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Recent Case Notes

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RECENT CASE NOTES

Administrative Law — Primary Jurisdiction — Antitrust Violations and FCC Determinations

Radio Corporation of America, seeking to acquire television stations in five of the eight largest market areas in the United States, made an agreement to exchange its tenth largest market-area station in Cleveland for the fourth largest market-area station in Philadelphia owned by Westinghouse. This exchange required approval by the Federal Communications Commission (FCC), Communications Act of 1934, 48 Stat. 1086 (1934), as amended, 47 U.S.C.A. § 310(b) (Cum. Supp. 1958), and the antitrust division of the Justice Department was informed of the FCC proceedings but did not request a hearing. The FCC approved the exchange, and no appeal from this determination was taken by the Justice Department. Thereafter the federal government instituted suit contending that the exchange was in furtherance of a conspiracy in restraint of trade and violative of the Sherman Act. RCA contended that, under the doctrine of primary jurisdiction, prior consideration of the exchange by the FCC precluded a subsequent suit through operation of the principles of *res judicata* and collateral estoppel. *Held*: In antitrust cases the doctrine of primary jurisdiction is inapplicable where no pervasive regulatory scheme or rate structure imbalance exists, and any determination in such a case by an administrative agency cannot bar a subsequent antitrust action. *United States v. Radio Corp. of America*, 358 U.S. 334 (1959).

Similar to the rule requiring exhaustion of administrative remedies, the doctrine of primary jurisdiction attempts to promote a properly balanced relationship between courts and administrative agencies charged with regulatory duties. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956). Primary jurisdiction determines only whether a court or agency will initially decide a particular issue, 3 DAVIS, ADMINISTRATIVE LAW § 19.01 (1958), and application of the doctrine means that an appeal to a court will lie to test only whether an agency acted within its statutory bounds and on the basis of rational evidence supporting a reasoned conclusion, *Federal Maritime Bd. v. Isbrandsten Co.*, 356 U.S. 481, 500 (1958) (dissenting opinion). Since the first application of this doctrine by the Court in a determination of the reasonableness of a rail rate, see *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the principle has been extended to cases raising issues of fact which a court normally has neither the

training nor experience to determine, *Far East Conference v. United States*, 342 U.S. 570 (1952). Resort must be had to administrative agencies when uniform regulation of rates, rules or practices, or expert analysis of voluminous technical evidence can be achieved only by agency decision. *Great No. Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1922). Thus, a contested trackage agreement between two railroads must be considered first by the ICC, *Thompson v. Texas Mexican Ry.*, 328 U.S. 134 (1946); the reasonableness of cancelling an airline flight must be originally determined by the Civil Aeronautics Board, *Adler v. Chicago & So. Air Lines Inc.*, 41 F. Supp. 366 (E.D. Mo. 1941); and a dispute between unions concerning the scope of their respective bargaining agreements with a railroad company is within the exclusive jurisdiction of the National Railroad Adjustment Board, *Slocum v. Delaware, Lackawanna & W. R.R.*, 339 U.S. 239 (1950).

Although regulatory agencies do not *enforce* the antitrust laws, primary jurisdiction of an agency will be upheld when the basis of an alleged antitrust violation is the reasonableness of a rate, rule, or practice in a regulated industry. See *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). The fact that the federal government may be the plaintiff in the antitrust action is immaterial. *Far East Conference v. United States, supra.* Once an agency has defined its interest in terms of authority to deal with an alleged antitrust violation, the doctrine of primary jurisdiction requires that a court may not disregard the agency's ruling on the basis that the agency will in the future alter its position. *Seatrain Lines v. Pennsylvania R.R.*, 207 F.2d 255 (3rd Cir. 1953). Moreover, agency approval of a merger or consolidation may exempt that agreement from attack under the antitrust laws when the agreement is within the statutory scope of agency approval, see, *e.g.*, Civil Aeronautics Act, 52 Stat. 1004 (1938), as amended, 49 U.S.C.A. § 494 (1952); Shipping Act, 64 Stat. 1277 (1950), as amended, 46 U.S.C.A. § 814 (1952), on the theory that the regulatory act supersedes the antitrust laws and the agency has exclusive primary jurisdiction, *United States Nav. Co. v. Cunard S.S. Co.*, 284 U.S. 474 (1932). However, it has been held that antitrust exemptions will not be implied by the court, and in the absence of express congressional exemptions the doctrine of primary jurisdiction is inapplicable. See *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945).

The Court in the principal case expressly limits application of the doctrine of primary jurisdiction in the antitrust field to industries with rate structures and pervasive regulatory schemes. 358 U.S. at

350. The weakness in applying the Court's reasoning is in determining what type of regulatory scheme is "pervasive." Admittedly the broadcasting industry is under a comprehensive regulatory system, *e.g.*, regulation of licenses and permits. See *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Accordingly, since, in the absence of statutory provision, primary jurisdiction has been applied most frequently in those industries with a rate structure, see 3 DAVIS, *op. cit. supra*, § 19.06, the presence (or absence) of a rate structure would seem to be the material factor in determining whether or not a regulatory scheme is "pervasive." On the other hand, the Court in the principal case could have reasoned that since a merger by common carriers is exempt from the antitrust laws when approved by the FCC, Communications Act of 1934, 48 Stat. 1080 (1934), as amended, 47 U.S.C.A. § 221(a) (Cum. Supp. 1958); 57 Stat. 5 (1943), 47 U.S.C.A. § 222(e) (Cum. Supp. 1958), and since a statutory exemption from antitrust laws is not accorded to broadcasters, see Communications Act of 1934, 48 Stat. 1087, as amended, 47 U.S.C.A. § 313 (1952), the regulatory laws cannot supersede the antitrust laws and primary jurisdiction is inapplicable, see *United States Nav. Co. v. Cunard S.S. Co., supra.* However, the weakness in this reasoning lies in previous statements of the Court that indicate the modern problem is not one of strictly applying the antitrust laws, but rather a problem of harmonizing antitrust policy with regulatory policy, *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944); see also *FCC v. Radio Corp. of America Communications, Inc.*, 346 U.S. 86 (1953), thus seemingly requiring consideration by a court of an agency's specific regulatory policy, 3 DAVIS, *op. cit. supra*, § 19.05 (1958).

The position taken by the Supreme Court in the instant case will limit application of the primary jurisdiction principle in antitrust cases, and may preclude application of primary jurisdiction in other industries without rate structure and pervasive regulatory schemes, *e.g.*, pipeline construction and operation in the natural gas industries under the direction of the Federal Power Commission. However, if the modern problem is one of harmonization of the antitrust policy with the regulatory policy, then a distinction between regulated industries based on the presence (or absence) of rate structures would not seem to be justified. Moreover, since a regulatory agency may consider both the fact issues raised by an antitrust question and the effect of proposed transactions upon a particular industry without removing jurisdiction from the courts to enforce the antitrust laws, it would seem highly desirable to expand the doctrine of primary jurisdiction. The governmental interest in enforcing the antitrust laws is pro-

tected by the provision permitting a direct appeal from an administrative decision, and, in the absence of appeal, a defendant should be able to rely on an agency decision without fear of liability from a subsequent collateral attack. Further, if the agency acts first, needed uniformity and consistency in regulation of business is more readily achieved, and judicial review derives the benefit of agency expertise. Thus, by applying the doctrine of primary jurisdiction to prevent a subsequent collateral attack on the basis of antitrust violations, a balance (not obtainable under the present holding) would be achieved in the protection of possible conflicting interests.

