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Case Notes

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Case Notes /

Antitrust Law—Clayton Act—Applicability of Section 7 to Bank Mergers—
United States v. Philadelphia National Bank, 83 S. Ct. 1715 (1963).

THE PHILADELPHIA NATIONAL BANK (PNB) and Girard Trust Corn Exchange Bank (Girard) agreed on a proposal whereby they would consolidate under the PNB charter. Girard's stockholders were to exchange their shares for shares in the new bank, PNB's stockholders retaining their shares. The banks sought approval for the merger from the Comptroller of the Currency, who, under the Bank Merger Act, 12 U.S.C. 1828 (c), is authorized to approve application for a merger if he finds it to be in the public interest. The merger was approved. Thereafter, the United States filed suit in U.S. District Court to enjoin the merger on the ground that it would restrain trade and substantially lessen competition in violation of the Sherman Act, 15 U.S.C. §1, and the Clayton Act, 15 U.S.C. §18. The court dismissed the complaint, holding that the proposed merger is not within the scope of Section 7 of the Clayton Act, and that the government failed to prove that the merger would unreasonably restrain trade in violation of the Sherman Act. 201 F. Supp. 348 (E.D. P. 1962). On appeal to the United States Supreme Court, in an opinion by Mr. Justice Brennan, the decision of the District Court was reversed; the merger was held prohibited by Section 7 of the Clayton Act. The Court held that, because the proposed merger would result in the merged bank controlling thirty percent of banking business in the four-county Philadelphia area, its effect would be to lessen competition substantially. The Court did not consider the alleged violation of the Sherman Act.

Whether, and to what extent, banks are subject to the Clayton Act are questions answered for the first time in the Philadelphia case. Section 7 of the Clayton Act prohibits a corporation engaged in commerce from acquiring stock, and a corporation subject to the Federal Trade Commission's jurisdiction from acquiring assets, of another corporation where the effect may be to lessen competition substantially or tend to create a monopoly "in any line of commerce in any section of the country." 15 U.S.C. §18. In order for the PNB-Girard merger to be subject to this section, the merger must be by way of stock acquisition, since banks are not subject to FTC regulation, and thus are outside the scope of the assets acquisition provision.

The banks argued that a corporate merger is not a stock acquisition. In *Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission*, 291 U.S. 587 (1934), it was held that a merger was not a stock acquisition merely because the acquiring of stock preceded the merger. Courts have uniformly held that corporate acquisition by way of merger was essentially an acquisition of assets, and outside the scope of Section 7's stock acquisition provision. *Thatcher Mfg. Co. v. Federal Trade Comm'n*, decided together with *Federal Trade Comm'n v. Western Meat Co.*, 272 U.S. 554 (1926). This "loophole" in Section 7 allowing unrestrained mergers was remedied by a 1950 amendment (64 Stat. 1125) to include assets acquisitions, precisely because mergers are effected through the acquiring of assets. The PNB-Girard merger was nevertheless held to be covered by Section 7, because the Court ruled that it was not a pure acquisition of assets but a transaction fitting neither the stock nor the assets provisions exclusively.

The *Arrow-Hart* case, *supra*, is still authority for the principle that a merger is not essentially a stock acquisition. There are crucial differences between a merger and a stock acquisition. A corporation whose stock is acquired usually remains in existence as a subsidiary, unlike a merged corporation. In future cases involving bank mergers, it may still be argued that the transaction is solely an acquisition of stock.

For decades, the banking industry was considered to be an activity separate from traditional types of "commerce." In *Nathan v. Louisiana*, 8 How. 73 (1850), transactions in money were held to be excluded from the concept of "commerce." But this view was rejected in *U.S. v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944), where the insurance industry was held to be subject to antitrust laws. Banking, by analogy, is compared to insurance companies for antitrust purposes. The Clayton Act seemed specifically to recognize banking as a distinct industry by providing that authority to enforce compliance with sections applicable to banks would be vested in the Board of Governors of the Federal Reserve System, 15 U.S.C. §21. In *Transamerica Corp. v. Board of Governors of Federal Reserve System*, 206 F. 2d 163 (3d Cir. 1953), it was held that the authority of the Federal Reserve Board (FRB) to enforce Section 7 against banks could not be challenged on the ground that it is inapplicable to banks, since "immunity from the antitrust laws is not lightly implied," *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962).

However, the Bank Merger Act of 1960, by giving authority to the Comptroller of the Currency to approve mergers after considering, among other factors, competitive effects, would perhaps seem to have removed banks from the operation of Section 7. But the Court held that the 1960 act was not intended to immunize bank mergers from the antitrust laws. "No express immunity is conferred by the Act," states the Court, and "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored." In *California v. Federal Power Comm'n*, *supra*, it was held that where Congress intended immunity from the antitrust laws, it expressly stated so.

In the light of this decision, the role of the FRB under its authority to enforce Section 7, 15 U.S.C. §21, is unclear. If the PNB-Girard merger is a stock acquisition, which it must be if Section 7 is applicable, it would seem that the FRB must be the agency to proceed against the banks. Only after the FRB has rendered its opinion should resort to the judiciary be had. The Clayton Act expressly provides for judicial review of administrative decisions, 15 U.S.C. §21. In the *Transamerica* case, *supra*, the District

Court dismissed Transamerica's complaint on the well-settled ground that it had no jurisdiction to interfere with an administrative hearing authorized by the Clayton Act, and that the proper remedy was for Transamerica to seek judicial review under 15 U.S.C. §21 after the Federal Reserve Board had taken action. Cf. *Pan American World Airways v. United States*, 371 U.S. 296 (1962). However, the principal case seems to disregard these statutory provisions by giving the Justice Department, not the Federal Reserve Board, the primary responsibility for enforcing Section 7 against banks. But "certainly the Board of Governors of the Federal Reserve System is in a far better position to deal with the nice problems of required competition in a field also requiring the co-operation implicit in commercial banking." Berle, *Banking Under the Antitrust Laws*, 49 COLUM. L. REV. 589, 605 (1949).

The administration of antitrust laws always involves basic economic policy considerations, which necessarily play a part in judicial decisions. "It is surely the case that competition is our fundamental economic policy," declares Mr. Justice Brennan. But perhaps, as Mr. Justice Harlan states in dissenting, "Considerations other than simply the preservation of competition are relevant." Commercial banking has a position in our economy fundamentally different from other types of commercial business. Banks are subject to extensive federal regulation. In approving a bank merger, the Comptroller is required above all else to consider whether the transaction is in the public interest, and the anticompetitive effects of a merger are merely one consideration. If the Comptroller approves a merger as being in the public interest, should the Justice Department ask a court to enjoin the merger solely because of its anticompetitive effects? This would inevitably lead to conflicting standards among federal agencies as to what constitutes the public interest.

Corporate mergers are essentially effected by acquisition of assets, not merely by the transfer of stock. Bank mergers should therefore not be subject to the stock acquisition provision of Section 7. Even if mergers were subject to this provision, the proper agency to enjoin its violation is the Federal Reserve Board, for Congress has created a sound scheme of administrative regulation which should not be disregarded.

