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Case Notes

CASE NOTES

Antitrust Law—Unincorporated Subdivisions of a Single Corporation Held Capable of Conspiracy under Section One of the Sherman Act.—Plaintiff brought this action under section 4 of the Clayton Act[1] to recover treble damages for injury occasioned by defendants' alleged violation of the provisions of the Sherman Act. Plaintiff claimed that the defendants had entered into a conspiracy to discontinue dealing with it and had thereby eliminated it from the wholesale liquor distribution business in violation of section 1 of the Sherman Act.[2] This concerted refusal to deal had followed plaintiff's failure to adhere to maximum resale prices which defendants sought to impose on distributors. Defendant House of Seagram is a wholly-owned subsidiary of defendant Joseph E. Seagram and markets the parent corporation's product through seven unincorporated sales divisions. Plaintiff requested the court to instruct the jury to treat three of the unincorporated sales divisions, Calvert, Four Roses and Frankfort, as separate entities in determining whether there had been a conspiracy among them in violation of the antitrust laws. The court instructed the jury in conformance with plaintiff's request[3] and, in a memorandum decision, attempted to support its position that unincorporated divisions of the same parent corporation were capable of entering into a conspiracy within the meaning of the Sherman Act. *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967).

The decision in the instant case constitutes a new and generally unexpected development in the law of intracorporate conspiracy. Section 1 of the Sherman Act does not prohibit restraint of trade as such, but is directed toward activity on the part of at least two actors in restraint of trade and, therefore, cannot be violated by the activity of a single person.[4] Section 2,[5] on the other hand, may

1. Clayton Act § 4, 15 U.S.C. § 15 (1964) provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained . . . ."

2. Sherman Act § 1, 15 U.S.C. § 1 (1964) provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal . . . ."

3. The actual instruction given to the jury by the court provided: "Calvert Distilling Co., Four Roses Distilling Co. and Frankfort Distilling Co. were each separate unincorporated divisions of the defendant House of Seagram, Inc. at the time that each terminated dealings with Hawaiian Oke.

"Each of these divisions of defendant House of Seagram, Inc., shall be treated by you as separate entities for the purpose of determining whether or not there has been a combination or conspiracy, as I have heretofore defined those terms, to terminate Hawaiian Oke as their respective distributor. For the purposes of returning a verdict, however, you will consider these divisions as being the defendant House of Seagram Inc." Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc., 272 F. Supp. 915, 916 (D. Hawaii 1967).

4. Handler, Some Misadventures in Antitrust Policymaking, 76 Yale L.J. 92, 120-21 (1966).

5. Sherman Act § 2, 15 U.S.C. § 2 (1964) provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons . . . shall be deemed guilty of a misdemeanor . . . ."

be violated by the activity of a single person, and it is only when a conspiracy to monopolize is charged that two or more actors must be involved.[6] Although a section 1 restraint of trade could in some cases be termed a part of an overall plan to monopolize and be attacked under section 2 without proving a concert of action between at least two parties,[7] the necessity of proving specific intent to monopolize under section 2 has induced many plaintiffs to bring section 1 actions and to attempt to prove the existence of conspiracies within corporate and multicorporate structures.[8]

The case of *United States v. General Motors Corp.*[9] was one of the first instances of the application of section 1 to a multicorporate enterprise. The defendant was charged with having criminally conspired with its wholly-owned, but separately incorporated sales and financing subsidiaries for the purpose of compelling new and used car dealers to finance sales through the defendant's own financing subsidiary. Although the defendant corporation contended that as a single business unit it was incapable of conspiring with itself, the Seventh Circuit held that each incorporated subsidiary was a separate person for purposes of conspiracy and that multicorporate organization subjected the defendant to liability under section 1.

The rule postulated in *General Motors* provided the basis for a section 1 action in the later case of *United States v. Yellow Cab Co.*[10] The defendant was charged with having conducted an anticompetitive operation in which it attained ownership and control over taxicab operating companies in four major cities, separately incorporated these companies as affiliates of the parent defendant and then required them to purchase their vehicles exclusively from a single manufacturer. The defendant sought to avoid the charge of conspiracy by a showing that the operating companies were all affiliated and that agreements between the affiliates and the parent corporation were conducted within the confines of a single business unit, and not among separate entities. Unlike *General Motors*, the multicorporate organization in *Yellow Cab* was allegedly formed for the purposes of restraining trade and creating a monopoly, and the illegal practices were not adopted within a previously existing enterprise. The Court recognized this distinction in finding the defendant guilty on the grounds that: "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed."[11] Therefore, the *Yellow Cab* decision does not rest solely on the intracorporate conspiracy theory found in *General Motors* but turns also on the finding that the enterprise itself was the product of a conspiracy to restrain trade.[12]

6. Handler, supra note 4, at 121.

7. Id. at 122.

8. See Note, Intra-Enterprise Conspiracy under the Sherman Act, 63 Yale L.J. 372, 374 (1954). Among the advantages of a section 1 action listed by the author the most significant and persuasive are the lighter burden of proof and an extension of the statute of limitations where conspiracy is alleged.