Ed. G. Ruland

Constitutional Law — Double Jeopardy — Successive State and Federal Prosecutions

Petitioners were convicted in a state court for conspiring to injure the property of another in violation of the laws of Illinois. Subsequently, in a prosecution based upon the same transaction as the state conviction, they were convicted in a federal court for violating a federal statute preventing conspiracy to destroy means of communication operated and controlled by the United States. *Held on appeal to the Supreme Court*: The double jeopardy provision of the fifth amendment is inapplicable to successive state and federal prosecutions for different crimes arising from the same act. *Abbate v. United States*, 359 U.S. 187 (1959) (6-3 decision). In a case decided by the Supreme Court on the same day, petitioner had been acquitted in a federal court of robbing a federally-insured savings and loan association in violation of a federal statute. He had subsequently been indicted in a state court for violation of an Illinois robbery statute upon an indictment reciting facts substantially the same as those contained in the prior federal indictment. *Held*: The due process clause of the fourteenth amendment does not prohibit a state prosecution founded on conduct which formed the basis for a prior federal action. *Bartkus v. People of Illinois*, 359 U.S. 121 (1959) (5-4 decision).

Although presenting technically different problems, the primary issue involved in both cases is the same, *viz.*, whether the federal constitution prohibits successive prosecutions by federal and state governments based on the same transaction. The Constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. (Of course

the doctrine of double jeopardy applies only to criminal cases, *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938), including misdemeanors as well as felonies, *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1874).) Although this constitutional provision is binding only on the federal government, *Palko v. Connecticut*, 302 U.S. 319 (1937), five states recognize the principle of double jeopardy as part of their common law and all others, including Texas, have similar constitutional provisions. See, *e.g.*, TEX. CONST. art. I, § 14; *State v. Brunn*, 22 Wash. 2d 120, 154 P.2d 826, 828 (1945). It has been stated that the reason for this prohibition is the injustice of two punishments for one offense, *Ex parte Lange*, supra at 168, but the prevailing view as to the theory of double jeopardy provisions is the danger inherent in allowing the full power of the government to be brought against the accused twice for the same offense, *United States v. Ball*, 163 U.S. 662, 669 (1896); *State v. Fredlund*, 200 Minn. 44, 273 N.W. 353, 357 (1937). Double jeopardy applies equally to former acquittal or former conviction, since it is the fact of the *trial*, not the outcome, that is basic to the concept of double jeopardy. *Kepner v. United States*, 195 U.S. 100, 126 (1904); *State ex rel. Alcala v. Grayson*, 156 Fla. 435, 23 So. 2d 484 (1945).

Thus, the concept of double jeopardy creates two basic problems: when is one deemed to have been placed "in jeopardy"? and when are two offenses sufficiently similar to be, in reality, one offense? ROTTSCHAEFER, HANDBOOK OF AM. CONST. LAW 812 (1939). For purposes of determining when one has been placed in jeopardy, it is generally sufficient that (1) the accused has been brought to trial after a valid information or indictment has been returned, (2) the defendant has pleaded and been arraigned before a court of competent jurisdiction, and (3) a jury has been impaneled and sworn to hear the evidence. *McCarthy v. Zerbst*, 85 F.2d 640, 642 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936). The test of similarity of offenses is predicated upon the "identity" of the offenses with which one is charged, *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *e.g.*, where the offenses are perfectly distinct in law, the defense of double jeopardy is unavailable, even though they arise out of the same transaction. *Burton v. United States*, 202 U.S. 344, 380 (1906). Crimes prohibited by both federal and state laws have been treated as offenses against both governments and may be prosecuted by both. *Moore v. Illinois*, 20 U.S. (14 How.) 13, 20 (1852).

Although the Supreme Court previously had recognized the possibility of double jeopardy arising from successive state and federal prosecutions, *Houston v. Moore*, 4 U.S. (5 Wheat.) 1 (1820), it was

in *Fox v. Ohio*, 46 U.S. (5 How.) 410, 419, 434-35 (1847), that the Court first observed that the fifth amendment did not prohibit a federal prosecution based on the same conduct on which a prior state prosecution had been predicated. This principle was strengthened by dicta in later decisions which followed the reasoning that each citizen of the United States is also a citizen of a state or territory subject to punishment by each sovereign for disobedience to its laws; hence, successive state and federal prosecutions cannot be considered double jeopardy as the accused has, by one act, committed two offenses. See, *e.g.*, *Ex parte Siebold*, 100 U.S. 371, 389 (1879); *United States v. Cruikshank*, 92 U.S. 542, 550 (1875); *Moore v. Illinois, supra; United States v. Marigold*, 18 U.S. (9 How.) 560, 569 (1850). The issue of double jeopardy as a result of successive state and federal prosecutions was squarely presented to the Court for the first time in *United States v. Lanza*, 260 U.S. 377 (1922). Lanza had been convicted in a federal court following a prior state conviction based on the same conduct. A unanimous Court held that an act denounced as a crime by both national and state sovereignties may be punished by each, and double jeopardy arises only in a prosecution under the authority of the federal government subsequent to a trial for the same offense under *federal* authority. *United States v. Lanza, supra* at 382.

The principal cases are the latest in a long line of decisions upholding this principle of dual sovereignty. *E.g.*, *Screws v. United States*, 325 U.S. 91 (1945); *Guyot v. State*, 222 Ark. 275, 258 S.W.2d 569, 570 (1953). However, the *Bartkus* case presents to the Court, for the first time, the problem of a federal prosecution followed by state action, and requires a construction of the fourteenth amendment with respect to that problem. The due process clause of the fourteenth amendment does not incorporate the Bill of Rights as such, *Adamson v. California*, 332 U.S. 46, 53 (1947); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949), but rather prohibits only those practices "repugnant to the conscience of mankind," *Palko v. Connecticut, supra* at 323. Concluding that successive state and federal prosecutions for a single transaction is not a "repugnant" practice, the Court in the *Bartkus* case employed the same reasoning applied in the *Lanza* case. The majority in the *Abbate* case also reaffirmed the ruling of the *Lanza* case, reasoning that the *Lanza* principle was firmly established, *but see* Grant, *Successive Prosecutions by State and Nation*, 4 U.C.L.A. L. REV. 1 (1956), and that to hold otherwise would greatly impair the effectiveness of federal and state law en-

forcement. Justice Brennan, though apparently agreeing with the basic legal reasoning of the majority, dissented in *Bartkus* on the theory that the facts show that federal authorities participated in the state trial to such an extent that it actually constituted a second federal prosecution in violation of the fifth amendment. See *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Feldman v. United States*, 322 U.S. 487 (1944). The other dissenters (the same in both cases) took the position that although the argument of the majority that dual offenses arise from one transaction merely because of dual sovereignty is perhaps theoretically sound and logical, it is too subtle to be meaningful as the accused is nevertheless forced to face trial twice for the same conduct. Moreover, denial to state and federal governments of the right of each to prosecute offenses arising out of the same transaction will not necessarily preclude successful law enforcement by either government. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1330 (1932). In accord with the position of the dissenters, it has been suggested by legal writers that the courts adopt the principle of *non bis in idem*—where a particular offense in its entirety is subject to prosecution by two sovereigns, the first sovereign which undertakes the prosecution of the offense "absorbs" the case, thereby precluding action by the other sovereign. Grant, *The Lanza Rule of Successive Prosecutions*, 32 COLUM. L. REV. 1309, 1330 (1932). However, the majority in *Bartkus* suggests that this problem is not one for the courts but one to be resolved by the federal and state legislatures. It has also been pointed out by legal writers that the constitutional division of power between local and federal governments gives both state and federal governments ample protection. See Grant, *Successive Prosecutions by State and Nation*, 4 U.C.L.A. L. REV. 1, 37 (1956); Comment, 55 COLUM. L. REV. 83 (1955). Further, far-sighted cooperation between the local and national governments as mutually supplementing agencies of law enforcement would resolve much conflict. Pound, *Cooperation in Enforcement of Law*, 17 A.B.A.J. 9 (1931).