THOMAS E. PATTON

Criminal Law—Effective Assistance of Counsel—Attorney and Client—

Eavesdropping—Remedy—*State v. Cory*,—Wash.—, 382 P. 2d 1019 (1963).

THE DEFENDANT was arrested on a lewdness charge and the information against him was later amended to include burglary and larceny. Unable to post bail, he was in-

carcerated in the county jail before and during his trial. Meetings with his lawyer were conducted in the consultation room provided in the jail. After several conferences, the defendant discovered that a microphone was intercepting his conversations with his lawyer. The eavesdropping was reported to the trial court and investigation resulted in the discovery of two tapes, which the trial court allowed the defendant and his attorney to hear. The court also permitted the prosecutor to hear the tapes. The trial judge refused to dismiss the charges, indicating that, upon objection by the defense, he would exclude any evidence shown to have resulted from the tape recordings. The defendant was convicted and assigns as error the judge's action in proceeding with the trial after discovery of the tapes. The Washington Supreme Court, *reversing*, held that the eavesdropping violated the accused's right to effective assistance of counsel under the state constitution, that the trial judge's offer to exclude the evidence was not sufficient to dispel the harm done by this intrusion into a private pre-trial consultation between lawyer and client, and that the only satisfactory remedy of the prejudice resulting from this infringement on the defendant's rights was dismissal of the charges. *State v. Cory*, — Wash. —, 382 F. 2d 1019 (1963).

Recognition of an interference with the effective assistance of counsel on the facts presented is not without precedent in the criminal law. The Washington Supreme Court, however, resolved an issue which other courts facing this situation have only casually considered, namely how can the prejudice resulting from this intrusion by the government into defense strategy be remedied? Their disposition of this issue is novel in this area of criminal procedure.

The state constitutional provision is substantially identical with the right to counsel clause of the Sixth Amendment of the U.S. Constitution. U.S. CONST. amend. VI; WASH. CONST. art. 1, §22; amend. No. 10.

Two federal cases based on similar prosecution tactics were disposed of by granting the defendant a reversal of the conviction and a new trial.

In *Coplon v. United States*, 191 F. 2d 749 (D.C. Cir. 1951), the defendant, Judith Coplon, alleged that FBI agents had succeeded in wiretapping telephone conversations with her attorney. In reversing the conviction, the court ordered the trial court to determine the extent of the wiretapping activities and to hold a retrial if their finding was that the conversations between attorney and client had actually been intercepted. On the issue of prejudice to the defense, the court's only ruling was that actual prejudicial harm did not have to be proven for a new trial to be granted.

Caldwell v. United States, 205 F. 2d 879 (D.C. Cir. 1953), involved infiltration into the defense attorney's staff by an agent of the prosecutor's office and a divulgence of defense strategy to the U.S. Attorney. As in the *Coplon* case, the court reversed the conviction and remanded the case for a new trial. The court approved the trial court's denial of a motion to dismiss on the grounds that there was no showing that the defense had been prejudiced to such an extent that a new trial would not be a proper remedy. On this point, the Washington Supreme court deviated from the course followed by the U.S. Court of Appeals for the D.C. Circuit. The Washington court interpreted the damage to the defense as permanent and irreparable without need of further proof of prejudice. Information extracted in violation of the defendant's rights would be available at any future trial. The confidential attorney-client relationship

had been invaded and the defendant would be justifiably apprehensive about the possibility of further eavesdropping. He would be reluctant to discuss the case freely and thoroughly with his counsel and this would hinder his defense. Dismissal of the charges would be a strong deterrent to future underhanded prosecution tactics.

The right to assistance of counsel in a criminal case involves more than a token assignment of a lawyer to represent a defendant. The lawyer must be untrammelled in his investigation of the case; he must be free to act in the defendant's best interests. In short, effective assistance of counsel has been interpreted to require that the defendant be afforded "the guiding hand of counsel in every step of the proceeding against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *Thomas v. District of Columbia*, 90 F. 2d 424 (D.C. Cir. 1937).

The defendant's right to effective assistance of counsel is violated when action by the prosecutor, the defense counsel or the judge prevents his case from receiving a fair trial. The judge may not cast aspersions on the character of the defense attorney or refuse to hear competent witnesses. *Thomas v. District of Columbia*, *supra*. An overzealous defense attorney's conduct in tampering with the evidence sufficiently impairs the defendant's case to warrant a new trial on the issue of ineffective assistance of counsel. *Bovey v. Grandsinger*, 253 F. 2d 917 (8th Cir. 1958).

The defendant has a right to a private consultation with his attorney. To present an effective defense, the lawyer must become familiar with the details of the case and the background of the defendant. A requisite to a meaningful investigation of the facts by the lawyer is confidence on the part of the accused that the attorney will not divulge information in any way which would be injurious to the defendant's interests. To give effect to this bond of trust between attorney and client, the government must allow the defendant to consult privately with his lawyer. *Louie Yung v. Coleman*, 5 F. Supp. 702, 703 (S.D. Idaho 1934). To hold otherwise would result in a reluctance or fear of the accused to talk freely and might also result in a divulgence of trial strategy by the third party. 21 *FORDHAM L. REV.* 175, 177 (1952). The right to private consultation is not absolute. Limitations of this right, however, are restricted to reasonable regulations arising from practical necessities. Thus, the time and place of the conference may be adjusted to allow for the convenience of the jail authorities. *Altmyer v. Sanford*, 248 F. 2d 161 (5th Cir. 1945). The courts will, in those instances, closely scrutinize the facts to assure themselves that restrictions as to the place of consultation will not result in disclosure of information to the prosecutor. *Krull v. United States*, 240 F. 2d 122 (5th Cir. 1957).

The release of the defendant appears to be a harsh remedy on its face. A person convicted of a crime is completely exonerated because of misconduct by the prosecution. However, the appearance of harshness is but a reaction to its novelty. The problem must be viewed in light of the pervasive nature of the right to counsel and its implications in all phases of the trial. The prejudice to the defense caused by an interception of its trial strategy is extensive and the need for private consultation, and especially of consultation beyond the hearing of the prosecutor's office, is essential in a society which protects the rights of those accused of crime and not yet proven guilty. The remedy chosen by the court was carefully measured to counteract the atrocity of this abuse of the prosecutor's duty. As stated by the U.S. Supreme Court, "the right to

have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States*, 315 U.S. 60, 76 (1942). The Washington Supreme Court carried this principle to its conclusion in this case and made it meaningful. An effective means for courts to prevent flagrant abuses of constitutional rights by government officials is the nullification of any government action which is so tainted. The court should not be an accomplice to illicit government activity. *McNabb v. United States*, 318 U.S. 332, 335 (1933). The words of Mr. Justice Holmes in *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (dissenting opinion) are appropriate in this case: "... (It is) less an evil that some criminals should escape than that the Government should play an ignoble part."

THOMAS E. WILLGING

Domestic Relations—Legitimacy of Offspring—Support—Heterologous Artificial Insemination—*Gursky v. Gursky*, 242 N.Y.S. 2d 406 (1963).

