further, the frustration is not significant to the extent that cases missed under § 302(a)(2) are picked up under § 301(a)(1).

62. Currie, supra note 25, at 549.

1. N.Y. Real Prop. Law § 345(4).

with two justices dissenting, reversed the appellate division[2] and held section 345 unconstitutional when retroactively applied. *Board of Educ. v. Miles*, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

Section 345 of the Real Property Law requires the periodic filing of declarations of intention to preserve forfeiture restrictions.[3] This section, in its retrospective application and in conjunction with Sections 1951 through 1954 of the New York Real Property Actions and Proceedings Law, was intended to remove useless or anachronistic restrictions on land.[4] The court of appeals in the instant decision held that such a nullification of a property right was "constitutionally invalid."[5]

The appellate division, which had found section 345 enforceable, rested its decision largely upon the theory that possibilities of reverter and powers of termination are not constitutionally protected property rights.[6] The court of appeals, however, implicitly assumed that these restrictions are constitutionally protected.[7]

Whether such interests are classified as property in a given state seems to depend largely upon whether that state considers them to be fully transferable and devisable.[8] In New York, they had been termed "bare possibilities,"[9] but these interests are now alienable and devisable in New York "in the same manner

2. Board of Educ. v. Miles, 18 App. Div. 2d 87, 238 N.Y.S.2d 766 (3d Dep't 1963).

3. N.Y. Real Prop. Law § 345(1).

4. See N.Y. Law Revision Comm'n Report, N.Y. Leg. Doc. No. 65(B), pp. 15-16 (1958); Legislative Memorandum of the Governor, in N.Y. Sess. Laws 1843 (McKinney 1958).

5. 15 N.Y.2d at 372, 207 N.E.2d at 186, 259 N.Y.S.2d at 136.

6. "The right to regulate and to extinguish under certain reasonable conditions depends in the end upon the nature of the thing regulated and extinguished. We have concluded that the recording requirement of section 345 is a valid exercise of legislative power . . . ." 18 App. Div. 2d at 90, 238 N.Y.S.2d at 769. The two dissenters in the court of appeals based their decision upon the appellate division's opinion. See 15 N.Y.2d at 374, 207 N.E.2d at 187, 259 N.Y.S.2d at 137 (dissenting opinion).

The Law Revision Commission stated that a good argument can be made that such interests "possess the normal characteristics of property to so small a degree" that they are not constitutionally protected. N.Y. Law Revision Comm'n Report, supra note 4, at 76.

7. The court referred to a contingent possibility of reverter as a "property right." 15 N.Y.2d at 370, 207 N.E.2d at 185, 259 N.Y.S.2d at 134.

8. In Illinois, such interests have been held not transferable. Pure Oil Co. v. Miller-McFarland Drilling Co., 376 Ill. 486, 34 N.E.2d 854 (1941). Moreover, possibilities of reverter are inalienable by statute. Ill. Rev. Stat. ch. 30, §§ 37(b), 37(g) (1963). The Illinois courts have also upheld a statute retroactively destroying these interests. Trustees of Schools v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955). The rationale is that such interests are considered unprotected. See Wood v. Chase, 327 Ill. 91, 158 N.E. 470 (1927); Jennings v. Capen, 321 Ill. 291, 151 N.E. 900 (1926). Other states which hold such interests to be transferable and protected, e.g., Richardson v. Holman, 160 Fla. 65, 33 So. 2d 641 (1948), have struck down statutes similar to the one upheld in Illinois. See Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954).

9. Upington v. Corrigan, 151 N.Y. 143, 151, 45 N.E. 359, 361 (1896); Nicoll v. New-York & E.R.R., 12 N.Y. 121, 132 (1854).

as estates in possession."[10] In addition, it has been held that the owner of a power of termination can obtain a decree requiring the recipient of a condemnation award to use it for the purpose required by the restriction.[11] These factors, although not conclusive,[12] certainly support the court's assumption that such interests are protected.

Legislation which impairs property rights is not unconstitutional merely because it operates retroactively.[13] Such legislation can be attacked as an impairment of the obligation of contracts,[14] or as a violation of the due process clause of the fourteenth amendment.[15] However, in recent years, the prohibition under the contract clause has merged into that of the due process clause, giving rise to the single test of the reasonableness of the legislation.[16] This test was outlined by Mr. Justice Roberts in *Nebbia v. New York*,[17] where he wrote that state regulation of private property rights will be "unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt . . . ."[18] This holding of a bare majority of the Supreme Court in 1934 began the Court's departure from the sphere of economic policy making. In 1937, with the Court's decision in *West Coast Hotel Co. v. Parrish*,[19] the change in the Court's direction became pronounced. Whereas before *West Coast Hotel* the Court had been substituting its judgment for that of the legislature, in decisions following that case the Court upheld any legislation which might have "some rational basis within the knowledge and experience of the legislators."[20] Although the Court has never specifically eliminated the limitation

10. N.Y. Real Prop. Law § 59. For the legislative intent see N.Y. Law Revision Comm'n Report, N.Y. Leg. Doc. No. 65(N) (1962).

11. In the Matter of County of Westchester, 243 App. Div. 706, 277 N.Y. Supp. 26 (2d Dep't) (per curiam), aff'd mem., 268 N.Y. 560, 198 N.E. 404 (1935) (condition subsequent that the land be used for hospital purposes).

12. Board of Educ. v. Miles, 18 App. Div. 2d 87, 89, 238 N.Y.S.2d 766, 768 (3d Dep't 1963), rev'd on other grounds, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965).

13. See Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 694 (1960); e.g., Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 315 (1945); League v. Texas, 184 U.S. 156, 161 (1902).

14. "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. E.g., Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954). See Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

15. E.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). See Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1944).

16. See Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32 (1940); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Hale, The Supreme Court and the Contract Clause: III, 57 Harv. L. Rev. 852, 890-91 (1944); Hochman, supra note 13, at 695.

17. 291 U.S. 502 (1934).

18. Id. at 539.

19. 300 U.S. 379 (1937).

20. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938). (Footnote omitted.) In Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955), the Court stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory or business and industrial conditions, because they may

upon state legislation afforded by substantive due process in the fourteenth amendment, as a practical matter, economic legislation is no longer invalidated upon the ground that it is unreasonable.[21] The instant court found the retroactive portion of section 345 to be "constitutionally invalid"[22] but, unfortunately, did not state the grounds upon which it based its conclusion.

Section 345 was enacted for the purpose of removing anachronistic restriction on land and, thus, of promoting the free alienability of land.[23] At the same time, the legislature enacted Sections 1951 through 1954 of the Real Property Actions and Proceedings Law, which provide that an action may be brought to declare useless restrictions unenforceable.[24] The legislative rationale was that there was no value in the recording requirement unless the restrictions were also subjected to a test of their continued usefulness;[25] otherwise, "it would be possible for the owner of a completely useless forfeiture restriction to perpetuate it indefinitely merely by fulfilling the recording requirement."[26] Acting alone, a recording requirement arbitrarily eliminates useful, as well as useless, restrictions, and this harmful effect is not substantially mitigated by the addition of sections 1951 through 1954. If all useless restrictions were destroyed by section 1954, there would be nothing but useful restrictions left for section 345 to eliminate. Thus, section 345 does not eliminate the useless restrictions at which it was aimed, except insofar as a holder of a restriction will be less likely to bother to record it if it has become useless. The knowledge that his restriction is subject to being destroyed in a proceeding under sections 1951 through 1954, despite the fact that it has been recorded, will also discourage the holder of such a restriction from recording it. Nevertheless, section 345 is rather ineffective.