The entire judicial history of the problem reflects the dilemma of the Court in trying to reconcile two important interests, *viz.*, protection of the rights of the individual as guaranteed by the Constitution, and protection of the concept of dual sovereignty inherent in our federal system of government. The idea of dual sovereignty as applicable to the double jeopardy principle was announced at a time (*Moore v. Illinois, supra*, decided in 1852) when federalism was of paramount concern to the Court. The issue then before the Court was whether both state and federal governments could make the same conduct a

crime and double jeopardy was only a hypothetical issue. It is unfortunate that the Court in the *Lanza* case chose to treat this dicta as settled precedent. Similarly, in the instant cases, the Court has refused to extend the scope of its reasoning beyond the evolution of the *Lanza* principle. It may well be that a broader re-evaluation of this problem, in the light of the increasing opportunities for successive prosecutions based on a single transaction, would suggest some way of resolving the dilemma which would not be so offensive to the spirit of the Constitution. The adoption of the principle *non bis in idem,* coupled with substantial cooperation between the law enforcement agencies, seems to offer an excellent solution. Whether *non bis in idem* or some other principle is utilized, a change appears desirable inasmuch as the sole distinction between these state and federal offenses seems to be found in the differing interests of the two sovereigns rather than in some aspect of petitioner's conduct. Regardless of the syllogistic perfection of the *Lanza* principle, shorn of the subtleties of legal fiction, there clearly remains two prosecutions for one wrong.

Earldean V.S. Robbins

Constitutional Law — Searches and Seizures — Right To Enter Private Home Without a Warrant

D, by refusing to permit public health officials to enter his home, violated a municipal health ordinance which gave those officers the authority to enter and inspect a private dwelling without a warrant provided they had probable cause to suspect a nuisance. Although another city ordinance made failure to abate a nuisance a misdemeanor, *D* was fined only for his refusal to let the officers enter. *Held*: A city health ordinance which gives public health officials the authority to enter and inspect a private dwelling without a warrant when they have probable cause to suspect a nuisance does not violate the fourth or the fourteenth amendments of the federal constitution. *Frank v. Maryland*, 360 U.S. 914 (1959) (5-4 decision).

The enactment and enforcement of health laws is a proper exercise of a state's police power to protect the health, safety, morals, and general welfare of the public, *Holden v. Hardy*, 169 U.S. 366 (1898), and a state, acting through its legislature, may delegate this power to its municipal subordinates, *Zucht v. King*, 260 U.S. 174 (1922). Although the due process clause of the fourteenth amendment does not curtail the proper exercise of the state police power, *Louisville & N. R.*

Co. v. Melton, 218 U.S. 36 (1910), an unreasonable or arbitrary exercise of this power is a violation of the fourteenth amendment, *Dobbins v. Los Angeles*, 195 U.S. 223 (1904). Moreover, as one of the provisions of the Bill of Rights which is incorporated into the fourteenth amendment, see *Adamson v. California*, 332 U.S. 46 (1947), the right to be free from unreasonable searches and seizures, secured by the fourth amendment, is enforceable against the states by operation of the due process clause of the fourteenth amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949).

Cases construing the prohibition of the fourth amendment generally have been concerned with criminal proceedings. See, *e.g.*, *Miller v. United States*, 357 U.S. 301 (1958); *Johnson v. United States*, 333 U.S. 10 (1948); *Nathanson v. United States*, 290 U.S. 41 (1933); *Weeks v. United States*, 232 U.S. 383 (1914); *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949). In such cases it has generally been held that a search warrant is required for a lawful search and seizure, and the right to search without one is exceptional. *United States v. Di Corvo*, 37 F.2d 124 (D.C. Conn. 1927). However, since the fourth amendment prohibits only *unreasonable* searches and seizures and impliedly allows reasonable ones, it has been held that searches and seizures made incident to a lawful arrest are reasonable although made without a warrant. *Carroll v. United States*, 267 U.S. 132 (1925). The first case to consider unreasonable searches and seizures in connection with searches by public health officials held that absent an acute emergency precluding resort to a court or magistrate, a public health official could not enter a private home to inspect sanitation conditions without a warrant. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950). Although the majority of the Supreme Court in that case did not pass on the constitutional issue, the dissent argued that the search by the health officer was reasonable, routine, accepted, and important to the protection of the public health and welfare. *District of Columbia v. Little*, 339 U.S. at 7-8.

The decision in the instant case was based largely on the theory that the fourth amendment applies only to unreasonable searches and seizures made in connection with criminal proceedings, and finds strength in the argument that the fourth and fifth amendments are to be read together, *Davis v. United States*, 328 U.S. 582 (1946); *Boyd v. United States*, 116 U.S. 616 (1886), implying that the fourth, like the fifth, applies only to criminal matters. *But see Nueslein v. District of Columbia*, 115 F.2d 690 (D.C. Cir. 1940). The district court in the *Little* case discredited this argument by empha-

sizing that the basic premise of the protection afforded by the fourth amendment was not self-incrimination, but rather was the common-law right of privacy in one's home. *District of Columbia v. Little, supra* at 16. See 1 COOLEY, CONSTITUTIONAL LIMITATIONS 610, 611 (8th ed. 1927). That court further stated that to support such an argument would lead to the "fantastic absurdity" of a suspected criminal having protection against the search of his home and a man not suspected of a crime having no protection. *District of Columbia v. Little, supra* at 17. The decision in the instant case indicates a liberal departure from the search and seizure requirements which heretofore have been strictly guarded. See *Perry v. United States,* 14 F.2d 88 (9th Cir. 1926); *Leonard v. United States,* 6 F.2d 353 (1st Cir. 1925). Although the exercise of the police power by a state may indicate a growth and development of the law rather than a tyrannical assertion of power, *Nebbia v. New York,* 291 U.S. 502 (1934), and although the obsolete methods of past generations must yield to the modern conception of progressive sanitation and public welfare, *Walcher v. First Presbyterian Church,* 76 Okla. 9, 184 Pac. 106 (1919), it is significant to note the firm declaration of the Supreme Court that "the search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws," *Agnello v. United States,* 269 U.S. 20 (1925). If there is no limit to the police power, then constitutional guarantees become mere directory suggestions without force or life, and the citizen is afforded only an illusory protection against the invasion of his rights. *Goldman v. Crowther,* 147 Md. 282, 128 Atl. 50 (1925). Accordingly, no general *exploratory* search and seizure of either persons, houses, or effects can ever be justified, either with or without a warrant. *United States v. Rembert,* 284 Fed. 996 (S.D. Tex. 1922). Such general explorations as the one in the instant case have not been allowed incident to a lawful arrest, *Agnello v. United States, supra,* or even with a valid search warrant, *Go-Bart Importing Co. v. United States,* 282 U.S. 344 (1931). *But see Harris v. United States,* 331 U.S. 145 (1947). The significance of the decision in the instant case is that it opens the door for any official, be he police officer or administrative official, to invade the privacy of one's home with only his personal suspicion as his guide and the police power as his authority. Thus, while adhering to the somewhat weak theory that the fourth amendment applies only in criminal proceedings, it would seem that the Court failed to see the possible destructive consequences of its decision.

The thorough review which is currently being given the law of

search and seizure must yield some concrete standards, but it seems that the decision in the instant case is a move in the wrong direction. The history of the fourth amendment does not seem to substantiate clearly the position of the majority that it has never been meant to apply except in criminal cases. The distinction drawn between criminal and civil proceedings is a distinction without difference since in many situations the investigation for a civil violation may well lay the foundation for a subsequent or collateral criminal prosecution. Moreover, it would seem that the Court in the instant case has upset the delicate constitutional balance between the rights of the individual and community health safeguards, since the process of securing a search warrant involves only slight inconvenience to the official. The Court could have better maintained this balance by establishing some standard whereby in the absence of a vital emergency the public officer would be required to secure a search warrant, whether investigating a crime or inspecting a home under a municipal health ordinance. Instead of the discretion of the officer being the sole guide, the reasonableness of the search would be determined by a court looking into the nature of the investigation, the end sought, and the comparative needs and rights of the community and the individual. This result would seem more consistent with the mandates of the fourth and fourteenth amendments.