THE PARTIES agreed that the defendant-wife would be artificially inseminated with the semen of a third party donor. This procedure is called heterologous artificial insemination to distinguish it from homologous artificial insemination which uses the semen of the husband. The plaintiff and the defendant both consented in writing to have the wife inseminated. Plaintiff, in addition, promised to pay all the expenses involved to effect the procedure. A child was born as a result of such insemination. Plaintiff-husband then sued for annulment and separation and defendant-wife answered and counterclaimed for separation and support. The New York Supreme Court held, that a child conceived by means of artificial insemination of the wife through the use, with the husband's consent, of semen contributed by a donor other than the husband was not the legitimate issue of the husband but that he was liable for the support of the child. *Gursky v. Gursky*, 242 N.Y.S. 2d 406 (1963).

The paucity of authority in this field stems from the fact that situations involving this procedure have rarely been presented to a court of competent jurisdiction in this country for determination, and have never been presented to a court of last resort. Confusion arises from the attempted application of legal definitions and principles to this novel procedure.

The only previous case dealing with this subject in New York is the case of *Strnad v. Strnad*, 78 N.Y.S. 2d 390 (1948). The case appears to have held that the offspring of heterologous artificial insemination, performed with the consent of the mother's husband, is legitimate. However this was but dictum on the part of Justice Greenberg. He carefully stepped around the legal morass of artificial insemination by declaring that the only issue upon which the court must rule was the fitness of Mr. Strnad to have visitation rights to the child. *Ibid.*

Was the *Strnad* dicta based upon principles of law or one expressing the sentiments of the judge? The judge, in the course of his summing up, said to Mrs. Strnad: "If you are successful here the child will be declared illegitimate. How will that help the child? The court will not lend itself to making any child illegitimate. It would be inhumane, inhuman and contrary to the highest precepts of sociology." *Strnad v. Strnad*, (January 13, 1948) in N.Y. Times, January 13, 1948, p. 13, col. 1; *id.* January 14, p. 48, col. 3.

When the issue of legitimacy was presented before a Canadian court in *Orford v. Orford*, 58 D.L.R. 251 (1921), the judge left no room for doubt as to his decision or opinion, nor did he evade the issue concerning the nature of heterologous artificial insemination as did his American counterpart in the *Strnad* case. He concluded that any child born of an adulterous union is illegitimate and "if such a thing has never before been declared to be adultery, then, on the grounds of public policy, the court should now declare it so."

Recently, where the precise issue of legitimacy has been squarely presented for determination, it has been held that heterologous artificial insemination by a third party donor, with or without the consent of the husband, constitutes adultery on the part of the mother, and that a child so conceived is not a child born in wedlock and is therefore illegitimate. *Doornbos v. Doornbos*, No. 54 S 14981, Superior Court, Cook Co., Ill., December 13, 1954.

From what principles of the common law do these opinions stem? It would seem that the court in the *Gursky* case approached the issue negatively in regard to its choice of common law principles. It starts its analysis with a concept which is historically imbedded in the law, "that a child who is begotten through a father who is not the husband of the mother, is deemed to be illegitimate." *Com'r of Public Welfare of City of New York v. Koehler*, 284 N.Y. 260, 264, 30 N.E. 2d 587, 589 (1941).

On the other hand, there is another presumption in the law which has been called "the strongest and most persuasive known to the law." *In re Findlay*, 253 N.Y. 1, 7, 170 N.E. 471, 472 (1930). That presumption is, "that any child born to a married woman is presumed to be the offspring of her husband and legitimate." *Holder v. Holder*, 9 Utah 2d 163, 340 P 2d 761 (1959). At one time in the law, no evidence would be accepted to rebut this presumption, but today both the presumption and the right to rebut it are recognized and applied as the law in the majority of states. *Nicolas, ADULTERINE BASTARDY*, pp. 164, 172. *THE UNIFORM ACT ON BLOOD TESTS TO DETERMINE PATERNITY*, §4-5, establishes a means to overcome the presumption.

Realizing the existence of these common law principles and their present effect, the courts, remembering the complete novelty of the matter under discussion, must be

cautious in applying principles and definitions which were given at a time and in circumstances when such a thing as heterologous artificial insemination was unknown.

Is it just to protect a child born through the use of heterologous artificial insemination with the blanket presumption of legitimacy? It has been contended that the whole procedure is against public policy and is illegal, and that all participants—the physician, patient, husband and donor—might be guilty of violating a statute common in most states, which makes it a criminal offense for two or more persons to conspire to do any illegal act injurious to public morals. *E.g.*, N.Y. PENAL LAW §580.

At first glance, it would appear that a decision declaring illegitimacy, when the husband has consented to the procedure, would act as an illogical and unjust social stigma to the child, who is innocent of any wrong. The state legislatures have expressed their power to modify the concept of illegitimacy in certain respects when they have deemed it fitting to do so. Thus some have provided that the subsequent marriage of parents of an illegitimate child legitimizes such child. *E.g.*, N.Y. DOMESTIC RELATIONS LAW §24. *Summo v. Snare*, 152 N.Y.S. 29 (1915). Is this not an ideal time for the legislature to act in clearing up the problems growing out of artificial insemination? There have been attempts in both the New York and Virginia legislatures to introduce legislation seeking in part to legitimize offspring conceived through artificial insemination and such legislation has been defeated.

Does the failure of the legislature in taking positive action in this field necessarily lead one to conclude that they are in agreement with the few judicial decisions holding such children illegitimate? The court in the *Gursky* case bases its decision upon the reasoning that unless there can be read into statutory enactments of this State, dealing with persons born out of wedlock, an intention to modify the settled concept as to the status of a child whose father was not married to its mother, it must be presumed that the historical concept of illegitimacy with respect to such a child remains in force and effect. Therefore, because of this disinclination on the part of the legislature to disturb the application of the historical concept of illegitimacy to children begotten through heterologous artificial insemination, the courts are bound to follow suit. However, is not the duty of making a choice of rules in accordance with public interest shared by both the courts and the legislatures? Since the legislature has not spoken, the court should feel free to declare a rule which will serve the best interests of the public. Surely the husband in this case would still have been liable for support had the child been declared legitimate. The word "legitimate" means "recognized by law." If an adopted child is "legitimate," why should not the child of Mrs. Gursky also be "legitimate," especially since the husband is legally liable for its support? What public purpose is served by attaching the stigma of illegitimacy to such a child, who was brought into being with full consent and cooperation of the husband?

LOUIS BARRACATO

Labor Law—FLSA 203(j)—“Closely Related Process.” *Bear Creek Mining Company v. Wirtz*, 317 F. 2d 67 (1963).

IN 1961, BEAR CREEK MINING COMPANY and Boyles Bros. Drilling Company were exploring or prospecting by way of soil sampling and test drilling, near Lares, Puerto Rico. Bear Creek, a wholly-owned subsidiary of Kennecott Copper Corporation, is engaged on the latter's behalf in exploration activities in various parts of the world. Kennecott is engaged in the mining and sale of copper and other minerals in interstate and international commerce. Boyles Bros. was under contract with Bear Creek to do the borings. After an investigation by the Wage and Hour Division of the U.S. Department of Labor, the Secretary instituted actions to enjoin the appellants from violating the Fair Labor Standard Act's minimum wage and overtime provisions with respect to their employees engaged in mineral prospecting activities.