9. 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).

10. 332 U.S. 218 (1947).

11. Id. at 227.

12. See Stengel, Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act, 35

The intracorporate conspiracy doctrine was firmly established in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[13] a case involving the present defendant. As in the instant case, the plaintiff alleged a section 1 conspiracy among the defendant's wholly-owned subsidiaries for their refusal to continue dealing with it because it would not adhere to maximum resale prices. The major distinction between *Kiefer-Stewart* and the instant case is that the defendant's subsidiaries were separately incorporated then, whereas in the instant case, as a result of a subsequent reorganization, they were unincorporated divisions of the parent. The defendant in *Kiefer-Stewart* relied on a single business unit theory, but the Court, citing *Yellow Cab*, observed that "this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws."[14] While the decision in *Yellow Cab* undoubtedly supported the Court's holding and was correctly cited as a basis for finding a conspiracy within a multicorporate enterprise, its use as a precedent in *Kiefer-Stewart* unfortunately blurred the essential factual differences between the two cases. Whereas the illegal conspiracy in *Kiefer-Stewart* arose within the confines of a pre-existing enterprise, the illegal conspiracy in *Yellow Cab* included formation of the enterprise itself.

Kiefer-Stewart represented the Supreme Court's first positive application of the intracorporate conspiracy doctrine to practices within a pre-existing multicorporate enterprise and also marked the first time a conspiracy was found on a horizontal level among the incorporated subsidiaries without the participation of the parent.[15]

The failure of the single unit defense in negating a charge of conspiracy within multicorporate enterprises induced many attempts to extend the intracorporate conspiracy doctrine. Thus, in *Nelson Radio & Supply Co. v. Motorola*,[16] the plaintiff alleged a conspiracy between the officers and agents of a single corporation. The court reasoned that a conspiracy requires at least two persons or entities and that a corporation is only a single entity. Since the acts of the agent are deemed to be those of the corporation, the requisite dual activity inherent in a conspiracy did not exist. The court, therefore, refused to enlarge the intracorporate conspiracy doctrine and observed that separate corporate entities are needed for its application.[17] This holding, that a conspiracy cannot exist between officers and agents within the confines of a single corporation, has been widely accepted as the general rule.[18]

Miss. L.J. 5, 12 (1963); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va. L. Rev. 183, 195 (1955).

13. 340 U.S. 211 (1951).

14. Id. at 215.

15. Having established the applicability of the doctrine to pre-existing enterprises, the Court encountered no barrier in also finding a conspiracy among a parent corporation and its separately incorporated foreign subsidiaries. See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

16. 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).

17. 200 F.2d at 914.

18. See, e.g., Mackay v. Sears Roebuck & Co., 237 F.2d 869 (7th Cir. 1956), appeal dismissed per stipulation, 355 U.S. 865 (1957); Herren Candy Co. v. Curtiss Candy Co., 153

The finding of section 1 conspiracies in cases where the conspirators were separately incorporated entities within a multicorporate enterprise and the refusal to find a conspiracy within the confines of a single corporate unit led to the conclusion that the intracorporate conspiracy doctrine could be evaded "if a company does business through unincorporated branches, divisions or departments . . . ."[19] The form of the organization became the determinative factor in construing the legality of corporate agreements and led to the concession on the part of Justice Department and FTC prosecutors that "single corporate form is a defense per se."[20] This theory, was confirmed in *Poller v. Columbia Broadcasting System, Inc.*,[21] which held that a parent corporation and its unincorporated division were incapable of conspiring within the meaning of section 1 because they did not satisfy the requirement of at least two separate entities. The *Poller* decision has been accepted by other courts as dispositive of a situation involving agreements between a corporate parent and its unincorporated divisions.[22]

A few years after the *Kiefer-Stewart* decision, and in reliance on the nascent theory that single corporate form would shield an enterprise from liability for conspiracy under section 1, the present defendant underwent a reorganization of its corporate structure on July 31, 1954.[23] The incorporated subsidiaries which had been found guilty of conspiracy in *Kiefer-Stewart*, including Calvert, Four Roses and Frankfort, became unincorporated sales divisions of the marketing company House of Seagram. Seagrams relied solely upon the *Poller* line of cases and the single corporate holding in *Nelson Radio* in opposing the plaintiff's requested charge before the instant court and argued that these decisions prevented a finding of conspiracy among unincorporated divisions within a single corporate entity.[24] The court, on the other hand, reasoned that these purported precedents were not controlling in the instant case since they dealt with vertical agreements between parent and division and the present case involved a horizontal agreement among the divisions themselves. Therefore, the court treated the case as one of first impression and proceeded to formulate standards for reaching a decision.