Section 345 also fails to accomplish another important goal of this type of legislation in that it does not shorten the title examiner's search. The statute does not operate against claims or restrictions other than possibilities of reverter and powers of termination.[27] Further, restrictions held by the United States or the State of New York are exempted,[28] as are restrictions limited by an event other than a restraint on the use of land.[29] Since these claims and restrictions

be unwise, improvident, or out of harmony with a particular school of thought." Id. at 488. Accord, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952); Daniel v. Family Security Life Ins. Co., 336 U.S. 220, 224-25 (1949).

21. Stern, The Problems of Yesteryear—Commerce and Due Process, 4 Vand. L. Rev. 446, 449-50 (1951). The author, writing in 1951, stated that "no statutes have been held violative of the due process clause on the grounds of substantive irrationality since 1937." Id. at 449.

22. 15 N.Y.2d at 372, 207 N.E.2d at 186, 259 N.Y.S.2d at 136.

23. N.Y. Law Revision Comm'n Report, supra note 4, at 15-16.

24. N.Y. Real Prop. Actions Law §§ 1951-54.

25. N.Y. Law Revision Comm'n Report, supra note 4, at 99-100.

26. Id. at 99-100. (Footnote omitted.)

27. N.Y. Real Prop. Law § 345(1).

28. N.Y. Real Prop. Law § 345(8)(a).

29. N.Y. Real Prop. Law § 345(1).

are not covered by the statute, the title examiner cannot rely upon the fact that no restrictions were recorded within the statutory period.

Section 345 would appear, nonetheless, to be well within the standard of reasonableness discussed above.[30] It certainly is not "demonstrably irrelevant to the policy the legislature is free to adopt,"[31] and the court's determination is questionable if it is taken as a federal rather than a state constitutional decision. Unfortunately, however, there is no clue as to whether the court meant the federal constitution or the New York State Constitution.

The language of Article 1, Section 6 of the New York State Constitution is essentially identical with the due process clause of the Fourteenth Amendment to the United States Constitution.[32] And, although the court of appeals is technically free to interpret the New York provision as it sees fit, it has generally held that "due process" is the same under both.[33] The court of appeals has found persuasive precedents in the interpretations which the Supreme Court has placed upon "due process."[34] For instance, the court of appeals, when it held that a New York law providing minimum wages for women violated the due process clauses of *both* the federal and state constitutions,[35] was following

30. See text accompanying notes 20 & 21 supra.

31. Nebbia v. New York, 291 U.S. 502, 539 (1934).

32. Compare N.Y. Const. art. I, § 6, with U.S. Const. amend. XIV.

33. E.g., Metropolitan Life Ins. Co. v. New York State Labor Relations Bd., 280 N.Y. 194, 207, 20 N.E.2d 390, 395 (1939); Central Sav. Bank v. City of New York, 280 N.Y. 9, 19 N.E.2d 659, cert. denied, 306 U.S. 661 (1939). In the latter case, the court of appeals, on rehearing, stated:

"Decisions of the Supreme Court defining the scope of the due process clause in the Federal Constitution are binding upon every court and in every State. We did not . . . intend to indicate that though we cannot give validity to a statute which is repugnant to the due process clause in the Federal Constitution we would give wider scope to the same clause in the State Constitution and hold invalid statutes not repugnant to the Federal Constitution as defined by the Supreme Court. No such question was presented or considered in this court. We gave to the decisions of the Supreme Court of the United States, defining the due process clause, the great weight which, in our opinion, they should have by reason of the prestige of the court and the strength of the reasoning even if technically we might have power to reject them in defining the same clause in the State Constitution. Our conclusion that the statute is repugnant to article 1, section 6, of the State Constitution followed necessarily from our determination that . . . the statute is repugnant to the Federal Constitution." 280 N.Y. at 10, 19 N.E.2d at 659. (Emphasis omitted.) (Citation omitted.)

34. Central Sav. Bank v. City of New York, supra note 33.

35. People ex rel. Tipaldo v. Morehead, 270 N.Y. 233, 200 N.E. 799, aff'd, 298 U.S. 587 (1936). The Supreme Court agreed with the court of appeals that Adkins v. Children's Hosp., 261 U.S. 525 (1923), controlled and that the statute as construed by the court of appeals violated the due process clause of the fourteenth amendment. 298 U.S. at 609. A few years later, the court of appeals held that, due to the Supreme Court's decision in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which expressly overruled Adkins, the constitutionality of a similar statute could not be questioned. Mary Lincoln Candies, Inc. v. Department of Labor, 289 N.Y. 262, 266, 45 N.E.2d 434, 435-36 (1942). However, the legislature, in drafting this statute, had been very careful to avoid the problems which the courts found in the Morehead cases. Id. at 267, 45 N.E.2d at 436.

the decision of the Supreme Court in *Adkins v. Children's Hosp.*[36] Yet, the recent liberality with which the Supreme Court has treated state economic legislation[37] has not always been manifested in New York State court decisions. The present decision is an illustration of this occasionally recurring divergence between state and federal standards of due process.[38]

In the instant case, the court dealt with section 345 by analogy to other types of legislation in this field. It noted that recording acts which destroy pre-existing property rights have been held constitutional[39] because they accomplish the legitimate public purpose of preventing fraud against subsequent purchasers.[40] But the present statute was held not to be a recording act because it was not intended to protect subsequent purchasers. It was designed, rather, to extinguish restrictions between the parties themselves and "without the justification of protecting the intervening rights of third persons."[41] The court also examined the possibility of upholding section 345 by analogy to marketable title statutes, but distinguished *Wichelman v. Messner*[42] which upheld the Minnesota Marketable Title Act.[43]

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36. 261 U.S. 525 (1923).

37. See text accompanying notes 17-21 supra.

38. See, e.g., Defiance Milk Prods. Co. v. Du Mond, 309 N.Y. 537, 132 N.E.2d 829 (1956). In this case, two justices dissented upon the ground that the majority was substituting its judgment for that of the legislature. Id. at 550, 132 N.E.2d at 836. Compare the language in People v. Faxlanger, 1 App. Div. 2d 92, 95, 147 N.Y.S.2d 595, 598 (4th Dep't 1955), aff'd, 1 N.Y.2d 393, 153 N.Y.S.2d 193, 135 N.E.2d 705 (1956), where the court upheld a statute because the legislative "acted on reasonable grounds and in a reasonable manner, and, furthermore, that the statute has a real and substantial relation to the public welfare," with that of the Supreme Court in United States v. Carolene Prods. Co., 304 U.S. 144 (1938). See text accompanying note 20 supra.

39. 15 N.Y.2d at 369-70, 207 N.E.2d at 184, 259 N.Y.S.2d at 134. E.g., Jackson ex dem. Hart v. Lamphire, 28 U.S. (3 Pet.) 280, 290 (1830).

40. 15 N.Y.2d at 369, 207 N.E.2d at 184, 259 N.Y.S.2d at 134.

41. Id. at 371, 207 N.E.2d at 185, 259 N.Y.S.2d at 135.

42. 250 Minn. 88, 83 N.W.2d 800 (1957).