The sole issue presented was whether the employees of both firms were engaged in a “closely related process or occupation directly essential” to the production of goods for (interstate) commerce within the coverage of the FLSA, 29 USCA 203 (j) (1949). The Secretary sought to narrow the gap between the original FLSA definition—“any process or occupation necessary” to the production of goods for commerce—and the more restrictive language of the 1949 Amendment—“any closely related process or occupation directly essential” thereto. He also sought to eliminate some of the ambiguities which have confused the interpretation of the act's coverage, and its enforcement in the ensuing years.

The district court held the act applicable because “minerals cannot be extracted before they are found any more than rabbit fricassee can be produced without first catching a rabbit,” 207 F. Supp. 398, 399-400. On appeal, defendants disputed this analogy, contending that the connection between their work and the actual extraction of minerals was “remote and tenuous” rather than “close” and “directly essential,” because of the numerous and costly intervening procedures before production is possible and practical.

In affirming the lower court, the U.S. Court of Appeals for the First Circuit refused to measure remoteness in terms of time, or the number of essential intervening activities, or even in terms of probabilities, *Bear Creek Mining Co. v. Wirtz*, 317 F. 2d 67 (1963). Despite the fact that mineral exploration by appellants had netted only four locations of substantial promise out of over 150 drilling sites and their operations involved only the initial stages, long before any indication that minerals could finally be extracted, the court was not persuaded that present prospecting was outside the act. The court rested its decision “not on the necessary connection between catching the rabbit and the fricassee, but on the immediate relation between defendants' activities and Kennecott's present business,” 317 F. 2d at 68.

This decision may help to dissipate some of the “fringe coverage” confusion which the 1949 Amendment created, despite the then avowed Congressional intention to narrow the scope of coverage to a more precise guide. The terms “closely related” and

“directly essential,” while not susceptible of precise definition, attempt to describe a process or occupation with reasonably close relationship to the production of goods for commerce, as distinguished from remote or tenuous, and which directly aids production in a practical sense by providing something essential to the effective, efficient, and satisfactory functioning of the employer’s operations.

The Supreme Court, before 1949, in *Warren-Bradshaw Drilling Co. v. Hall*, 317 U.S. 88 (1942), had held the act applicable to employees engaged in preliminary oil well drilling, even though the holes were drilled to a specified depth short of the oil’s expected location. The preliminary drilling operations, like the work of maintenance employees in a rental building occupied by producers for commerce held covered in *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517 (1942), had the requisite close and immediate tie with the production of goods for commerce to be within the act’s coverage—whether or not the wells ultimately proved productive. In *Warren-Bradshaw* the Court concluded that the “intent and expectation at the time of the work, rather than the eventual outcome long after the (employment) relationship is severed,” must be determinative of coverage. Other courts had held the act applicable to drilling operations even though no oil was discovered, *Culver v. Bell & Loffland*, 146 F. 2d 29 (1944), and to laborers employed in erecting drilling rigs, *Devine v. Levy*, 39 F. Supp. 44 (1941).

In the instant cases, appellants indicated that their own drilling activities took place in an area not definitely known to contain metals in commercially profitable quantities, whereas the activities held covered in previous cases were conducted in already established fields. However, the court drew no such distinction, holding the exploration for new ore deposits by *Bear Creek* no less essential than was the preliminary drilling in *Warren-Bradshaw*, made without assurance that it would result in production, to the extraction of oil.

The same court, in *Mitchell v. Dooley Bros.*, 286 F. 2d 40 (1960), cert. denied 366 U.S. 911 (1961), had said of the 1949 Amendment that, while “to some extent . . . (its) purpose . . . was to limit peripheral definitions adopted by some courts, . . . in the main it was a nod of approval,” *id.* at 42. The court referred to *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310 (1960), in which the Supreme Court, noting that “some restraint on coverage” was intended, emphasized that the language of the amendment “substantially adopts the gloss of *Kirschbaum*” with respect to activities primarily “related” to “production.”

The *Bear Creek* opinion did not distinguish the Fifth Circuit’s decision in *Sealy v. Mitchell*, 249 F. 2d 327 (1957), which held that the activities of a “wildcatter” in parts of Georgia, where previous attempts had failed to disclose the presence of oil in commercial quantities, did not hold out the “reasonable expectation that ‘goods,’ i.e., oil, will be produced,” *id.* at 328. Though the issue was not discussed by the court, the fact that *Bear Creek*’s exploratory activities were performed directly on behalf of Kennecott distinguishes the instant facts from those in *Sealy*, and from *Cameron v. Chichagof Mining Co.*, 82 F. Supp. 665 (1948)—relied upon by appellants—where recovery was denied for prospecting work performed for a gold mining company after it had ceased its mining operations, since it was not actually engaged in producing any goods for commerce at the time.

The *Bear Creek* decision rests not so much upon legal principles as upon economic realities. Thus, the opinion terms it as "axiomatic that a mine is a wasting asset," and notes that "in the mineral extraction industry exploration for new sources of supply is normally a continuing need," 317 F. 2d at 68. This is another instance of the First Circuit's liberal approach to coverage in contrast to other circuits, such as the Fifth, which still clings to a narrow and restrictive interpretation of the 1949 Amendments. Thus, the court here refused to follow the implication of *Mitchell v. W. E. Belcher Lumber Co.*, 279 F. 2d 789 (5th Cir., 1960), that an operation cannot be "closely related" to production if a long period of time intervenes. It should be noted that the Fourth Circuit just recently applied a restrictive approach to trash removal activities in *Wirtz v. Modern Trashmoval Inc.*, Nos. 8828-8830, September 23, 1963, in a factual situation similar to *Dooley*. It will be interesting to see what approach will eventually prevail.

MAURICE J. CAREY

Criminal Law—Federal Rules of Criminal Procedure—Suppression of Evidence Obtained by Illegal Means—*Smith v. United States*, 324 F. 2d 879 (D.C. Cir. 1963).

APPELLANTS BOWDEN AND SMITH were arrested in connection with a robbery. When the robbery victim failed to identify them, Bowden, a juvenile, was released, but Smith was detained. The circumstances of this alleged crime led police to suspect the involvement of appellants in an earlier robbery-murder. Consequently, Bowden was re-apprehended, detained, and finally he confessed to participation in the robbery-murder. After intermittent questioning for forty hours, Smith also confessed and gave substantial clues which led to the identity of an eyewitness who had participated in the crime. Twenty hours later Smith was taken before a commissioner, pursuant to Rule 5 (a) FED. R. CRIM. P. The trial court failed to exclude the testimony of the eyewitness. Smith was convicted of second degree murder and robbery, Bowden of robbery. On appeal, the court affirmed both convictions and held, *inter alia*, that the relationship between the illegal confessions and the eyewitness testimony was attenuated. *Smith v. United States*, 324 F. 2d 879 (D.C. Cir. 1963).