George Howard Nelson

Contracts — Defense of Illegality — Violation of Antitrust Laws

P, engaged in the business of marketing onions, informed *D* that he owned a substantial amount of onions which he would release upon the futures exchange, with a resulting depression in the price of onions, unless *D* and other growers purchased a large portion of these onions. Fearful that such action would cause him a substantial loss, *D* agreed to purchase some of *P's* onions at a reasonable price. After accepting a portion of the onions for which he had contracted, *D* repudiated the contract. *P* sold the balance of *D's* onions and brought suit for the difference between the market and contract prices. *D* contended that the entire transaction was in violation of the Sherman Act and therefore he was not liable for the damage suffered by *P* as a result of the repudiation. *Held*: Where a lawful sale for a fair consideration constitutes a complete economic transaction in itself, a concomitant

violation of the antitrust laws is not a defense to an action for breach of the contract. *Kelly v. Kosuga,* 358 U.S. 516 (1959).

At common law, an illegal contract is unenforceable. *Oscanyan v. Winchester Arms Co.,* 103 U.S. 261 (1880); RESTATEMENT, CONTRACTS § 598 (1932). However, an exception to this common-law doctrine is recognized if the plaintiff is innocent and justifiably unaware of the illegality, 5 WILLISTON, CONTRACTS § 1631 (rev. ed. 1937), or if some public policy is served by enforcement, 5 WILLISTON, *op. cit. supra* § 1632. Further, a severable agreement, a portion of which is illegal, may be enforced as to the legal portion. RESTATEMENT, CONTRACTS §§ 518, 606-07; 5 WILLISTON, *op. cit. supra* §§ 1661, 1664A. Although the Sherman Act is generally considered to embody common-law principles as applied to trade and commerce, 5 WILLISTON, *op. cit. supra* § 1658A, its definition of an illegal contract is more comprehensive than that of the common law, *Loewe v. Lawlor,* 208 U.S. 274 (1908); Lockhart, *Violation of the Antitrust Laws as a Defense in Civil Actions,* 31 MINN. L. REV. 507, 514 (1947).

It is generally stated that the remedies provided by the Sherman Act are exclusive, *Geddes v. Anaconda Copper Mining Co.,* 254 U.S. 590 (1921), and may not be expanded judicially by including avoidance of private contracts as a remedy, *Wilder Mfg. Co. v. Corn Products Co.,* 236 U.S. 165 (1915). Accordingly, since the Sherman Act does not specifically allow avoidance of private contracts on the ground of illegality, Lockhart, *supra* at 515, it has been held that a collateral attack, alleging that the plaintiff is *doing business* in violation of the Sherman Act, will not be a defense to an action to enforce a contract. *Small Co. v. Lamborn & Co.,* 267 U.S. 248 (1925); *Wilder Mfg. Co. v. Corn Products Co., supra; Cincinnati Packet Co. v. Bay,* 200 U.S. 179 (1906); *Connolly v. Union Sewer Pipe Co.,* 184 U.S. 540 (1902); *The Charles E. Wisewall,* 74 Fed. 802 (N.D.N.Y. 1896). Moreover, generally there is no true connection between the contract in question and the combination that is violative of the Sherman Act, and, thus, a collateral attack would not be sustained. See *Connolly v. Union Sewer Pipe Co., supra.* However, if the contract in question constitutes *an essential part* of a Sherman Act violation, the defense has been permitted, *Continental Wall Paper Co. v. Voight & Sons Co.,* 212 U.S. 227 (1909), on the theory that to enforce the contract, the court would be directly aiding a violation of the Sherman Act, see *Bement v. National Harrow Co.,* 186 U.S. 70, 88 (1902); *McMullen v. Hoffman,* 174 U.S. 639 (1899). *Cf.*

Sola Electric Co. v. Jefferson Electric Co., 317 U.S. 173 (1942); *B. B. Chem. Co. v. Ellis*, 314 U.S. 495 (1942); Lockhart, *supra* at 539 (a Sherman Act violation permitted as a defense in patent infringement cases on the theory of public interest in freedom from invalid patents *and* from restraints of trade).

The problem faced by the Court in the principal case was not whether the remedies provided by the Sherman Act may be expanded judicially by allowing avoidance of private contracts, but, rather, what type of conduct is necessary before a violation of the Sherman Act will be permitted as a defense. 358 U.S. at 521. The Court reasoned that while restrictive agreements in direct violation of the Sherman Act could not be enforced, the agreement to sell the onions was a complete economic transaction in itself, and hence was severable from the accompanying restrictive agreement. 358 U.S. at 521. This reasoning is questionable when applied to the facts in the instant case, since by the admission that this sale furnished the occasion for, and was part of, the restrictive agreement, the Court is in fact enforcing the major portion of a contract in restraint of trade. See *Continental Wall Paper Co. v. Voight & Sons Co., supra.* However, the contrary policy factor of unjust enrichment strengthens the reasoning of the Court, since the absence of this factor has been determinative in permitting Sherman Act illegality as a defense. *Cf. Continental Wall Paper Co. v. Voight & Sons Co., supra.* Thus, in an action on a contract where a Sherman Act violation is alleged as a defense, if the consideration is fair, if some performance has been rendered and value received, and if the illegal portions of the contract are logically severable, the defense may not be permitted. Conversely, factors of excessive price, executory agreements, or non-severability may be determinative in permitting the defense and not enforcing a contract. See Lockhart, *supra* at 573. (Of course, an excessive price on the market had been created by the parties in the instant case by withholding even a few of the products from the market, but this did not influence the Court.) However, even the determinative factors may not be sufficient to permit the defense, *e.g.*, had *D* in the principal case accepted all of the onions, withheld them from the market as agreed, and not paid any of the purchase price, enforcement of the contract would have been enforcement of the precise conduct prohibited by the Sherman Act; yet, the degree of unjust enrichment to *D* would have been greater, and the Court might have enforced the contract, notwithstanding its non-severability. Refusing to enforce the contract but permitting recovery on a *quantum meruit* theory may be the solution to this

problem. This solution would seem to conform more to the spirit of the Sherman Act than the solution adopted in the instant case.

Even though the reasoning of the Court may be questioned, the principal case is helpful in determining what factors are of sufficient materiality to permit a Sherman Act violation as a defense to an action on a contract. The *Wall Paper* case sanctioned the defense, the *Wilder* case limited the defense to direct attacks on the contract in question, and the principal case further restricts the permissible use of the defense in direct attacks to situations where enforcement would itself be a restraint of trade. Unjust enrichment of a defendant is a justifiable concern, and it is doubtful that adoption of a strict policy of non-enforcement of agreements tainted with Sherman Act illegality would decrease the number of such agreements. However, the respective bargaining positions of the parties should be observed, and a plaintiff who threatens economic reprisal unless his terms are accepted, as did *P* in the principal case, should not have the blanket aid of a court in enforcing his contract.

Richard N. Countiss

Labor Law — Certification Proceeding — Judicial Review

The National Labor Relations Board issued an order certifying an employees' association as the representative of a collective bargaining unit containing both professional and non-professional employees. The association brought suit in the federal district court, alleging that the NLRB had exceeded its statutory power in including the professional employees, without their consent, in a unit with non-professional employees. Section 9(b)(1) of the amended National Labor Relations Act provides that an appropriate bargaining unit may not include both professional and non-professional employees unless a majority of the professional employees vote for inclusion in a mixed unit. *Labor Management Relations Act* (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C.A. § 159(b) (1956). The NLRB moved to dismiss for want of jurisdiction on grounds that section 9(d) of the Taft-Hartley Act, 61 Stat. 136 (1947), 29 U.S.C.A. § 160(f) (1956), permitted judicial review of the NLRB certifications only in conjunction with an alleged unfair labor practice. *Held*: A federal district court, under its general powers, has original jurisdiction of an action to prevent the deprivation of a statutory right. *Leedom v. Kyne*, 358 U.S. 184 (1958).