43. Minn. Stat. § 541.023 (1961). In Wichelman v. Messner, supra note 42, this Minnesota statute operated to destroy a restriction very similar to the one in the instant case. The restriction was set forth in the recorded deed to the land, and the land was subject to it during the entire statutory period—forty years. The Minnesota court interpreted the language of the statute as applying to title in "fee simple" whether defeasible or not. Id. at 115, 83 N.W.2d at 820. That court held that it was immaterial that the fee title was based upon the same instrument which contained the restriction. Id. at 99-107, 83 N.W.2d at 812-16.

The instant court, while apparently disagreeing with the reasoning of the Minnesota court, stated that, even if a statute like the Minnesota one were to be held valid here, the cases are still distinguishable. 15 N.Y.2d at 373, 207 N.E.2d at 186, 259 N.Y.S.2d at 137. In Wichelman, the right had accrued before it became necessary to file a declaration. In the instant case, it would have been necessary for "unascertained persons, perhaps not even in being, to have recorded a declaration of intention to preserve a reverter which would not take effect in enjoyment until an indefinite future time." Ibid. On this ground, the court

The court found a distinct similarity in purpose and effect between section 345 and a Florida statute[44] which, in *Biltmore Village, Inc. v. Royal*,[45] was recently held unconstitutional as retroactively applied. The Florida statute automatically terminated all reverter provisions after they had existed for twenty-one years[46] and operated, so the *Biltmore* court found, to impair the obligation of contracts. But this statute is not analogous to the New York statute. The latter allows the restriction to be preserved indefinitely by periodic recording, whether the restriction has matured or not. The Florida enactment's only saving clause permitted suit to enforce the right if brought within one year,[47] but such suit could not, of course, be brought if the right had not yet accrued.

The court of appeals' decision, if taken as an interpretation of the due process clause of the New York State Constitution, is, of course, not subject to review by the United States Supreme Court. It represents the last word on the constitutionality of the retroactive portion of the statute. It stands, therefore, as a threat to the constitutionality of Section 1954 of the New York Real Property Actions and Proceedings Law.

Taxation—Seller's Proceeds of "Bootstrap Sale" to Tax-Exempt Organization Held Taxable at Capital Gains Rates.—In 1953, the California Institute for Cancer Research, a tax-exempt charity, purchased Clay Brown and Company, a close corporation. The purchase price, payable within ten years solely from the future earnings of the business, commonly called a "bootstrap sale,"[1] was 1,300,000 dollars. The Institute, in turn, leased the fixed assets for five years[2] to Fortuna, Incorporated, which was organized by Brown's attorneys for the purpose of operating the business.[3] The rent was

of appeals found a greater resemblance between the instant case and Biltmore Village, Inc. v. Royal, 71 So. 2d 727 (Fla. 1954), discussed at text accompanying notes 45 & 46 infra.

44. Fla. Stat. § 689.18 (1961).

45. 71 So. 2d 727 (Fla. 1954).

46. Fla. Stat. § 689.18 (1961).

47. Fla. Stat. § 689.18(6) (1961).

1. The Institute did not assume any personal liability for the payment of the purchase price. This element of the agreement rendered the transaction a bootstrap sale. See generally Alexander, The Use of Foundations in Business, N.Y.U. 15th Inst. on Fed. Tax 591 (1957); Clark, Changing Considerations in Sales Leaseback Transactions, 42 Taxes 725 (1964); Lanning, Tax Erosion and the Bootstrap Sale of a Business, 108 U. Pa. L. Rev. 623 (1960); Moore & Dohan, Sales, Churches and Monkeyshines, 11 Tax L. Rev. 87 (1956); Note, 40 Notre Dame Law. 304 (1965).

2. The five-year duration of the lease was essential for the ultimate success of the transaction. See notes 33-38 infra and accompanying text.

3. Brown entered into a management contract with Fortuna, receiving the right to name his successor. This agreement was terminated on October 31, 1954. In the same year, the Internal Revenue Service issued a ruling which stated that a similar transaction is not entitled to capital gains treatment. Rev. Rul. 54-420, 1954-2 Cum. Bull. 128.

eighty per cent of Fortuna's annual profits, ninety per cent of which the Institute agreed to pay to Brown until the 1,300,000 dollar non-interest bearing note was satisfied. Upon the failure of the business in 1957, its assets were sold. The total receipts from this sale and previous installments were 916,131.85 dollars, upon which Brown paid a tax at the capital gains rates. The Commissioner of Internal Revenue asserted that the receipts were taxable at the higher ordinary income tax rates and commenced an action to recover the balance.[4] A divided Tax Court held for the taxpayer.[5] The Court of Appeals for the Ninth Circuit affirmed.[6] The Supreme Court granted certiorari[7] and upheld the court of appeals, finding that the transaction was a bona fide sale of a capital asset and that the proceeds thereof were capital gains, not ordinary income. *Commissioner v. Brown*, 380 U.S. 563 (1965).

The issue before the Supreme Court was whether the proceeds of the transaction between Brown and the Institute were the result of a "sale or exchange" of a capital asset within the meaning of Section 1222(3) of the Internal Revenue Code,[8] and thus taxable at the capital gains rate of twenty-five per cent.[9] If the transaction were not a sale, the proceeds would have been taxable as ordinary business income.[10]

Mr. Justice White, writing for the majority, began with the proposition that the term "sale," as used by the Code without a limiting definition, should be given its current and ordinary meaning.[11] The Court found that the ordinary definition of the word "sale" is " 'a transfer of property for a fixed price . . . or its equivalent.' "[12] In deciding that the transaction in question fell within this definition, the Court looked to the transaction's economic reality rather than to its resulting tax consequences.[13] This was evidenced by the emphasis on the fact that the Tax Court had found that the parties negotiated at arm's

4. The difference between an ordinary income tax and a capital gains tax was $60,000. Commissioner v. Brown, 380 U.S. 563, 583-84 (1965) (dissenting opinion).

5. Clay B. Brown, 37 T.C. 461 (1961).

6. Commissioner v. Brown, 325 F.2d 313 (9th Cir. 1963), 49 Minn. L. Rev. 578 (1965).

7. Commissioner v. Brown, 377 U.S. 962 (1964).

8. "The term 'long-term capital gain' means gain from the sale or exchange of a capital asset held for more than 6 months . . . ." Int. Rev. Code of 1954, § 1222(3).

9. Int. Rev. Code of 1954, § 1201(b)(2).

10. Int. Rev. Code of 1954, § 1.

11. 380 U.S. at 571. See Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 249 (1941).

12. 380 U.S. at 571, quoting from Iowa v. McFarland, 110 U.S. 471, 478 (1883). Cf. Uniform Commercial Code § 2-106(1); Uniform Sales Act § 1(2) (1906).