Relying on the case of *Reines Distributors, Inc. v. Admiral Corp.*,[25] the court held that the relationship between the parent and unincorporated division will determine whether a conspiracy can exist and that divisions which function as separate entities without the supervision of the parent must be treated as sepa-

F. Supp. 751 (N.D. Ga. 1957); Whiteley v. Foremost Dairies, Inc., 151 F. Supp. 914 (W.D. Ark. 1957), aff'd, 254 F.2d 36 (8th Cir. 1958); Marion County Co-op. Ass'n v. Carnation Co., 114 F. Supp. 58 (W.D. Ark. 1953), aff'd, 214 F.2d 557 (8th Cir. 1954).

19. Att'y Gen. Nat'l Comm. to Study the Antitrust Laws 35 (1955). See also Handler, supra note 4, at 122; McQuade, supra note 12, at 183; Note, The Nature of a Sherman Act Conspiracy, 54 Colum. L. Rev. 1108 (1954).

20. Note, Intra-Enterprise Conspiracy under the Sherman Act, 63 Yale L.J. 372, 388 (1954).

21. 284 F.2d 599 (D.C. Cir. 1960), rev'd on other grounds, 368 U.S. 464 (1962).

22. See, e.g., Deterjet Corp. v. United Aircraft Corp., 211 F. Supp. 348 (D. Del. 1962); Johnny Maddox Motor Co. v. Ford Motor Co., 202 F. Supp. 103 (W.D. Tex. 1960).

23. 272 F. Supp. at 920.

24. Id. at 918.

25. 256 F. Supp. 581 (S.D.N.Y. 1966).

rate entities for purposes of being capable of conspiracy.[26] The *Reines* case, however, applied this test of autonomy to the question of whether an unincorporated division could be a purchaser from the parent within the meaning of the Robinson-Patman Act[27] and specifically stated that the rationale of the cases holding that a parent and unincorporated division are a single entity "seems logical in Sherman Act cases,"[28] while noting that those cases "dealt with a quite different antitrust problem."[29]

There was ample testimony offered by defendants' officers to support a conclusion that the sales divisions were autonomous units which outwardly, and in most cases internally, competed with one another without any supervision or control from the parent corporation. The testimony further showed that the agreement among Calvert, Four Roses and Frankfort to discontinue dealing with the plaintiff was reached without any directives from the parent and that an agreement of this nature was solely within the province of the sales divisions. This intracorporate independence provided the basis for the court's conclusion that, in conformance with its inapplicable standard, the sales divisions were capable of conspiring with one another in contravention of the provisions of section 1.[30]

There is, however, other language in the opinion which may provide the key to the court's decision and limit the scope of its holding. The court discussed the defendants' reorganization in light of the facts and holding of *Kiefer-Stewart* and made the observation that the internal structure and marketing techniques of the corporation had not substantially changed since the earlier decision.[31] In other words, the change in corporate form had not been accompanied by a corresponding change in the internal structure of the new enterprise, and the sales divisions had retained the autonomous character they had had as separtely incorporated subsidiaries. The critical question for the jury might have been: "For what purpose did the defendants reorganize their corporate structure?" *Yellow Cab*, which held that liability for a conspiracy to restrain trade wherein organization into a single business unit, albeit in multicorporate form, was necessary for the success of the restraint could not be avoided by a defense of single business entity, has subsequently been used as precedent for finding conspiracy within pre-existing multicorporate enterprises.[32] However, *Yellow Cab* also found conspiracy in the reorganization itself. Thus, in *Highland Supply Corp. v. Reynolds Metals Co.*,[33] it was found that where a conspiracy in restraint of trade included merger or affiliation as a means of effectuating the restraint and avoiding liability, the single entity defense would not protect the resulting corporate defendant from liability under section 1. In *Beacon Fruit & Produce Co. v. H. Harris & Co.*,[34] a corporation which had been formed as an instrumentality for securing control