When federal officers violate the Fourth Amendment, the evidence obtained as the direct result of their illegal activities is excluded in federal courts. *Silverthorne v. United States*, 251 U.S. 385 (1920). In *Nardone v. United States*, 308 U.S. 338 (1939), this doctrine, known as the "fruit of the poisonous tree", was extended to wire tapping evidence obtained in violation of section 605 of the Communications Act. However, the court indicated there could be situations in these cases where sophisticated argument might prove a causal connection between the illegal situations and the evidence subsequently obtained, whereas "good sense" would prove the connection had been attenuated or weakened. Therefore, the defendant would carry the burden of proving the illegality of the method used to obtain this evidence and of proving that the evidence was the substantial part of the case against him.

Here, relying on *Payne v. United States*, 294 F. 2d 723 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 883, the majority opinion of Judge Burger rejects the "fruit of the poisonous tree" analogy advanced by appellants. In *Payne*, both courts refused to exclude the eyewitness testimony. An earlier identification by the eyewitness of the defendant during his illegal detention was excluded at the trial. Police had located the witness independently, and the courts have admitted such evidence if it was "derived from an independent source." *Silverthorne v. United States*, *supra* at 392.

The prosecutor in the instant case conceded that both confessions were inadmissible. The *Mallory* rule requires the exclusion of any confession obtained during a detention in violation of Rule 5 (a) FED. R. CRIM. P. This rule necessitates taking the arrested person before a committing magistrate "without unnecessary delay." *Mallory v. United States*, 354 U.S. 449 (1957). Damaging oral admissions by a juvenile in police custody, before the juvenile court has waived its jurisdiction, are inadmissible in subsequent criminal proceedings. *Harling v. United States*, 295 F. 2d 161 (D.C. Cir. 1961).

Judge Burger acknowledges that the eyewitness testimony was the crucial evidence against Smith, but suggests that since a witness is living, his testimony is distinguishable from immutable, inanimate evidence. He maintains that *Wong Sun v. United States*, 371 U.S. 471 (1963), did not foreclose this distinction.

Wong Sun re-emphasized the necessity of excluding as "tainted" all evidence directly resulting from illegal acts which violate constitutional rights. The Supreme Court excluded statements taken after an illegal arrest plus the evidence derived from them. It saw no logical distinction between this physical and verbal evidence, and envisioned great dangers to the deterrent policy of the exclusionary rule in holding otherwise. *Id.* at 485-86.

Almost all state courts hold the "fruit" of inadmissible confessions admissible. It has been advanced that similar evidence in federal courts would probably be excluded by the Supreme Court. Note, 70 YALE L. J. 298, 303-04, n. 22 (1960). Some judges feel it should be excluded. See, e.g., *Killough v. United States*, 315 F. 2d 241, 248 (D.C. Cir. 1962) (Concurring opinion). Yet, the U.S. Court of Appeals for the D.C. Circuit refused to rule on a situation analogous to *Smith* in *Killough v. United States*, *supra*. There, during an illegal detention, the defendant made a confession explaining where a body was hidden. The trial court admitted eyewitness testimony from the coroner about this body. The Court of Appeals found it unnecessary to pass on its admissibility and reversed on the admission of a second confession obtained during a subsequent

legal detention because it was obtained as the product of the earlier illegal confession.

The Supreme Court has not yet predicated the *Mallory* rule on the Constitution, but Rule 5 (a) is derived from the Fourth and Fifth Amendments, and the "tainted evidence" exclusionary doctrine was extended to second confessions in *Killough v. United States, supra*. This doctrine was applicable in *Nardone v. United States, supra*, although wire tapping is not unconstitutional per se. *Olmstead v. United States*, 277 U.S. 438 (1928).

The dissent of Chief Judge Bazelon in the instant case states that admission of the eyewitness evidence would provide an incentive to continue to violate Rule 5 (a). He believes the connection of the testimony with the illegal confession was not attenuated, that the "fruit of the poisonous tree" doctrine leaves no room for an eyewitness distinction, and maintains that any such distinction contradicts *Wong Sun v. United States, supra*.

The test for exclusion of this evidence in *Wong Sun* is whether the evidence has been obtained by exploitation of the illegal situation "or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488. Evidence voluntarily proffered by the accused a reasonable time after the illegal situation had terminated was held admissible. Circumstances present at the time the evidence was obtained from him controlled its admissibility.

The existence and identity of an eyewitness must be known before he can give any testimony. This truism indicates that *Smith* is anomalous by deduction from any prior test. The use of the narrow distinction that no previous case bears directly on whether eyewitness testimony can be considered "fruit" of confessions obtained in violation of Rule 5 (a) probably limits the effect of the decision.

One state has excluded eyewitness testimony when it was discovered as a result of an illegal search. *People v. Albea*, 2 Ill. 2d 317, 118 N.E. 2d 277 (1954), 41 A.L.R. 2d 895 (1955). By analogy, eyewitness testimony should be excludable if the Supreme Court specifically extends this doctrine to Rule 5 (a) violations. To guarantee this result, a test for attenuation other than the nebulous "good sense" may be required. By specifically enunciating an eyewitness testimony test for the "fruit of the poisonous tree" doctrine and extending it to Rule 5 (a), the Supreme Court would compel the exclusion of such evidence and thereby remove this added motive for police to disobey the rule. Justice to arrested persons seems to require this action as the only effective reparation for the invasion of their rights.

LYNN CHARLES THOMPSON

Statutes—Adoption from another jurisdiction—Binding force in adopting jurisdiction—*Association of Western Railways, et al., v. Riss & Co., Inc.*,—F. 2d—(D.C. Cir. 1963).

IN AN ANTI-TRUST SUIT, after a ten month trial, the District Court entered judgment against five defendants which was reversed on appeal; the case was remanded for entry of judgment in their favor. *Association of Western Railways v. Riss & Co.*, 112 App. D.C. 49, 299 F. 2d 133, *cert. denied*, 370 U.S. 916 (1962). The District Court refused costs to the prevailing parties.

Appellants contended that section 1517 of Title 11, D.C. Code, as "a statute of the United States," was within the meaning of, and one of the valid exceptions to, Rule 54 (d) FED. R. CIV. P., thus stripping the trial judge of discretion to award costs and making such award mandatory in their favor.

Appellee, relying on *Manoukian v. Tomasian*, 99 App. D.C. 57, 237 F. 2d 211 (1956), asserted that D.C. CODE ANN. 11-1517 (1961) was not a "statute of the United States" and that Rule 54 (d) was correctly applied in the court below.

In tracing the historical origin of 11-1517, the court noted that the Act of 1901, D.C. CODE ANN. 49-301 (1961), which adopted the Code, embraced also all "British statutes in force in Maryland on February 27, 1801" as part of the statutory law of the District. The codifiers included numerous sections which they believed had been adopted by the Maryland Constitutional Convention of 1776 as part of the statutory law of the state but which, in fact, had never been adopted as such by the legislature, then or since. No one had even determined which British statutes were "applicable to local circumstances" until Chancellor William Kilty undertook to do so in 1810. The significant fact is that on February 27, 1801, the crucial date, the Maryland legislature had not gotten around to determining which were suitable.