13. Whether the particular transaction had a "substantial economic reality" is one of the latest tests applied in analyzing borderline cases in other areas of tax law. See Nassau Lens Co. v. Commissioner, 308 F.2d 39 (2d Cir. 1962). The fact that the seller was motivated by a desire to minimize his taxes will not prevent his actions from being held valid. See, e.g., Commissioner v. Tower, 327 U.S. 280 (1946); Gregory v. Helvering, 293 U.S. 465 (1935); Superior Oil Co. v. Mississippi ex rel. Knox, 280 U.S. 390 (1930); United States v. Isham, 84 U.S. (17 Wall.) 496 (1873).

length[14] for a price that was "reasonable . . . in the light of the earnings history of the corporation and the adjusted net worth of its assets . . . ."[15]

In the Supreme Court, the Commissioner admitted that the transaction had "real substance,"[16] but, nevertheless, maintained that it was not a "sale" because the economic risks of the business were not transferred to the buyer. He reasoned that, since the Institute's liability for the purchase price was totally contingent upon the future success of a business over which it had no control and for which it assumed no responsibility, a sale did not occur.[17] In rejecting this argument, the Court stated:

> To require a sale for tax purposes to be to a financially responsible buyer who undertakes to pay the purchase price from sources other than the earnings of the assets sold or to make a substantial down payment seems to us at odds with commercial practice and common understanding of what constitutes a sale.[18]

Mr. Justice White seemed to indicate that the bootstrap sale is common "commercial practice," whether or not the buyer is exempt from taxation.[19] This is questionable since, if the buyer is not tax exempt, the annual installments will necessarily be decreased by the amount of corporate income tax that the purchaser is required to pay.[20] Consequently, the period in which the purchase price is to be satisfied will have to be extended. The longer the payment period, the greater the risk is that the seller may not be paid in full, since his receipts are dependent upon the business remaining profitable. Therefore, only one in an extremely weak bargaining position, such as the seller of an unstable business, would be willing to accept the risks involved in such a transaction. However, if the buyer is tax exempt, a bootstrap sale is quite advantageous since the purchaser, by virtue of its charitable exemption, can pay *nearly all* of its annual profits to the seller and thereby satisfy the purchase price at a more accelerated rate than an ordinary buyer could afford.

Where the transaction is not economically reasonable unless the buyer is tax exempt, the charity trades on its exemption. This, it is submitted, is the

14. 380 U.S. at 569, relying upon the language of the Tax Court in Clay B. Brown, 37 T.C. 461, 486 (1961).

15. 380 U.S. at 569. The Court also noted that in accordance with common business practice the seller had reserved a security interest in the property. Id. at 577.

16. Id. at 569. In the Tax Court, the Commissioner unsuccessfully argued that the transaction was a sham because the parties never intended to effect a sale. The Commissioner asserted that, after paying a capital gains tax for several years, Brown intended to trigger a default by the buyer by causing the operating company to withhold rent due the Institute. 37 T.C. at 483-84. This argument was abandoned on appeal.

17. 380 U.S. at 573. This was the rationale of Mr. Justice Goldberg's dissenting opinion, in which he was joined by Mr. Chief Justice Warren and Mr. Justice Black. Id. at 581-91.

18. Id. at 575.

19. The commentators on this subject, however, generally confine their discussion to situations where the buyer is a charity, thus indicating that a tax-exempt party is essential to the ultimate success of a bootstrap sale. See authorities cited note 1 supra.

20. Id. at 582-83 (dissenting opinion).

crux of the problem.[21] A charitable organization's tax exemption is granted to enable the recipient to perform a public service,[22] and is designed to foster charitable, educational, medical, and religious work.[23] The exemption is not designed to permit a seller to reduce his taxes at the ultimate expense of the general public. When such an organization participates in a bootstrap sale, the charity permits outsiders neither related to, nor interested in, its charitable purposes to profit by the charity's manipulation of a privilege which Congress granted to the charity alone.

At present, such transactions are susceptible to attack under section 504 of the Code, which provides, *inter alia,* that an exempt organization is to be denied its tax exemption for the taxable year if the amounts accumulated out of income received during that period are "unreasonable in amount or duration"[24] or are "used to a substantial degree for purposes or functions other than those constituting the basis for exemption . . . ."[25]

Thus, in an action against the charity, the Commissioner might assert that prolonged payments from income (such as those made by the Institute in the present case) to a seller violate section 504 and that, consequently, the foundation's tax exemption should be revoked.[26] Dictum in a recent Tax Court case, *A. Shiffman,*[27] appears to support this view. In *Shiffman,* a tax-exempt foundation purchased real property and satisfied the purchase price out of rentals earned from the property.[28] The payments were extended over a five-year period.[29] Although the Tax Court held that such payments were not grounds for a revocation of the foundation's tax exemption,[30] the court added:

> Assuming, but not deciding, that the use of income, year by year, to pay an indebtedness incurred in acquiring income-producing property constitutes an accumulation of income, such accumulation *here* involved is neither unreasonable nor for substantially nonexempt purposes.[31]

The question can thus be posed whether payments extended over a ten-year period would be considered an unreasonable accumulation.

21. On October 11, 1965, the Internal Revenue Service announced that in the future it would challenge bootstrap sales to a charity only when the price paid for the business was unreasonable. 34 U.S.L. Week 1049 (U.S. Oct. 12, 1965). Apparently, the Commissioner is attempting to limit the present case strictly to its facts, and is ignoring the charity's abuse of its tax-exempt status.

22. Duffy v. Birmingham, 190 F.2d 738, 740 (8th Cir. 1951); Harvey v. Campbell, 107 F. Supp. 757 (N.D. Tex. 1952). See generally Keir, What Is a Charity: Statutory Definition; Exclusively; Lobbying, N.Y.U. 14th Inst. on Fed. Tax 19 (1956).

23. Int. Rev. Code of 1954, § 501(c), (d).

24. Int. Rev. Code of 1954, § 504(a)(1).

25. Int. Rev. Code of 1954, § 504(a)(2).

26. See Comment, 61 Mich. L. Rev. 1140, 1156 (1963).

27. 32 T.C. 1073 (1959).

28. Id. at 1078.

29. Id. at 1078-79.

30. Id. at 1081.

31. Id. at 1081 (dictum). (Emphasis added.)

If Congress determines that bootstrap sales to tax-exempt organizations have become an abuse and deems it necessary to rectify the present situation through new legislation,[32] it is submitted that a modification of section 514(b) would provide the appropriate remedy. Section 511 of the Code imposes a tax on the unrelated business income[33] of tax-exempt organizations.[34] Section 512(b)(3), however, excludes "all rents from real property (including personal property leased with the real property) . . . ."[35] from the definition of unrelated business income. Notwithstanding this latter provision, section 514 imposes a tax on income derived from a "business lease" which is defined as "a lease for a term of *more than* 5 years . . . ."[36] Therefore, the income derived from a lease for a period of *five years or less*, as in the present case, is exempt from taxation although it clearly falls within the Code's definition of unrelated business income. The "five-year rule" was enacted because the typical bootstrap sale then involved a long-term lease.[37] Now that it appears that these leases have been adjusted to take advantage of section 514(b),[38] the logical and simplest statutory change would be the elimination of the five-year exception.

Trade Regulation—Use of Undisclosed Mock-Up in Television Commercial Demonstration Held To Be Deceptive Practice in Violation of Federal Trade Commission Act.—Respondent Colgate-Palmolive Company presented three television commercials purportedly demonstrating the moisturizing ability of its shaving cream, "Rapid Shave," by first applying the cream to "sandpaper" and then shaving the "sandpaper" clean. However, due to the

32. On August 27, 1965, the House Committee on Ways and Means announced that it will study the problems resulting from the Supreme Court's approval of the bootstrap sale in the instant case. 6 P-H 1965 Fed. Tax Serv. ¶ 60487.

33. The Internal Revenue Code defines unrelated business taxable income as "the gross income derived by any organization from any unrelated trade or business . . . regularly carried on by it . . . ." Int. Rev. Code of 1954, § 512(a). Unrelated trade or business is "any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption . . . ." Int. Rev. Code of 1954, § 513(a).