Denial by statutory implication of judicial review of administrative actions is not a violation of due process of law, where the administrative procedure prescribed by the statute affords to those affected a reasonable opportunity to be heard and present evidence. *Yakus v. United States*, 321 U.S. 414 (1944). Generally, when a statute is silent as to the review of administrative decisions, the court attempts to determine congressional intent, *General Comm. of Adjustment of Bhd. of Locomotive Eng'rs for Missouri-Kan.-Tex. R. R. v. Missouri-Kan.-Tex. R.R.*, 320 U.S. 323 (1943); *Switchmen's Union v. National Mediation Bd.*, 320 U.S. 297 (1943), and in the absence of statutory guidance or legislative history, recent cases have presumed a right of review, see *Service v. Dulles*, 354 U.S. 363 (1957); *United States v. ICC*, 337 U.S. 426 (1949); *Stark v. Wickard*, 321 U.S. 288 (1944). This presumption has been overcome in a few cases by a showing of special reasons for the denial of review arising from peculiar subject matter or circumstances. See *Orloff v. Willoughby*, 345 U.S. 83 (1953) (status of one lawfully inducted into the Army); *Ludecke v. Watkins*, 335 U.S. 160 (1948) (presidential directive that a certain alien enemy be deported); *United States v. Pink*, 315 U.S. 203 (1942) (executive recognition of a foreign nation). Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C.A. § 1009 (1956), seems to create a presumption in favor of judicial review of administrative actions where the statute does not clearly withhold review. Schwartz, *The Administrative Procedure Act in Operation*, 29 N.Y.U.L. REV. 1173, 1239 (1954); Comment, 33 TEXAS L. REV. 663 (1955). Moreover, it has been held that courts may take jurisdiction of a controversy when Congress has failed to provide a means (*e.g.*, an administrative board) for enforcement of its statutory commands. *Virginia Ry. v. System Federation*, 300 U.S. 515 (1937); *Texas & New Orleans Ry. v. Brotherhood of Ry. & Steamship Clerks*, 281 U.S. 548 (1930). However, under the unexplicit (as to judicial review) Railway Labor Act, a federal district court does not have jurisdiction to review a union certification by the National Mediation Board, even though a violation of a statutory right is claimed. *Switchmen's Union v. National Mediation Bd.*, *supra*. Further, even where the court does have the power to hear the appeal, if the question involves an administrative determination, agency discretion will not be disturbed unless the complaining party meets the heavy burden of proving that the agency action was plainly arbitrary. *Lucas v. Kansas City Structural Steel Co.*, 281 U.S. 264 (1930).

Section 10(f) of the act, *supra*, authorizes a circuit court to review

final orders of the NLRB where there is an alleged unfair labor practice. Under this statutory scheme, it is well settled that orders of the NLRB certifying unions as collective bargaining representatives as well as directions with respect to elections to be held as a preliminary step to certification are not final orders based on unfair labor practices; therefore, they are not a proper subject for review by a circuit court. *AFL v. NLRB,* 308 U.S. 401 (1940); *NLRB v. International Bhd. of Electrical Workers,* 308 U.S. 413 (1940). However, as the complete record of the Board's proceedings in an unfair labor practice case is to be received by the reviewing circuit court, *Labor Management Relations Act,* 61 Stat. 143 (1947), 29 U.S.C.A. § 159(d) (1952), it has been held that a certification order may be reviewed if it is the *basis* for the alleged unfair labor practice, *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146 (1941). There are indications, moreover, that Congress clearly intended that judicial review of certifications be denied except in connection with section 10 proceedings. *Labor Management Relations Act, supra*; see *Madden v. Bhd. & Union of Transit Employees,* 147 F.2d 439 (4th Cir. 1945); 93 *Cong. Rec.* 6444 (1947); *H. Conf. Rep.* No. 510, 80th Cong., 1st Sess. 56-57 (1947); *H.R. Rep.* No. 245, 80th Cong., 1st Sess. 43, 59-60, 94 (1947); 79 *Cong. Rec.* 7658 (1934); *Hearings before Senate Committee on Education and Labor, et al,* 76th Cong., 1st Sess. 584-587 (1939); S. *Rep.* No. 573, 74th Cong., 1st Sess. 6 (1935); *H.R. Rep.* No. 1147, 74th Cong., 1st Sess. 7, 23 (1935) (hereinafter cited as Labor Management Relations Act legislative history); Note, 42 MINN. L. REV. 938 (1958). Nonetheless, the fact that a representation proceeding under section 9 of the act is consolidated with an unfair labor practice proceeding under section 10, and both proceedings are decided at the same time has been held not to make the Board's rulings in the representation proceeding reviewable where its orders in the unfair labor practice proceeding were not predicated upon its ruling in the representation proceeding. *NLRB v. Falk Corp.,* 308 U.S. 453 (1940). Although the Supreme Court has recognized the possibility of review of a certification proceeding outside of section 10 in an independent suit brought in a federal district court under its general jurisdiction powers when there is a clear showing of an unlawful action under the statutory scheme and a resulting injury threatened or suffered, the Court stated that the question of jurisdiction could not be considered until these criteria were present. See *Inland Empire Dist. Council v. Millis,* 325 U.S. 697 (1945); *AFL v. NLRB, supra.* When the criteria of statutory violation coupled with resulting injury being threatened or suffered have been present, lower federal courts have split on the

question of district court jurisdiction to review a labor certification. *Compare Reilly v. Millis*, 52 F. Supp. 172 (D.C. 1943), *aff'd*, 144 F.2d 259 (D.C. Cir. 1944), *cert. denied*, 325 U.S. 879 (1945), *and AFL v. Madden*, 33 F. Supp. 943 (D.C. 1940), *with Zimmer-Thomson Corp. v. NLRB*, 60 F. Supp. 84 (D.C. 1945), *and Northrop Corp. v. Madden*, 30 F. Supp. 993 (S.D.Cal. 1937).

The instant case is the first time the Supreme Court has passed directly on the question of general jurisdictional power to review a certification of a union by the NLRB. The Court reasoned that since Congress had given a right to professional employees, it must have been contemplated that the right could be enforced, especially when the NLRB attempted to exercise a power (certification of a professional-non-professional employee bargaining unit without approval of the professional employees) that had been withheld specifically by statute. 358 U.S. at 188-90. This reasoning does not seem to follow congressional intent that certification questions can only be reviewed in connection with an unfair labor practice order. Labor Management Relations Act legislative history, *supra*. Although the Court does not follow its holding under the very similar Railway Labor Act, *Switchmen's Union v. National Mediation Bd., supra*, the decision is not in conflict with preceding opinions under the Labor Management Relations Act, which have indicated the possibility of review, *Inland Empire Dist. Council v. Millis, supra; AFL v. NLRB, supra*. Further, the principal case seems to follow the recent case of *Harmon v. Brucker*, 355 U.S. 579 (1958), which held that a federal district court may review the administrative proceedings of the Army Review Board where an alleged statutory violation is presented.