Seven years ago, in a decision always taken rather lightly, this same court held, in *Manoukian v. Tomasian*, 99 App. D.C. 57, 237 F. 2d 211 *cert. denied*, 352 U.S. 1026 (1956), that D.C. CODE SECTION 49-301 accorded to such British Statutes only the same status in this District that they had had in Maryland in 1801. British statutes deemed applicable to Maryland's situation in 1776 were treated thereafter as part of the body of the common law of Maryland.

In re-affirming that decision, the court now makes it abundantly clear that "no pre-emigration British statute was in force as a statute in Maryland on February 27, 1801" and that, therefore, those which were included by error of the codifiers to our code, were *not* made part of the statute law of the District by the Congressional Act of 1901, though they are contained in the Code and have the appearance, at least superficially, of "statutes."

But what of the "Pandora's Box" opened by this conclusion? Lawmen in the District look to the Code as a refuge from doubt. Sections of the Code regarded as having the effect only of judicial precedent are intermingled with those which have the force of legislative enactment. Questioning certain sections involving costs (11-1517, 11-1518)

has only opened the door to doubt as to the reliance to be placed on provisions which invalidate service or execution on Sunday (13-102), provisions regarding pleadings (13-203, 13-205, 13-206, 13-207, 13-210, 13-212, 13-218, 13-219, 13-220) or amendments and mistakes (13-304, 13-305, 13-306, 13-307, 13-308, 13-309, 13-310, 13-311, 13-312, 13-313, 13-314, 13-315, 13-316, 13-317, 13-318, 13-319, 13-320). Are these to be challenged at every turn? And what of those provisions followed so implicitly as "statutes" as regards judgments and decrees (15-104, 15-106, 15-111), execution (15-207), or the guarantee that land will not be seized for debt if chattels are sufficient to pay (15-213)? In Title 16 of the Code, numerous sections are involved dealing with special remedies and proceedings, including parties to action (16-101), ejectment (16-502, 16-527, 16-528, 16-529, 16-530, 16-531, 16-532, 16-533, 16-534), gaming transactions (16-701, 16-702, 16-703, 16-704, 16-705, 16-706, 16-707) and sureties (16-2003, 16-2004, 16-2005). Dower rights are affected (18-201, 18-203, 18-205, 18-206, 18-207, 18-208, 18-209) as well as the power of co-executors to sell under power in a will (18-605), other provisions relating to attestation of wills (19-104, 19-105, 19-106) and that proviso which holds an executor or administrator liable in cases of waste or conversion of property of the estate (20-112, 20-113, 20-114), as well as suits by next friend (21-117). While no statute in Title 22, which covers criminal offenses, is affected, criminal procedure is, as regards the sufficiency of an indictment for perjury (23-204, 23-205). So also are commercial instruments (28-410, 28-920), computation of time (28-2801, 28-2802, 28-2803), real property (45-309), mortgages and deeds of trust (45-605, 45-606, 45-607, 45-608, 45-609, 45-610, 45-620), landlord and tenant (45-918, 45-919, 45-920, 45-921, 45-922, 45-923, 45-924, 45-925, 45-926, 45-927, 45-928, 45-929, 45-930, 45-931, 45-933, 45-934), uses and trusts (45-1202) and waste (45-1301, 45-1302, 45-1303).

If there is to be some semblance of certainty in the law, then those sections which are now to be given only the effect of *judicial precedent* must not be allowed to remain, sprinkled throughout the three volumes of the Code, unless they are *distinguished* as such, lest they be relied upon as "statutes of the United States." Perhaps they should be removed altogether. Or perhaps, after all, is it not incumbent upon the Congress to simply re-examine each of these sections and to enact *as statutes* those "which by experience have been found applicable to the local circumstances"? We are entitled to some uniformity in the rules we live by.

DAVID C. GALFOND

Criminal Law—Summary Contempt—Double Jeopardy and Mental Competency as Defenses—Necessity of Rule 42 (a).

U.S. v. Mirra, 220 F. Supp. 361 (S.D.N.Y. 1963)

U.S. v. Panico, 32 U.S.L. Week, 3151 (U.S. October 21, 1963)

ANTHONY MIRRA AND Salvatore Panico were two of twenty-nine defendants charged with violating the Federal Narcotics Act. During retrial summary contempt sentences were imposed, pursuant to FED. R. CRIM. P. 42 (a), of one year (Mirra) for hurling the witness chair at the United States Attorney, and of fifteen months (Panico) for storming the jury box. After Mirra's contempt sentence, the government filed an indictment charging him with assault with a deadly weapon (18 U.S.C. §111). Mirra moved to dismiss on the ground that his contempt sentence constituted a prior trial and that, therefore, the government was barred by double jeopardy. His motion was denied. The court held that his contempt sentence was a punishment, not a trial, and that double jeopardy protects against successive prosecutions, not against being twice punished. The court also distinguished contempt and assault as separate offenses, thus barring double jeopardy. *U.S. v. Mirra*, 220 F. Supp. 361 (S.D.N.Y. 1963). Panico's appeal of his contempt sentence was based on his mental competency at the time of his contumacious behavior. The court, though weighing the propriety of using Rule 42 (a) when a substantial question has been raised which requires expert testimony, affirmed the sentence (Judge Friendly dissenting), reasoning that resorting to the lengthier procedures of Rule 42 (b) would seriously undercut the power of the courts to punish for contempt. The U.S. Supreme Court granted certiorari, and, in a per curiam decision, held that justice requires a hearing under Rule 42 (b) "to determine the question of the petitioner's criminal responsibility." 32 U S L Week 3151 (U.S. October 21, 1963). *Mirra* and *Panico* question the use of Rule 42 (a).

Rule 42 (a) provides for summary punishment, without a hearing, for criminal contempt committed in the actual presence of the court. Rule 42 (b) provides for punishment of criminal contempt, not necessarily committed in the court's presence, by notice and hearing, affording the contemnor the possible use of counsel, bail and trial by jury. In overruling the denial of Panico's appeal, the Court is limiting the use of Rule 42 (a) when the criminality of the act is questionable because of the actor's mental condition.

Rule 42 (a) is based on the necessity that the court uphold its power, *Bessette v. M. B. Conkey Co.*, 194 U.S. 324, 327 (1904), and that "the ends of justice demand immediate action," *Ex parte Terry*, 128 U.S. 289, 310 (1888). That Mirra's and Panico's acts are historically criminal offenses, see 8 HALSBURY, LAWS OF ENGLAND 3, 3d ed.; that having been committed in the presence of the court they were punishable summarily, see *Cooke v. U.S.*, 267 U.S. 517, 534 (1925), *Sacher v. U.S.*, 343 U.S. 1, 9 (1952).