26. 272 F. Supp. at 919-20.
27. 15 U.S.C. § 13 (1964).
28. 256 F. Supp. at 583.
29. Id. at 585.
30. 272 F. Supp. at 924.
31. Id. at 921.
32. See text accompanying note 14 supra.
33. 238 F. Supp. 561 (E.D. Mo. 1965).
34. 152 F. Supp. 702 (D. Mass. 1957).

of a market and imposing a restraint of trade upon the buyers could not avail itself of the single entity defense because the conspiracy included formation of the corporation. It is not inconceivable, then, that *Yellow Cab* may be extended to cases where a reorganization, though not necessary for the commission of the restraint itself, was effected for the purpose of clothing the restraint in legality, in the sense that the dual entity requirement of section 1 would be unfulfilled in the reorganized form. If defendant's purpose in reorganizing was not to protect itself from liability for normal business agreements among its subsidiaries but to continue the illegal practices, which *Kiefer-Stewart* forbade, behind the shield of a single corporate entity, the resulting single corporate form should not have protected it from liability in the instant case. The conspiracy in restraint of trade, if there was one, might have been the agreement among separately incorporated entities to reorganize into a single corporate unit in order to continue the illegal practice which their old form of organization prohibited. Therefore, the proper charge to the jury, reached upon a true interpretation of the facts and an accurate application of precedents, might have been more arguably correct had it stated that the intent of the defendants in formation of the single corporate unit determined the question of whether a conspiracy had taken place prior to the reorganization and that an agreement occurring after the reorganization could not constitute a conspiracy because the requisite of two separate actors would not be met.

The fact that the instant court went beyond the single corporate shield to find in the unincorporated divisions the separate entities requisite for a conspiracy reflects a current trend in judicial thinking. That disregard of the corporate form is now being used as an approach for enforcing the substantive prohibitions of the antitrust laws is evident in the recent Supreme Court decision in *United States v. Sealy, Inc.*[35] Sealy was charged with having violated section 1 by allocating mutually exclusive territories among its licensees. Although vertical territorial allocation had not previously been held per se illegal, the Court found that these agreements were in reality horizontal allocations, which were per se illegal, and did so by going beyond the corporate shield of the defendant and finding that the licensees themselves owned substantially all of the defendant's stock and controlled its board of directors as well as the day-to-day business of the corporation.[36] In the instant case, however, the enjoyment by the divisions of a high degree of autonomy in performing those functions for which they were responsible seems insufficient ground for disregarding the single corporate form of the enterprise and for the court's abrogation of the dual entity requirement of Sherman Act section 1.

Constitutional Law—Social Welfare—Residence Requirement Held to Violate Welfare Recipient's Constitutional Right to Free Interstate Travel. —Plaintiff, an indigent mother with one child and another expected, moved from Boston, where she had been receiving welfare payments for her dependent child, to Hartford to be near her mother. The Boston payments were discon-

35. 388 U.S. 350 (1967).

36. Id. at 352-53.

tinued because of plaintiff's change of residence. Plaintiff's application to Connecticut for aid under a similar program was denied because she failed to meet the state's one year residence requirement[1] although she was otherwise eligible.[2] She sued to obtain these payments from the Connecticut Commissioner of Welfare, and the Federal District Court of Connecticut held in a 2-1 decision[3] that the residence requirement was an unconstitutional violation of plaintiff's right to travel and to establish residence in any state of the union. *Thompson v. Shapiro*, 270 F. Supp. 331 (D. Conn. 1967), prob. juris. noted, 36 U.S.L.W. 3286 (Jan. 16, 1968).

Three steps are logically necessary for the court to reach the instant decision. First, the right to interstate travel must be established. Although the right to interstate travel does not appear in the Constitution *in haec verba*, several clauses of the Constitution have been consistently interpreted as establishing it.[4] Secondly, the residence requirement must be shown to infringe upon this right. It is arguable that a welfare residence requirement[5] protects a state's taxpayers from being forced to subsidize the travel of another state's indigents, rather than directly limiting indigents' right to travel freely among the states.[6] This approach has been rejected by the courts.[7] Residence requirements for public aid have been ruled unconstitutional in four states and the District of Columbia.[8] Although the extent of the right to interstate travel has not been clearly defined,[9] the leading Supreme Court authority in this area, *Edwards v. Cali-*

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1. Conn. Gen. Stat. § 17-2d (Supp. 1966). Before this provision was enacted by the Connecticut Legislature in 1965, Connecticut had no residence requirement for this program.

2. Thompson v. Shapiro, 270 F. Supp. 331, 333 (D. Conn. 1967), prob. juris. noted, 36 U.S.L.W. 3286 (Jan. 16, 1968).

3. See 28 U.S.C. § 2282 (1964). This section forbids the issuance of an injunction restraining enforcement, operation or execution of an Act of Congress for repugnance to the Constitution, except by a three-judge district court.

