Fordham Law Review

Volume 28 | Issue 3 Article 10

1959

Case Notes

CASE NOTES

Constitutional Law — First Amendment Not Violated by Inquiry of Committee on Un-American Activities.—Petitioner, a former Vassar College teacher, appeared before a subcommittee of the House Committee on Un-American Activities, which was then investigating communist infiltration into the field of education.[1] While denying any fear of self incrimination, he refused to answer five questions[2] regarding his relationship with the Communist Party, basing his objections on a prepared statement which, *inter alia,* assailed the power and jurisdiction of the subcommittee to inquire into matters of belief and association. As a result, petitioner was charged with a violation of section 192 of the Congressional and Committee Procedure Act[3] and was subsequently convicted, fined and sentenced to six months imprisonment for contempt of Congress. On appeal, the court of appeals, three judges sitting, affirmed.[4] The Supreme Court, granting certiorari, vacated the judgment and remanded the case to the circuit court for reconsideration[5] in light of *Watkins v. United States.*[6] A divided court of appeals, sitting *en banc,* again affirmed.[7]

1. See Hearings Before the Subcommittee on Communist Methods of Infiltration of the House Committee on Un-American Activities, 83d Cong., 2d Sess. 5753 (1954).

2. These questions were: (a) Are you now a member of the Communist Party? (b) Have you ever been a member of the Communist Party? (c) Did you know Francis Crowley as a member of the Communist Party? (d) Were you ever a member of the Haldane Club of the Communist Party at the University of Michigan? (e) Were you a member while a student of the University of Michigan Council of Arts, Sciences and Professions? Id. at 5801-14.

3. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958) provides: "Every person who having been summoned as a witness by the authority of either House of Congress . . . or any committee of either House of Congress . . . who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

4. 240 F.2d 875 (D.C. Cir. 1957).

5. 354 U.S. 930 (1957).

6. 354 U.S. 178 (1957). Here the Court reversed the contempt conviction of a former labor official who had refused on the statutory grounds of pertinency to identify certain names put to him by a subcommittee of the House Committee on Un-American Activities, and held that the due process requirements of the fifth amendment had been violated because the subcommittee had not made clear to the witness the subject of its inquiry and the pertinency of the questions to that subject. This decision has been criticized for lack of "clear rationale." Comment, 43 A.B.A.J. 1029 (1957). However, for the effect of the decision on subsequent contempt cases, see Scull v. Virginia, 359 U.S. 344 (1959) (state contempt conviction reversed for lack of pertinency); United States v. Flaxer, 358 U.S. 147 (1958) (conviction of a union official reversed because he was not apprised of the subject of inquiry); Sacher v. United States, 356 U.S. 576 (1958) (contempt conviction reversed because questions asked were impertinent); Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957) (reversal solely on basis of Watkins, supra); United States v. Peck, 154 F. Supp. 603 (D.D.C. 1957) (contempt conviction of a newspaperman reversed because first amendment had been violated).

7. 252 F.2d 129 (D.C. Cir. 1958).

The Supreme Court, four Justices dissenting, affirmed. The provisions of the first amendment did not excuse petitioner from testifying before the Committee on Un-American Activities. *Barenblatt v. United States*, 360 U.S. 109 (1959).

For more than a hundred years both Houses of Congress have exercised the power to investigate and compel the disclosure of information by the threat of contempt proceedings.[8] While the power has been widely used,[9] it has not been without limitations.[10] It is now settled law that the courts will not sanction compelled disclosures if a congressional committee acts outside the area of inquiry authorized by Congress,[11] or in relation to matters not within the legislative domain,[12] nor if the questions asked[13] or materials subpoenaed[14] by a committee are impertinent to the subject of inquiry. Recent cases have recognized the individual's privilege against self incrimination as an additional restriction upon the investigatory power of Congress.[15]

8. The first congressional investigation in the United States was instituted in 1792. For a detailed account, see Taylor, Grand Inquest 17-29 (1955). It was not, however, until 1827 that the House of Representatives authorized an investigation backed by the subpoena power. 4 Cong. Deb. 889 (1827). In 1859 such an investigation was used by the Senate. Cong. Globe, 36th Cong., 1st Sess. 141 (1859).

That Congress has the implied power to punish recalcitrant witnesses for contempt without resort to the courts was established at an early date. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821). At the same time, it was recognized that imprisonment could in no event extend beyond the adjournment date of Congress. Id. at 231. In order to supplement this inherent power of Congress, the Act of Jan. 24, 1857, ch. 19, § 1, 11 Stat. 155, the predecessor of 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958), was passed, making contempt of Congress a criminal offense. But the statute did not impair the inherent contempt power of Congress. Jurney v. MacCracken, 294 U.S. 125 (1935); In re Chapman, 166 U.S. 661 (1897).

9. For an excellent study of congressional investigations, see Taylor, Grand Inquest (1955); Barth, Government by Investigation (1955). See also Comment, 40 A.B.A.J. 1073 (1954); Comment, 40 A.B.A.J. 763 (1954).

10. See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153 (1926); McGeary, Congressional Investigations: Historical Development, 18 U. Chi. L. Rev. 425 (1951).

11. See, e.g., United States v. Rumley, 345 U.S. 41 (1953) (House investigation of "lobbying activities" was invalidated); United States v. Kamin, 136 F. Supp. 791 (D. Mass. 1956) (Senate inquiry into operations of defense plants was found improper).

12. Kilbourn v. Thompson, 103 U.S. 168 (1881). This was the first time the Supreme Court held a particular investigation to be outside the power of Congress. In the course of its opinion, the Court stated that "no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire. . . ." Id. at 190. See Morgan, Congressional Investigations and Judicial Review: Kilbourn v. Thompson Revisited, 37 Calif. L. Rev. 556 (1949).

13. Watkins v. United States, 354 U.S. 178 (1957); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953).

14. See Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), cert. denied, 339 U.S. 933 (1950).

15. For the successful use of the fifth amendment before the House Committee on Un-American Activities, see Bart v. United States, 349 U.S. 219 (1955); Emspak v. United

Whether there is a first amendment limitation upon congressional committees comparable in effect to that of the fifth amendment, has been a source of some confusion and uncertainty.[16] The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . ."[17] It has been suggested that the right of free speech includes a right to remain silent, and that compelling a witness to break his silence violates this right.[18] It has also been argued that compelled testimony inhibits the expression of views because it acts as a restraint on those who hold unpopular and unorthodox beliefs.[19] Heretofore these arguments had never been squarely passed upon by the Supreme Court, though several lower federal courts had considered them.[20] That

States, 349 U.S. 190 (1955); Quinn v. United States, 349 U.S. 155 (1955). And see the dictum in Watkins v. United States, 354 U.S. 178, 195-96 (1957). However, the privilege against self incrimination is no panacea to a witness. In Rogers v. United States, 340 U.S. 367 (1951), a witness, having testified before a grand jury regarding her Communist Party activities, unknowingly waived the privilege as to subsequent questions. That questions relating to Communist Party activities are incriminating, see Blau v. United States, 340 U.S. 159 (1950). See generally Noonan, Inferences from the Invocation of the Privilege against Self-Incrimination, 41 Va. L. Rev. 311 (1955); Williams, Problems of the Fifth Amendment, 24 Fordham L. Rev. 19 (1955).

16. Part of the reason for this lies in the failure of the Supreme Court to pass on the question. If possible, the Court will steer away from constitutional issues. See, e.g., United States v. Rumley, 345 U.S. 41 (1953). Cf. FTC v. American Tobacco Co., 264 U.S. 298 (1924); Harriman v. ICC, 211 U.S. 407 (1908). As a result, one author believes that the fifth amendment privilege against self incrimination has been used by witnesses as a protection of first amendment rights. Griswold, The Fifth Amendment Today 61 (1955). In Quinn v. United States, supra note 15, at 163, a witness pleaded "'the first amendment to the Constitution, supplemented by the fifth amendment.'"

17. U.S. Const. amend. I. Although the rights of the amendment are absolute in form, they have never been so construed by the courts. See, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919) (clear and present danger test); United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951) ("gravity of the evil test, discounted by its improbability," was used to justify legislative abridgement of the first amendment). For a review of the law in this area, see Mendelson, Clear and Present Danger—From Schenck to Dennis, 52 Colum. L. Rev. 313 (1952).

18. That there may be a right of privacy dates back to Kilbourn v. Thompson, 103 U.S. 168 (1881), where the Court stated that "neither . . . [House of Congress] possesses the general power of making inquiry into the private affairs of the citizen." Id. at 190. In dicta, this statement reappeared in Watkins v. United States, 354 U.S. at 198; United States v. Rumley, 345 U.S. at 58 (concurring opinion); McGrain v. Daugherty, 273 U.S. 135, 173-74 (1927).

19. Watkins v. United States, supra note 18, at 197-98; American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950).

20. In United States v. Josephson, 165 F.2d 82, 92 (2d Cir. 1947), cert. denied, 333 U.S. 838 (1948), the court rejected the contention that the first amendment protects "privacy in speaking" as a "fallacy essentially based upon the idea that the Constitution protects timidity." And the court added that "there is no restraint resulting from the gathering of information by Congress in aid of its power and duty to legislate which does not flow wholly from the fact that the speaker is unwilling to advocate openly what

the first amendment may be violated by a congressional investigation, however, was indicated by the Court in *United States v. Rumley*[21] and *Watkins v. United States*.[22] In the latter opinion, the Court stated:

> Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking.
>
> * * *
>
> The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference.[23]

In the present case the Court finally faced up to the constitutional question, and a "balancing test" was employed so as to accommodate the congressional need for information via the investigative process with the individual's "first amendment freedoms." In tipping the scales in favor of the investigatory power of Congress, the Court placed emphasis on the Government's so-called "right of self-preservation" against communist attacks.[24] Speaking for the majority, Justice Harlan declared that the Communist Party was not "an ordinary political party from the standpoint of national security."[25] Indeed, he took a realistic approach, reasoning that the Court could not "blind itself to world affairs which have determined the whole course of our national policy

---

he would like to urge under cover." Ibid. See also Barsky v. United States, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948); Comment, 5 U.C.L.A.L. Rev. 645, 656-58 (1958).

In addition to the Josephson and Barsky cases, supra, no first amendment violation was found in Marshall v. United States, 176 F.2d 473 (D.C. Cir. 1949), cert. denied, 339 U.S. 933 (1950); nor in Lawson v. United States, 176 F.2d 49 (D.C. Cir. 1949), cert. denied, 339 U.S. 934 (1950). But see Rumley v. United States, 197 F.2d 166 (D.C. Cir. 1952), aff'd on other grounds, 345 U.S. 41 (1953), in which the court of appeals found no urgent public need to justify abridgement of the first amendment. The most recent case on the subject is Davis v. United States, 269 F.2d 357 (6th Cir. 1959), where, in a situation almost identical to the instant one, the court refused to acknowledge the defendant's first amendment contention. Affirming the contempt conviction of a teacher, the court relied heavily upon the present opinion.

21. Justice Frankfurter stated that "we would have to be that 'blind' Court . . . that does not see what '[a]ll others can see and understand' not to know that there is wide concern, both in and out of Congress, over some aspects of the exercise of the congressional power of investigation." 345 U.S. 41, 44 (1953). Compare this with the concurring opinion of Justices Douglas and Black. Id. at 58.

22. 354 U.S. at 196-98.

23. Id. at 197.

24. 360 U.S. at 128. The Court cited Dennis v. United States, 341 U.S. 494, 509 (1951).

25. 360 U.S. at 128-29. For a view of the Supreme Court on Communism, see Dennis v. United States, supra note 24; American Communications Ass'n v. Douds, 339 U.S. 382 (1950). For the view of Congress, see Internal Security Act of 1950, ch. 1024, § 2, 64 Stat. 987; Communist Control Act § 2, 68 Stat. 775 (1954), 50 U.S.C. § 841 (Supp. V, 1958).

since the close of World War II . . . ."[26] Further, since communist activities were being scrutinized, the majority felt that an investigation could not be bound by the strict requirements of evidence needed for a criminal prosecution.[27] The rationale was that Congress has a right to inquire step by step about matters leading up to overthrow of the Government, and that this includes a right to identify a witness as a member of the Communist Party.

Although the Court acknowledged the application of the first amendment to congressional investigations,[28] it did not make explicit just what interests are protected by the amendment. Whether there is a first amendment right of "privacy in speaking" still remains speculative, albeit the instant opinion had language to the effect that such a right does exist.[29] At any rate, the adoption of a "balancing test" to justify possible abridgements of the amendment does appear to be a practical formula for reconciling the varied, conflicting interests.[30]

The dissenting opinion, written by Justice Black, took an extreme position, rejecting the majority's reliance on the nature of Communism as well as the majority's premise that the first amendment could justifiably be abridged if a "balancing test" were used. Instead, it was argued that the Communist Party was a political party with some "perfectly normal political and social goals,"[31] and that the guarantees of the first amendment needed absolute protection. Although the propriety of a "balancing test" was rejected, the dissent nevertheless felt impelled to say that the majority did not weigh "the interest of the people as a whole in being able to join organizations, advocate causes and make political 'mistakes' without being later subjected to governmental penalties for having dared to think for themselves."[32]

Another question considered by the Court was whether the Committee on Un-American Activities had the power to investigate Communism.[33] It was

26. 360 U.S. at 129.

27. Compare Dennis v. United States, 341 U.S. 494 (1951), with Yates v. United States, 354 U.S. 298 (1957).

28. 360 U.S. at 126.

29. Id. at 126-27. It would appear from a close reading of the Court's opinion, however, that the so-called right of "privacy in speaking" is merely an appropriate way of saying that an investigation must be pursuant to a valid legislative purpose before compelled disclosures will be enforced. See Comment, 40 A.B.A.J. 763 (1954); Comment, 5 U.C.L.A.L. Rev. 645, 653 (1958). See also the Brief on rehearing for Petitioner, pp. 3-6, where it is conceded that if Communism is an urgent threat to the national security, the Government has a right to compel testimony. The rehearing was denied. 28 U.S.L. Week 3111 (U.S. Oct. 13, 1959).

30. See Taylor, Grand Inquest 169-73 (1955).

31. 360 U.S. at 149.

32. Id. at 144.

33. The Committee's resolution provides: "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all

argued by the petitioner that the authorizing resolution of the Committee had been declared invalid on grounds of vagueness by *Watkins v. United States.* Although conceding that the resolution was vague, the majority nevertheless reviewed the legislative history of the Committee on Un-American Activities and concluded that the investigation of communist activities in the field of education[34] was one facet of the Committee's intended authority and, therefore, a permissible subject of inquiry. In the process, the *ratio decidendi* of the *Watkins* decision was found to be nothing more than a procedural one.[35]

---

other questions in relation thereto that would aid Congress in any necessary remedial legislation." H. Res. 282, 75th Cong., 3d Sess., 83 Cong. Rec. 7568, 7586 (1938). The original resolution has remained intact ever since. For the Watkins criticisms of the resolution, see 354 U.S. at 202-03. See also Carr, The Un-American Activities Committee and the Courts, 11 La. L. Rev. 282 (1951); Comment, 47 Colum. L. Rev. 416 (1947).

34. The Court was faced with the argument that the tenth amendment barred Congress from the field of education. The majority, in order to avoid this question, reasoned that an interrogation of a teacher was neither an investigation of the school system nor an intrusion into "academic teaching-freedom," but rather an investigation into communist activities. But see Sweezy v. New Hampshire, 354 U.S. 234 (1957), where the Court held invalid under the due process clause of the fourteenth amendment an inquiry into the contents of a teacher's lecture and Progressive Party affiliations.

35. Justice Harlan stated that "a principal contention in Watkins was that the refusals to answer were justified because the requirement . . . that the questions asked be 'pertinent to the question under inquiry' had not been satisfied. . . . This Court reversed the conviction solely on that ground, holding that Watkins had not been adequately apprised of the subject matter of the Subcommittee's investigation or the pertinency thereto of the questions he refused to answer." 360 U.S. at 116-17.