The instant case is a new precedent in the field of labor law and possibly in the field of administrative law. The instant case and the recent case of *Harmon v. Brucker* seem to indicate new criteria for permitting judicial review of administrative proceedings under statutes unexplicit as to review. The principal case discounts congressional intention as gathered from the legislative history and possibly even intention in general when a statutory right is violated. As a practical matter, it seems desirable not to restrict all district court review of certifications, for many times section 10 review is unavailable to an injured union because no unfair labor practice has been committed by the employer. Further, prohibiting review could induce deliberate unfair labor practices for the sole purpose of obtaining review of certifications under section 10. This strategy definitely would produce more work for the Board and the courts since the created unfair labor practices would have to be considered as well as the certification ques-

tions. The argument that ingenious counsel will be able to get into court under an "unlawful action" in labor certification controversies when only an administrative discretionary issue is actually involved may be met by allowing courts to take jurisdiction only when a clear violation of a statutory right and a question of law is presented. Allowance of review when a statutory right clearly has been violated should not interfere with administrative objectives nor permit the court to substitute its judgment for that of the Board in the considerable areas of discretionary right. A check upon administrative proceedings is desirable for the same reasons that an appellate court's check upon a trial court is desirable.

Lawrence E. Steinberg

Procedure — Appeal and Error — Time For Filing Appeal Bond

After a lengthy trial in a Texas District Court which resulted in a jury verdict for *D*, judgment *non obstante veredicto* was entered for *P*. Nine days later, *D* filed notice of appeal. On the following day, *P*, not satisfied with his judgment, filed a motion for new trial. However, after *D* failed to file an appeal bond within thirty days after rendition of judgment, *P* requested leave to withdraw his motion for new trial. Later in the same day, *D* filed an appeal bond. The trial court subsequently granted *P* leave to withdraw the motion for new trial. On appeal, *P* contended that since *D* had not filed an appeal bond within thirty days after *rendition of judgment*, rule 356 required that the appeal be dismissed. *Held*: Under rule 356, a party who initiates an appeal by filing notice of appeal must file an appeal bond within thirty days after rendition of judgment and not thirty days after disposition of the adverse party's pending motion for new trial. *Neuhoff Bros., Packers v. Acosta*, —Tex.—, 327 S.W.2d 434 (1959).

Perfecting an appeal from the trial court is now governed by the Rules of Civil Procedure, TEX. RULES CIV. PRO. ANN. rules 352-69a (1955) (hereinafter cited as "Rules"). A party litigant who falls within the proviso of rule 324 may appeal from the district court by filing notice of appeal within ten days after final judgment, Rule 353, but in all other cases appealed from the district court, a motion for new trial, filed within ten days of the final judgment is a prerequisite to appeal, Rule 324. In the latter situation, if the motion for

new trial is overruled by an *order* of the judge, notice of appeal must be filed within ten days of that action, Rule 353, although, if the motion for new trial is overruled *automatically* by operation of law (45 days after filing of the motion or amended motions) notice of appeal is not necessary. *Combined American Ins. Co. v. Morgan,* 214 S.W.2d 145 (Tex. Civ. App. 1948). Thus (except where a motion for new trial is overruled by operation of law) notice of appeal is always necessary, although in certain cases the filing of a motion for new trial, and its subsequent overruling, will postpone the time for filing notice of appeal. Of course, if a motion for new trial is granted, no appeal is allowed. See *Brazoria City v. Upham,* 308 S.W.2d 531 (Tex. Civ. App. 1957); *Bush v. Bush,* 265 S.W.2d 676 (Tex. Civ. App. 1954) *error dism.* Further, whenever a party appeals, he must file a cost bond pursuant to rule 354, unless he comes within the province of rule 355 (the "pauper's bond"). Rule 356 requires that the bond be filed with the clerk within thirty days after the date of the "rendition of judgment or order overruling motion for new trial." The interpretation of this rule poses the controlling question in the principal case: "In determining the time for filing an appeal bond under the rule [356], may one litigant rely upon his opponent's action in filing a motion for new trial?" 327 S.W.2d at 434.

In support of the instant court's holding is rule 5 which provides that time limits under the rules relating to appeal periods must not be extended except as provided in the specific rule. Accordingly, it has been held that the time for filing the appeal bond is mandatory and jurisdictional and may not be enlarged by the courts for any reason, *Glidden Co. v. Aetna Cas. & Surety Co.,* 155 Tex. 591, 291 S.W.2d 315 (1956); *Dallas Storage & Warehouse Co. v. Taylor,* 124 Tex. 315, 77 S.W.2d 1031 (1934), nor waived by the adverse party, *Grant v. Hughes,* 198 S.W.2d 630 (Tex. Civ. App. 1946). It is well settled, however, that the general rules governing appeals are to be construed liberally, *Hunt v. Wichita County Water Imp. Dist. No. 2,* 147 Tex. 47, 211 S.W.2d 743 (1948); *Bantuelle v. Bantuelle,* 195 S.W.2d 686 (Tex. Civ. App. 1946), and in favor of the appealing party, *Turnbow Petroleum Corp. v. Fulton,* 145 Tex. 56, 194 S.W.2d 256 (1946); *Lawyer's Lloyds v. Webb,* 137 Tex. 107, 152 S.W.2d 1096 (1941). In the light of this principle and since rule 356 is phrased in the conjunctive without reference to either party, a reasonable construction could lead to the conclusion that either party may safely rely on the other's motion for new trial. See *Meda v. Lawton,* 214 Cal. 588, 7 P.2d 180 (1932). Accordingly, *D* in the instant case contended that the pendency of *any* motion for new trial operates to "ex-

tend" the time for filing an appeal bond, on the theory that until the motion is disposed of, it is uncertain that an appeal will be necessary. 327 S.W.2d at 435. The court rejected this argument and held that the instant case was controlled by *Peurifoy v. Wiebusch,* 125 Tex 207, 82 S.W.2d 624 (1935). In that case the appellant had filed a premature motion for new trial, which under the law at that time was void. Rule 306c. (Rule 306c has since been changed and now makes a premature motion sufficient.) In the *Peurifoy* case, the court said that since appellant had in effect not filed a motion for new trial (*i.e.*, his attempted motion for new trial was void), his time for filing an appeal bond "ran" from the date of judgment. However, although in the *Peurifoy* case the other party had filed a motion for new trial, that court did not consider the possibility of a longer appeal time on the basis of the filing of a motion for new trial by another party after rendition of judgment; and it is not discernible from the *Peurifoy* opinion that the court was even aware of the problem presented in the instant case. *Peurifoy v. Wiebusch, supra* at 626.

Moreover, it seems that the construction rejected by the court in the principal case would not actually "extend" the appeal time but would merely place one who did not file a motion for new trial under that part of rule 356 which permits filing within thirty days after a motion for new trial has been overruled. On the other hand, since appellee's motion for new trial was not in fact overruled but "withdrawn," adoption of appellant's construction would have necessitated the interpretation that "dismissed by consent" means "overruling." Thus, on this basis, the seemingly strict construction by the court could be argued to be the more reasonable solution to the dilemma presented by the principal case. See *Glasscock v. Bryant,* 185 S.W.2d 595 (Tex. Civ. App. 1944) *error ref. w.o.m.*

A possible solution to the quandary presented in the principal case lies in the discretion of the trial judge to refuse permission to withdraw a motion for new trial; such an interpretation would alleviate the necessity for an interpretation that withdrawal means overruling. However, even if the trial judge pursued this action and then overruled the motion for new trial, the instant court's interpretation of rule 356 would still require a result tantamount to that in the principal case. For example, if *P's* motion for new trial had been overruled (either by judicial action or inaction) *D's* appeal would still have been dismissed since the court reasoned that one may file an appeal bond within thirty days after overruling a motion for new trial *only if* he himself has filed the motion. Moreover, in analogous rules (rules

381, 384, and 386) establishing filing time predicated upon one or more alternatives, it would seem that one can avail himself only of those time limits under the alternative which *he* has performed, if the view of the principal case is to be confirmed. Thus, even though the construction of rule 356 by the court in the principal case may have been the more reasonable solution to the problem presented by these facts, the effect of the decision upon analogous rules would justify amending the rules to clarify whether one party may avail himself of time limits prescribed generally when supplementary motions have been filed by another party to the suit.