4. United States v. Guest, 383 U.S. 745 (1966); New York v. O'Neill, 359 U.S. 1 (1959); Edwards v. California, 314 U.S. 160 (1941); Twining v. New Jersey, 211 U.S. 78 (1908); Williams v. Fears, 179 U.S. 270 (1900); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). The instant court found the Connecticut statute to violate the "privilege and immunities" clause and the "equal protection" clause of the fourteenth amendment. For a discussion of all the clauses possibly violated by welfare residence requirements, see Harvith, The Constitutionality of Residence Tests for General and Categorical Assistance Programs, 54 Calif. L. Rev. 567 (1966).

5. "Welfare residence requirement" refers to the requirement of a certain duration of residence (such as one year in the instant requirement). The constitutionality of denying non-residents welfare aid is not under discussion.

6. The rationalization for this argument can be traced back to that used for the Elizabethan poor laws. See H. Hirsch, Our Settlement Laws (1933). See also Mandelker, The Settlement Requirement in General Assistance, 1955 Wash. U.L.Q. 355-56.

7. United States v. Guest, 383 U.S. 745, 767 (1966); Edwards v. California, 314 U.S. 160, 174-75 (1941).

8. See Harrell v. Tobriner, 36 U.S.L.W. 2283 (D.D.C. Nov. 14, 1967). The four states are Delaware, Green v. Department of Pub. Welfare, 270 F. Supp. 173 (D. Del. 1967); Pennsylvania, Smith v. Reynolds (E.D. Pa. 1967) (pendente lite); Wisconsin and Illinois, both also in 1967. See N.Y. Times, Dec. 29, 1967, at 20, col. 3.

9. United States v. Guest, 383 U.S. 745, 758 (1966); New York v. O'Neill, 359 U.S. 1,

fornia,[10] declared unconstitutional a California statute which made it a misdemeanor to bring an indigent non-resident into the state.[11] *Edwards* thus implies that residence requirements may violate the right to interstate travel.[12] While the statute in the *Edwards* case, like the instant statute, did not directly prevent an indigent from entering California,[13] it did have a definitely chilling effect on the ability of many indigents to enter the state and thus, on their right to travel freely.[14] In 1966, in *United States v. Guest*,[15] the Court again implied that actions or laws which even discourage interstate travel (by making it less feasible) infringe upon the right to interstate travel.[16] Since it is impractical for a welfare recipient who has met the residence requirement in one state to cut off his only source of income by moving to another state that refuses to provide him with a new source of income, the instant residence requirement does indirectly infringe upon an indigent's right to interstate travel.[17]

The third and critical step is to negate the possibility that the residence requirement in question is a justifiable infringement on the right. While statutes are generally presumed constitutional,[18] there is a marked weakening of that presumption when a possible abrogation of first amendment rights is involved,[19] and a recent Supreme Court case, *Aptheker v. Secretary of State*,[20] indicated that where the statute involved may infringe upon fourteenth amendment rights (like the right to interstate travel[21]) a similar weakening of the presumption of constitutionality will be effected.[22] This is not to say that the state can never, in the exercise of its "police powers," constitutionally restrict a fourteenth

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14-15 (1959) (dissenting opinion); Edwards v. California, 314 U.S. 160, 183 (1941) (concurring opinion).

10. 314 U.S. 160 (1941).

11. The statute was § 2615 of the California Welfare and Institutions Code (1901).

12. 314 U.S. at 172. Mr. Justice Jackson, concurring, said "Any measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty-bound to the place where it has suffered misfortune is not only at war with the habit and custom by which our country has expanded, but is also a shortsighted blow at the security of property itself." Id. at 185.

13. Id. at 176.

14. Id. at 173.

15. 383 U.S. 745 (1966). In this case, the defendants used violence in an attempt to prevent Negroes from traveling in interstate commerce.

16. Id. at 760. See 270 F. Supp. at 336.

17. 270 F. Supp. at 336.

18. B. Arneson, Elements of Constitutional Law 49-50 (1928).

19. See Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964). The first amendment rights are freedom of "religion," "speech," "press" and "to assemble."

20. 378 U.S. 500 (1964).