The reason for the clarity requirement is that the due process clause of the fifth amendment requires every federal statute to be definite enough to inform those who are subject to it what conduct on their part is criminal. Connally v. General Constr. Co., 269 U.S. 385, 391-93 (1926); United States v. Cohen Grocery Co., 255 U.S. 81, 89-93 (1921). The standard under the federal contempt statute is twofold: (1) pertinency, and (2) the question under inquiry. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1958). If the question under inquiry is unclear or the questions asked impertinent, the Government has not sustained the burden of proof. See, e.g., United States v. Orman, 207 F.2d 148, 155 (3d Cir. 1953); Bowers v. United States, 202 F.2d 447 (D.C. Cir. 1953); United States v. DiCarlo, 102 F. Supp. 597, 601 (N.D. Ohio 1952). In Quinn v. United States, 349 U.S. at 165-66, the Supreme Court made it clear that a committee must specifically overrule any objections made by a witness and then direct him to answer before he can be convicted for contempt of Congress. But the witness should object on grounds of pertinency. Watkins v. United States, 354 U.S. at 214-15. And "in the event he is mistaken as to the law it is no defense, for he is bound rightly to construe the statute." Townsend v. United States, 95 F.2d 352, 361 (D.C. Cir.), cert. denied, 303 U.S. 664 (1938). See also Sinclair v. United States, 279 U.S. 263, 299 (1929).

In the principal case the Court disposed of the due process requirement by saying that "'pertinency' was made to appear 'with undisputable clarity.'" 360 U.S. at 124. The Court relied on Watkins, supra, for the principle of "undisputable clarity." In addition, the majority seemingly rejected the claim that a resolution must be particularized. It now seems that the due process requirement of clarity can be established by either reference to the authorizing resolution, the opening statement of the Chairman, the nature

The dissenting Justices reasoned that if Congress wanted an investigation of Communism in the field of education, it should have expressed the need for such in the authorizing resolution of the Committee. Since the terms employed in the resolution were vague, the dissent found a violation of both the first and fifth amendments in that petitioner was given no standard by which to appraise the Government's need for the information sought.[36] Furthermore, while the majority deferred to the view that it is improper to intervene on the basis of "motives" where the record of an investigating committee reveals a valid legislative purpose,[37] the minority felt no similar restraint, arguing that the House Committee's only purpose was to expose alleged subversives to public obloquy and scorn and that the Committee had therefore violated the first amendment as well as usurped the power of the courts by attempting "to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliations."[38]

The principal case and that of *Uphaus v. Wyman*,[39] wherein the Court upheld the power of the New Hampshire Legislature to investigate subversion within the state, no doubt place investigating committees in a stronger position than they have enjoyed in the last two years.[40] Yet, the Court has made it reasonably clear that a due regard for the importance of investigations does not mean a disregard for individual rights. In any first amendment case, a majority of the Court has committed itself to reconciling the public and private interests involved, and the outcome of any balance will depend upon delicate questions of degree. Whether the balance was properly struck in the present case is moot, depending on the weight one would accord the public

---

of the proceedings, the questions themselves or the Chairman's response to an objection. See Watkins v. United States, 354 U.S. at 209-15.

36. The dissent considered clarity of the resolution an essential part of the criminal prosecution for contempt, and therefore concluded that the Committee's resolution was a violation of due process. See note 35 supra. Unable to find a "compelling" interest of the Government in the present inquiry, the dissenting Justices reasoned that the first amendment had been violated. 360 U.S. at 139. See NAACP v. Alabama, 357 U.S. 449, 463 (1958), citing Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957) (concurring opinion). In Watkins v. United States, 354 U.S. at 198, the Court stated: "We cannot simply assume . . . that every congressional investigation is justified by a public need that overbalances any private rights affected."

37. See McGrain v. Daugherty, 273 U.S. 135, 173-77 (1927); McGray v. United States, 195 U.S. 27, 55 (1904). See also Eisler v. United States, 338 U.S. 189, 196 (1949) (dissenting opinion) (the responsibility for the behavior of the investigators is with Congress); Barsky v. United States, 167 F.2d 241, 250 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948) (the problem is a political and not a judicial one, and the remedy lies with the people).

38. 360 U.S. at 153.

39. 360 U.S. 72 (1959). This case was decided on the same day as the instant decision. Compare Uphaus, supra, with Pennsylvania v. Nelson, 350 U.S. 497 (1956).

40. Two authors are of the opinion that "the deadly direction of the Watkins case was completely reversed" by the instant decision. See Cohn & Bolan, The Supreme Court and the A.B.A. Report and Resolutions, 28 Fordham L. Rev. 233, 273 (1959). See Comment, 45 A.B.A.J. 850 (1959) (the Supreme Court has moved in a complete circle since 1881).

and private interests. It is certain, however, that five members of the instant Court consider Communism, its tenets and manifestations, a real threat to national security. Notwithstanding the public interests involved, it is to be expected that the Court will guard against unjustified abridgements of individual rights by the proper utilization of the balancing principle.

Constitutional Law—State Statute Penalizing Refusal To Admit Health Officer Without Search Warrant.—An inspection by a member of the Baltimore City Health Department, seeking to discover the source of neighborhood rat infestation, revealed that appellant's house was in an extreme state of decay and that a half ton of debris mingled with straw and rodent feces had accumulated in the rear. A request by the inspector to examine the basement area was refused. Returning later and receiving no response to his knock, he reinspected the exterior of the premises and swore out a warrant, alleging a violation of section 120 of the Baltimore City Code[1] for appellant's refusal to permit the inspector to enter his house. At no time did the inspector have a warrant authorizing an entrance. The criminal court affirmed appellant's conviction by a police justice. Certiorari was denied by the Court of Appeals of Maryland. The United States Supreme Court, one Justice concurring, four Justices dissenting, affirmed. Appellant's conviction for resisting inspection of his house without a warrant was not obtained in violation of due process of law. *Frank v. Maryland,* 359 U.S. 360 (1959).

Protection against unreasonable search and seizure by the federal government is guaranteed by the fourth amendment.[2] That this protection extended to the state level was indicated by dictum in *Wolf v. Colorado,*[3] wherein the Supreme Court said that the fourteenth amendment in effect incorporated the fourth amendment, and thus applied it to the states.[4]

The fourth amendment was designed to preclude any repetition of the abuses

1. Baltimore City Code art. 12, § 120 provides: "Whenever the Commissioner of Health shall have cause to suspect that a nuisance exists in any house, cellar or enclosure, he may demand entry therein in the day time, and if the owner or occupier shall refuse or delay to open the same and admit a free examination, he shall forfeit and pay for every such refusal the sum of Twenty Dollars."

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

3. 338 U.S. 25 (1949).

4. The Court reiterated the principle that the due process clause was not intended to be shorthand for the first eight amendments, and refused to apply to the states the federal rule barring the admission in court of evidence obtained through an unreasonable search or seizure. However, the Court went on to say that no state may affirmatively sanction any unreasonable invasion of an individual's privacy: "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the states through the Due Process Clause." Id. at 27.

of power growing out of the use of general warrants.[5] Historically, while the fourth amendment has been thought to protect privacy when civil litigation, as well as criminal prosecution, was in the offing,[6] the Supreme Court's concern has invariably involved either criminal or quasi-criminal cases.[7] Now, for the first time, the Court had to consider whether health inspections also fell within the ambit of the fourth and fourteenth amendments, and to determine whether such inspections without a warrant constituted such unlawful entry or unreasonable invasion of privacy as the Court promised to strike down in *Wolf*.

The applicability to health inspections of constitutional guarantees against unreasonable search has been the subject of judicial consideration in four cases. In *District of Columbia v. Little*[8] the court of appeals rejected the contention that the law of unreasonable search and seizure was restricted solely to criminal cases. It held that reasonableness of a search without a warrant is to be adjudged solely by the extremity of the circumstances and not by the character of the officer or his mission. Except for the most urgent of necessities, the question of reasonableness is for a magistrate and not for the enforcement officer.[9]

5. These general warrants were sanctioned by the Court of Star Chamber in England, while the colonial courts issued comparable writs of assistance empowering revenue officers, in their discretion, to search suspected places for smuggled goods. Boyd v. United States, 116 U.S. 616, 625 (1886).

6. FTC v. American Tobacco Co., 264 U.S. 298 (1924).

7. See Harris v. United States, 331 U.S. 145, 175-81 (1947), where in his dissent, Mr. Justice Frankfurter compiled a list of the twenty-six Supreme Court cases, arising from 1914 to 1938, involving searches and seizures. Each of these cases was concerned in some manner with a crime or the payment of a penalty or forfeiture. Judicial restriction of the protection of the fourth amendment to searches and seizures connected with criminal prosecution or enforcement of penalties was greatly implemented by Boyd v. United States, 116 U.S. 616 (1886), wherein the Court theorized on the correlation between the fourth and fifth amendments and the interrelation of the two in determining the reasonableness of a search or seizure. Prior to 1948, searches and seizures without a warrant were considered reasonable if made in connection with a valid arrest, i.e., either under an arrest warrant or, if the crime were committed in the officer's presence, without one. Harris v. United States, 331 U.S. at 150-51. However, McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); and Johnson v. United States, 333 U.S. 10 (1948), narrowed the area of permissible search and seizure without a warrant by adopting, as a criterion of reasonableness, the "inherent necessity" of the incidental search, 334 U.S. at 708; or the presence of "exceptional circumstances," 333 U.S. at 14.

8. 178 F.2d 13 (D.C. Cir. 1949), aff'd on other grounds, 339 U.S. 1 (1950). This was the first case to consider this problem extensively and, originating in federal jurisdiction, to raise the issue under direct application of the fourth amendment. Upon receiving a complaint that health regulations were being violated by the defendant, a Health Department inspector attempted to make an inspection of the defendant's home, a private residence. Defendant refused to unlock her front door, whereupon she was arrested for interfering with a Health Department inspector in the performance of his duty. On appeal, it was held, one judge dissenting, that a health inspector may not inspect a private home without a warrant if the owner objects. For discussion of the issues and arguments raised by such inspections, see 2 Ala. L. Rev. 314 (1950); 63 Harv. L. Rev. 349 (1949); 44 Ill. L. Rev. 845 (1950); 17 U. Chi. L. Rev. 733 (1950); 3 Vand. L. Rev. 820 (1950).

9. 178 F.2d at 16.

Reasoning from this premise, the court found the health inspection unreasonable within the meaning of the fourth amendment. The dissent, however, relying on a view suggested in *Boyd v. United States*,[10] reasoned that the fourth amendment applied only to criminal cases, and an inspection in the interest of public health and safety, therefore, was not forbidden.[11] Although the *Little* case subsequently came before the Supreme Court, the constitutional issue was deftly side-stepped by a divided Court.[12]

The three other cases arose in state courts. The Maryland Court of Appeals, in *Givner v. State*,[13] subscribed to the theory that constitutional provisions against unreasonable search and seizure grew out of searches for evidence to be used for criminal prosecution. But the court also expressed doubt that, under the opinions of the Supreme Court, the scope of the fourth amendment was to be regarded as so limited.[14] In examining the *Little* case, the Maryland court did not find it to be decisive of the issue of reasonableness.[15]

10. 116 U.S. 616 (1886). The case dealt with the exclusion, in criminal cases, of evidence obtained through an allegedly unreasonable search and seizure. In discussing the question of reasonableness the Court said that "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment." Id. at 633.

11. See the conclusion of Judge Holtzoff's dissent, 178 F.2d at 25.

12. The majority stated that "neither the facts of this case, nor the District law on which the prosecution rests, provide a basis for a sweeping determination of the Fourth Amendment's application to all these varied types of investigations, inspections and searches. Yet a decision of the constitutional requirement for a search in this particular case might have far-reaching and unexpected implications as to closely related questions not now before us. This is therefore an appropriate case in which to apply our sound general policy against deciding constitutional questions if the record permits final disposition of a cause on non-constitutional grounds." 339 U.S. at 3-4. With two dissenting Justices upholding the constitutionality of health inspections without warrants, the Court disposed of the case on the rather tenuous ground that defendant's refusal to unlock her door was not "interference" within the meaning of the district statute.

13. 210 Md. 484, 124 A.2d 764 (1956). This case arose under the same statute as the instant case. See note 1 supra. Inspectors representing the Commissioner of Health, the Buildings Inspections Engineer and the Chief Engineer of the Fire Department, accompanied by an electrical inspector and a uniformed policeman, visited the premises of the appellant and asked permission to enter to make an inspection of the premises under the Baltimore City Code. The appellant refused the right of entry to the inspection team, and was subsequently found guilty of violations relating to the inspection of buildings. Appellant attacked the conviction upon the ground that these were unlawful searches. In affirming, the court of appeals determined that the inspections were not unlawful and did not involve any violation of the Maryland Constitution or the fourteenth amendment.

14. The Maryland Court of Appeals referred to the majority opinion of the Supreme Court in District of Columbia v. Little, 178 F.2d 13 (D.C. Cir. 1949); and FTC v. American Tobacco Co., 264 U.S. 298 (1924).

15. The court based its reasoning on the reluctance of the Supreme Court to decide

It asserted, citing *United States v. Rabinowitz*,[16] that prohibitions against unreasonable searches and seizures do not bar reasonable searches and seizures. The court found that the proposed inspections were reasonable in that they were primarily for protective, and not punitive, purposes.[17] In *State v. Price*[18] the Supreme Court of Ohio, reasoning that the homeowner's castle is subordinate to the general health and safety of the community, found consistent with its constitution an ordinance authorizing a housing inspector to enter the premises for inspection at any reasonable hour. Finally, in *Richards v. City of Columbia*,[19] the Supreme Court of South Carolina, in a dictum, expressed doubt "whether such an entrance [for housing inspection] would come within the constitutional guaranties [sic] against unreasonable searches."[20] The court cited the divided opinions of the court of appeals and the Supreme Court in the *Little* case, which, in its judgment, left unresolved the question whether an inspection without a warrant might be an unlawful search.

Is this question resolved in the present case? Mr. Justice Frankfurter, speaking for four of the five Justices of the majority, has written an ambiguous opinion. It is not clear whether he would soften the stringent protection of the fourth and fourteenth amendments as applied to inspections without warrant when such inspections serve as adjuncts to regulatory schemes advancing community welfare, or whether such health inspections are to be considered reasonable in and of themselves, by virtue of the limitations encompassing the inspection power and the demand created by modern living conditions. The recurring emphasis in his opinion on the necessity of a warrant where evidence of criminal action is sought supports the inference that the fourth amendment does not extend to health inspections. Indeed, this interpretation is underscored

---

the constitutional questions posed, and on the dissenting opinion of Mr. Justice Burton that the duties which the inspector was seeking to perform "were of such a reasonable, general, routine, accepted and important character, in the protection of the public health and safety, that they were being performed lawfully without such a search warrant." 339 U.S. at 7.

16. 339 U.S. 56 (1950). The Court held that a search and seizure incident to a lawful arrest was not unreasonable, and did not violate the fourth amendment. What is a reasonable search is not to be determined by any fixed formula, but rather is to be determined by the facts and circumstances of each case.

17. 210 Md. at 505, 124 A.2d at 775.

18. 168 Ohio St. 123, 151 N.E.2d 523 (1958). The Supreme Court recently noted probable jurisdiction in this case, 27 U.S.L. Week 3348-49 (U.S. June 8, 1959). However, Mr. Justice Stewart, among the majority in the instant case, disqualified himself from considering the merits of Price because his father, sitting on the Supreme Court of Ohio, was one of the deciding judges in the case.

19. 227 S.C. 538, 88 S.E.2d 683 (1955). The constitutionality of a municipal housing ordinance, a provision of which authorized housing inspections without warrants, was upheld by a divided court.

20. While the court stated that the question of inspection itself was not presented, because there had been no actual entry of the premises over the objection of the occupant, it nonetheless expressed its opinion as to the doubt existing on the issue and called attention to the inconclusiveness of the Little decision. Id. at 555, 88 S.E.2d at 692.

by the concurring opinion of Mr. Justice Whittaker and the dissenting opinion of Mr. Justice Douglas. Whittaker held that the fourth and fourteenth amendments did apply, but found the inspection here to be reasonable.[21] The four dissenting Justices agreed that health inspections came within the ambit of the fourth and fourteenth amendments, but found the proposed inspection to be unreasonable due to the absence of a warrant issued on a showing of probable cause.[22]

Justice Frankfurter said:

> [I]t was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions or for forfeitures that the great battle for fundamental liberty was fought. While these concerns for individual rights were the historic impulses behind the Fourth Amendment and its analogies in state constitutions, the application of the Fourth Amendment and the extent to which the essential right of privacy is protected by the Due Process Clause of the Fourteenth Amendment are of course not restricted within these historic bounds. But giving the fullest scope to this constitutional right to privacy, its protection cannot be here invoked.[23]

While it would appear that Frankfurter was not willing to restrict the fourth and fourteenth amendments to criminal situations solely and that his only concern was for the reasonableness of the proposed search, nowhere in his opinion does he explicitly say that the search was reasonable. Such inference may only be drawn from his discussion of the exigencies of urban living[24] and the limitations surrounding the search.[25] On the contrary, he continually reverts to the idea that this was not a search for evidence of a crime.