Joe E. Griffith

Securities Regulation — Insider Trading — Invalidation of SEC Rule on Stock Options

D, a director of Jones & Laughlin Steel Corporation, sold stock of the corporation, and within six months thereafter purchased similar stock under a restricted stock option plan, realizing a profit on the transactions. *P*, a stockholder of the corporation, brought an action under section 16(b) of the Securities Exchange Act of 1934, alleging that the profit should inure to the corporation. *D* contended that the option plan under which he purchased the stock complied with the requirements of the Securities and Exchange Commission's Rule X-16B-3, and was therefore exempt from the operation and effect of the Securities Exchange Act. *Held, inter alia*: A stock option is within the purview of section 16(b), and the SEC lacks quasi-legislative discretion to exempt a class of transactions from an enunciated congressional standard. *Perlman v. Timberlake*, 172 F. Supp. 246 (S.D.N.Y. 1959) (on appeal).

One problem Congress faced in enacting the Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C.A. §§ 78a-78jj (1952), was how to prevent the abuse by corporate insiders of information available only to them because of their positions of trust in the corporation. Cole, *Insiders' Liabilities Under the Securities Exchange Act of 1934*, 12 Sw. L.J. 147 (1958); S. Rep. No. 1455, 73d Cong., 2d Sess. 2-3 (1934). As one solution to this problem, Congress incorporated section 16(b) into the act, which provides that any profit realized by a director, officer, or ten per cent shareholder from the purchase and sale *or* sale and purchase within a six month period of the corporation's stock will inure to the corporation. (Such a profit is characterized as

a "short-swing profit".) 48 Stat. 896 (1934), 15 U.S.C.A. § 78p (1952). In order to avoid the difficulties of such common-law elements as bad faith, the section operates in complete disregard of the actual or intended use of the information by the insider. *Gratz v. Claughton,* 187 F.2d 46 (2d Cir.), *cert. denied,* 341 U.S. 920 (1951); *Lockheed Aircraft Corp. v. Campbell,* 110 F. Supp. 282 (S.D. Cal. 1953); Cook and Feldman, *Insider Trading Under the Securities Exchange Act,* 66 HARV. L. REV. 385 (1953); Hearings Before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess. 6557 (1934). Section 16(b) has been held constitutional, *Gratz v. Claughton, supra,* and has been construed broadly to "squeeze" all possible profits out of stock transactions, *Smolowe v. Delendo Corp.,* 136 F.2d 231 (2d Cir. 1943). Moreover, courts have given the word "purchase," as used in this section, a broad meaning, bringing within the definition a receipt of securities pursuant to an employment contract, *Truncale v. Blumberg,* 88 F. Supp. 677 (S.D.N.Y.), *aff'd,* 182 F.2d 1021 (2d Cir. 1950), an acquisition of securities in connection with a plan for corporate simplification, *Blau v. Hodgkinson,* 100 F. Supp. 361 (S.D.N.Y. 1951), and an exercise of an option to convert preferred into common stock, *Parke & Tilford, Inc. v. Schulte,* 160 F.2d 984 (2d Cir.), *cert. denied,* 332 U.S. 761 (1947). However, cases construing the word "purchase" are to be decided on their own facts, *Ferraiolo v. Newman,* 259 F.2d 342 (6th Cir. 1958), and transactions which do not involve the economic equivalent of a purchase, and where there is no possibility of abuse of information, have been held to be outside the scope of the act on the theory that the particular transaction was not a purchase, *Shaw v. Dreyfus,* 79 F. Supp. 533 (S.D.N.Y. 1948), *aff'd,* 172 F.2d 140 (2d Cir.), *cert. denied,* 337 U.S. 907 (1949) (acquisition of a pro rata right to subscribe to additional common stock); *Roberts v. Eaton,* 119 F. Supp. 362 (S.D.N.Y. 1953), *aff'd,* 212 F.2d 82 (2d Cir. 1954) (statutory reclassification of outstanding corporate stock).

Although section 16(b) is phrased in terms of absolute liability, its purpose is stated to be the prevention of "unfair abuse of information" by corporate insiders, and the SEC is granted authority to exempt transactions "not comprehended within the purpose" of the section. 48 Stat. 896 (1934), 15 U.S.C.A. § 78p (1952). Pursuant to this exemptive power, *Emerson Elec. Mfg. Co. v. O'Neill,* 168 F. Supp. 804 (E.D. Mo. 1958); SEC Securities Act Release No. 5312, May 21, 1956, and for the purpose of providing corporate insiders with beneficial tax treatment afforded them by Congress and facilitating the stock option device as an incentive compensation plan, *Greene v.*

Dietz, 143 F. Supp. 464 (S.D.N.Y. 1956), *aff'd*, 247 F.2d 689 (2d Cir. 1957); SEC Securities Act Release No. 4754, Sept. 24, 1952, the SEC promulgated rule X-16B-3, 17 C.F.R. § 240.16b-3(d) (1949). The rule operates, in effect, to exempt from section 16(b) all acquisitions of stock and non-transferable options pursuant to compensation plans, provided the plans comply with certain restrictions (*e.g.*, stockholder approval and limitation of shares subject to a plan), placed in the rule as safeguards against abuse. Loss, SECURITIES REGULATION 591 (1951). The validity of rule X-16B-3 was upheld by the district court in *Greene v. Dietz*, 143 F. Supp. at 473, but, the Second Circuit, although affirming the decision on other grounds, expressed doubts that the SEC had the authority to promulgate this rule. Moreover, the Second Circuit warned that, pending re-evaluation of the rule, further reliance on it would be "ill-advised," *Greene v. Dietz*, 247 F.2d at 697. However, these expressions of doubt have been regarded as dicta in subsequent cases concerning the rule. *Emerson Elec. Mfg. Co. v. O'Neill, supra; Gruber v. Chesapeake & Ohio Ry.*, 158 F. Supp. 593 (N.D. Ohio 1957). The principal case, although regarding this doubt as dictum, stated that it was entitled to "this court's respect." 172 F. Supp. at 253.

The court in the principal case described the function of the SEC as that of making a "factual determination" concerning a particular transaction, and exempting each transaction which does not fall within the provisions of the section. 172 F. Supp. at 255. Accordingly, the court reasoned that the SEC has no power to exempt a certain class of transactions, *viz.*, stock option plans, from section 16(b) liability. This reasoning conforms with the general view that stock options are among the transactions intended by Congress to be within the purpose of section 16(b). *Jefferson Lake Sulphur Co. v. Walet*, 104 F. Supp. 20 (E.D. La. 1952); Senate Committee on Banking and Currency, *supra* at 55-58. However, certain stock option plans, providing the corporation with a less expensive means of promoting management incentive than by salary increase, have been recognized as essential forms of incentive compensation, Dean, *Employee Stock Options*, 66 HARV. L. REV. 1403 (1953), and have been accorded preferential tax treatment in that no realization of income occurs in either the grant or the exercise of a stock option pursuant to a qualified (restricted) stock option plan, INT. REV. CODE OF 1954 § 421. Moreover, many bonus payment plans exempted by rule X-16B-3 provide for an annual granting of securities, and since any sale for profit by the recipient would automatically fall within six months of a prior or subsequent purchase, the decision in the principal case would

render this type of transaction subject to section 16(b) liability, thereby greatly diminishing the value of these plans. Cook and Feldman, *supra* at 635, 636; LOSS, SECURITIES REGULATION, *op. cit. supra* at p. 591. The controversy on appeal, therefore, will center around the scope of discretion granted the SEC by section 16(b), *i.e.*, did Congress intend to give the SEC authority to weigh the possibility of abuse of confidential information against interference by the statute with a device beneficial to the corporation and its stockholders as well as insiders, or (as held in the principal case) did Congress intend to make section 16(b) purely objective in its operation, with the SEC acting merely as a fact-finding body. See Memorandum of SEC as amicus curiae, *Greene v. Dietz, supra,* reprinted in CCH FED. SEC. L. REP. ¶ 90,821 at p. 92,575.