21. See note 4 supra.

22. In Aptheker v. Secretary of State, 378 U.S. 500, Justice Goldberg asserted that "freedom of travel is a constitutional liberty closely related to rights of free speech and association . . . ." Id. at 517. Justice Douglas reiterated this in his concurring opinion. Id. at 520. The new-found importance of fourteenth amendment rights exists partly because most civil rights decisions arise out of interpretations of the "privileges and immunities" and "equal protection" clauses of the fourteenth amendment. See United States v. Guest, 383 U.S. 745 (1966).

amendment right by statute.[23] All state residence requirements have *some* tendency to restrict interstate travel; but when the need for the requirement outweighs the infringement of the right, it may be said that there is a sufficiently compelling reason for enacting the statute.[24] In such cases, the residence requirement is a constitutional exercise of state's rights.[25] For example, the need for qualified public officials familiar with local problems sufficiently justifies residence requirements for holding office.[26] Similarly, residence requirements for voting are constitutional because they prevent those who would fraudulently control state or local election results by importing nonconstituent voters.[27]

Is there a sufficiently compelling reason to restrict the right to interstate travel by requiring a period of residence in order to receive welfare benefits? Only three days after the instant decision, a federal district court held constitutional a welfare residence requirement in a case based on facts closely paralleling the facts in the instant case.[28] Judge Holtzoff, in the Federal District Court of the District of Columbia, justified the residence requirement as necessary to protect the taxpayers,[29] to prevent a mass migration of indigents seeking to take advantage of Washington, D.C.'s generous welfare programs.[30] Judge Clarie, in the dissenting opinion in the instant case, applied precisely this argument to the Connecticut residence requirement.[31] Neither Judge Holtzoff nor Judge Clarie offered factual documentation in support of his prediction. The District of Columbia holding has been overruled[32] (still at the district court level) in an opinion which failed to advert to the possibility of extensive migration. Without citing authority, the instant majority rejected, as unfounded, predictions of a vastly increased welfare burden.[33] Clearly, New York (the largest of the three states that have not enacted any meaningful residence requirement[34]) has experienced continuing and significant increases in its welfare

23. See, e.g., New York v. O'Neill, 359 U.S. 1, 5 (1959); Edwards v. California, 314 U.S. 160, 172, 184 (1941); New York v. Miln, 36 U.S. (11 Pet.) 102, 143 (1837). These "police powers" are reserved for the state in the tenth amendment to the U.S. Constitution.

24. The instant majority noted that if welfare residence requirements were necessary to prevent fraud, they would undoubtedly be justified. The defendant testified, however, that prevention of fraud was not a purpose for the requirement. 270 F. Supp. at 338.

25. Fleming v. Nestor, 363 U.S. 603, 614 (1960); Edwards v. California, 314 U.S. 160, 172-73 (1941).

26. See The Alvelino—Rosales Case, Residence Qualifications for Public Officers, 27 Phil. L.J. 894 (1952).

27. See Harvith, supra note 4, at 623-26. See generally, Schmidhauser, Residency Requirements for Voting and the Tensions of a Mobile Society, 61 Mich. L. Rev. 643 (1963).

28. Harrell v. Board of Comm'rs, 269 F. Supp. 919 (D.D.C. 1967).

29. Id. at 921.

30. Id.

31. 270 F. Supp. at 341.

32. Harrell v. Tobriner, 36 U.S.L.W. 2283 (D.D.C. Nov. 8, 1967).

33. 270 F. Supp. at 337.

34. N.Y. Soc. Welfare Law §§ 117, 131, 132, 138, 139, 157, 158. New York does have a "removal" restriction, permitting the state to return any applicant, who came solely to obtain welfare, back to his original home. N.Y. Soc. Welfare Law § 139-a. For obvious reasons of cost of investigation, the statute is ineffective. See Harvith, supra note 4, at 623. The other two states with no welfare residence requirements are Hawaii and Rhode Island.

burden.[35] Whether these increases stem from the combination of relatively generous welfare benefits[36] with the absence of a waiting period is not clear. The two studies which have been made (one of which involved New York) indicate that indigents do not enter states in order to obtain welfare advantages.[37] These studies, however, are too few, too old and inadequate.[38]

Assuming that indigents do not come to a state in order to obtain generous welfare payments, why do they come? If it could be shown that vast numbers of indigents are coerced into leaving their original home by racial discrimination,[39] would the burdened state be justified in enacting or retaining a residence requirement? In determining whether the requirement is justified, the courts must necessarily examine the goals of welfare programs and the effect of a residence requirement on these goals, as well as the importance of protecting the taxpayer. In fairness to both indigents and taxpayers, financial welfare assistance should be a temporary part of constructive programs which will enable most recipients to [re]-establish themselves as productive members of society. Unfortunately, most of today's welfare beneficiaries remain permanently apart from the economic mainstream and constitute a self-perpetuating drain upon the other members of society.[40] This problem demands a more comprehensive attack than that which is offered by present welfare laws.[41] Psychologically, welfare recipients need to develop the realization that the future includes a realistic possibility of economic self sufficiency.[42] By recognizing that an indigent, like any other citizen, has the right to unfettered interstate travel, the instant case accords with the trend recognizing the dignity of the welfare recipient as a person, which is vital to his psychological resuscitation.[43]