Regardless of Mr. Justice Frankfurter's meaning and intent, two principles emerge quite clearly from the *Frank* decision. First, the four dissenting and one concurring Justices agreed that the fourth and fourteenth amendments extend to health inspections. A majority of the Court therefore so held, and there is no reason why this case should not settle the issue. Secondly, all of the Justices accepted the dictum of *Wolf v. Colorado*.[26] It is therefore settled with finality that the core of the fourth amendment operates upon the states by reason of its incorporation into the due process clause of the fourteenth amendment.

One pertinent problem remains. When is a health inspection without a warrant reasonable? The inspection which is purely for reasons of health and without any penal sanction involved will apparently be accepted with less scrutiny than a search made to find evidence of crime. In the instant case it seems clear that there was no arbitrary attempt to invade the security of a private home. The Court calls attention to the fact that no evidence for criminal prosecution was sought to be seized, that the inspection was designed and pursued solely for the protection of the community's health, that the inspection was conducted with due regard for time and place, and that the power of

21. 359 U.S. at 373.
22. Id. at 374-79.
23. Id. at 365-66.
24. Id. at 371-72.
25. Id. at 366-67.
26. See note 4 supra.

inspection under the Code was carefully and strictly limited. The complexities and exigencies of modern urban living seem to be the dominant consideration in the resolution of this entire question. Where need obviously exists and the demand made on individual freedom is carefully circumscribed in an attempt to meet this need, it would not seem that a routine inspection of one's house is unreasonable or violative of due process of law. However, what will happen when, pursuant to the statute, the health officer returns to reinspect the premises to determine whether previously noted violations have been removed? Then a criminal penalty is immediately involved. The position of the dissent is clear. How will the majority react? Will they apply the customarily strict standard for reasonableness of a search used in criminal cases, or will they consider the criminal sanction merely incidental to the purpose of the inspection and apply the more relaxed standard of the present case?

Criminal Law—Double Jeopardy Arising out of Discharge of Jury for "Convenience."—Defendant's criminal prosecution was adjourned after the jury had been impaneled and sworn but before evidence was taken. At the call of the trial calendar on the date for reconvening, the district attorney moved for a mistrial, stating that in the interim another trial had begun before the same court, that the other trial would delay commencement of defendant's trial, and that the discharge of the jury would serve the convenience of the court, jury and defendant. The motion was granted over defendant's objection. On retrial, defendant pleaded double jeopardy and moved for a dismissal of the indictment and a discharge. The Court of General Sessions, New York County, held that "convenience," such as alleged by the district attorney, was not a proper ground for mistrial, and that, consequently, the plea of double jeopardy was proper. *People v. Colon,* 18 Misc. 2d 1061, 184 N.Y.S.2d 537 (N.Y. Ct. Gen. Sess. 1959).

A defendant tried before a jury for a criminal offense is "in jeopardy"[1] when he has been charged with a crime, has been arraigned, and a jury has been impaneled and sworn to hear his cause.[2] A defendant, once in jeopardy, cannot

1. The term is derived from the punishment—death or dismemberment—frequently meted out in earlier times to those found guilty of felonies. People v. Goodwin, 18 Johns. R. 187, 201 (N.Y. 1820). It is now used in a variety of forms, such as "jeopardy of life and limb for the same punishment;" "jeopardy of life or limb;" "jeopardy for the same offense;" "twice in jeopardy of punishment;" all meaning substantially the same thing. 22 C.J.S. Criminal Law § 238 (1940). Cf. Stout v. State, 36 Okla. 744, 130 Pac. 553 (1913).

2. People ex rel. Stabile v. Warden of City Prison, 202 N.Y. 138, 150, 95 N.E. 729, 732 (1911); People ex rel. Bullock v. Hayes, 166 App. Div. 507, 510, 151 N.Y. Supp. 1075, 1077 (2d Dep't 1915). Where the court sits without a jury, the defense arises after a witness is duly sworn. People ex rel. Cohen v. Collins, 238 App. Div. 592, 594, 265 N.Y. Supp. 475, 477 (1st Dep't 1933). But see King v. People, 5 Hun 297 (N.Y. Sup. Ct. 1875), where Judge Boardman prefers that evidence be given in any case, regarding the rule that it is sufficient that the jury be impaneled and sworn as "a very technical rule." Id. at 299. Few cases have had to deal with the exact question, with the result

be placed there again for the same offense.[3] Further, the trial must generally proceed without undue delay and be prosecuted to its legal determination.[4] In some circumstances, however, a court may halt the proceedings short of reaching a determination without barring a second valid prosecution of the defendant.[5]

The grounds most frequently cited for a valid mistrial and discharge of the jury which do not bar a second prosecution include injury or casualty to the defendant, a juror, or the court; inability of the jury to agree upon a verdict; mutual consent of the prosecution and defense to such a discharge;[6] or mis-

---

that many have used unfortunately broad and imprecise language which has tended to becloud the distinction. In People ex rel. Meyer v. Warden of Nassau County Jail, 269 N.Y. 426, 199 N.E. 647 (1936), the court states that "a prisoner is placed in jeopardy when he has been arraigned and pleaded to a valid charge, a jury has been examined and sworn, and evidence given." Id. at 428, 199 N.E. at 648. But in that case evidence had been given, so that, on the facts, the imprecise wording made no difference. The rule has been cited in this way in other cases where evidence had been given. See, e.g., People ex rel. Blue v. Karney, 181 Misc. 981, 44 N.Y.S.2d 691 (Sup. Ct. 1943), aff'd mem., 292 N.Y. 679, 56 N.E.2d 102 (1944). The rule is cited in cases where magistrates had summary jurisdiction. See, e.g., People v. Pearl, 272 App. Div. 563, 74 N.Y.S.2d 108 (1st Dep't 1947); People ex rel. Fasano v. Ashworth, 59 N.Y.S.2d 316 (Sup. Ct. 1946). The Fasano court went so far as to declare that "the cases unanimously hold that, where all prior proceedings are valid, jeopardy arises only after evidence is offered against the accused." 59 N.Y.S.2d at 317. The rule has also been cited in this manner where no trial had been held at all, but only an information filed. People v. Caiden, 156 N.Y.S.2d 716 (N.Y.C. Ct. Spec. Sess. 1956). None of these cases, until the instant case, bothers to make any clear distinction between jury trials and trials without a jury. Thus, several cases hold that jeopardy arises at the impaneling and swearing of the jury. People ex rel. Stabile v. Warden of City Prison; People ex rel. Bullock v. Hayes, supra. Others cite a rule differing in language but do not, on their facts, dispute the former rule. People ex rel. Meyer v. Warden of Nassau County Jail; People ex rel. Blue v. Karney; People v. Pearl; People ex rel. Fasano v. Ashworth; People v. Caiden, supra.

3. U.S. Const. amend. V; N.Y. Const. art. I, § 6; People ex rel. Stabile v. Warden of City Prison, 202 N.Y. 138, 95 N.E. 729 (1911); People ex rel. Meyer v. Warden of Nassau County Jail, 269 N.Y. 426, 199 N.E. 647 (1936).

4. U.S. Const. amend. VI; N.Y. Civ. Rights Law § 12; N.Y. Code Crim. Proc. § 8; 5 Wharton, Criminal Law and Procedure § 1912 (1957).

5. The common law proclaimed a rigid rule that a jury could not be discharged until it had rendered a verdict, but occasions of misconduct of jurors or their inability to agree forced a relaxation of this position. See United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); People v. Goodwin, 18 Johns. R. 187 (N.Y. 1820); People v. Olcutt, 2 Johns. Cas. 301 (N.Y. 1801); Comment, 32 N.C.L. Rev. 526 (1955).

6. In instances where the jury has retired to consider its verdict, the discretion of the court is defined and limited to these first three grounds by N.Y. Code Crim. Proc. § 428. This statute has been held not to affect the exercise of discretion before final submission to the jury. People ex rel. Brinkman v. Barr, 248 N.Y. 126, 161 N.E. 444 (1928) (dictum); People v. Montlake, 184 App. Div. 578, 172 N.Y. Supp. 102 (2d Dep't 1918); People ex rel. Herbert v. Henley, 142 App. Div. 421, 126 N.Y. Supp. 840 (1st Dep't 1911); People ex rel. Epstein v. Lawes, 164 Misc. 58, 297 N.Y. Supp. 386 (Sup. Ct. 1937) (dictum); People v. Zendano, 136 N.Y.S.2d 106 (Erie County Ct. 1954). N.Y. Code Crim. Proc. § 430 provides that, where a jury has been discharged, the cause may be tried again.

conduct of jurors.[7] The circumstances warranting such a course of action must be "very extraordinary and striking,"[8] necessitating the intervention as "essential to the furtherance of justice."[9]

The courts have paramount concern for the protection of the defendant's rights. Thus, a mistrial was held proper where the public prosecutor was guilty of misconduct,[10] but was not proper where the prosecutor was unprepared with his evidence.[11] Furthermore, consent of the defendant has always carried great weight. A mistrial, therefore, was held improper where the district attorney requested such because of the publication of a newspaper article unfavorable to the defendant and the defendant had objected.[12]

The question presented in the present case, then, was whether the district attorney had offered reasons sufficiently compelling to justify the declaration of a mistrial over defendant's objections. The grounds presented have no relation in principle to any of the precedents mentioned. There is no question of illness,[13] inability to agree, or misconduct. Nothing had occurred prior to this point which could prejudice the defendant. The convenience of the defendant was cited, but this reason, in the light of defendant's own objection, was apparently a fiction. Nor can much consideration be given to the convenience of the court; it is without precedent,[14] and the court makes no mention of it in its opinion. There remains, then, the convenience of the jury.

The primary concern of the law is not the convenience of jurors. The law requires that they serve for two weeks at least, and when the trial in which they are sitting extends beyond that time they may be required to sit for as

7. People v. Fishman, 64 Misc. 256, 119 N.Y. Supp. 89 (N.Y. County Ct. Gen. Sess. 1909). See People v. Olcutt, 2 Johns. Cas. 301 (N.Y. 1801); Comment, 32 N.C.L. Rev. 526 (1955).

8. People ex rel. Wright v. Klein, 139 Misc. 353, 357, 248 N.Y. Supp. 478, 482 (Sup. Ct. 1931).

9. People v. Olcutt, 2 Johns. Cas. 301, 307 (N.Y. 1801).

10. People v. Montlake, 184 App. Div. 578, 172 N.Y. Supp. 102 (2d Dep't 1918) (references, in presence of jury, to defense counsel as attorney of the pickpocket trust, and even a pickpocket himself).

11. People v. Barrett & Ward, 2 Cai. R. 305 (N.Y. Sup. Ct. 1805).

12. People ex rel. Totalis v. Craver, 174 Misc. 325, 20 N.Y.S.2d 533 (Sup. Ct. 1940).

13. The adjournment preceding the mistrial had been caused by the illness of the complaining witness, but by the time the court reconvened the witness had recovered and would have been able to testify. 18 Misc. 2d at 1062, 184 N.Y.S.2d at 538-39.

14. In People ex rel. Epting v. DeVoe, 206 Misc. 278, 133 N.Y.S.2d 129 (Sup. Ct.), rev'd per curiam, 284 App. Div. 1092, 136 N.Y.S.2d 650 (3d Dep't 1954), aff'd mem., 309 N.Y. 818, 130 N.E.2d 616 (1955), a mistrial was held proper in a situation similar to that under consideration here. The trial judge was faced with an uncertain delay when the court stenographer became seriously ill while the first witness was on the stand. In disclosing his intention to discharge the jury, the judge cited the difficulties he had previously experienced in finding substitute stenographers. This, then, can also be reduced to a matter of convenience. But the history of the case, made difficult to evaluate by the fact that the appellate division, in reversing, wrote a per curiam decision, while the court of appeals wrote a memorandum, suggests that the mistrial was finally held proper more because of the consent of the defendant than for the urgency of the circumstances.

long as the trial may last.[15] The jury in the present case had been sitting ten days when the mistrial was declared,[16] and the further delay anticipated by the district attorney was a matter of a few days and no more.[17]

As against this minor delay, the district attorney presented to the defendant an alternative of waiting over a year before the prosecution could be continued, due to the crowded calendar of this particular court.[18] To allow such a delay on the ground of convenience could not be countenanced without having "a dire effect . . . on the fundamental doctrine that sound public policy demands prompt disposition of criminal cases."[19]

Discovery—Striking Complaint Upon Plaintiff's Invocation of Privilege Against Self Incrimination.—Plaintiff, the assignee of a cause of action, invoked the privilege against self incrimination when the defendant, in an examination before trial duly ordered by the court, sought to obtain information supporting his affirmative defense that the plaintiff had purchased the cause of action in violation of sections 274 and 275 of the Penal Law.[1] At the trial, defendant's motion to strike the complaint was granted and the action was dismissed.[2] On appeal, the Appellate Division, Second Department, two justices dissenting, affirmed without opinion. *Levine v. Bornstein*, 7 App. Div. 2d 995, 183 N.Y.S.2d 868 (2d Dep't) (memorandum decision), *aff'd mem.*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1959).

The appellate division reasoned that the court has inherent power, i.e., that power possessed by the judiciary, in excess of any statutory authorization, to insure the "proper and complete administration of justice,"[3] to strike a pleading provided that there is no statutory prohibition against such action by the court.[4]

15. N.Y. Unconsol. Laws § 3921 (McKinney 1949); N.Y. Code Crim. Proc. §§ 10(e)(f).

16. The jury had been impaneled and sworn Oct. 11, 1957; the mistrial was declared Oct. 21, 1957. 18 Misc. 2d at 1063, 184 N.Y.S.2d at 539.

17. The district attorney, in his remarks while making his motion for a discharge, said that the trial which had been started in the interim would "undoubtedly go for at least the rest of this trial week." 18 Misc. 2d at 1062, 184 N.Y.S.2d at 538.

18. A comparison here is noteworthy. Epting's case, tried in an upstate court, was put back four months. People ex rel. Epting v. DeVoe, 206 Misc. at 280, 133 N.Y.S.2d at 131. From the mistrial in the instant case to the final disposition of the defendant's motion to dismiss on April 2, 1959, a period of 19 months elapsed.

19. 18 Misc. 2d at 1065, 184 N.Y.S.2d at 541.

1. N.Y. Penal Law §§ 274, 275 provide that under certain circumstances to solicit, buy or take a chose in action for the purpose of bringing an action thereon is a misdemeanor. These provisions are designed to prevent attorneys, individuals engaged in the business of the collection and adjustment of claims and certain corporations from the prohibited activities. The plaintiff in the instant case was an attorney.

2. Levine v. Bornstein, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (Sup. Ct. 1958).

3. In re Burge, 203 Misc. 677, 682, 118 N.Y.S.2d 23, 29 (Sup. Ct. 1952).

4. 13 Misc. 2d at 165, 174 N.Y.S.2d at 578. See Gross v. Clark, 87 N.Y. 272 (1881). However, the need for this extra legislative power has been lessened by appropriate statutory enactments. N.Y. Civ. Prac. Act § 299 permits striking a pleading where there

This power of the court to strike has, in New York, been restricted heretofore to cases where a party disobeys an order of the court, as distinguished from a mere notice.[5] In the principal case, insofar as the plaintiff did not refuse to answer, but answered by claiming a privilege, one might argue, as did the dissent, that the court's directive was not disobeyed and that, therefore, the dismissal was improper.[6] The fact remains, however, that in either event the defendant has been denied information to which he is entitled, and the plaintiff's refusal to divulge the information is in both cases intentional and deliberate. Only the means differ. Should a party refuse to answer simply because he knows that a truthful answer would prejudice his case there is then obviously good cause to dismiss the party's pleading. Is there any less cause when his refusal is predicated on the privilege against self incrimination?

The privilege against self incrimination usually is invoked by defendants and nonparty witnesses who are before the court not of their own choice, but at the request of another.[7] In the instant case, however, the person invoking the

---

is a "wilful failure to appear for the examination or to produce the books and papers required by the order or notice." Before this section was amended in 1955, the courts had no power to strike a complaint and render judgment for failure to submit to examination unless the plaintiff had violated an order rather than a notice. Nowak v. Buffalo Elec. Co., 286 App. Div. 987, 144 N.Y.S.2d 425 (4th Dep't 1955); Mack v. Edell, 284 App. Div. 1022, 134 N.Y.S.2d 844 (4th Dep't 1954) (memorandum decision); In re Pipski, 152 Misc. 307, 273 N.Y. Supp. 256 (Surr. Ct. 1934). N.Y. Civ. Prac. Act § 405 provides for striking a pleading for failure without reasonable excuse to obey an order duly served on the party requiring him to attend and be examined or produce books or papers. See generally Segal v. Princess Ann Girl Coat, Inc., 285 App. Div. 811, 137 N.Y.S.2d 242 (1st Dep't 1955) (per curiam); Roseberg Holding Co. v. Berman, 214 App. Div. 146, 211 N.Y. Supp. 900 (2d Dep't 1925); Levine v. Moskowitz, 206 App. Div. 194, 200 N.Y. Supp. 597 (1st Dep't 1923). N.Y. Civ. Prac. Act § 325 also prescribes penalties, including the striking of the pleadings at the discretion of the court, for disobedience of orders concerning discovery and inspection. See Feingold v. Walworth Bros., 238 N.Y. 454, 144 N.E. 675 (1935); Moore v. Jackson Tube Co., 86 N.Y.S.2d 488 (Sup. Ct. 1949). Failure to comply with an order for examination in the federal courts is punishable under Fed. R. Civ. P. 37(b). See also Fed. R. Civ. P. 26(b).