Although the broad scope of the present rule X-16B-3 may have justified its invalidation, it is inconsistent to say that the act is purely objective in operation, and also that the SEC has the power to exempt transactions not within its purpose. Congress must have intended that the SEC be given the power to weigh the possibility of abuse against interference with such a beneficial device, and to promulgate a rule which will exempt an incentive compensation plan from the rigors of section 16(b). If the SEC provided sufficient safeguards in its exemption it would seem that the value of stock option plans would far outweigh the possibility of abuse, even though it is difficult to conceive a situation in which *all* possibility of abuse could be eliminated by the SEC. For example, the SEC could incorporate into its exemption a required waiting period between the grant and exercise of the option, thus bringing the transaction more within the policy of the section. However, if the SEC is in fact restricted, as held in the principal case, it would seem that the decision has tacitly rendered invalid every class of exemptions granted by the SEC pursuant to its statutory exemptive power.

Larry M. Lesh

Wills — Quantum of Estates Created — Rule Against Repugnancy

T executed a will in which he apparently devised and bequeathed all his property in fee simple to his wife in one paragraph, but in the next paragraph directed that whatever property was not disposed of by his wife during her lifetime should be divided equally between

his and her heirs. A few years after *T's* death his widow died intestate, still in possession of certain real and personal property willed to her by her husband. A controversy as to the construction of the husband's will subsequently arose between the heirs: did the husband's will give absolute title in the property to the wife or only a life estate with a power of disposition over the remainder? *Held*: Where one clause of a will purports to grant an estate in fee simple and the following clause attempts to limit this devise, the latter clause is void for repugnancy to the former. *Collie v. Tucker*, —Ark.—, 317 S.W.2d 137 (1958).

The primary objective of any court in the construction of a will is to ascertain the intent of the testator, *In re Dimmitt's Estate*, 141 Neb. 713, 3 N.W.2d 752 (1942), and rules of construction are designed to aid the court in determining this intention, *Blaisdell v. Coe*, 83 N.H. 167, 139 Atl. 758 (1927). Intention is to be gathered from the whole instrument, *Pearson v. Orcutt*, 106 Kan. 610, 189 Pac. 160 (1920); *Hanks v. McDanell*, 307 Ky. 243, 210 S.W.2d 784 (1948), and it is presumed that every word or clause is intended to have some meaning, *Regnier v. Regnier*, 122 Kan. 59, 251 Pac. 392 (1926). Accordingly, no word or clause is to be rejected to which a reasonable effect can be given. *Strauss v. Strauss*, 363 Ill. 442, 2 N.E.2d 699 (1936). A court will attempt to harmonize apparent repugnancies, *Regnier v. Regnier, supra; Crozier v. Bray*, 120 N.Y. 366, 24 N.E. 712 (1890), and if two constructions are possible, one which will defeat the will, the other which will give effect to the will, the latter will be adopted, *In re Austin's Estate*, 236 Iowa 945, 20 N.W.2d 445 (1945). Thus, by the better view, there is no necessary repugnancy where a later provision enlarges, *Porter v. Union Trust Co. of Indianapolis*, 182 Ind. 637, 108 N.E. 117 (1915), or diminishes a former gift, *In re Keefer's Estate*, 353 Pa. 281, 45 A.2d 31 (1946); see *Smith v. Bell*, 6 Pet. (U.S.) 68 (1832). However, the intention of the testator will not prevail over a clearly defined rule of law or public policy. *Hanks v. McDanell, supra.*

If the language of a will *expressly* denominates the grants as a life estate with a power of disposition and a remainder, most courts agree that this express language will be followed. *Darden v. Boyette*, 247 N.C. 26, 100 S.E.2d 359 (1957); *Edds v. Mitchell*, 143 Tex. 307, 184 S.W.2d 823 (1945). *Contra, Totten v. Dawson*, 104 W. Va. 274, 139 S.E. 858 (1927). However, in construing a will wherein the testator attempts by one clause to limit in some manner a grant in fee simple made in a previous clause there are three conflicting interpretations. One interpretation is to apply the rule against repugnancy

that a grant in fee once made cannot be limited or defeated by a subsequent grant to another person, and the attempted gift over is ineffective. *Bernstein v. Bramble*, 81 Ark. 480, 99 S.W. 682 (1907). The theory of this interpretation seems to rest upon the generally valid presumption that a grant which does not specify the quantum of the estate created is nevertheless intended to convey a fee simple. *Fox v. Snow*, 6 N.J. 12, 76 A.2d 877, 878 (1950) (dissent). To accept this reasoning the court usually must construe the parts of the will separately, *Minges v. Mathewson*, 66 App. Div. 379, 72 N.Y.S. 612 (1901), and the result obtained generally contravenes the intention of the testator, *Southworth v. Sullivan*, 162 Va. 325, 173 S.E. 524 (1934). The least common interpretation is to acknowledge that the testator intended to grant the first beneficiary a fee, but that the fee is subject to being shifted upon the occurrence of a given event, *i.e.*, the death of the first beneficiary before disposal of the property. See *McClure v. Bailey*, 209 S.W.2d 671 (Tex. Civ. App. 1948) *error ref. n.r.e.* Still another interpretation is to construe the general language of the will as granting a life estate with a power of disposition in the first beneficiary and a remainder to the second beneficiary contingent upon there being property of the testator in the possession of the first beneficiary at his death. See *Hanks v. McDanell, supra.* This interpretation appears to be the modern rule. *Glidewell v. Glidewell*, 360 Mo. 713, 230 S.W.2d 752 (1950).

The principal case adopted the rule against repugnancy and thus held the attempted limitation of the granted fee invalid. 317 S.W.2d at 139-40. A determination that the first grant was a fee simple rested upon the rebuttable presumption that a grant which does not state the nature of the estate is to be in fee simple, see *Bernstein v. Bramble, supra*, yet the attempted limitation over was not accepted either as directly limiting the first estate or as rebutting this presumption even though the court professed to construe the will as a whole. Since it was admitted that the testator had two intentions, these intentions could have been reconciled by viewing the second paragraph as an express limitation of the first estate or as evidence rebutting the presumption of a grant in fee simple. See *Smith v. Bell, supra.* However, it seems that too little weight was given to evidence which was clearly in conflict with a result reached merely on the basis of a presumption. The court's unwillingness to set aside a "rule of property," 317 S.W.2d at 140, is in accord with the theory that a will is to be read as strictly as a deed and that subsequent provisions could not limit estates previously granted. See *Fox v. Snow, supra* (dissent). The court did state that a will granting a life estate with

power of disposition would be given effect as such and that the testator could then grant the remainder to another. 317 S.W.2d at 139. However, an examination of the cases cited for this proposition indicates that the distinction between construing the primary clause as a fee simple or as a life estate is based on minute variations in the language of the first grant without consideration of the language of the second. See *Piles v. Cline*, 195 Ark. 857, 125 S.W.2d 129 (1939); *Jackson v. Robinson*, 197 Ark. 431, 112 S.W.2d 417 (1938); *Bernstein v. Bramble, supra.* To interpret a primary clause in this manner is to ignore the double task of determining the intent of the testator and then giving effect to this intention so far as possible.

Although it is well known that different persons can reasonably construe language quite differently, the court in the instant case by enforcing a narrow rule of construction rather than examining the entire will for its actual meaning, clearly did not reach the result intended by the testator. The court should have reconciled all the provisions of the will, thereby giving effect to both the intention that the wife have complete control of the property and the intention that any property left at her death be divided between his and her heirs. The case is an unfortunate example of a court refusing to take a forward step in line with modern authorities from other jurisdictions.

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