As an important step in solving the problems of welfare, employment must be

35. See, e.g., Bureau of Family Services, United States Dep't of Health, Educ. & Welfare, Advance Release of Statistics on Public Assistance (Sept. 19, 1965); N.Y. Times, Oct. 2, 1967, at 51, col. 4; id., July 30, 1967, § 1 at 66, cols. 1-7.

36. See Bureau of Family Services, supra note 35, at table 7. See also N.Y. Daily News, Nov. 20, 1967, at 2, cols. 1, 2.

37. E.g., N.Y. State Dep't of Welfare, The Movement of Population and Public Welfare in New York State (1958); see Harvith, supra note 4, at 615-19, for a discussion of both studies. The other state studied was Rhode Island.

38. Harvith, supra note 4, at 616-19.

39. See N.Y. Daily News, Nov. 20, 1967, at 2, cols. 1-2. See generally Miller, Race, Poverty, and the Law, 54 Calif. L. Rev. 386 (1966).

40. See, e.g., Wedemeyer & Moore, The American Welfare System, 54 Calif. L. Rev. 326, 356 (1966); N.Y. Post, Nov. 28, 1967, at 45, cols. 1-3.

41. See, e.g., Handler, Controlling Official Behavior in Welfare Administration, 54 Calif. L. Rev. 479 (1966); Wedemeyer & Moore, supra note 40; N.Y. Times, July 30, 1967, § 1, at 66, cols. 1-7.

42. See LoGatto, Residence Laws—A Step Forward or Backward? 7 Catholic Law. 101, 106 (1961). See generally Diamond, The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions, 54 Calif. L. Rev. 357 (1966); Briar, Welfare From Below: Recipients' Views of the Public Welfare System, 54 Calif. L. Rev. 370 (1966).

43. Note, Residence Requirements in State Public Welfare Statutes, 51 Iowa L. Rev. 1080, 1090 (1966); Briar, supra note 42, at 384-85; LoGatto, supra note 42, at 111.

made available to the employable unemployed.[44] Unquestionably, indigent mobility is job productive.[45] By destroying an impediment to mobility, the instant case has tempered the hard economic realities which confront those who are trying to escape the poverty syndrome. In light of the psychological and economic advantages which accrue from this mobility, and regardless of the real reason for indigent migration,[46] the protection of public funds is not a reason which sufficiently compels a welfare residence requirement.

Connecticut is not the only state that requires a period of residency before an indigent can qualify for assistance. The basic types of federal and state welfare programs in operation today have been classified as general assistance programs and categorical assistance programs.[47] General assistance is a form of welfare program financed entirely without federal funds. The length of general assistance residence requirements is at the discretion of the state.[48] Categorical assistance programs are those authorized in the Social Security Act and are available to people who fall into certain classifications[49] (for example, dependent children as in the instant case). The federal government contributes funds in qualifying categorical state plans.[50] A qualifying state may enact a residence requirement provided it does not *exceed* the period of time specified in the Social Security Act.[51] If the infringement on interstate travel caused by the instant residence requirement is not constitutionally justified as a necessary

44. See, e.g., Miller, supra note 39, at 401; Note, 51 Iowa L. Rev. 1080, 1085-86 (1966); N.Y. Daily News, Nov. 20, 1967, at 2, cols. 1-2.

45. Note, 51 Iowa L. Rev. 1080, 1085 (1966); LoGatto, supra note 42, at 111; N.Y. Daily News, Nov. 20, 1967, at 2, col. 2.

46. Harrell v. Tobriner, 36 U.S.L.W. 2283 (D.D.C. Nov. 14, 1967); see text accompanying notes 36-39 supra.

47. See Harvith, supra note 4, at 567-68.

48. There are nearly as many different requirements as there are programs. The longest is five years: e.g., N.H. Rev. Stat. Ann. § 164:1 (1964 rep. ed.). The shortest is none, found in three states (Hawaii, New York, Rhode Island): e.g., Hawaii Rev. Laws §§ 108-15 (Supp. 1963). For a complete table, see Note, 51 Iowa L. Rev. 1080, 1091-95 (1966).