5. Nowak v. Buffalo Elec. Co., 286 App. Div. 987, 144 N.Y.S.2d 425 (4th Dep't 1955); Levine v. Moskowitz, 206 App. Div. 194, 200 N.Y. Supp. 597 (1st Dep't 1923).

6. Levine v. Bornstein, 7 App. Div. 2d 995, 996, 183 N.Y.S.2d 868, 869 (2d Dep't 1959), wherein the minority cites Bradley v. O'Hare, 2 App. Div. 2d 436, 156 N.Y.S.2d 533 (1st Dep't 1956), for the proposition that a motion to strike defendant's answer for invoking his right to claim privilege on examination before trial will be denied.

7. 8 Wigmore, Evidence §§ 2251, 2263 (3d ed. 1940). The privilege has had general application to criminal proceedings. U.S. Const. amend. V; N.Y. Const. art. I, § 6; People ex rel. Taylor v. Forbes, 143 N.Y. 219, 38 N.E. 303 (1894); N.Y. Code Crim. Proc. § 10. However, its application to civil cases is not disputed. Siegel v. Crawford, 266 App. Div. 878, 42 N.Y.S.2d 837 (2d Dep't 1943) (memorandum opinion); Chappell v. Chappell, 116 App. Div. 573, 101 N.Y. Supp. 846 (4th Dep't 1906) (4-to-1 decision). The privilege has been applied also in pretrial examinations. Weiner v. Weiner, 283 App. Div. 950, 130 N.Y.S.2d 212 (2d Dep't 1954) (memorandum decision); Southbridge Finishing Co. v. Golding, 208 Misc. 846, 143 N.Y.S.2d 911 (Sup. Ct. 1955), aff'd mem., 2 App.

privilege came before the court voluntarily, seeking affirmative relief. Reasoning that the plaintiff "obviously" had the right to claim the privilege but only at the risk of forfeiting his cause of action,[8] the trial court apparently weighed the plaintiff's duty, in an action initiated by him for his own benefit, to disclose all pertinent evidence and his constitutional privilege to withhold testimony which might incriminate him. The plaintiff's duty to disclose was found superior to his privilege. The court's reasoning is in accord with the recent United States Supreme Court cases of *Beilan v. Board of Educ.*,[9] and *Lerner v. Casey*.[10] In *Beilan* the Court permitted the dismissal of a public school teacher who, upon request by the Board of Education, refused to reply to questions regarding the teacher's alleged affiliations in communist organizations. The Court found that the teacher violated his obligation of "frankness, candor and cooperation in answering inquiries made of him by his employing Board . . . ."[11] The *Lerner* case sanctioned the dismissal of a subway conductor under the same circumstances. The Court, in each of these cases, reasoned that the violation of the teacher's or the conductor's duty to disclose pertinent information bearing on his fitness as a public employee could not be overcome by his right to remain silent.

The lower federal courts, in cases[12] where a party-plaintiff declines to answer interrogatories or to respond on an examination before trial because his answers might tend to incriminate him, deny that party the protection of the privilege against self incrimination. These courts maintain that the plaintiff, by instituting his action and seeking the aid of the court to enforce his rights therein, has agreed in advance to disclose all information pertinent to the litigation. The plaintiff, in effect, has waived his privilege. Under the waiver theory a party could thus be compelled to answer. The present court accorded him a right to remain silent. Under either theory the result is the same and, it is submitted, proper.[13] The privilege against self incrimination is a shield and not a

Div. 2d 882, 157 N.Y.S.2d 898 (1st Dep't 1956); King v. Liotti, 190 Misc. 672, 76 N.Y.S.2d 98 (Sup. Ct. 1947); American Blue Stone Co. v. Cohn Cut Stone Co., 97 Misc. 428, 161 N.Y. Supp. 667 (Sup. Ct. 1916), aff'd mem., 177 App. Div. 952, 164 N.Y. Supp. 1035 (4th Dep't 1917). See for the propriety of invoking the privilege against testimonial compulsion to avoid criminal prosecution: Brill v. Dobb, 36 N.Y.S.2d 975 (Sup. Ct. 1942); penalty or forfeiture: N.Y. Civ. Prac. Act § 355; Richardson, Evidence § 535 (8th ed. 1955); 8 Wigmore, Evidence §§ 2256-57 (3d ed. 1940).

8. 13 Misc. 2d at 165, 174 N.Y.S.2d at 578.

9. 357 U.S. 399 (1958) (5-to-4 decision).

10. 357 U.S. 468 (1958) (5-to-4 decision).

11. 357 U.S. at 405.

12. Independent Prod. Corp. v. Loew's, Inc., 22 F.R.D. 266 (S.D.N.Y. 1958); Fleming v. Bernardi, 1 F.R.D. 624 (N.D. Ohio 1941).

13. Another method available to the present court, but not considered, is the possibility of drawing an inference of guilt from a party's invocation of the privilege against self incrimination in a civil proceeding. Bradley v. O'Hare, 2 App. Div. 2d 436, 156 N.Y.S.2d 533 (1st Dep't 1956) (dictum); Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953); 8 Wigmore, Evidence § 2272, at 163 (Supp. 1955). See also Franklin v. Franklin, 365 Mo. 442, 283 S.W.2d 483 (1955); Annest v. Annest, 49 Wash. 2d 62, 298 P.2d 483 (1956).

sword. A party should not be permitted to use it to gain an advantage over his adversary. Certainly, if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or to the defense.

Habeas Corpus—Contempt Proceeding Pursuant to Section 406 of New York Civil Practice Act.—Relators were subpoenaed before the Temporary State Commission of Investigation, investigating the so-called Apalachin meeting held at the home of Joseph Barbara in New York.[1] Both relators were asked twenty-six questions, and each declined to answer on the grounds of possible self incrimination. The Commission, thereupon, granted them immunity.[2] They again refused to answer and were committed to civil jail pursuant to section 406 of the Civil Practice Act,[3] until they answered "truthfully and responsively" the twenty-six questions set forth in the orders of special term and the warrants committing them. These orders were affirmed unanimously by the appellate division.[4] Six days after affirmance by the court of appeals, the Commission convened a hearing, at relators' request, to give them an opportunity to answer the twenty-six questions. They gave answers to the enumerated questions as well as to other questions propounded. At the conclusion of the hearing the Commission refused to release them, stating that the answers given were false, evasive, incredible and obstructive of its investigation. Relators then brought habeas corpus proceedings, contending that they had answered the questions specified in the orders of commitment and were entitled to release. The appellate division[5] affirmed the order of special term dismissing the writ as to Costenze P. Valenti, but reversed the order dismissing the writ as to Frank J. Valenti, and directed his discharge. The court of appeals, three judges dissenting,[6] affirmed in both instances. Costenze Valenti's answers were so

1. The subpoena served on the relators stated in part that the subject being investigated included " 'matters concerning the public peace, public safety and public justice, and the faithful execution and effective enforcement of the laws of the State of New York, with particular reference but not limited to organized crime and racketeering, including the organization, purposes and participants of, and discussions had and decisions made at, a meeting held on the premises of Joseph Barbara on or about November 14, 1957, at Apalachin, Tioga County, State of New York.' " People ex rel. Valenti v. McCloskey, 17 Misc. 2d 695, 695, 186 N.Y.S.2d 798, 800 (Sup. Ct. 1959).

2. N.Y. Pen. Law § 2447.

3. See note 11 infra.

4. Commission of Investigation v. Lombardozzi, 7 App. Div. 2d 48, 180 N.Y.S.2d 496 (1st Dep't 1958), aff'd mem., 5 N.Y.2d 1026, 160 N.E.2d 125, 185 N.Y.S.2d 550, cert. denied, 360 U.S. 930 (1959).

5. 8 App. Div. 2d 74, 185 N.Y.S.2d 952 (1st Dep't), affirming 17 Misc. 2d 695, 186 N.Y.S.2d 798 (Sup. Ct. 1959).

6. Judge Froessel wrote the opinion as to Frank Valenti and dissented as to Costenze Valenti. Judges Fuld and Van Voorhis concurred. Judge Burke wrote the opinion as to Costenze Valenti and dissented as to Frank Valenti. Chief Judge Conway and Judge Dye concurred. Judge Desmond concurred as to both in a separate opinion. Froessel, Fuld

false, evasive and obstructive as to amount to a complete refusal to answer, while the answers of Frank Valenti were considered sufficiently clear and unequivocal, raising only an issue of credibility. *People ex rel. Valenti v. McCloskey,* 6 N.Y.2d 390, 160 N.E.2d 647, 189 N.Y.S.2d 898 (1959).

The courts have long used both civil and criminal contempt proceedings to compel recalcitrant witnesses to testify. Once the witness has answered he cannot be punished summarily for testifying falsely under civil[7] or criminal[8] contempt, since the witness who is alleged to have testified falsely is entitled to the safeguards of criminal procedure. But if his response is so false and evasive as to be equivalent to no answer at all, then the witness remains subject to contempt proceedings.[9] Judge Hand, in *United States v. Appel,*[10] noted that a witness in failing to recall where he had slept the night before, or whether he was sane or sober, is obviously evading an answer as to matters within his recollection. However, if the witness could not recall where he had slept a year or even a month before, then it would be equally clear that he had not evaded the question.

In New York a third contempt proceeding is established by section 406 of the Civil Practice Act.[11] This is available to agencies, not empowered to impose direct sanctions, to compel the giving of evidence. The statute permits the indefinite detention of reluctant witnesses until they have complied with a court order. But the issue of whether the questions posed have been answered within the purview of section 406 has been considered only once before by the court of appeals. In *People ex rel. Falk v. Sheriff,*[12] the court implicitly

and Van Voorhis voted to discharge both relators. Conway, Burke and Dye voted to dismiss the writs of both relators. Desmond voted to discharge Frank J. Valenti, and to dismiss the writ of Costenze. The net result is that four judges discharged Frank, but dismissed the writ of Costenze.

7. See Foster v. Hastings, 263 N.Y. 311, 189 N.E. 229 (1934); Fromme v. Gray, 148 N.Y. 695, 43 N.E. 215 (1896); Silberman Dairy Co. v. Econopouly, 177 App. Div. 97, 163 N.Y. Supp. 824 (2d Dep't 1917).

8. See People v. De Feo, 284 App. Div. 622, 131 N.Y.S.2d 806 (1st Dep't 1954), rev'd on other grounds, 308 N.Y. 595, 127 N.E.2d 592 (1955); Steingut v. Imrie, 270 App. Div. 34, 58 N.Y.S.2d 775 (3d Dep't 1945); Finkel v. McCook, 247 App. Div. 57, 286 N.Y. Supp. 755 (1st Dep't), aff'd, 271 N.Y. 636, 3 N.E.2d 460 (1936).

9. See United States v. Appel, 211 Fed. 495 (S.D.N.Y. 1913). In Foster v. Hastings, 263 N.Y. 311, 189 N.E. 229 (1934), the court stated that "when the witness refuses to answer or when it plainly appears that the witness denies knowledge or recollection of a fact, obviously to evade an answer as to matters within his recollection, the court may refuse to aid in a mere subterfuge and may compel an answer. . . ." Id. at 314, 189 N.E. at 231. See also People v. De Feo, supra note 8, where the court held that the technique of giving evasive answers which are tantamount to a refusal to answer, may serve as the basis for a proceeding to punish for contempt.

10. 211 Fed. 495 (S.D.N.Y. 1913).

11. N.Y. Civ. Prac. Act § 406(3) provides: "If the person subpoenaed . . . refuses without reasonable cause to be examined, or to answer a legal and pertinent question . . . a judge of a court of record . . . may forthwith . . . by warrant commit the offender to jail, there to remain until he submits to do the act which he was so required to do or is discharged according to law."

12. 258 N.Y. 437, 180 N.E. 110 (1932). Asked whether he had bribed any public

recognized that the rules governing the false and evasive answer in the field of judicial contempt are equally applicable to a proceeding under section 406.[13]

Several tests have been employed by the courts in determining whether the witness has responded directly with clear and unequivocal answers. Judge Hand, in *Appel,* stated that the only proper test to determine whether an answer was false and evasive was whether the witness made a bona fide effort to answer the question.[14] If the conduct of the witness shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court.[15] Though *Appel* is the most oft cited case on the subject, the United States Supreme Court in *In re Michael*[16] has provided a clearer test. The rule of the *Michael* case is that if the witness responds directly with answers that are unequivocal and clear enough to subject him to a perjury indictment, then he has answered the question and he may not be summarily committed for refusing to answer.

This is the test Judge Froessel adopted in his opinion here. He argued that when the answers given by the relators are carefully measured against this standard, "it becomes apparent that, though they may have been false, they were definite and unequivocal."[17] Judge Burke, in a very brief opinion, reached the opposite conclusion, holding that the answers given by both relators were "incredible, evasive, inconsistent testimony designed to thwart the legitimate object of the inquiry."[18] He concluded that they were rightly confined pursuant to section 406 which was "designed to obtain truthful answers to legitimate objects of investigation and inquiry."[19]

There is a clear and very basic difference between the tests employed by Judge Froessel and Judge Burke. The latter invoked the same nebulous and elusive standards applied by the appellate division. They were categorically rejected by Froessel.[20] The contention that relators may be subject to prosecu-

official, a witness before a legislative committee answered in the negative. The court held that he was entitled to his discharge from imprisonment for failure to answer, even though he had declined to answer before on the ground of self incrimination.

13. This was expressly stated by Judge Froessel in the instant case, 6 N.Y.2d at 399, 160 N.E.2d at 651, 189 N.Y.S.2d at 904. It should be noted that this is only an assumption on the part of the court, but since the rules pertaining to civil and criminal contempt are similar in this regard, the assumption appears to be valid.

14. 211 Fed. at 496. For New York cases following this rule see Foster v. Hastings, 263 N.Y. 311, 189 N.E. 229 (1934); People ex rel. Falk v. Sheriff, 258 N.Y. 437, 180 N.E. 110 (1932).

15. "A court . . . ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test." 211 Fed. at 495.

16. 326 U.S. 224 (1945).

17. 6 N.Y.2d at 404, 160 N.E.2d at 654, 189 N.Y.S.2d at 908.

18. Id. at 405, 160 N.E.2d at 655, 189 N.Y.S.2d at 910.

19. Id. at 406, 160 N.E.2d at 655, 189 N.Y.S.2d at 910.

20. Id. at 403, 160 N.E.2d at 654, 189 N.Y.S.2d at 908. The appellate division made reference to four such standards, though recognizing that the terminology was not completely satisfactory. These standards as cited by the court of appeals were: "'palpably false and evasive of the obligation to answer,' 'so false as to offer not the slightest probability of truthfulness,' 'so false and preposterous as to preclude the raising of any issue of fact,'

tions for perjury was dismissed by Burke because such a prosecution is punitive in nature and would not aid the Commission in its investigation.[21]

In a concurring opinion, Judge Desmond voted to affirm the appellate division because Costenze Valenti's answers were so clearly evasive and obstructive as to be "contemptuous and contumacious as a matter of law."[22] As to the answers of Frank Valenti, however, he concluded that they were sufficiently responsive so as to raise only an issue of credibility.[23]

The differing opinions announced in the instant case leave the present New York law in doubt. Judge Desmond's conclusion is a compromise between the opinions of Judge Froessel and Judge Burke. But Judge Desmond spoke only for himself, while the Burke and Froessel opinions each represented the views of three members of the court. It is submitted that Judge Froessel offers the clearest standard yet proposed by a New York court. It avoids placing the witness in the rather unique position of responding with answers which are clear and unequivocal enough to subject him to a perjury indictment, but which at the same time can be found evasive enough to convict him of contempt even though he may have made a bona fide effort to answer.