34. Int. Rev. Code of 1954, § 511.

35. Int. Rev. Code of 1954, § 512(b)(3).

36. Int. Rev. Code of 1954, § 514(b)(1). (Emphasis added.)

37. H.R. Rep. No. 2319, 81st Cong., 2d Sess. 38-40 (1950); Comment, 61 Mich. L. Rev. 1140, 1157 (1963).

38. E.g., Union Bank v. United States, 152 Ct. Cl. 426, 429, 285 F.2d 126, 127 (1961); Royal Farms Dairy Co., 40 T.C. 172, 177 (1963); Anderson Dairy, Inc., 39 T.C. 1027, 1035 (1963), appeal dismissed, — F.2d — (— Cir. 1965); Estate of Hawley, 20 CCH Tax Ct. Mem. 210, 214 (1961). See Comment, 61 Mich. L. Rev. 1140 (1963); Note, 40 Notre Dame Law. 304, 305 (1965).

technical difficulties in photographing sandpaper,[1] plexiglass, to which sand had been applied, was substituted for the actual sandpaper during each commercial. The Federal Trade Commission issued a cease and desist order[2] on the ground that the commercials tended to be deceptive, in that the viewer, because of the use of plexiglass "mock-ups,"[3] was not seeing actual sandpaper being shaved. The court of appeals refused to enforce the Commission's order.[4] Certiorari was granted[5] and the Supreme Court reversed, two Justices dissenting, holding that the undisclosed use of the plexiglass "mock-ups" was a deceptive practice in violation of the Federal Trade Commission Act.[6] *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The Commission found two material misrepresentations in the commercials here in question. It found first that "Rapid Shave" could not shave sandpaper within the time depicted in the commercials.[7] This finding was not contested by respondents, and certiorari was granted solely on the second finding, namely, that the undisclosed use of the plexiglass "mock-ups" were material misrepresentations even if the sandpaper could have been shaved exactly as claimed in the commercials.[8]

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1. The rough texture of sandpaper is not perceivable when photographed with the television camera. Colgate-Palmolive Co., 59 F.T.C. 1452, 1455-56 (1961).

2. Colgate-Palmolive Co., supra note 1.

3. A "mock-up" is an object used to aid in the creation of a desired effect. Specifically, its use in a television commercial is to simulate a real object which, for some reason, is impractical or impossible to use in the commercial. See id. at 1460.

4. Colgate-Palmolive Co. v. FTC, 310 F.2d 89 (1st Cir. 1962). Judge Aldrich set aside the order as being ambiguous and directed the Commission to enter an order confined to the facts. Id. at 93-94. However, the modified order was also held unacceptable when reviewed by the court of appeals. Colgate-Palmolive Co. v. FTC, 326 F.2d 517 (1st Cir. 1963).

5. FTC v. Colgate-Palmolive Co., 377 U.S. 942 (1964). Respondents claimed in the instant case that the Commission failed to file their petition for certiorari within 90 days after the entry of the lower court's decision, as is required by 28 U.S.C. § 2101(c) (1964). However, the Supreme Court held that the 90 days should be measured from the second court of appeals decision rather than from the first, since the second opinion "resolved a genuine ambiguity in the first . . . ." FTC v. Colgate-Palmolive Co., 380 U.S. 374, 378-84 (1965).

6. Federal Trade Commission Act § 5(a), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45 (a)(1) (1964), which states: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

7. Respondents claimed that the word "soak," as used in the commercials, implied the passage of time. However, the Commissioner properly dismissed this claim, since the word was mentioned only once, and fleetingly, in the course of each commercial. Colgate-Palmolive Co., 59 F.T.C. 1452, 1463 (1961).

8. 380 U.S. at 377-78. In order to eliminate any possibility of confusion over the scope of its decision, the Court assumed that the shaving of sandpaper and of plexiglass would be a similar process, thereby disregarding the fact that the time required to soak and shave actual sandpaper is much greater than the time needed to shave the plexiglass "mock-up." Thus, the Court focused on whether the seller's assertion to the viewer that he was actually seeing demonstrative proof of a product claim was a separate and distinct misrepresentation under the Federal Trade Commission Act.

In 1938, Congress passed the Wheeler-Lea Amendment[9] to the Federal Trade Commission Act, the effect of which was to broaden the coverage of the act to protect the consumer from the effects of false and misleading advertising.[10] The wording of the act, however, provides only the broadest outline of protection, and leaves to the Commission and the courts the creation of a workable standard for determining what is a deceptive practice within the meaning of section 5(a).[11]

Although the present case is one of first impression in the field of television advertising,[12] the courts have been called upon to decide a large number of cases dealing with false advertising in other areas.[13] These cases have dealt with false claims which have unfairly prejudiced both competitors and consumers. In the cases involving competitors, the Commission has found to be unlawful those advertisements which either discredited the competitor himself,[14] or falsely attributed undesirable qualities to his product.[15] The cases dealing with consumers can be divided into two groups. The first group involves claims about the quality of the product itself.[16] Included in this category are false claims regarding the effectiveness[17] or ingredients[18] of the advertised product, as well as

9. 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1964). See note 6 supra.

10. The act, in its original form, applied only to competitors. Amendment co-author Lea, in his remarks before Congress, specifically stated that one of the main purposes of the bill was to "protect the consumer as well as the competitor." 83 Cong. Rec. 392 (1938).

11. See FTC v. Motion Pictures Advertising Serv. Co., 344 U.S. 392, 394 (1953), where the Court stated that § 5 of the FTCA was "to be defined with particularity by the myriad of cases from the field of business."

12. Other advertising cases dealing with television commercials have come before the Federal Trade Commission, although Colgate is the first to go before the courts. See, e.g., Colgate-Palmolive Co., 58 F.T.C. 422 (1961); Hutchinson Chem. Corp., 55 F.T.C. 1942 (1959); Adell Chem. Co., 54 F.T.C. 1801 (1958); American Chicle Co., 54 F.T.C. 1625 (1958).

13. For a general discussion of cases brought under the Federal Trade Commission Act, see Annot., 65 A.L.R.2d 225 (1959).

14. Chamber of Commerce v. FTC, 13 F.2d 673 (8th Cir. 1926); Sears, Roebuck & Co. v. FTC, 258 Fed. 307 (7th Cir. 1919).

15. See Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693 (7th Cir. 1951); Perma-Maid Co. v. FTC, 121 F.2d 282 (6th Cir. 1941).

16. See, e.g., FTC v. Algoma Lumber Co., 291 U.S. 67 (1933), where respondents were selling "Western Yellow Pine" under the name of "California White Pine." The Commission found the former to be inferior to true white pine lumber. Speaking for the Court, Mr. Justice Cardozo said: "The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. . . . In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance." Id. at 78. (Citations omitted.)

17. See, e.g., Carter Prods., Inc. v. FTC, 268 F.2d 461 (9th Cir.), cert. denied, 361 U.S. 884 (1959), where the Commission's order that Carter remove the word "Liver" from its "Little Liver Pills" was upheld when it was shown that the pills had no therapeutic action on any disease or disorder of the liver; accord, Consolidated Royal Chem. Corp. v. FTC, 191 F.2d 896 (7th Cir. 1951); Capon Water Co. v. FTC, 107 F.2d 516 (3d Cir. 1939).