49. The categories are (1) Old Age Assistance, Social Security Act; (2) Medical Assistance for the Aged, Title I, 49 Stat. 620 (1935), as amended, 42 U.S.C. §§ 301-06 (1964), as amended, 42 U.S.C. §§ 302-06 (Supp. I 1965); (3) Aid to the Blind, Social Security Act, Title X, 49 Stat. 645 (1935), as amended, 42 U.S.C. §§ 1201-06 (1964), as amended, 42 U.S.C. §§ 1202-06 (Supp. I 1965); (4) Aid to the Disabled, Social Security Act, Title XIV, 64 Stat. 555 (1950), as amended, 42 U.S.C. §§ 1351-55 (1964), as amended, 42 U.S.C. §§ 1352-55 (Supp. I 1965); (5) Programs combining any of the previous four, Social Security Act, Title XVI, 42 U.S.C. §§ 1381-85 (1964), as amended, 42 U.S.C. §§ 1382-85 (Supp. I 1965); (6) Medical Assistance under Title XIX, 79 Stat. 343, 42 U.S.C. §§ 1396-96d (Supp. I 1965); (7) Aid to Needy Families with Children, Social Security Act, Title IV, 49 Stat. 627 (1935), as amended, 42 U.S.C. §§ 601-09 (1964), as amended, 42 U.S.C. §§ 602-06 (Supp. I 1965).

50. These federal restrictions are found in the sections authorizing the programs, cited in note 49.

51. To qualify for federal funds, state requirements for Old Age Assistance, Aid to the Blind, Aid to the Disabled, and combinations of them, may not exceed five of the nine years immediately preceding application and continuous residence during the last year. Medical Assistance programs must be open to all residents without regard to duration of

protection of public funds,[52] neither are the residence requirements for other states' categorical and general assistance programs so justified.[53]

If it is true that states, such as New York, which have superior benefits,[54] are bearing a heavy burden for refusing to enact a residence requirement,[55] the instant decision portends a lessening of this burden. If all residence requirements are declared unconstitutional, the number of states from which an indigent seeking to change his residence may realistically choose will be increased, and presumably formerly protected states will share increasingly the burden of new resident indigents.

The instant decision may call into question the constitutionality of residence requirements for state universities.[56] There are, however, better reasons for state university residence requirements than for welfare residence requirements. Welfare residence requirements affect the very economic subsistence of the indigent seeking to change his residence. Residence requirements for state universities affect only the possibility of a slight educational advantage. Moreover, most of those who are dissuaded from travel by university residence requirements are non-indigents who can afford to meet the period of residence required to be admitted to the state school. The prospect of many non-indigent students moving to a state such as California to take advantage of its highly regarded, free, state universities, seems far more likely than that of many indigents changing states to obtain welfare advantages.[57] And states certainly should not be discouraged from having a good state university system by making them accept newly arrived residents.[58] Thus, avoiding a greater tax burden would seem a constitutionally valid purpose for university residence requirements while the same reasoning cannot be used to render welfare residence requirements constitutional.

residence. The maximum residence requirement for programs involving dependent children is one year; or if the child is under age one, not in excess of one year's residence by a parent before the child's birth. 49 Stat. 627 (1935), as amended, 42 U.S.C. § 602(b)(2) (1964). Forty states require the one year maximum, the other ten having no wait (Alaska, Georgia, Hawaii, Kentucky, Maine, North Dakota, South Dakota, New York, Rhode Island and Vermont). See N.Y. Times, Jan. 16, 1967, at 21, col. 1; Note, 51 Iowa L. Rev. at 1091-95.

52. 270 F. Supp. at 337-38.

53. Harrell v. Tobriner, 36 U.S.L.W. 2283, 2284 (D.D.C. Nov. 14, 1967) (dissenting opinion Holtzoff, J.).

54. See note 36 supra.

55. The Conservative Party of New York maintains this, as evidenced by a press release from its State Vice-Chairman, Charles E. Rice, occasioned by his proposition at the New York State Constitutional Convention that New York adopt a one year public welfare residence requirement. It is known that one million of the two million Negroes who left the South from 1960 to 1965 found their way to New York City. See N.Y. Daily News, Nov. 20, 1967, at 2, col. 2.

56. See Harvith, supra note 4, at 662; cf. Wall St. J., June 20, 1967, at 14, col. 6.

57. See text accompanying note 37 supra.

58. Proponents of welfare residence requirements apply this same argument to welfare programs. They claim that absent all residence requirements on welfare programs, the states will soon be competing to present the least attractive program to the migrating indigent. 270 F. Supp. at 339 (dissenting opinion Clarie, J.). In light of the fact that every state has some form of welfare program, when none are required by law, this contention seems unlikely.