The relators in the instant case, responding to questions posed by the Commission, said that they had gone to the home of Barbara solely as spontaneous and casual visitors to a sick friend, and remained there saying nothing of note beyond superficial conversation, innocuous greetings and farewells. Had they refused to answer at all or feigned complete inability to recall what occurred at the "Apalachin meeting," then clearly they would stand in contempt. But since relators did to some extent account for their presence there, it should then be determined whether their answers, if they testified falsely, were clear and unequivocal enough to subject them to a perjury indictment. If they were, relators should have been prosecuted for perjury, thus insuring them the guarantees of criminal procedure.

Courts should be wary of sentencing witnesses to an indefinite incarceration for contempt when a witness has appeared and has testified. There is always present the danger that contempt proceedings might then be used for the purpose of exacting from the witness a character of testimony which the court would deem truthful.[24] The punishment for perjury is a criminal prosecution with the

and 'so patently obstructive and evasive as to raise no issue of fact.'" Id. at 403, 160 N.E.2d at 654, 189 N.Y.S.2d at 908.

21. Id. at 405, 160 N.E.2d at 655, 189 N.Y.S.2d at 910. It should be noted that mere perjury alone is not sufficient for the witness to be held in contempt. The Supreme Court has held that "in order to punish perjury in the presence of the court as a contempt there must be added to the essential elements of perjury under the general law the further element of obstruction to the court in the performance of its duty." Ex parte Hudgings, 249 U.S. 378, 383 (1919). This case was cited with approval by Judge Froessel in the instant case. Accord, Blim v. United States, 68 F.2d 484 (7th Cir. 1934); United States v. McGovern, 60 F.2d 880 (2d Cir. 1932). But see Riley v. Wallace, 188 Ky. 471, 222 S.W. 1085 (1920).

22. 6 N.Y.2d at 406, 160 N.E.2d at 655, 189 N.Y.S.2d at 910.

23. Id. at 406, 160 N.E.2d at 656, 189 N.Y.S.2d at 910.

24. In this regard Judge Froessel wrote: "By keeping relators in prison until they

attendant guarantee of a jury trial. If the testimony given is unequivocal then its truth or falsity should be determined by a jury, and not in summary fashion by a judge or an investigating committee.[25]

Interstate Commerce — Right of Shipper To Defend Against Unreasonable Rates in Postshipment Litigation.—Petitioner, an interstate motor carrier, brought an action under the Tucker Act[1] against the Government, as shipper, for unpaid transportation charges.[2] The United States raised the defense that the charges which, in accordance with the Motor Carrier Act,[3] were filed as tariffs with the Interstate Commerce Commission, were unreasonable and unlawful under the Motor Carrier Act.[4] The district court granted summary judgment for the carrier, holding that neither the court nor the Commission had jurisdiction to review the reasonableness of rates charged on past shipments.[5] The court of appeals reversed,[6] and decided that the district court

supply answers which satisfy the commission and the courts, they are not only being sentenced to conceivable life imprisonment, without a trial by jury or any of the other traditional rights which the law accords to a defendant, but they are in effect being compelled to admit they committed perjury in giving the answers they did." 6 N.Y.2d at 405, 160 N.E.2d at 655, 189 N.Y.S.2d at 909.

25. The Supreme Court has yet to question the right of a state to incarcerate a witness indefinitely for a contemptuous refusal to answer. However, in light of the fact that the Supreme Court has ruled in Gitlow v. New York, 268 U.S. 652 (1925), that the guarantees of the first amendment are protected by the due process clause of the fourteenth amendment from impairment by the states, there is a tendency to interpret the former as protecting a right of privacy. See Uphaus v. Wyman, 360 U.S. 72 (1959); Sweezy v. New Hampshire, 354 U.S. 234 (1957), where it was said that state investigating committees must act pursuant to a valid legislative purpose, especially since constitutional guarantees are involved when a witness is compelled to testify. It might well be that state investigations will become subject to the same limitations as congressional investigations. See Barenblatt v. United States, 360 U.S. 109 (1959); Watkins v. United States, 354 U.S. 178 (1957).

1. 28 U.S.C. § 1346(a)(2) (1958).

2. The shipper charged a through rate which exceeded the combination rate by $3.83 per hundredweight. The charge was originally paid, but on postpayment audit the General Accounting Office concluded that the combination rate was applicable and required petitioner to refund the difference between the through and combination rates. Petitioner made the refund under protest and then brought this suit.

3. 49 Stat. 543 (1935), 49 U.S.C. §§ 301-27 (1952).

4. 49 Stat. 558 (1935), 49 U.S.C. § 316(b) (1952) provides: "It shall be the duty of every common carrier . . . to establish, observe, and enforce just and reasonable rates, charges, and classifications, and just and reasonable regulations and practices relating thereto. . . ."

49. Stat. 558 (1935), 49 U.S.C. § 316(d) provides: "All charges made for any service rendered or to be rendered by any common carrier . . . shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. . . ."

5. The opinion of the District Court for the Northern District of Texas (T.R. 23-25) is unreported.

6. United States v. T.I.M.E., Inc., 252 F.2d 178 (5th Cir. 1958).

could entertain such postshipment litigation, holding it in abeyance pending a determination of the reasonableness of the rate by the Commission. The Supreme Court, four Justices dissenting, reversed, and held that under the Motor Carrier Act a shipper of goods cannot challenge in postshipment litigation the reasonableness of the carrier's charges which were made in accordance with the tariff governing the shipment. *T.I.M.E., Inc. v. United States,* 359 U.S. 464 (1959).

With the passage of the Motor Carrier Act, which became Part II[7] of the Interstate Commerce Act, the power to regulate rates of motor carriers, which by the statute are required to be reasonable,[8] was given to the Interstate Commerce Commission. Under Part I,[9] dealing with rail carriers, and Part III,[10] relating to water carriers, the Commission is given the express authority to award reparations as to past shipments where the filed rate was unreasonable,[11] but Part II is silent with respect to past shipments. At common law, however, the right of a shipper by common carrier to defend against unreasonable charges in postshipment litigation was recognized by the courts.[12] The Motor Carrier Act provides that "nothing in this section shall be held to extinguish any remedy or right of action not inconsistent herewith."[13] Thus, the question is whether the common law right is inconsistent with the Act.

Since the Motor Carrier Act was enacted the Commission has consistently declared that the common law remedy survived to the extent that an action could be brought in a federal court, with the issue of reasonableness submitted to the Commission. The question of reasonableness was properly the concern of the Commission, it was reasoned, because Congress had vested it with the "primary jurisdiction" of that problem.[14] This interpretation was followed by the lower federal courts.[15] Here, for the first time, the question of the survival of the common law remedy was before the Supreme Court.

The Court first rejected the Government's contention that the Act itself imposed a judicially enforceable duty on motor carriers to charge reasonable

7. 49 Stat. 543 (1935), 49 U.S.C. §§ 301-781 (1952).

8. See note 4 supra.

9. 49 Stat. 543 (1935), 49 U.S.C. §§ 1-27 (1952).

10. 54 Stat. 929 (1940), 49 U.S.C. §§ 901-23 (1952).

11. 49 Stat. 543 (1935), 49 U.S.C. § 9 (1952). Under this provision the shipper can complain to the Commission or bring suit in an appropriate district court of the United States.

12. At common law it was a tort for a common carrier to demand an unreasonable charge for its customary services. Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 436 (1907). See 2 Hutchinson, Law of Carriers § 805 (3d ed. 1906). In Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92 (1902), it was held that a carrier in interstate commerce is subject to common law liability in the absence of federal legislation.

13. 49 Stat. 560 (1935), 49 U.S.C. § 316(j) (1952).

14. Bell Potato Chip Co. v. Aberdeen Truck Line, 43 M.C.C. 337 (1948); W.A. Barrows Porcelain Enamel Co. v. Cushman Motor Delivery Co., 11 M.C.C. 365 (1939).

15. United States v. Garner, 134 F. Supp. 16 (E.D.N.C. 1955); New York & New Brunswick Auto Express Co. v. United States, 126 F. Supp. 215 (Ct. Cl. 1954).

rates.[16] The majority reasoned that the common law action did not survive the passage of the Act, basing its conclusion on an interesting, but questionable, interpretation of the doctrine of "primary jurisdiction."

The doctrine of primary jurisdiction was first enunciated in *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*,[17] a case arising under Part I of the Interstate Commerce Act. Suit was brought by a shipper in a state court to recover allegedly unreasonable charges exacted from it by a rail carrier, which charges had been filed as tariffs with the Commission. The Court here construes the *Abilene* case to say that any common law right is extinguished under a statutory scheme which permits only the Commission to decide the reasonableness of rates. "It is important to note," said the majority, "that this conclusion did not rest upon the fact that under Part I the ICC had reparations authority with respect to unreasonable charges paid by shippers, but instead was evidently dictated by the broader conclusion that the crucial question of reasonableness could not be decided by the courts."[18]

The conclusion followed that once the power to determine the issue of reasonableness had been taken from the courts and vested in a commission, then, unless the statute also established a procedure to give the courts jurisdiction, no jurisdiction can exist in a suit where the sole issue is one of reasonableness.

The dissent, in the present case, dealt exclusively with the question whether the Motor Carrier Act preserved the pre-existing common law remedy of the shipper. In concluding that it did, the dissent attacked the majority's conclusion regarding the effect of primary jurisdiction, declaring that the *Abilene* case did not hold that primary jurisdiction destroyed judicial remedies, but rather that it merely shifted from the court to the Commission the power to determine the reasonableness of rates. Thus, a common law action would not be inconsistent with the existence of primary jurisdiction in the Commission.

In the *Abilene* case the Court was concerned with the power of a judicial body, after the passage of the Interstate Commerce Act, to adjudge what was and was not a reasonable rate, not with any possibility of inconsistency between a common law action and an administrative determination of fact. Its conclusion was that the need for uniformity in rates made it essential that the determination of reasonableness be vested exclusively in the administrative body established for that purpose. *Southern Ry. v. Tift*,[19] decided the same year, recognized that *Abilene* did not see, or at least did not adjudicate, any inconsistency between a common law action and the primary jurisdiction of the Com-

16. T.I.M.E., Inc. v. United States, 359 U.S. 464, 468-70 (1959). The Court here relied on the omission of reparations provisions in the Act as contrasted with Part I, 49 Stat. 543 (1935), 49 U.S.C. §§ 1-27 (1952), and Part III, 54 Stat. 929 (1940), 49 U.S.C. §§ 901-23 (1952), of the Interstate Commerce Act, the Commission's interpretation of these omissions and the decision in Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).

17. 204 U.S. 426 (1907).

18. 359 U.S. at 473.

19. 206 U.S. 428 (1907). See also Robinson v. Baltimore & O.R.R., 222 U.S. 506, 511 (1912).

mission. The *Tift* Court said that *Abilene* simply decided that "the state courts had no jurisdiction to entertain a suit based on the unreasonableness of a rate as published *in advance* of the action of the Interstate Commerce Commission adjudging the rate unreasonable."[20] But the earlier view, that the finding of the Commission must be made in advance of any court action, has been modified so that now it is recognized procedure for a court to hold an action in abeyance, rather than dismiss, pending the Commission's determination of the issue of reasonableness.[21]

The principal case involved the referral of the sole issue in litigation to an administrative body. There are cases where the court, in the course of a common law action, has referred to a commission under the doctrine of primary jurisdiction some part of the issues presented, even though the commission lacked jurisdiction to decide the action and could not grant the relief requested. In *United States Nav. Co. v. Cunard S.S. Co.*[22] the plaintiff sought injunctive relief[23] which the Shipping Board could not grant, but the Court held that the administrative questions involved should be referred to the Board under the doctrine of primary jurisdiction. In *General Am. Tank Car Corp. v. El Dorado Terminal Co.*,[24] an action for breach of contract, the defendant pleaded that enforcement would work an illegal rebate to the shipper. The controversy between plaintiff, a shipper, and defendant, a supplier of tank cars, was not subject to the jurisdiction of the Interstate Commerce Commission. The Supreme Court nevertheless referred the question of illegal rebate to the Commission. A claim was then made that the Commission lacked jurisdiction to make a declaration which would serve no function other than to advise the court. On direct appeal from the Commission's ruling on the rebate, the Court held that the Commission had such jurisdiction.

In *United States v. Western Pac. R.R.*,[25] the Court declared that primary jurisdiction applied "where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."[26] In the case under consideration there was a claim "originally cognizable in the courts" if the common law remedy were found to be consistent with the primary jurisdiction of the Commission. The cases cited indicate that no inconsistency exists.[27]

20. 206 U.S. at 439. (Emphasis added.)

21. United States v. Western Pac. R.R., 352 U.S. 59 (1956); General Am. Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940).

22. 284 U.S. 474 (1932).

23. The plaintiff sought relief under the Shipping Act, 39 Stat. 728 (1916), 46 U.S.C. §§ 801-42 (1952).

24. 308 U.S. 422 (1940).

25. 352 U.S. 59 (1956).

26. Id. at 64.

27. A less apparent reason for the decision in this case might be the conclusion of the

The Court's decision here may be negligible in its effect on the private commercial shipper,[28] but as to the Government, it is certain to have substantial impact. The General Accounting Office customarily reviews the charges assessed against government agencies after these charges have been paid, and in the case of an overpayment, will deduct the amount from the bills subsequently rendered by the carrier.[29] Prior to the instant decision, the General Accounting Office had decided in a number of cases that there had been an overpayment where the filed tariffs were unreasonable, for example, where the military had contracted for the "exclusive use" service.[30] The instant decision will prohibit this practice, and may even be the basis for recovery by the carrier of deductions made in the past on the grounds of unreasonableness.

Mechanics' Liens — Equity Jurisdiction To Enter Personal Judgment Where Plaintiff's Equitable Action Fails.—Plaintiff brought suit to foreclose a mechanic's lien and to recover a personal judgment for labor and materials furnished to the defendant. The trial court, sitting as a court of equity, found that no lien existed, but entered a personal judgment against the defendant. The Supreme Court of Nebraska, one justice dissenting, affirmed the trial court's findings with respect to the lien, but reversed the entry of personal judgment against the defendant. A mechanic's lien foreclosure suit is an equitable action, and a court of equity, unless defendant has waived his right to trial by jury, does not have continuing jurisdiction to enter a personal judgment in favor of a plaintiff who has failed to establish an enforceable lien.[1] *Gillespie v. Hynes,* 168 Neb. 49, 95 N.W.2d 457 (1959).

Court as to the justice and desirability of leaving the shipper without a remedy. The Court reasoned that this is not an unjust result, since Congress intended to strike a balance between the rights and interests of shippers and carriers. Thus, although a shipper may in fact be forced to pay an unreasonable rate for a period of time, the carrier is also subject to the situation wherein he may be forced to carry goods at a rate less than the reasonable one. This situation arises during a suspension period when a newly filed rate is being examined by the Commission. Even if the new rate is ultimately declared to be reasonable, there is no means whereby the carrier may recover any loss incurred during the period that the old rate remained in effect.

28. The petitioner here had only one case for reparation by a private commercial shipper in thirty years of operation, and it arose out of the decision in this case in the court below.

29. This procedure is authorized under the Transportation Act, 54 Stat. 955 (1940), 49 U.S.C. § 666 (1952).

30. Under this service the shipper has the exclusive use of a trailer which he packs and turns over to the carrier, who then takes it sealed to its destination, turning it over to the party at that end. The carrier cannot utilize any empty space in the trailer, and does not know what commodity, or volume, is being transported.

---

1. Due to the merger of law and equity the trial court had general jurisdiction of both legal and equitable actions. Instead of dismissing the plaintiff's complaint, the supreme court remanded the case for trial at law on the issue of personal liability. The plaintiff was not required to bring a new action at law since the case was merely transferred to the law side of the court.

Prior to the principal case, Nebraska had adopted the rule that where a court of equity obtained jurisdiction of a cause for any purpose, the court would retain jurisdiction of the matter in order to grant all the relief, legal or equitable, to which the parties were entitled. This was true notwithstanding the failure of the plaintiff's equitable cause of action. This rule was designed to minimize unnecessary litigation and to prevent a multiplicity of lawsuits.