18. See, e.g., Jacob Siegel Co. v. FTC, 150 F.2d 751 (3d Cir. 1944), rev'd on other grounds, 327 U.S. 608 (1946) (advertisement using the name "Alpacuna" for coats containing no vicuna fiber).

advertisements which, either through misleading statements or by deceptive silence, give the impression that the product advertised is entirely safe while, in reality, it is potentially dangerous to the consumer.[19] In the second group of cases involving consumers, the deception has not been as to the nature or the quality of the product itself, but, rather, as to "collateral misrepresentations" which induced the consumer to purchase the advertised product.[20] Included in this category are false claims regarding the origin of the product,[21] the seller's line of business,[22] the simulation of a competitor's trade name,[23] and the use of fictitious testimonials and unauthorized endorsements.[24]

The majority of the Court placed the present case in the same category as cases dealing with "collateral misrepresentations."[25] Specifically, it found as deceptive the assertion of the advertiser that the viewer was actually "seeing for himself" proof of a product claim.[26] In taking this approach, it appears that the majority placed too much emphasis on the technical "untruth" and did not sufficiently consider the *effect* of the "untruth" on the consumer. It seems to have ignored the peculiar difficulties presented by the television medium, namely,

19. See, e.g., Carter Prods., Inc. v. FTC, 186 F.2d 821 (7th Cir. 1951) (skin irritation); Gelb v. FTC, 144 F.2d 580 (2d Cir. 1944) (same); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942) (gastro-intestinal disturbances).

20. See note 25 infra.

21. See, e.g., Kerran v. FTC, 265 F.2d 246 (10th Cir.), cert. denied, 361 U.S. 818 (1959), where re-refined oil was marketed in containers indistinguishable from those generally used to market lubricating oil refined from virgin crude. The court stated that, even if the quality of the re-refined oil were as good as that produced from virgin crude, the public would be entitled to have knowledge of that fact. Id. at 248.

22. See, e.g., FTC v. Royal Milling Co., 288 U.S. 212 (1933).

23. See, e.g., FTC v. Balme, 23 F.2d 615 (2d Cir.), cert. denied, 277 U.S. 598 (1928); cf. Pep Boys—Manny, Moe & Jack, Inc. v. FTC, 122 F.2d 158 (3d Cir. 1941); H. N. Heusner & Son v. FTC, 106 F.2d 596 (3d Cir. 1939).

24. See, e.g., FTC v. Standard Educ. Soc'y, 302 U.S. 112 (1937); Stanley Labs. Inc. v. FTC, 138 F.2d 388 (9th Cir. 1943).

25. See notes 20-24 supra and accompanying text. Mr. Chief Justice Warren, writing for the majority, found "an especially strong similarity between the present case and those cases in which a seller induces the public to purchase an arguably good product by misrepresenting his line of business, by concealing the fact that the product is reprocessed, or by misappropriating another's trademark." 380 U.S. at 388-89. Mr. Chief Justice Warren concluded that the Commission's view was that the "misrepresentation of any fact so long as it materially induces a purchaser's decision to buy is a deception prohibited by § 5," while the respondents contended that "the only material facts are those which deal with the substantive qualities of a product." Id. at 386-87. (Emphasis omitted.) The Chief Justice based these findings on the briefs submitted by counsel for both parties. The position taken by respondents, as stated by the Chief Justice, is contrary to the weight of authority, which holds that misrepresentations related to matters other than the substantive qualities of the product have been found to be actionable under § 5. See notes 21-24 supra and accompanying text. However, it appears that the Chief Justice has oversimplified the position of respondents by treating statements, intended by respondents to be applied solely to the present case, as broad assertions relating to deceptive practices in general. 380 U.S. at 386 n.16.

26. Id. at 386.

that it is often necessary to photograph one object in order to accurately reproduce another object on the television screen.[27] In addition, the majority approach failed to take into account whether or not the original object is accurately reproduced by the "mock-up." Mr. Justice Harlan's position in his dissent, however, was that so long as the "mock-up" is an accurate portrayal of the original object the viewer is in no way deceived,[28] and thus is in no danger of suffering any injury from the technical "untruth."

In light of the fact that the viewer of the "Rapid Shave" commercial was actually seeing nothing different from what he would have seen if the experiment were performed live,[29] in his presence, using real sandpaper, it is difficult to call the "Rapid Shave" commercial misleading or deceptive in any "legally significant" sense.[30] The viewer was seeing an accurate image of the objective proof, an image more accurate than he would see if he were viewing actual sandpaper photographed with the television camera.[31] It cannot be seriously contended, therefore, that the viewer will suffer any injury from the "misrepresentation" as such. This is in sharp contrast to "collateral misrepresentation" cases where the consumer does suffer an injury from the seller's false assertions, in that he is deceived into buying a product which he otherwise might not have purchased.[32]

In its attempt to set up a standard for the future use of "mock-ups" in television commercials, the majority stated that only where props are used in strategic places in commercials that invite the viewer to rely on his own perception for demonstrative proof of a claim will there be a material deception;[33] that is, where "the emphasis is on the seller's word, and not on the viewer's own perception, the respondents need not fear that an undisclosed use of props is prohibited by the present order."[34] To explain the application of the above standard, the Court discussed the use of a scoop of mashed potatoes as a

27. See Colgate-Palmolive Co. v. FTC, 326 F.2d 517 (1st Cir. 1963). For example, a blue shirt will appear white to the television viewer. Similarly, a scoop of ice cream will melt under the television studio lights; therefore, a scoop of mashed potatoes is often substituted for the real ice cream. Id. at 519 n.2.

28. 380 U.S. at 396 (dissenting opinion). The dissent placed its emphasis on the receiving end of the televising process, rather than on the transmitting end, where the majority appeared to place its emphasis. Ibid.

29. See note 8 supra.

30. 380 U.S. at 396 (dissenting opinion).

31. See note 1 supra.

32. There is a difference between the situation where a consumer buys the product because he was told by the seller that a certain celebrity uses it, and the situation in which the consumer purchases the product in reliance on the seller's assertion that the consumer has been shown objective proof of a product claim. In the former instance, the consumer is injured, since he would not have purchased the product if he had known that the celebrity did not use or endorse it. However, in the latter instance, applied to a situation similar to the present case, the consumer would not suffer any injury once he realized that the experiment he had witnessed was an exact simulation of the actual sandpaper experiment, for he had seen, for all practical purposes, "Rapid Shave" shave sandpaper.

33. 380 U.S. at 393.

34. Ibid.

substitute for ice cream in a commercial "extolling the goodness" of the latter product, and reasoned that only if "the focus of the commercial becomes the undisclosed potato prop and the viewer is invited, explicitly or by implication, to see for himself the truth of the claims about the ice cream's rich texture and full color . . ." would the use of such props be unlawful.[35] Therefore, as long as the prop plays a subordinate, background role in the commercial message, its use will be permitted.

However, the Court is unclear as to how much emphasis can be placed on a prop before it becomes involved in "proving a product claim." In the ice cream illustration, for example, how long could the camera focus exclusively on the mashed potatoes before the potatoes would become the focal point of the commercial? At what point would the viewer be "impliedly invited" to see for himself the truth about the appealing claims made for the "ice cream"?[36] The majority opinion will necessarily require resolution of such questions at some future time. Under the reasoning of the dissent, however, these questions would never arise, for, as long as the potato prop appeared to the television viewer as real ice cream, there would be no deception and the detailed distinctions drawn by the Court would be unnecessary.