The necessity for Rule 42 (a) has been grounded generally in the *sui generis* argument that the power to punish without a hearing (Rule 42 (a)) is unique. The better reasoning is that only the power to punish upon notice and hearing (Rule 42 (b)) is

sufficiently unique to be a ground for necessity. The myth of immemorial usage which is used to support the necessity for Rule 42 (a) was exploded by Frankfurter and Landis, *Power to Regulate Contempts*, 37 HARV. L. REV. 1010, 1011 (1924). The *sui generis* argument favoring Rule 42 (a) is circular—it holds that contempt is so “because it has been customarily treated peculiarly, and that it is treated this way because it is *sui generis*,” Goldfarb, *The Constitution and Contempt of Court*, 61 MICH. L. REV. 283, 299 (1962). Rather than being argued this way, *sui generis* should be recognized as being limited by “due process of law and the other standards of decency and fairness in the administration of Federal justice.” *Penfield Co. v. Sec. & Exch. Comm’n.*, 330 U.S. 585, 609 (1947), Frankfurter, J. (dissenting). Trial by jury is “not held by sufferance, and cannot be frittered away on any plea of state or political necessity,” (emphasis added), *Ex parte Milligan*, 4 Wall. (71 U.S.) 2, 123 (1866). It is embedded in the Constitution to secure its “inviolateness and sanctity against the passing demands of expediency or convenience,” *Reid v. Covert*, 354 U.S. 1, 10 (1957). The argument that direct contempt is *sui generis* has met these constitutional arguments head on, and defeated them.

Mirra and *Panico* attack the *sui generis* legalism by focusing attention on the punishment. The ancient lineage of contempt held that the power of the Chancellor to imprison was to compel obedience to the King, and not as a means of punishment. The power to punish for contempt has for its great and only purpose the securing of judicial authority from obstruction, and the power “has been grudgingly granted, and has been held down uniformly to the ‘least possible power adequate to the end proposed,’ ” *Ballantyne v. U.S.*, 237 F. 2d 657, 667 (5th Cir. 1956), *In re Michael*, 326 U.S. 224, 227 (1945). In *Mirra* and *Panico* the acts punished were past acts. Are the sentences excessive in light of the purpose of the Rule to secure the order of the court with the least possible power necessary to that end? Proper administration of the trial could have possibly been resumed with the imposition of a thirty-six hour sentence; however, under Rule 42 (a) thirty-six months could have been imposed. Justice Frankfurter, dissenting in *Sacher v. U.S.*, *supra*, at 29, stated: “All grants of power, including the verbally unlimited terms of Rule 42 (a) of the Rules of Criminal Procedure, are subject to the inherent limitation that the power shall be fairly used for the purpose for which it is conferred.” Rule 42 (a), as to punishment, is without statutory maximum. The power to punish is ill controlled, and the “practice of District Judges has not been uniform when they have deemed resort to the power necessary.” *Sacher v. U.S.*, *supra*, at 7. Would there be a complete distinction between the contempt and assault offenses under the following supposition: the chair had hit the District Attorney and knocked him unconscious, whereupon the court sentenced the contemnor, under Rule 42 (a), to five years, subsequent to which the government filed an indictment, under which the contemnor was convicted, and sentenced to five years. The punishments are the same, though the purposes for the punishments are quite different. The most reasonable way to equate the punishments is to assume in the sentence under Rule 42 (a) the unintentional injection of punishment for assault—which is not the purpose of the Rule, possibly coupled with the court’s forgetfulness, during the excitement, of the least possible power adequate to the end proposed limitation on contempt punishment. If this be so, is not the contemnor actually being “tried” in

a criminal case? If the punishment is the result of the court trying the contemnor, is not the process equivalent to the first element (trial) of double jeopardy, and, thus, Mirra's motion plausible?

Panico's judgment under Rule 42 (a) was delayed until the end of the trial, with no apparent damage to the fair administration of the trial. If this can be done under Rule 42 (a), there is no need to resort to that rule in the first place, since its summary nature is justified basically in terms of necessity of immediate action. If Panico could have been judged long after he had committed his act, at a time when damage to the court was impossible, why could he have not been heard under Rule 42 (b), and allowed his essential safeguards? Certainly, some contumacious conduct is well planned, but just as certainly other such conduct is the result of a confused mind. If it is, it may not constitute a crime, and to employ Rule 42 (a) without a hearing to determine competency at the time of commission is to punish as a criminal offense what may not be a crime.

The Court's decision in *Panico* signifies a change in thinking concerning Rule 42 (a). Rule 42 (b) can better serve the government and the accused, and is to be preferred.

MARTIN A. FARRELL, JR.

Federal Procurement Law—Policy of Competition—Conflict with State Price Regulation—*Paul v. United States*, 371 U.S. 245 (1963).

THE AGRICULTURAL CODE of California, sec. 4340, charges the Director of Agriculture with the duty of administering minimum wholesale and retail prices for fluid milk throughout the state. Under a comprehensive price regulation scheme, minimum prices were set for areas in which the United States had established three military bases. The procurement officers at these three bases, having received bids substantially below the minimum, initiated two actions in the United States District Court for the Northern District of California to determine the applicability of the California regulation to suppliers of the United States. The United States alleged that enforcement of these regulations would amount to an undue burden on procurement officers and therefore would be unconstitutional. The District Court, sitting as a three-judge court, granted the motion of the United States for summary judgment. *United States*

v. Warne, 190 F. Supp. 645 (N.D. Cal. 1960). On appeal to the Supreme Court of the United States, held, *inter alia*, with respect to milk purchased from appropriated funds and used for strictly military consumption or resale at federal commissaries, that the enforcement of the minimum price regulations conflicts with military procurement policy which requires the United States to deal in a competitive market. The price regulations effectively eliminate competition, are a burden on the United States in the exercise of its constitutional powers to maintain the Armed Services, and therefore are unconstitutional. *Paul v. United States*, 371 U.S. 245 (1963).

The *Paul* case squarely places before the court the question of the applicability of state price regulations to contractors dealing with the Federal Government. Is there a conflict between state regulatory schemes and federal procurement policy? The answer is found in the dictates of the federal procurement statutes, 10 U.S.C. 2301-14, and the Armed Services Procurement Regulations (A.S.P.R.) promulgated under the statutes. These show that the basic method to be followed in federal procurement is formal advertising. Negotiative purchasing is allowed as an exception to the basic method, in certain specific instances, where it would be impracticable to operate under the rigors of formal advertising. No matter which method is used, the procurement regulations are clear that it must reflect active competition. That method of procurement shall be used "which will be most advantageous to the Government—price, quality and other factors considered." A.S.P.R. 1-301. "Such procurement shall be made on a competitive basis, whether by formal advertising or by negotiation, to the maximum practicable extent. . . ." *Ibid.* The three dissenters contend that the negotiative method is evidence that Congress has provided situations where competition is not required. They point to the September, 1962, amendment to the Procurement Statutes as substantial evidence of congressional recognition of valid state price regulations. The amendment provides in part, "In all negotiated procurements in excess of \$2,500 in which rates or prices are *not fixed by law or regulation* . . . proposals shall be solicited from the maximum number of qualified sources. . . ." 10 U.S.C. 2304 (g). (Emphasis added). The majority correctly disposes of this contention by showing that the purpose of this amendment was indeed to increase competition in procurements by the negotiative method. Again they point out that the method of negotiation is used at the discretion of the contracting officer, always keeping in mind the most advantageous contract for the United States. Furthermore, definite restrictions are placed on contracting officers who might use certain negotiative purchasing exceptions to formal advertising in order to avoid competition. One exception susceptible of such usage is the "impracticable to obtain competition" afforded by 10 U.S.C. 2304a (10). As pointed out by one author, A.S.P.R. requires, "that every contract negotiated under this authority must be accompanied by a signed statement of the contracting officer justifying its use, and that a copy of such statement must be sent to the General Accounting Office with a copy of the negotiated contract." OFFICE OF THE GENERAL COUNSEL, DEPT. OF THE NAVY, NAVY CONTRACT LAW 130 (2nd ed., 1959).