The majority of the supreme court here reasoned that such considerations must yield when weighed against the defendant's loss of the right to a jury trial of the purely legal issues remaining after the court had denied the plaintiff's alleged equitable right. In so holding, the instant court overruled four of its prior decisions.[2] Now the equity court's power to determine legal issues exists only where the plaintiff has proved his right to a measure of equitable relief. The court found this limitation on the trial court's power necessary to prevent a plaintiff from fraudulently bringing an unenforceable equity suit for the sole purpose of depriving the defendant of his right to a jury trial of the underlying legal action.[3]

The dissent argued that the right to a jury trial has always been a limited one, and the deprivation of a jury trial here in no way violated defendant's constitutional rights.[4] The dissent rejected as "absurd" the majority's conten-

In some cases where the equitable action has failed, the courts have dismissed the complaint altogether, thereby subjecting the plaintiff to the danger of being barred by the statute of limitations in prosecuting a subsequent law action. Apparently this has been done on the ground that the jurisdiction of an equity court is originally based on the equitable cause of action stated in the complaint. When that cause fails, the court loses all jurisdiction and must dismiss the complaint. See, e.g., International Photo Recording Mach., Inc. v. Microstat Corp., 269 App. Div. 485, 56 N.Y.S.2d 277 (1st Dep't 1945). The many aspects of this problem and the confusion in the New York cases are discussed in Comment, 42 Cornell L.Q. 376 (1957); Note, 55 Yale L.J. 826 (1946).

2. Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N.W.2d 233 (1958); Gibson v. Koutsky-Brennan-Vana Co., 143 Neb. 326, 9 N.W.2d 298 (1943); Robinson v. Dawson County Irr. Co., 142 Neb. 811, 8 N.W.2d 179 (1943); Parsons Constr. Co. v. Gifford, 129 Neb. 617, 262 N.W. 508 (1935). Citing Reynolds v. Warner, 128 Neb. 304, 258 N.W. 462 (1935), the instant court stated: "We disapprove the holdings of these cases [supra], and others of similar import, which conflict with the general rule that equity jurisdiction will not be retained to grant legal relief where no right to equitable relief is established." Gillespie v. Hyne, 168 Neb. 49, —, 95 N.W.2d 457, 460 (1959). It is interesting to note that Patterson v. Spelts Lumber Co., supra, is now rejected by exactly the same court which had decided it only a year before the instant case.

3. The court, in taking this position, relies heavily upon language quoted from Reynolds v. Warner, supra note 2, wherein the court denied interveners the right to damages in an equity action when they failed to establish an attorney's charging lien. The Reynolds case was decided the same year as Parsons Constr. Co. v. Gifford, supra note 2, one of the cases which is now rejected. The dissenting justice points out that the same judge wrote both decisions within an eight month period, thereby attempting to bolster its contention that the Reynolds case is distinguishable from the instant case because it involved suit on an attorney's charging lien which was a recognized action at common law, while mechanic's lien actions are statutory. 168 Neb. at ——, 95 N.W.2d at 471.

4. 168 Neb. at —, 95 N.W.2d at 469. It is elementary that the right to a jury trial does not exist in purely equitable actions. In an equity case a defendant is denied the

tion that some equitable relief must be granted before an equity court may decide legal issues. That, said the dissent, would make jurisdiction to decide a major legal controversy depend merely on the court's power to decide an equitable controversy of infinitesimal value.[5] In addition, the dissent contended that there are practical disadvantages in the majority position insofar as it requires the duplication of evidence in a subsequent action at law which had already been heard by an equity judge in a suit where no equitable right was granted.[6]

Nebraska, by virtue of the present decision, is now in accord with the majority of American courts which deny an equity court the right to grant legal relief when it appears there was never in fact any ground for equitable relief.[7]

---

right to a jury trial of legal issues raised in defense or by way of counterclaim. See, e.g., Beh v. Tilk, 222 Iowa 729, 269 N.W. 751 (1936). See also Annot., 89 A.L.R. 1391 (1934).

In England, where it originated, the right to a jury trial in civil actions has almost been abolished. Administration of Justice Act, 1933, 23 & 24 Geo. 5, c. 36, § 6. Trial by jury may only be demanded in actions for fraud, libel, slander, false imprisonment, malicious prosecution, seduction or breach of promise of marriage. But even in those actions the judge, at his discretion, may deny a jury if the case is complicated. See Mayhead v. Hydraulic Hoist Co., [1931] 2 K.B. 424 (action for breach of warranty and fraud).

In the United States a "constitutional right" means a right under the state constitution and not under the federal constitution since the federal guarantee of trial by jury in civil cases does not operate to restrict the states. Where, in any particular case, the denial of a jury trial is consistent with the constitution of the state, neither litigant can complain that due process of law has been denied. Walker v. Sauvinet, 92 U.S. 90 (1875). See also Maxwell v. Dow, 176 U.S. 581 (1900).

5. The theory behind the majority view, which is not explained by the instant court, seems to be that the equity court acquires jurisdiction to grant a legal remedy only where that remedy is derived from an equitable cause of action which the plaintiff has proven. See Gogebic Auto Co. v. Board of Rd. Comm'rs, 292 Mich. 536, 290 N.W. 898 (1940), where plaintiff's bill was dismissed because there was no proof of an equitable assignment. Chief Justice Simmons, dissenting in the instant case, contending that the theory is unsound, referred to Patterson v. Spelts Lumber Co., 166 Neb. 692, 90 N.W.2d 283 (1958), now overruled, where the plaintiff was entitled to a lien for only $6.52. The Chief Justice observed that "some interesting questions can arise on appeal as a result of this opinion . . . . It is my understanding of the opinion of the court . . . that equity has the full right to render both a decree of foreclosure and a personal judgment under those circumstances." 168 Neb. at ——, 95 N.W.2d at 462-63.

6. "The action is heard initially as an action in equity. The trial court in equity may hear all the evidence as to the right of the plaintiff to an injunction and to damages. If at the close of the evidence the court determines that equitable relief by injunction should not be granted, then it cannot properly determine the issue of damages, already tried. It must then retry the cause and submit that question to a jury unless the defendant waives a jury, in which event the court determines it as an action at law, although the court had heard the evidence as a cause in equity subject to equity rules." Id. at ——, 95 N.W.2d at 461. Chief Justice Simmons continues the attack: "But what of the burden cast upon trial courts of trying causes piecemeal and twice where heretofore one trial has been held sufficient?" Id. at ——, 95 N.W.2d at 463.

7. See cases cited in 30 C.J.S. Equity § 73, nn. 34 & 35 (1942). See also Thompson v. Wade, 154 Kan. 611, 121 P.2d 189 (1942) (accounting suit); Baldwin v. Chesapeake &

The contrary view has found favor in only a small number of states.[8] A third view, which appears to have been adopted only by Massachusetts, allows an equity court, at its own discretion, to retain a particular case for decision on legal issues or to dismiss it without prejudice to an action at law.[9] In exercising its discretion the court will consider the plaintiff's good faith in bringing the equity suit.

Some courts have held that mechanics' liens, created by statute, are not governed by the same rule applicable to other equity suits. Such was the reasoning in *Wise v. Jerome*[10] where an Illinois court, in restricting its denial of jurisdiction to a court of equity to grant damages after the equitable action had failed, solely in regard to statutory liens, reasoned that lien actions are limited by the necessarily strict construction given the lien statute. While the court in the principal case was not unmindful of the reasoning of *Wise v. Jerome*,[11] it obviously felt that mechanic's lien suits are to be treated in the same manner as any other equitable action. Thus, the instant court refused to limit its holding to cover only lien actions and chose to extend its decision to cover all equity cases.[12]

Potomac Tel. Co., 156 Md. 552, 144 Atl. 703 (1929) (damages); Doyle v. Allstate Ins. Co., 1 N.Y.2d 439, 136 N.E.2d 484, 154 N.Y.S.2d 10 (1956); International Photo Recording Mach., Inc. v. Microstat Corp., 269 App. Div. 485, 56 N.Y.S.2d 277 (1st Dep't 1945) (reformation of contract); Kelsey v. Distler, 133 App. Div. 916, 117 N.Y. Supp. 1084 (2d Dep't 1909) (specific performance); City of Reedsport v. Hubbard, 202 Ore. 370, 274 P.2d 248 (1954) (foreclosure of contract for sale of land); Cella v. Davidson, 304 Pa. 389, 156 Atl. 99 (1931) (title of corporate officer contested).

8. Silverman v. Greenberg, 12 Cal. 2d 252, 83 P.2d 293 (1938) (suit for return of money or title to land); Shaw v. Owen, 229 Miss. 126, 90 So. 2d 179 (1956) (nuisance); Burnett v. Bass, 152 Miss. 517, 120 So. 456 (1929) (adverse possession); Moore v. Capital Gas Corp., 117 Mont. 148, 158 P.2d 302 (1945) (dictum) (extrinsic fraud).

9. The Massachusetts cases seem well settled to this effect. Di Nardi v. Di Vidio, 312 Mass. 398, 45 N.E.2d 269 (1942); Degnan v. Maryland Cas. Co., 271 Mass. 427, 171 N.E. 482 (1930). But see Byrne v. Gendreau, 279 Mass. 77, 180 N.E. 670 (1932). In Geguzis v. Brockton Standard Shoe Co., 291 Mass. 368, 197 N.E. 51 (1935), the court stressed that in exercising its discretionary power, it would take cognizance of the plaintiff's good faith in bringing the equity suit. If the plaintiff does so to deprive the defendant of jury trial, he will be made to seek his remedy at law.

10. 5 Ill. App. 2d 214, 125 N.E.2d 292 (1955). In taking this position, the court reached the same result as the principal case without disturbing Illinois precedents cited by the lien claimant in support of his contention that equity would retain jurisdiction to award damages even where no equity right was proven.

11. The court makes reference to the Nebraska statute in connection with the following contention: "We point out that the mechanic's lien statute provides benefits to the holders of mechanic's liens. One having no lien can claim no rights under it. Consequently, one who claims a mechanic's lien and fails to establish it is in no better position than if the mechanic's lien statute did not exist." 168 Neb. at ——, 95 N.W.2d at 459-60.

12. The principal case is followed in Buck v. Village of Davenport, 168 Neb. 250, 95 N.W.2d 488 (1959), where the trial court denied the injunction sought by the plaintiff, but entered a personal judgment against the defendant for damage inflicted on plaintiff's home due to defendant's negligence in maintaining its sewer system. The Nebraska Supreme Court, citing the instant case as controlling, reversed the trial court and remanded the case for trial at law on the issue of damages.

From a practical viewpoint, there is a sound basis for enabling a court of equity, sitting without a jury, to retain jurisdiction to grant damages after the equitable action has failed. There is a growing need for reduction in the expense, effort, duration and complexity involved in the prosecution of litigation due to its constantly increasing volume in most jurisdictions. As the dissent points out, the view taken by the majority only adds to the burdens besetting the trial courts by requiring them to try and retry the same issues. While the Nebraska court attempted to protect the defendant's right to a trial by jury, the real effect of its decision was to enable a defendant to evade and forestall having to make payment of a legal obligation to which the plaintiff was entitled in the trained judgment of a trial judge, who had considered all the evidence in the case. Thus, the plaintiff here was effectively deprived of the right to prompt compensation for damage suffered as a result of defendant's breach of duty, a right which the Nebraska court obviously considered secondary to the right of trial by jury.

The right to jury trial in civil cases is not so fundamental a right as to be imbued in the concept of due process. The several states have the power to restrict the right or to abolish it completely.[13] When weighed against the economical, efficient and prompt administration of justice which would result from its denial in cases of the instant kind, the right to jury trial loses its appeal. Where the plaintiff brings a mechanic's lien foreclosure action in good faith, and not for the sole purpose of depriving the defendant of his right to trial by jury of legal issues necessarily presented in the lien suit, is it not preferable to permit the equity court to determine all the rights of the parties with respect to the transactions out of which the lien action arose? At the same time, the defendant is entitled to be protected against the sham suit which is instituted on the equity side of the court simply to avoid a jury trial of the legal cause of action. The Massachusetts rule, extended to all equity suits, would supply that needed protection. Striking the middle ground, the equity judge is empowered to enter a judgment at law but only for a plaintiff who in good faith has alleged and proved plausible, albeit invalid, grounds for equitable relief.

Process — Federal Law as Determinative of the Effectiveness of Federal Process on Foreign Corporation.—A New York corporation, pursuant to contract, had for a period of five years acted as export representative for defendant, an Iowa corporation. The New York corporation solicited the sale of defendant's products for delivery throughout the world and, in so doing, used defendant's letterheads, listed defendant's telephone number in a New York directory, received all inquiries regarding the sale of defendant's products, and made, except for a few instances, all arrangements for the shipping of these goods. There was, however, no intercorporate relationship between defendant and the New York corporation. All sales were subject to approval by defendant and, in the vast majority of cases, the sales contract was made between the defendant and the customer directly. Service of process of the District Court for the Southern District of New York was made upon the Iowa corporation

13. See note 4 supra.

by serving an executive of the New York corporation in New York State. The district court held that federal law determines the effectiveness of service in a diversity case, and that under federal law a foreign corporation soliciting business through a domestic corporation, as did defendant, was subject to its jurisdiction. *Nash-Ringel, Inc. v. Amana Refrigeration, Inc.*, 172 F. Supp. 524 (S.D.N.Y. 1959).

The court here was called upon to determine whether the rule of *Erie v. Tompkins*[1] extends to the acquisition of jurisdiction over a foreign corporation and to the problem of what constituted "doing business" within a state. Since *Erie* was decided in 1938, the lower federal courts, and the Supreme Court itself, have been more interested in the spirit of the *Erie* case than in the substantive-procedural dichotomy expounded by the decision.[2] In essence, the intent of the decision was to insure that, in cases where a federal court is exercising jurisdiction solely because of diversity of citizenship, so far as legal rules determine the outcome of a case, the result of the litigation in the federal courts should be the same as it would be in a state court.[3] Following the so-called "result" test, the Courts of Appeals for the First,[4] Third,[5] Fifth,[6] Seventh,[7] and Tenth[8] Circuits have held that in determining the amenability of a foreign corporation to service of process the federal courts should apply state law. These courts have reasoned that Federal Rule 4(d)(7)[9] permits service to be made in the manner prescribed by the law of the state in which the federal court sits and that, since the manner of service is to accord with state law, it follows that the federal courts should conform to the particular state's determination of those activities properly required to subject the corporation to service.

Taking the opposite view, the Court of Appeals for the Second Circuit, while it has never expressly so held, has intimated that federal law applies in determining whether a district court has personal jurisdiction over a foreign corporation,[10] and the decisions of the District Court of the Southern District of New York, which handles approximately twenty per cent of all the federal cases of this type, have been almost unanimous in their holding that federal

1. 304 U.S. 64 (1938).

2. Guarantee Trust Co. v. York, 326 U.S. 99 (1945); Shawe v. Wendy Wilson, Inc., 171 F. Supp. 117 (S.D.N.Y. 1959).

3. Woods v. Interstate Realty Co., 337 U.S. 535, 537-38 (1949); Angel v. Bullington, 330 U.S. 183, 191-92 (1947).

4. Pulson v. American Rolling Mill Co., 170 F.2d 193 (1st Cir. 1948).

5. Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3d Cir. 1953).

6. Albritton v. General Factors Corp., 201 F.2d 138 (5th Cir. 1953).

7. Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 199 F.2d 485 (7th Cir. 1952).

8. Steinway v. Majestic Amusement Co., 179 F.2d 681 (10th Cir. 1949).

9. Fed. R. Civ. P. 4(d)(7).

10. French v. Gibbs Corp., 189 F.2d 787, 790 (2d Cir. 1951); Latimer v. S/A Industries Reunidas F. Matarazzo, 175 F.2d 184, 186 (2d Cir.), cert. denied, 338 U.S. 867 (1949); Jacobwitz v. Thomson, 141 F.2d 72, 75 (2d Cir. 1944).

law should apply.[11] The Southern District decisions, followed by the case under consideration, put particular emphasis on Federal Rule 4(d)(3)[12] which provides for the manner of service on a foreign corporation. The court here argued that, since Congress has provided for federal service, it is illogical to employ service under state law or to allow the state courts to determine the effect of such federal service.

The problem comes to the fore where there is a conflict between state and federal interpretations of the concept of "doing business." In the present case, had New York law been applied it is most likely that jurisdiction would have been denied.[13] Although a precise definition of what constitutes "doing business" has never been formulated by either federal or state courts, in *McGee v. International Life Ins. Co.*[14] the Supreme Court underscored the contacts which it will consider sufficient to satisfy the provisions of due process and, in *McGee*, they were few in number. If the lower federal courts were to find *Erie* inapplicable, it is more than likely that a federal rule as to what constitutes "doing business" would be fashioned on such minimum contacts as found in *McGee*. In other words, a due process test would result, and a minimum number of contacts necessary to satisfy due process would enable the district court to acquire jurisdiction over the absentee corporation. Thus, the resulting federal rule would, in the great majority of instances, be more liberal than the prevailing state tests.[15] The Second Circuit has utilized this so-called due process test.[16] It requires that all relevant factors be taken into consideration, such as the nature and character of the business;[17] whether the forum has some particular interest in granting relief;[18] whether the activities within the jurisdiction are related

11. Clifton Prod., Inc. v. American Universal Ins. Co., 169 F. Supp. 842, 847 (S.D.N.Y. 1959); Naplebaum v. Atlantic Greyhound Corp. 171 F. Supp. 547, 549 (S.D.N.Y. 1958); Anderson v. British Overseas Airways Corp., 144 F. Supp. 543, 546 (S.D.N.Y. 1956); Nugey v. Paul-Lewis Lab., Inc., 132 F. Supp. 448, 450 (S.D.N.Y. 1955); Satterfield v. Lehigh Valley R.R., 128 F. Supp. 669, 670 (S.D.N.Y. 1955); General Elec. Co. v. Masters Mail Order Co., 122 F. Supp. 797, 800 (S.D.N.Y. 1954). Contra, Shawe v. Wendy Wilson, Inc., 171 F. Supp. 117 (S.D.N.Y. 1959).