The majority was remiss in clarifying what it meant by "objective proof of a product claim." The Court sought to distinguish between the "sandpaper" situation and one in which a celebrity provides written verification of an experiment actually performed and observed, but, due to the inability of the television cameras to accurately transmit a picture of the testimonial as written, the seller reproduces it on another substance so that it can be seen by the viewing audience.[37] Chief Justice Warren stated that the difference between the two situations lies in the fact that in the "sandpaper" case the objective proof offered—"the viewer's own perception of an actual experiment"[38]—does not exist, while in the hypothetical case, the objective proof offered—"the word of the celebrity . . . that the experiment was actually conducted"[39] (and *not* the viewer's own perception of the word of the celebrity)—does exist. However, it appears that, in the hypothetical case, the reproduced testimonial is the commercial's focal point.[40] Thus, could not a strong argument be made that the viewer is being invited to see for himself that such a testimonial actually

35. Ibid.

36. The majority suggested that, in all borderline cases, the advertiser may "oblige the Commission to give them definitive advice as to whether their proposed action . . . would constitute compliance with the order." Id. at 394. See 16 C.F.R. § 3.26 (Supp. 1965) for the Federal Trade Commission Rules authorizing such a request for advice. Another possible solution would be a disclosure of the "mock-up" during the commercial, but the few related decisions on pre-disclosure in fields other than television advertising would seem to require more than a casual mentioning of the "mock-up." See Note, 72 Yale L.J. 145, 157 n.43 (1962). Needless to say, this policy would greatly reduce the effectiveness of the commercials.

37. 380 U.S. at 390.

38. Ibid.

39. Ibid.

40. See text accompanying note 35 supra.

exists? It is not inconceivable that a viewer who would not have bought the product on the word of the announcer that the testimonial existed would make the purchase after "seeing" the testimonial for himself.

The instant case has placed the use of props and "mock-ups" in television commercials in an uncertain state. By emphasizing the "untruth" itself, rather than the potential injury posed to the consumer by that "untruth," the Court has offered a questionable rationale. We are given a standard which is more oriented toward "punishing" the seller and advertiser than toward protecting the consumer. Yet it is the latter which constitutes the primary objective of the Federal Trade Commission Act.[41]

Venue—Definition of Corporate Residence Under the Jones Act Expanded To Include Any District in Which the Corporation Is Doing Business.— Appellee was injured while working as a seaman on appellant's boat. He instituted suit in the Southern District of Florida under the Jones Act,[1] which provides that an action may be brought against an employer either in the district where the "employer resides or in which his principal office is located."[2] Appellee argued that venue was properly laid since appellant, by doing a substantial amount of business in Florida, was a "resident" of that state. He reasoned that the court should use the revised definition of corporate residence contained in the general venue statute of title 28,[3] which provides that the legal residence of a corporation is the district in which it is incorporated, licensed to do business, or doing business. Appellant, an Ohio corporation with its principal place of business in Illinois, sought to transfer the case from Florida on the grounds that it was not a "resident" of that state for the purposes of Jones Act litigation. The motion to transfer was denied by the district court. The court of appeals affirmed the denial, holding that a corporate defendant may be sued under the Jones Act in any district in which it is incorporated, licensed to do business, or doing business. *Pure Oil Co. v. Suarez*, 346 F.2d 890 (5th Cir. 1965).

Prior to 1948, a corporation's residence, for venue purposes, was the judicial district in which it was incorporated.[4] With the enactment of the 1948 revision of the Judicial Code,[5] Congress greatly expanded the definition to include the districts in which a corporation was doing business or licensed to do business.

41. See note 10 supra.

1. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

2. Ibid. Although the statute uses the term "jurisdiction," it has long been interpreted to mean venue. Panama R.R. v. Johnson, 264 U.S. 375 (1924).

3. 28 U.S.C. § 1391(c) (1964).

4. Suttle v. Reich Bros. Constr. Co., 333 U.S. 163 (1948). The restrictive effect of corporate venue had been mitigated by Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939), where the Supreme Court ruled that, by consenting to be sued in a state court, a corporation had also consented to be sued in the federal district courts of that state.

5. 62 Stat. 935 (1948) (now 28 U.S.C. 1391(c) (1964)).

The extent, however, to which the new definition was applicable to existing venue statutes using the term "residence" was not stated in the revision.[6] It has been left to the courts to decide whether Congress intended the new, expanded definition to apply to all suits involving corporations or merely to situations not already covered by specific venue statutes such as the Jones Act.

In 1958, the Supreme Court, in *Fourco Glass Co. v. Transmirra Prods. Corp.*,[7] shed light on this problem when it held that "28 U.S.C. § 1400(b) is the sole and exclusive provision controlling venue in patent infringement actions, and . . . it is not to be supplemented by . . . provisions of 28 U.S.C. § 1391(c)."[8] The Court based its decision on the fact that a study of the legislative and judicial history of section 1400(b) indicated that Congress intended the patent infringement venue provisions to be restrictive.[9] In light of this, the Court, to implement the narrow construction intended by Congress, invoked the familiar principle that the specific provisions of a statute prevail over the more general.[10]

Before *Fourco*, the expanded definition of "residence" had been applied in Jones Act litigation.[11] The first Jones Act case to consider the *Fourco* ruling was *Leith v. Oil Transp. Co.*,[12] in which the plaintiff attempted to bring suit in a district in which his employer was not incorporated but was merely doing business. *Leith*, citing *Fourco*, found that section 1391(c) was not applicable to the Jones Act.[13] In the instant case, the court agreed that the *Fourco* principle was controlling[14] but, unlike *Leith*, distinguished between patent infringement and Jones Act venue provisions. Whereas *Leith* read *Fourco* as a blanket ruling

6. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A127 (1947).

7. 353 U.S. 222 (1957).

8. Id. at 229. According to 28 U.S.C. § 1400(b), an action for damages due to patent infringement may be brought in either the judicial district where the corporate defendant resides or where it both has a regular place of business and has committed acts of infringement. Fourco Glass, a West Virginia corporation, was sued in the Southern District of New York for patent infringement. While it maintained a regular place of business in New York, there was no showing that any acts of infringement had been committed there. Venue, therefore, could be based only on the "residence" provision of the statute.

9. 353 U.S. at 224-28. The Court found that the 1948 revision was not intended to alter the meaning of § 1400(b). Therefore, the Court accepted Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561 (1942), as controlling the interpretation of patent infringement venue provisions. 353 U.S. at 225. Stonite had found that the original act which created specific venue for patent infringement actions was "a restrictive measure, limiting a prior, broader venue." 315 U.S. at 566.

10. 353 U.S. at 228-29.

11. Franklin v. Tomlinson Fleet Corp., 158 F. Supp. 850 (N.D. Ill. 1957); Phillips v. Pope & Talbot, 102 F. Supp. 51 (S.D.N.Y. 1952); Bounds v. Streckfus Steamers, Inc., 89 F. Supp. 242 (D. Del. 1950); Bagner v. Blidberg Rothchild Co., 84 F. Supp. 973 (E.D. Pa. 1949).

12. 321 F.2d 591 (3d Cir. 1963). Defendant-employer was incorporated and maintained its principal place of business in Louisiana. Plaintiff-seaman attempted to bring suit in the Western District of Pennsylvania.