The decision in *Paul* represents a clear departure from the doctrine established under *Penn Dairies v. Milk Control Commission*, 318 U.S. 261 (1943). There the court held that the Federal Procurement scheme must conform to valid state price regulation. While a slight change in the Procurement Regulations between the time

of *Penn Dairies* and *Paul* allowed the court in *Paul* to distinguish the two cases, the views of the two courts are clearly opposed as to the purpose of the federal procurement scheme. In *Paul* the court recognizes the present day need for competitive procurement and the basic conflict with this need imposed by state price regulation. Once this conflict is recognized it is clear that the federal scheme must prevail. While a good policy argument was advanced by appellants in support of price regulations in the milk industry (Brief for Appellant, pp. 43-50, *Paul v. United States, supra*. See also Annot. 155 A.L.R. 1383 (1945)). The issue in *Paul* is that of state-federal conflict. In deciding this question of conflict the merits of regulation of the milk industry cannot be considered.

The contracting officer is charged with the duty of obtaining the most advantageous contract for the United States—price, quality, and other factors considered. His tools are formal advertising and, where permitted, the more liberal negotiative method. His discretion guides him in using one method over the other, but all his purchases must reflect active competition. In *Paul* the court has recognized that state price regulations defeat his purpose as defined by Congress. The decision opens the door to more active competition, which is needed in today's Federal purchasing.

HARRY J. ROPER

Municipal Ordinances—Aesthetic Nuisance—Police Power, *People v. Stover*, 12 N.Y. 2d 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272, *dismissed per curiam* 375 U.S. 42 (1963).

THE APPELLANTS, Mr. and Mrs. Stover, live in a pleasant residential district of the City of Rye. A clothesline, filled with old clothes and rags, made its first appearance in the appellants' front yard in 1956 as a form of protest against the high taxes imposed by the City. The appellants added another clothesline each succeeding year to mark their continued displeasure with the taxes. In 1961, a total of six lines were strung across the appellants' front and side yards. Each line displayed tattered clothing, old uniforms, underwear, rags and scarecrows.

In August, 1961, the City enacted an ordinance prohibiting the erection and main-

tenance of clotheslines or other devices for hanging clothes or other fabrics in a front or side yard abutting a street, without a permit. The court deemed it is more than a fair inference that the adoption of the ordinance was prompted by the conduct and action of the appellants. A permit was denied appellants, and the City subsequently convicted them of violating the ordinance.

On appeal, the Court of Appeals for New York affirmed, ruling that conduct which is offensive to the sense of sight may be a valid subject of regulation under the police power. *People v. Stover*, 12 N.Y. 2d 462, 240 N.Y.S. 2d 734, 191 N.E. 2d 272, dismissed *per curiam* 375 U.S. 42 (1963).

The *Stover* decision represents the first complete deviation by a state court from the generally held views of legislation based solely on aesthetic considerations.

Courts have historically been reluctant to allow regulations that were motivated by aesthetics to be imposed upon their citizens. Reluctance may be attributed to economics, legal practicality and individualism.

The growing America of the post-industrial revolution era subordinated concepts of attractiveness to industrialization and functionalism. The influx of many nationalities in this era brought a myriad of aesthetic standards. Courts believed the problem of establishing a universal standard to be legally insuperable. Concurrently, they were vexed with the conflict of individualism and aesthetics. The idea of a man's home being his castle left no room for unnecessary regulation by the tastes of an ultra-sensitive few. A typical expression of this earlier judicial reluctance can be found in *City of Passaic v. Paterson Bill Posting Co.*, 72 N.J.L. 285, 62 A. 267, 268 (1905). There the court said:

... Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

The present judicial thought has mellowed and is commensurate with the modern day social, economic and legal thought. Today it is generally held that aesthetic considerations alone do not justify the enacting of municipal ordinances. This means that aesthetics may only be a consideration if the legislation could also otherwise be sustained as promoting the public health, safety or welfare. *McMahon v. City of Dubuque*, 255 F. 2d 154 (1958); *Rogalski v. Township of Upper Chichester*, 406 Pa. 550, 178 A. 2d 712 (1962); *City of Norris v. Bradford*, 204 Tenn. 319, 321 S.W. 2d 543 (1959); *City of Jackson v. Bridges*, 243 Miss. 646, 139 So. 2d 660 (1962). Thus, the law has given "aesthetics" the role of a factor that is only to be considered if found with other factors. The aesthetic factor seems to be more self-sufficient in several limited areas such as the location of billboards or funeral parlors. But even in these areas courts deem it necessary to find, if not fictionalize, other factors.

The *Stover* decision has eliminated the vestiges of the prior judicial refusal to consider aesthetics alone.

The traditional device utilized by the court to reach this new plateau is a remarkable combination of legal precedent and logic. The court first states that even if aesthetic considerations themselves are insufficient to support an exercise of the police power, they may be taken into account as a "factor" by the legislative body in enacting laws which are also designed to promote health and safety. *Baddour v. City of Long*

Beach, 279 N.Y. 167, 18 N.E. 2d 18 (1938). Thus, reasons the court, if it be conceded that the factor of aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.

The opinion admits that cases may arise where a legislative body goes too far in the name of aesthetics. However, the *Stover* case does define the aesthetic standards, which eluded the earlier courts, in the standard of the reasonably prudent man. The ordinance simply proscribes conduct which is unnecessarily offensive to the visual sensibilities of the average person. This standard is consistently applied to similar offenses to the senses of hearing and smell and this court can perceive no basis for a different result merely because the sense of sight is involved. The holding of the case is a clear and definite statement of what the law, devoid of the conjured subterfuge of conjunctive considerations, had actually been for some time.

Recognizing the conceptual proximity of such ordinances and the common law nuisance, could a New York municipality now abate an aesthetic nuisance without the aid of a pertinent ordinance? Though the latter question may be unanswered by *Stover*, it was the first case to respond affirmatively to the broad dictum of the Supreme Court in *Berman v. Parker*, 348 U.S. 26, 33 (1954), in which Mr. Justice Douglas, writing for a unanimous Court said:

The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

The *Berman* dictum was brought in point when the present case was appealed to the Supreme Court. The City of Rye defended the validity of aesthetic legislation and submitted that the appellants' freedom of speech was not at issue. The appellants argued that, even if aesthetic considerations are allowable, their freedom of speech negated an ordinance based purely on aesthetic considerations. The Supreme Court dismissed the appeal for the lack of a substantial federal question 375 U.S. 42 (1963). The *Stover* case, which is the first conclusive legal authority for upholding legislation based on aesthetic considerations alone, adds new impetus to the goals of the municipal planner, zoner and redeveloper.

CHARLES D. GILL