12. Fed. R. Civ. P. 4(d)(3).

13. "Where . . . the foreign corporation is represented within the jurisdiction only by a person or corporation who sells on commission as part of his or its general business of acting for similarly situated primary sellers, the New York courts disclaim jurisdiction." Shawe v. Wendy Wilson, Inc., 171 F. Supp. at 119, citing Fried v. Lakeland Hide & Leather Co., 14 Misc. 2d 208, 157 N.Y.S.2d 633 (Sup. Ct. 1956), and Gertenstein v. Peninsulor & Oriental Nav. Co., 202 Misc. 838, 113 N.Y.S.2d (New York City Ct. 1952).

14. 355 U.S. 220 (1957), citing International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

15. This is not to say that the federal rule would be more liberal than such states as California, under the statute of which the service in McGee v. International Life Ins. Co., supra note 14, was originally effected.

16. See notes 10 & 11 supra.

17. MacInnes v. Fontainebleau Hotel Corp., 257 F.2d 832, 833 (2d Cir. 1958).

18. McGee v. International Life Ins. Co., 355 U.S. at 223.

to the cause of action;[19] and the relative convenience of the parties.[20]

The Supreme Court has held that solicitation alone by a foreign corporation is not enough.[21] From this quickly evolved the "solicitation plus" rule, whereby it was held that solicitation within a state by agents of a foreign corporation, plus some measure of additional activities, was sufficient to render the corporation amenable to suit brought in that state.[22] In the present case, the court held that mere solicitation of business within a jurisdiction, if regular and continuous, is enough to bring a foreign corporation within the reach of the process of that jurisdiction and, while the court has some precedents for this holding,[23] it would seem to be in conflict with the so-called *Hotel* cases.[24] In the *Hotel* cases there was substantial and continuous solicitation by an agent of the foreign hotels at the time process was served. The courts, in refusing to accept jurisdiction, paid particular attention to the fact that the defendant's business was local in character, confined to the jurisdiction where the hotel was located, and to the fact that all the hotel services were rendered outside the forum. Here the court noted that the defendant's business was both nationwide and international, and that the activities sued upon arose out of dealings actually related to the New York forum.

Conflicts between the circuits, particularly with respect to the much litigated and important field of jurisdiction over foreign corporations, is certainly undesirable. The federal rules do not supply a solution. There is more than a surface ambiguity between Rule 4(d)(7) and Rule 4(d)(3). But the apparent meaning of the federal rules has never deterred the Supreme Court from reading them in such a way as to give full play to the philosophy and purpose of its decision in the *Erie* case.[25] Providing that both state and federal tests accord with due process, as they must, then uniformity becomes the end which is to be sought. Uniformity between state and federal courts is obviously a desirable end in itself. It is, therefore, reasonable to surmise that eventually the Supreme Court will require that state law be followed.

The manner of service, being strictly a procedural question, might be accomplished either by state law, under Rule 4(d)(7), or federal law, under Rule 4(d)(3). Then, following the *Erie* decision, state law would determine the acquisition of jurisdiction, and the plaintiff would have a choice only as to the manner of service. In practice, state procedure would in most cases be more appealing, but Rule 4(d)(3) would stand as a liberalizing force in those states with restrictive methods of service. Uniformity, it is submitted, is sufficient

19. International Shoe Co. v. Washington, 326 U.S. at 317.

20. Ibid.

21. Green v. Chicago, Burlington & Quincy Ry., 205 U.S. 530, 532 (1907).

22. People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79 (1918); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914).

23. Nugey v. Paul-Lewis Lab., 132 F. Supp. 448 (S.D.N.Y. 1955); Alleque v. Gulf & So. Am. S.S. Co., 103 F. Supp. 34 (S.D.N.Y. 1952).

24. MacInnes v. Fontainebleau Hotel Corp., 257 F.2d 832 (2d Cir. 1958); Weiderhorn v. The Sands, Inc., 142 F. Supp. 448 (S.D.N.Y. 1956).

25. See Ragen v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 532-33 (1949).

reason to reject the conclusion drawn in the present case, and to accept the reasoning of the First, Third, Fifth, Seventh and Tenth Circuits.

Taxation — Dealer Reserve Accounts Are Income as of Time Recorded.— The Commissioner of Internal Revenue, in three separate instances, assessed income tax deficiencies against three taxpayers, two retail dealers in automobiles and one retail dealer in house trailers, for failing to report as income during the taxable years in question moneys withheld by finance companies and retained in "dealer reserve accounts."[1] The reserve accounts were established to insure against losses on installment paper, issued to the dealer by the automobile or trailer purchaser, and negotiated by the dealer to the finance companies. All three taxpayers used the accrual method of accounting. The Tax Court of the United States sustained the Commissioner's ruling. On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the Tax Court's decision, while the Court of Appeals for the Eighth Circuit and the Court of Appeals for the Ninth Circuit reversed. The United States Supreme Court, one Justice dissenting, affirmed the Seventh Circuit, and reversed the Eighth and Ninth. Amounts withheld by finance companies to cover possible losses on installment paper constitute income to taxpayers who employ the accrual method of accounting from the time the amounts are recorded on the books of the finance companies as liabilities to the taxpayers. *Commissioner v. Hansen*, 360 U.S. 446 (1959).

Under existing tax law a cash basis taxpayer has taxable income when money is actually received.[2] The cash method, however, does not require that cash or its equivalent be physically received to constitute income. Amounts are considered as cash received if "they are unqualifiedly available to the taxpayer or absolutely subject to his demand. This is commonly spoken of as the theory of 'constructive receipt.'"[3] On the other hand, an accrual basis taxpayer

1. A typical "dealer reserve account" is established in the following manner. The dealer and the purchaser, having agreed on the price for a particular vehicle, enter into a conditional sales contract. In part payment of the price, the purchaser makes a down payment. To the remaining balance of the purchase price is added financing charges and cost for insurance. This amount is secured by a negotiable or nonnegotiable instrument, usually on a form supplied by the finance company. The dealer thereupon assigns or negotiates the instrument to the finance company for an agreed price. The finance company pays to the dealer a percentage of the purchase price (usually 95%), but under the terms of the contract between them, they are permitted to retain the remaining percentage of the price. This amount they credit on their books to a "dealer reserve account," which is used to assure performance by the dealer of his liabilities as endorser or guarantor to the finance company. The agreement between the dealer and the finance company further provides that, at stated intervals, the finance company would pay to the dealer any amount in the reserve which exceeds a certain percentage (usually between 5 and 15%) of the aggregate unpaid balance of all outstanding installment paper sold.

2. Treas. Reg. 118, § 39.42-2 (1953).

3. 2 Merten, Law of Federal Income Taxation § 12.03 (1955). See also Treas. Reg. 118, § 39.42-2 (1953).

pays taxes on income as the fixed right to receive the income arises. In the frequently cited *Spring City Foundry Co. v. Commissioner,* the Supreme Court said: "Keeping accounts and making returns on the accrual basis, as distinguished from the cash basis, import that it is the right to receive and not the actual receipt that determines the inclusion of the amount in gross income. When the right to receive an amount becomes fixed, the right accrues."[4] In the *Spring City* case it was held that income from the sale of merchandise accrued although the purchaser went into bankruptcy before the end of the taxable year and prior to the contract price having been paid the vendor-taxpayer.[5] The question in the instant case was substantially that posed in *Spring City.* When does the income accrue? The Internal Revenue Code does not set forth any concrete rules for determining when items of income accrue.[6] On the precise question of the accrual of dealer reserves, the Commissioner, as early as 1931, had ruled[7] that a service charge,[8] payable to the dealer, was taxable income in the year in which the amount was credited to the dealer's reserve account. Subsequently, the Tax Court first held that amounts in dealer reserves constituted income when listed on the books of the finance company, since they were not subject to any reduction by claims of the finance company against the dealer and the payment of the money in such cases was, therefore, merely deferred.[9] If, however, the reserve was established to insure the finance company against repossessions and other liabilities of the dealer, then the reserves, being subject to contingencies, were not income until actually paid.[10] The distinction appeared reasonable and acceptable.[11] However, the Tax Court subsequently discarded the distinction and ruled that such amounts, for whatever purpose retained by the finance company, were income when credited on the books of the finance company.[12] Taxpayers appealing the adverse decisions of the Tax Court to the circuit courts, generally found those courts more sympathetic to their views.[13]

---

4. Spring City Foundry Co. v. Commissioner, 292 U.S. 182, 184 (1934).

5. The Court also held that the taxpayer could not take a deduction in the year in question even though he knew of the bankruptcy of the purchaser, but rather had to wait until the extent of uncollectability was definitely ascertained. Id. at 184.

6. Int. Rev. Code of 1954, § 446(a) provides: "[I]ncome shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income. . . ." Int. Rev. Code of 1954, § 446(b) provides: "[I]f the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary or his delegates, does clearly reflect income."

7. G.C.M. 9571, X-2 Cum. Bull. 153 (1931).

8. The agreement between the dealer and the finance company usually provides that approximately one-fourth of the finance charges will be paid to the dealer on a deferred basis.

9. Shoemaker-Nash, Inc., 41 B.T.A. 417 (1940).

10. Ernest G. Beaudry, 10 P-H B.T.A. Mem. 249 (1934).

11. See 2 Merten, Law of Federal Income Taxation § 12.124 (1955).

12. See Vance L. Wiley, 16 CCH Tax Ct. Mem. 1039 (1957); William Koch Motors, Inc., 14 CCH Tax Ct. Mem. 1322 (1955).

13. See, e.g., Texas Trailercoach, Inc. v. Commissioner, 251 F.2d 395 (5th Cir. 1958),

The Court in the instant case had a variety of theories upon which to decide the issue. First, it could be argued that although the taxpayer would not receive the money in the reserves until some indeterminate future time, ultimately it could only be applied to his benefit in one of two ways; either it would be paid to him, or it would be used to defray his contractually assumed liabilities.[14] Holding this view necessarily implies either that the possibility of purchaser defaults reducing the reserve does not constitute a sufficient contingency to prevent accrual, or that a repossession constitutes a condition subsequent which merely reduces the amount but does not destroy the already existing right.[15] Secondly, the sale of the vehicle by the dealer to the purchaser and the transfer of the purchaser's note to the finance company can be construed as consisting of two severable and distinct transactions. Thus, when the dealer sells the vehicle he has a presently enforceable right to the full purchase price, which is not subsequently divested by the transfer of the note to the finance company.[16] If this position is accepted, then it is unnecessary to go any further. A third theory suggested, although not by the courts, is that, irrespective of whether the sale of the vehicle is considered as involving one or two transactions, the sale of the note to the finance company establishes the fair market value of the note at something less than the actual cash value.[17] The dealer, under this theory, should only report as income the amount derived from the sale of the note. Finally, if the sale of the vehicle and the transfer of the note are considered as a single three-cornered transaction, with the finance company involved from the very outset, it can be argued that it is the purchaser who takes the loan directly from the finance company and, though the reserve is credited to the dealer, in reality it is the property of the purchaser, and thus cannot be accrued by the dealer until it is actually received by him.[18]

The Court in the instant case rejected the single transaction theory of the taxpayers. The Court observed that "in every instance, the installment paper was executed by the purchaser and made payable to the dealer . . . and that the same was later assigned or endorsed by the dealer and sent to the finance company for purchase. . . ."[19] This, the Court argued, was the substance of the transaction.[20] Ultimately, the Court adopted the argument of *Baird v. Com-*

reversing 27 T.C. 575 (1956); Johnson v. Commissioner, 233 F.2d 952 (4th Cir. 1956), reversing 25 T.C. 123 (1955).

14. Baird v. Commissioner, 256 F.2d 918 (7th Cir. 1958).

15. In Schaeffer v. Commissioner, 258 F.2d 861, 864 (6th Cir. 1958), the court said that "the only contingency which existed was how much of the amount would not be paid to the petitioner but would be applied by the Finance Company to the payment of petitioner's legal obligations."

16. Baird v. Commissioner, 256 F.2d 918 (7th Cir. 1958).

17. Emery, Time for Accrual of Income and Expenses, N.Y.U. 17th Inst. on Fed. Tax. 183 (1959).

18. This was the argument of counsel for taxpayers in the leading case. Brief for Respondent Hansen, p. 16. See Int. Rev. Code of 1954, § 453(d).

19. 360 U.S. at 462.

20. It has always been a basic consideration of the courts in applying the provisions of the Internal Revenue Code, to look at the substance of business transactions and not the form. United States v. Phellis, 257 U.S. 156 (1921).

missioner.[21] It held that the fixed right required for accrual arose when the amount was placed on the books of the finance company. Anything that happened thereafter might lessen the amount but the fixed right was in no way affected. The Court thus placed this case squarely in line with *Spring City*. In both, the fixed right arose, and anything accruing thereafter would be a condition subsequent and, consequently, have no affect upon that right.

The cases are, however, distinguishable. In *Spring City* the taxpayer had a legally enforceable contract right whereby he could have recovered judgment for the amount. Here the taxpayers had no right to enforce their "fixed right." They were bound by the terms of the contract with the finance companies which provided only for receipt of the reserves under certain conditions.[22] The very essence of a fixed right under the accrual method of accounting should involve the ability to enforce that right in a court of law, at least in so far as obtaining a judgment. To hold otherwise is to extend the *Spring City* doctrine to the point of imposing on taxpayers the obligation of paying taxes on amounts which not even a court of law can recognize as owing.

Torts — Liability of an Innkeeper for Personal Injuries to Guests. —Plaintiff, a guest at defendant hotel, was assaulted in her hotel room by a bellboy-employee of the hotel. The bellboy was not on duty at the time of the assault and had gained access to plaintiff's room for reasons unrelated to his employment. The trial judge instructed the jury that entry by the bellboy into plaintiff's room without the latter's permission and without any justifiable reason, was sufficient to impose liability upon the hotel. The jury found for the plaintiff and, pursuant to further instructions from the court, awarded both compensatory and punitive damages. The court of appeals, one judge dissenting in part, reversed and remanded.[1] A hotel is not an insurer of the personal safety of the guest and must exercise only reasonable care to protect the guest from any improper disturbance. *McKee v. Sheraton-Russell, Inc.*, 268 F.2d 669 (2d Cir. 1959).

At common law an innkeeper was liable as an "insurer" of the goods of his guest in that he was responsible for their loss whether by theft, fire, negligence or an unknown cause, unless the loss was occasioned by the negligence of the guest, an act of God or public enemies.[2] The rule was designed to safeguard

21. 256 F.2d 918 (7th Cir. 1958). See note 14 and accompanying text.

22. See note 1 supra. There is no effective way a dealer can recover his reserves at his own desire. Even if he were to go out of business, he must wait until all his outstanding notes were paid up.

1. All the judges agreed that the award of punitive damages was improper. See Craven v. Bloomingdale, 171 N.Y. 439, 64 N.E. 169 (1902). Judge Hand dissented on the ground that an innkeeper is not liable, in the absence of his own wrongdoing, for the tortious acts of his employees unless such acts were in the course of their employment. Only this point is considered in the present note.