13. Id. at 593.

14. 346 F.2d at 895.

that specific venue provisions prevail over the more general in all cases involving section 1391(c), the instant court found that "the court [in *Fourco*] contemplates an analysis of the relationship of section 1391(c) to special venue statutes in light of the history and purpose of the special provisions."[15] The present court interpreted *Fourco* as holding that specific venue statutes prevail over section 1391(c) "in the absence of a clear manifestation to the contrary by the legislature."[16] The expanded definition is applicable, therefore, where Congress intended a given venue requirement to be "expansive" and to provide "additional federal forums."[17] The court found such legislative intent in the fact that the Jones Act is remedial legislation designed to assist seamen in bringing suit against their employers.[18]

If the present decision is correct, the relationship of section 1391(c) to other specific provisions, many of which have thus far been held to be restrictive, may be open to reinterpretation. The controlling factor under the court's reasoning would be a determination as to whether Congress intended the various venue provisions to be restrictive or remedial. Application of the court's formula could result in the third change within a decade of a corporation's "residence" with respect to Clayton Act venue provisions.[19] Prior to *Fourco*, courts had assumed that the general venue statute defined "residence" in antitrust litigation.[20] Currently, however, the courts have read the antitrust venue provisions exclusive of section 1391(c).[21] Since it is generally accepted that Congress, in passing the Clayton Act, intended to create a wide choice of forums for antitrust litigants,[22] acceptance of the instant court's position could cause the courts to revert to the pre-*Fourco* holdings.

Venue provisions which relate to federal court actions concerning orders of the Interstate Commerce Commission may also be open to reinterpretation.[23]

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15. Id. at 895. (Footnote omitted.)

16. Id. at 892.

17. Id. at 895.

18. Id. at 896.

19. 38 Stat. 736 (1914), 15 U.S.C. § 22 (1964).

20. Sunbury Wire Rope Mfg. Co. v. United States Steel Corp., 230 F.2d 511 (3d Cir. 1956), assumed that the two statutes should be read together. The court in Lipp v. National Screen Serv. Corp., 95 F. Supp. 66, 69-70 (E.D. Pa. 1950), citing Moore, Commentary on the U.S. Judicial Code (1949), held that the general provision should be read into the specific.

21. Crawford Transp. Co. v. Chrysler Corp., 191 F. Supp. 223, (E.D. Ky. 1961); R. J. Coulter Funeral Home, Inc. v. National Burial Ins. Co., 192 F. Supp. 522 (E.D. Tenn. 1960). Both cases assume that Fourco precludes a reading of § 1391(c) in conjunction with the Clayton Act.

22. United States v. Scophony Corp. of America, 333 U.S. 795, 804-05 (1947) (by implication); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 373-74 (1927).

23. The discussion of the ICC provisions assumed that the controversy surrounding § 1391(c) is applicable to corporate plaintiffs as well as defendants. The issue is unresolved. See Robert E. Lee & Co. v. Veatch, 301 F.2d 434 (4th Cir. 1961), cert. denied, 371 U.S. 813 (1962), holding that § 1391(c) does not apply to corporate plaintiffs. The opposite proposition is cited by 1 Barron & Holtzoff, Federal Practice and Procedure § 80, at 387 (rules ed.

Three distinct classes of litigants may institute suit in federal courts to "enforce, suspend, or set aside"[24] an order of the Commission. The possible litigants are the ICC, the party who sought an order to correct an alleged violation, and the party seeking review of an order adversely affecting him. Prior to a 1948 amendment, the party originally applying to the ICC for a corrective order was favored by the venue provisions. Proper venue in these actions was defined, with exceptions, as the district wherein resided the party "upon whose petition the order was made."[25] The amended venue statute now provides that federal court jurisdiction may be invoked in "the judicial district wherein is the residence or principal office of any of the parties bringing such action."[26] Now, both the original applicant and the party seeking review can lay venue in one or more home districts.[27] The form of the new statute was recommended by the Judicial Conference of the United States.[28] The Conference, in suggesting a revision, pointed out that, since the original applicant was generally only a nominal party and the litigation was generally between the ICC and the party seeking review, the latter should be favored in the matter of venue.[29] By adopting the Conference's position,[30] which gave the petitioner for review the privilege of litigating in his home district, Congress, in effect, made litigation more convenient for the parties most affected by the choice of forum. Thus far, one district court has held that "residence" in this provision is not to be read in conjunction with section 1391(c).[31] But if the present decision is accepted and "residence" is given an expansive interpretation wherever venue "was meant to provide a convenient federal forum,"[32] a new interpretation may be forthcoming.

The uncertainty regarding venue has resulted in *ad hoc* determinations by

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1960), citing Freiday v. Cowdin, 83 F. Supp. 516 (S.D.N.Y.), appeal dismissed, 177 F.2d 1020 (2d Cir. 1949).

24. 28 U.S.C. § 1398(a) (1964). In 1964, Congress designated former 28 U.S.C. § 1393 (1958), as 28 U.S.C. § 1398(a), and added 28 U.S.C. § 1398(b).

25. 38 Stat. 219 (1913).

26. See note 24 supra.

27. If residence is defined by § 1391(c), either party, if it is a corporation, may lay venue wherever it is "incorporated or licensed to do business or is doing business."

28. Report of the Judicial Conference of Senior Circuit Judges 19-20 (1947).

29. Ibid. The Department of Justice, however, favored retaining the venue statute in its old form. The Attorney General stated that "the applicant to the Commission, rather than the party bringing suit to set aside the Commission's order, should be favored in the matter of venue." Id. at 4. (Footnote omitted.)

30. Moore, op. cit. supra note 20, ¶ 0.03(28), at 182.

31. Zonolite Co. v. United States, 209 F. Supp. 597 (W.D. Pa. 1962). A Montana corporation with its principal place of business in Chicago, attempted to bring an action to set aside an order of the ICC in the Western District of Pennsylvania. The district court stated that the location of a processing plant in that district did not make it a resident thereof. With respect to note 23 supra, it is interesting to note that the court, citing Fourco, seemed to rely on the argument that the ICC venue provisions are to be read exclusive of § 1391(c), not because § 1398 concerns corporate plaintiffs rather than defendants, but because specific provisions should prevail over the general.

32. 346 F.2d at 896.

various courts in instances where a thorough investigation and explicitly detailed revision would certainly be preferable. In 1958, Congress made just such a revision to clear up uncertainty regarding suits against the United States for return of erroneously collected income taxes.[33] The pertinent statute contained an ambiguous clause which made suit possible "only in the judicial district where the plaintiff resides."[34] Congress, attempting to "define more particularly venue"[35] in tax refund suits by corporations, effectively eliminated the confusion in this area by the addition of a provision specifically stating that a corporation may lay venue "in the judicial district in which is located the principal place of business or principal office or agency of the corporation . . . ."[36] To prevent future conflicts among the courts, a similar revision would seem to be warranted for many of the specific venue statutes.

33. 28 U.S.C. § 1402(a)(1964). The confusion was demonstrated in cases cited by the American Bar Association and the Committee on the Judiciary of the House of Representatives in recommending a change in the existing statute. 1958 U.S. Code Cong. & Ad. News 5263. In Southern Paperboard Corp. v. United States, 127 F. Supp. 649 (S.D.N.Y. 1955), it was held that § 1391(c) supplemented the tax refund venue provisions. In United Merchants & Mfrs. v. United States, 123 F. Supp. 435 (M.D. Ga. 1954), the court held that § 1391(c) did not change the meaning of the specific venue provisions.

34. 62 Stat. 937 (1948) (now 28 U.S.C. § 1402 (1964)).

35. 1958 U.S. Code Cong. & Ad. News 5263.

36. 28 U.S.C. § 1402(a)(2) (1964).