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Recent Decisions

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RECENT DECISIONS

FEDERAL JURISDICTION — THREE-JUDGE DISTRICT COURTS — THREE-JUDGE COURTS ARE NOT REQUIRED IN SUPREMACY CLAUSE CASES INVOLVING ONLY FEDERAL-STATE STATUTORY CONFLICTS. — The Swift and Armour Companies, packers of frozen stuffed turkeys in Minnesota and Wisconsin, ship their turkeys into New York State for sale to retailers who in turn resell them to the general public. These turkeys are labeled in accordance with a federal statute[1] and Department of Agriculture regulations thereunder[2] to indicate the net weight of the turkey, including stuffing. A New York statute, as administratively interpreted,[3] required that such package bear a label indicating both the weight of the turkey, excluding stuffing, as well as the weight of the entire package. Swift and Armour, upon refusal of the Poultry Products Section of the Department of Agriculture to allow them to change their labels in order to conform with New York's requirements, requested a three-judge district court be convened under 28 U.S.C. § 2281.[4] They sought an injunction to restrain enforcement of the New York law on the ground that it was violative of the commerce clause and the Fourteenth Amendment of the United States Constitution. In addition, due to overriding requirements of federal law, the New York statute was alleged to violate the supremacy clause of the federal constitution. The District Court for the Southern District of New York, acting in both a three-judge and single-judge capacity due to uncertainty as to its jurisdiction, dismissed the complaint on its merits.[5] Simultaneous appeals were executed to the Court of Appeals for the Second Circuit on the one-judge ruling and, under 28 U.S.C. § 1253,[6] to the United States Supreme Court on the three-judge

1 Poultry Products Inspection Act of 1957, 71 Stat. 441, 21 U.S.C. §§ 451-469 (1964).

2 The Secretary of Agriculture is authorized by § 463 to issue regulations. 7 C.F.R. § 81.125 (1959) requires containers to bear "approved labels"; 7 C.F.R. § 81.130(a)(3) (Supp. 1965) declares that labels must include the net weight of the contents and that "The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials."

3 N.Y. AGRIC. & MKTS. LAW § 193(3) provides: "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner."

Net weight was not defined in the regulations, 1 N.Y.C.R.R. § 221.40 (now § 221.9 (c)), but "[t]he Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures." Swift & Co. v. Wickham, 230 F. Supp. 398, 401 (S.D.N.Y. 1964). The reason advanced for such an interpretation was that it was an aid to the consumer who was unsure of the exact amount of fowl included in a package, since the amount of stuffing varied with each package.

4 37 Stat. 1013 (1913), 28 U.S.C. § 2281 (1964) provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

5 Swift & Co. v. Wickham, 230 F. Supp. 398 (S.D.N.Y. 1964).

6 28 U.S.C. § 1253 (1964) provides:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

decision. The Supreme Court (Justices Douglas, Black, and Clark dissenting) agreed with the district court that the commerce clause and fourteenth amendment claims were too insubstantial to support the jurisdiction of the three-judge court, and *held:* a suit to enjoin the enforcement of a state law solely on the ground of a supremacy clause violation was not within the scope of § 2281 (overruling *Kesler v. Department of Pub. Safety*[7]). Since the three-judge district court lacked jurisdiction under § 2281, no direct appeal lay to the Supreme Court to consider the merits under § 1253. *Swift & Co. v. Wickham,* 382 U.S. 111 (1965).

Before reaching the merits in *Wickham,* the Court faced the threshold question of whether it had jurisdiction to hear the case under the direct appeal statute.[8] This, in turn, depended upon whether a three-judge district court had been required to hear the case in the first instance. In considering the propriety of convening the statutory panel, the Court first reviewed the history and purpose behind the three-judge requirement.

The three-judge statute — now codified as 28 U.S.C. § 2281 — had its genesis as a result of congressional indignation over *Ex parte Young.*[9] This case held that a single federal judge could enjoin a state officer (and effectively the state itself) from enforcing a state railroad-rate regulation statute which was alleged to violate the due process clause of the federal constitution.[10] The implications of such a doctrine vesting so much power in a single federal judge were not lost upon the states and the decision precipitated vehement debate in the United States Senate.[11] Many states had been experimenting with social

7 369 U.S. 153 (1962).

8 28 U.S.C. § 1253 (1964). See note 6 *supra.*

9 209 U.S. 123 (1908).

10 The Minnesota legislature in 1907 passed a law regulating railroad rates and providing severe penalties for noncompliance. Stockholders of a number of railroads brought suit in federal court to enjoin their companies from complying with this law on the basis that the prescribed rates were confiscatory. They also prayed that Young, Attorney General of Minnesota, be restrained from enforcing the law. When Young refused to obey an order enjoining enforcement of the railroad rate order on the grounds that the suit was in fact one against the state in violation of the eleventh amendment, he was committed for contempt. The Court held:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of the Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual action.

209 U.S. at 159-60.

It is almost universally conceded that this decision rests on the purest of fictions. WRIGHT, FEDERAL COURTS 160 (1963). Yet the decision remains as a landmark in constitutional adjudication. As one recent commentator surmised: "Behind the outlandish conceptual justification concocted to support this holding lay the not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity; therefore the philosophy of [state] immunity had to yield." Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 4 (1964). See generally Davis, *Suing the Government by Falsely Pretending to Sue an Officer,* 29 U. CHI. L. REV. 435 (1962).

11 For the congressional debates on the decision in *Ex parte Young* and the proposed Three-Judge Act see 42 CONG. REC. 4846-59 (1908); 45 CONG. REC. 7253-57 (1910).