2. See, e.g., Millhiser v. Beau Site Co., 251 N.Y. 290, 167 N.E. 447 (1929) (dictum); Hancock v. Rand, 94 N.Y. 1 (1883); Wilkins v. Earle, 44 N.Y. 172 (1870); Cohen v.

the traveler who, in earlier times, had little protection when he sought refuge at the wayside inns.[3] The original reasons for the rule may no longer exist, but if a guest were to lose his jewelry or other personal property, the common law imposes upon the modern hotelkeeper, though faultless, the duty of making restitution.[4] The law, however, is not as strict with the innkeeper in regard to the personal safety of the guest. An innkeeper has been required to exercise only reasonable care to prevent personal injuries to guests occasioned by defects in the hotel or acts of those who are not employees.[5] Of course if the injury is caused by an employee acting within the scope of his employment the innkeeper, just as other employers, is legally responsible.[6] The liability of innkeepers, however, for tortious acts committed by employees acting outside the scope of their employment has not yet been the subject of any authoritative holding by the court of appeals. In *DeWolf v. Ford*[7] the court invoked the doctrine of *respondeat superior* to hold a hotel liable for the wrongful acts of its house detective, and indicated in a strong dictum that the innkeeper is not an insurer of the personal safety of the guest and that his duty is only one of reasonable care to prevent personal injuries to guests occasioned by acts of his employees outside the scope of their employment.[8] Several lower court cases later ignored the dictum and made the innkeeper's duty absolute.[9]

The court here professed to follow the *DeWolf* dictum. It found that the hotel must exercise only reasonable care to protect the person of the guest from any improper disturbance.[10] But the majority then found that the hotel could

Janlee Hotel Corp., 276 App. Div. 67, 92 N.Y.S.2d 852 (1st Dep't 1949), rev'd on other grounds, 301 N.Y. 736, 95 N.E.2d 410 (1950).

3. See, e.g., Crapo v. Rockwell, 48 Misc. 1, 94 N.Y. Supp. 1122 (Sup. Ct. 1905); Brown, The Law of Personal Property §§ 102-06 (2d ed. 1955).

4. But see N.Y. Gen. Bus. Law §§ 200-03(b).

5. Jungjohann v. Hotel Buffalo, 5 App. Div. 2d 496, 173 N.Y.S.2d 340 (4th Dep't 1958); Schubart v. Hotel Astor, Inc., 168 Misc. 431, 5 N.Y.S.2d 203 (Sup. Ct.), aff'd, 255 App. Div. 1012, 8 N.Y.S.2d 567 (2d Dep't 1938), aff'd, 281 N.Y. 597, 22 N.E.2d 167 (1939). See 43 C.J.S. Innkeepers § 22 (1945); Annot., 27 A.L.R.2d 822 (1953); 18 A.L.R.2d 973 (1951).

6. Boyce v. Greeley Square Hotel Co., 228 N.Y. 106, 126 N.E. 647 (1920); DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908).

7. 193 N.Y. 397, 86 N.E. 527 (1908).

8. The court stated: "The innkeeper, it is true, is not an insurer of the safety, convenience or comfort of the guest. But the former is bound to exercise reasonable care that neither he nor his servants shall by uncivil, harsh or cruel treatment destroy or minimize the comfort, convenience and peace which the latter would ordinarily enjoy if the inn were properly conducted, due allowance being always made for the grade of the inn and the character of the accommodation which it is designed to afford." Id. at 404, 86 N.E. at 530.

9. Trebitsch v. Goelet Leasing Co., 226 App. Div. 567, 235 N.Y. Supp. 426 (1st Dep't) (dictum), aff'd mem., 252 N.Y. 554, 170 N.E. 140 (1929); McKeon v. Manze, 157 N.Y. Supp. 623 (Sup. Ct. 1916); Schell v. Vergo, 166 Misc. 839, 4 N.Y.S.2d 644 (Rochester City Ct. 1938). The Schell case imposed liability on a saloonkeeper. The court argued that his liability should be the same as that of an innkeeper and cited the McKeon case, supra, as directly in point.

10. The court reversed the trial judge on the ground that "the district court's instruc-

be responsible for the bellboy's acts whether or not such acts were in the traditional course of employment.[11] Even if it had exercised reasonable care in the selection, retention and supervision of its employees the hotel could be held responsible for acts outside the scope of employment. The majority imposed liability because a hotel, which cannot escape liability for the loss of the guest's goods by showing it was occasioned by the act of an employee outside the scope of his employment, should not be able to use that defense to escape liability for injury to the person of the guest.[12]

These comments of the majority move in the direction of making the innkeeper's liability for the personal safety of his guests the same as his liability for their goods. In this event, the next step would be to hold the innkeeper responsible for the acts of a stranger who injures a guest. But if this is the law of New York, why did the majority adopt the dictum of *DeWolf* and reverse the judgment of the trial court? Perhaps the majority was merely extending the rule of *respondeat superior*,[13] putting hotelkeepers in a special class and making them responsible for acts of their employees outside the scope of their employment. But what logical reason is there for doing this? Also, if this be the law of New York, why did the majority reverse the decision of the trial court since, even under the trial court's instruction, the jury would have to find that an employee of the defendant breached a right which the plaintiff possessed as a guest of the defendant hotel.

Judge Hand, in his dissent, questioned that portion of the majority's opinion which advanced the absolute liability theory. He pointed out that both cases from the New York Court of Appeals dealing with this problem involved acts by hotel employees within the scope of their employment.[14] In each case the hotel was found liable on the basis of the *respondeat superior* doctrine. Judge Hand argued that these decisions "squarely assimilated the position of an innkeeper to that of any other employer,"[15] and lead to the conclusion that the law of New York "does not impose any liability upon an innkeeper for personal maltreatment of a guest by one of his servants, unless the servant was acting within the scope of his authority, or unless the innkeeper had not used due diligence in selecting the servant, or in supervising his conduct."[16]

At present, statutes in many states relieve the innkeeper, at least in part, of

---

tion did not impose the duty of 'reasonable care' spelled out in DeWolf, but, instead, imposed a more rigorous one—that of an absolute duty upon the hotel to protect the guest from any improper disturbance." McKee v. Sheraton-Russell, Inc., 268 F.2d 669, 671 (2d Cir. 1959).

11. This statement of the law is correct if the majority were merely indicating that the hotel might be liable because of primary negligence. But the majority is actually pointing out possible theories under which the plaintiff may recover in the absence of any such negligence.

12. 268 F.2d at 672.

13. On the scope of the respondeat superior rule see generally 57 C.J.S. Master and Servant § 561 (1948).

14. See note 6 supra.

15. 268 F.2d at 674.

16. Id. at 673.

his common law liability for the goods of his guests.[17] The majority of jurisdictions which have ruled on the question have also refused to make the innkeeper liable, in the absence of his own wrongdoing, for injuries to guests occasioned by acts of his employees outside the scope of their employment.[18] It is also clear that an innkeeper is not absolutely liable for injuries to guests as a result of accidents in which his employees take no part. The latter statements of the majority are thus in direct contradiction to the apparent tendency in American law to relieve the innkeeper of his insurer's liability and impose upon him a less rigorous standard of care.

The holding of the case under discussion conforms with the prevailing law in most American jurisdictions. But the comments of the majority which apparently contradict the actual holding of the case can only serve to confuse the extent of the innkeeper's liability for the personal safety of his guests. The question now to be resolved by the district court on retrial is what duty of care to impose upon the hotel.

Workmen's Compensation — Reopening of Disallowed Claim After Expiration of Statutory Period.—In March of 1944, claimant filed an application with the Workmen's Compensation Board, asserting that she was suffering from silicosis and, as a consequence, was unable to continue working. The New York Workmen's Compensation Law[1] authorized compensation in silicosis cases only in the event of total disability. The Board, resting its finding on the testimony of an impartial expert who had erroneously diagnosed claimant's condition, found that claimant's disability was not total, when in reality it was total. Subsequently, claimant applied for a reopening of her case, maintaining that her physician had not been permitted to testify. At that time she erroneously conceded that her disability was only partial and, as a result, her application for reopening was denied. Ten years later, the Board permitted a reopening of her case and, recognizing the prior error, found claimant's disability was total. The appellate division reversed,[2] holding that no claim disallowed after a trial on the merits may be reopened after the statute of limitations has run.

17. A list of such statutes is contained in 52 Harv. L. Rev. 334 (1938). The New York legislation is discussed in Navagh, A New Look at the Liability of Inn Keepers for Guest Property under New York Laws, 25 Fordham L. Rev. 62 (1956).

18. Clancy v. Barker, 131 Fed. 161 (8th Cir. 1904); Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659 (1904); Laughlin v. Bon Air Hotel, 85 Ga. App. 43, 68 S.E.2d 186 (1951); Ledington v. Williams, 257 Ky. 599, 78 S.W.2d 790 (1935); Mayo Hotel Co. v. Danciger, 143 Okla. 196, 288 Pac. 309 (1930); Cary v. Hotel Rueger, 195 Va. 980, 81 S.E.2d 421 (1954). Contra, Clancy v. Barker, 71 Neb. 83, 98 N.W. 440 (1904), decided on the same facts as the federal case of Clancy v. Barker; supra. The law of Massachusetts is in doubt. Compare McFadden v. Bancroft Hotel Corp., 313 Mass. 56, 46 N.E.2d 573 (1943), and Frewen v. Page, 238 Mass. 499, 131 N.E. 475 (1921), with Crawford v. Hotel Essex Boston Corp., 143 F. Supp. 172 (D. Mass. 1956).

1. N.Y. Workmen's Comp. Law § 3(2)28. At the time of the instant case the applicable statute was N.Y. Workmen's Comp. Law § 66.

2. Stimburis v. Leviton Mfg. Co., 5 App. Div. 2d 209, 171 N.Y.S.2d 153 (3d Dep't 1958).

The court of appeals, in reversing, three judges dissenting, held that where a claimant had filed an application for a reopening of the claim within the statutory period, that claim having been disallowed on the merits, the Board may subsequently reopen the case, even though the claimant reapplied after the statute of limitations had run. *Stimburis v. Leviton Mfg. Co.*, 5 N.Y.2d 360, 157 N.E.2d 621, 184 N.Y.S.2d 632 (1959).

Section 123 of the New York Workmen's Compensation Law provides that "no claim for compensation . . . that has been disallowed after a trial on the merits . . . shall be reopened after a lapse of seven years from the date of the accident . . . ."[3] The court, in the present case, in spite of the clear wording of the statute, found for the claimant relying, as it did, on *Roder v. Northern Maytag Co.*[4] In that case, claimant's application for reopening was made within the statutory period but was erroneously denied after the statute had run. Petitioner, there, immediately made another application to reopen, though the statute had run, which the Board granted, treating it as a reconsideration rather than a reopening. The court of appeals affirmed and, in so doing, laid the groundwork for the judicial repeal of section 123.

Roder, however, is readily distinguishable from the present case. In *Roder*, the Board denied the initial application for reopening while under the erroneous belief that the seven year period had elapsed since the accident. Seven years had, in fact, not elapsed. Since the Board was, therefore, upon reapplication after the statute had run, merely examining its own error made before the statute had run, its action was properly termed a reconsideration. In the present case the Board made no mistake, rather the mistake was made by an independent witness. A re-examination of the claim under these circumstances could not properly be termed a reconsideration, but rather a reopening. Furthermore, aside from any distinction which may exist under section 123, it should be noted that the time element which elapsed between the denial of claimant's application for reopening and subsequent reapplication in the two cases was so different that any analogy would be unwarranted. In *Roder*, the reconsideration came within one week of the denial, whereas in the present case the reapplication for reopening came ten years after the original denial. This delay in the present case was, without doubt, unreasonable, and on the basis of this, recovery was properly denied.

The reliance on *Roder* by the present court has pushed the law to the point where a claimant can secure a reopening at any time, provided that he has taken the simple precaution of filing a request for reopening sometime within the statutory period. In so carrying *Roder* to this questionable extreme, the court, as the dissent observes,[5] has construed the statute out of existence.

3. N.Y. Workmen's Comp. Law § 123. In the case under consideration the court said that "even though no oral testimony was taken in 1944, nevertheless there was within the contemplation of the Workmen's Compensation Law a trial on the merits at that time." Stimburis v. Leviton Mfg. Co., 5 N.Y.2d 360, 366, 157 N.E.2d 621, 623, 184 N.Y.S.2d 632, 636 (1959).

4. 297 N.Y. 196, 78 N.E.2d 470 (1948).

5. 5 N.Y.2d at 369, 157 N.E.2d at 625, 184 N.Y.S.2d at 639.

There is no doubt that the courts should be duly solicitous of the substantive rights of employees in workmen's compensation and allied proceedings. In such cases, statutes of limitations are treated more as technicalities with only restricted application. That this is true is evidenced by the various devices which courts have employed to circumvent the statute. In *Scarborough v. Atlantic Coast Line R.R.*,[6] for example, the court used a somewhat warped theory of estoppel to escape the statute of limitations. There, defendant's claims agent in good faith had misrepresented to the plaintiff that he might file his claim any time within three years after the plaintiff reached his majority. Plaintiff brought his action within that time, but the statute had, as a matter of law, already barred his action. The court reasoned that since the plaintiff had delayed the action in reliance on the agent's misrepresentation, the railroad was now estopped from pleading the statute of limitations.

In the present case, the misrepresentation was one of fact and not as to a matter of law as in *Scarborough*. From that point of view, an estoppel might have been more appropriately invoked here. However, no misrepresentation was made by the employer or any of its agents or representatives. The mistake or misrepresentation was made by an independent party, the medical witness who appeared before the Board.[7]

6. 202 F.2d 84 (4th Cir. 1953). The court of appeals reversed the district court on the ground that the judge charged the jury so as to confuse them on the question of whether the defendant must be found guilty of actual fraud in order that plaintiff avoid the bar of the statute of limitations. This was the third appeal in this case. On the previous consideration of the issue, the court of appeals had reversed the district court because of improper instructions to the jury that plaintiff was required to prove that defendant's misrepresentations were made with the intent to deceive or mislead. 190 F.2d 935 (4th Cir. 1951). In the first appeal, the district court's dismissal of the action, on the ground that the statute of limitations could not be tolled by defendant's misrepresentations, was reversed, the court of appeals holding that even though the statute of limitations was of the substantive type, it could be suspended by fraud. 178 F.2d 253 (4th Cir. 1950), cert. denied, 339 U.S. 919 (1950). In this case estoppel was used, together with the theory that a misstatement, although made in good faith, amounts to fraud, which tolls the statute of limitations. This is stretching the concept of fraud. On the subject of fraud tolling the statute of limitations, see generally Annot., 15 A.L.R.2d 500 (1951); Dawson, Undiscovered Fraud and Statutes of Limitations, 31 Mich. L. Rev. 591 (1933); Comment, 2 Stan. L. Rev. 793 (1950); Note, 33 Calif. L. Rev. 152 (1945).

7. In the present case it was agreed that if the court were to sustain the award, the employer and insurance carrier would be liable, rather than the Special Fund for Reopened Cases.

The Special Fund consists of moneys paid in by employers and insurance carriers on a determined basis. Its function is to relieve employers and insurance carriers from paying awards for claims that are reopened after the seven year period has elapsed. N.Y. Workmen's Comp. Law § 25(a). This section is subject to § 123, which provides that a claim which has been disallowed after a trial on the merits may not be reopened at all after seven years have elapsed from the date of the accident.

The legislature established the Fund "to insure in a proper case the benefits of the Workmen's Compensation Law to the injured workman regardless of prior denials and time limitations. . . ." Watkins v. Cornwall Press, Inc., 270 App. Div. 615, 617, 63 N.Y.S.2d 23, 25 (3d Dep't 1946).

Other courts, in their concern for the injured workman, have held that the statute of limitations does not commence to run until the claimant's condition is discovered, or should have been discovered.[8] This reasoning has been applied in cases where a claimant's injuries have been diagnosed as a noncompensible condition by the employer's physician, and the mistake was not discovered until a time when the statute of limitations would have barred a claim had it started running at the date of the injury.[9] In the present case, claimant, relying on the Board's finding that her disability was a partial one, did not discover that it was total until after seven years had run. To argue that the statute of limitations in the instant case did not commence running until claimant discovered that she was totally disabled would, however, do as much violence to the plain meaning of section 123 as the reasoning actually employed by the court.

The majority, in the present case, has subverted the plain meaning of the statute of limitations. The situation presented here might well call for an exception to the statute, but exceptions to statutes are the proper concern of the legislature and not the courts.

8. See, e.g., Associated Indem. Corp. v. Industrial Acc. Comm'n, 71 Cal. App. 2d 820, 163 P.2d 771 (1945); Griffitts v. Humphrey, 199 Tenn. 528, 288 S.W.2d 1 (1956); 58 Am. Jur. Workmen's Compensation § 409 (1948).

9. See, e.g., Fravel v. Pennsylvania R.R., 104 F. Supp. 84 (D. Md. 1954); Burcham v. Carbide & Carbon Chems. Corp., 188 Tenn. 592, 221 S.W.2d 888 (1949).

It has even been held that the statute had not begun running in cases where the claimant's personal physician had corroborated the erroneous diagnosis of a state physician. Wilson v. Van Buren County, 196 Tenn. 487, 268 S.W.2d 363 (1954). But cf. Goode v. Fleischmann Distilling Corp., 275 S.W.2d 903 (Ky. Ct. App. 1955).