Senator Overman of North Carolina stated:

> Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it. . . . The whole

reform legislation, aimed primarily at the excessive rates charged by certain railroad and public utility companies.[12] There followed in the wake of *Young* a deluge of injunctions restraining the enforcement of these state statutes on the grounds of their repugnancy to the due process and commerce clauses of the federal constitution.[13] The spectre of federal interference with important state legislation was viewed with genuine alarm by the states. Not only did injunctions issue in the discretion of individual federal trial judges, but often these judges insisted upon reading their own economic theories into the due process and commerce clauses.[14] If there was to be a confrontation between the due process clause and state regulatory legislation, federal district courts were thought improper arenas and single federal judges were thought improper referees. Some restrictions on federal judicial power were thought necessary to placate the states.

It was in this atmosphere of federal-state tension that the three-judge statute was enacted in 1910.[15] Its purpose was "to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies."[16] Viewed as an instrument to guard against the "improvident state-wide doom by a federal court of a state's legislative policy,"[17] the Three-Judge Act — a political as well as a procedural statute — was a deferential bow to state sovereignty.[18] Under its terms, in any suit seeking to enjoin the enforcement of a state statute, "upon the ground of the

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purpose of the proposed statute is for peace and good order among the people of the States.

45 CONG. REC. 7256 (1910).

Commenting on the *Young* decision, Senator Bacon of Georgia stated:

> . . . the decision trampled upon the rights of the State of Minnesota, and I may add that if it trampled upon the rights of the State of Minnesota, it necessarily trampled upon the rights of every other State. . . .
>
> If these subordinate courts can exercise such power, then, indeed, the States are but provinces and dependencies.

42 CONG. REC. 4853 (1908).

12 See generally Currie, note 10 *supra* at 3-9; Hutcheson, *A Case for Three Judges,* 47 HARV. L. REV. 795, 803-05 (1934); Comment, *The Three-Judge Federal Court In Constitutional Litigation: A Procedural Anachronism,* 27 U. CHI. L. REV. 555, 557-58 (1960).

13 See, *e.g.,* Louisiana R.R. Comm'n v. Cumberland Tel. Co., 212 U.S. 414 (1909); Prentis v. Atlantic Coast Line Co., 211 U.S. 210 (1908). See also Roach v. Atchison, T. & S.F. Ry., 218 U.S. 159 (1910); Herndon v. Chicago, R.I. & Pac. Ry., 218 U.S. 135 (1910).

14 "[The Three-Judge Act] was enacted to remedy a well-known evil, viz. the activities of sovereign states too frequently enjoined by a single judge too prone to sign on the dotted line upon the request of public utilities." Northern P. Ry. v. Board of R.R. Comm'rs., 34 F.2d 295, 297 (D.Mont. 1929).

15 As a compromise measure, Congress enacted Senator Overman's bill which prohibited the issuance of an interlocutory injunction against a state statute upon grounds of federal unconstitutionality unless the application for injunction was heard and determined by a district court of three judges. It was passed as an appendage to the Mann-Elkins Railroad Act, Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (1910) which was later codified as § 266 of the Judicial Code, 36 Stat. 1162 (1911). This statute was amended in 1913 to include orders of state administrative boards and commissions, 28 U.S.C. § 2281, (1964) and in 1925 to include applications for permanent as well as interlocutory injunctions, 28 U.S.C. § 2281 (1964).

16 Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965). See congressional debates *supra* note 11, Professor Moore calls the Three-Judge Act a "Congressional restriction upon federal judicial power for the purpose of preventing undue collision with state legislative action." 1A MOORE, FEDERAL PRACTICE § 0.205 (2d ed. 1965).

17 Phillips v. United States, 312 U.S. 246, 251 (1941).

18 Hutcheson, *supra* note 12 at 811. See Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368, 379 (1949).

unconstitutionality of such statute," a statutory panel of three judges was to be convened to determine the controversy. As a further safeguard, an accelerated appeal could be taken directly to the Supreme Court from an order granting or denying the injunction. Such a scheme was thought to provide less opportunity for individual predilection in sensitive and politically emotional areas.[19] Thus, § 2281 and its predecessors are not to be viewed as mere technical rules of procedure. Indeed, the impact of this statute probes the very heart of the federal system and affects the allocation of power between the federal and state governments.[20]

As one court aptly noted, "the principles in regard to the convening of a court of three judges have been clearly stated but are not too simple in application."[21] These "clearly stated" prerequisites of § 2281 are: an interlocutory or permanent injunction must be sought; such injunction must seek to restrain the action of a state officer or administrative agency; the action sought to be enjoined must involve the enforcement of some state statute; and finally, the injunction must be sought on the ground of the alleged unconstitutionality of the state statute.[22] Since convocation of a three-judge court involves a serious drain of judicial manpower,[23] the federal courts have long engaged in a process of limiting the reach of § 2281 by a restrictive construction of the statutory language. Thus, the Supreme Court in *Phillips v. United States*[24] stated that the three-judge procedure is not to be viewed "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[25] To implement this technical construction of the statute, federal courts have developed a number of control devices. Chief among these are the requirements that a three-judge court need not be convened if the claim of unconstitutionality is wholly insubstantial[26] or if prior decisions make it clear that the state statute is patently unconstitutional.[27]

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19 See congressional debates, *supra* note 11. The device of a court of special dignity, with expedited review was not an innovation. A 1903 Act, 32 Stat. 823 (1903), had utilized three-judges for certain antitrust cases certified by the Attorney General to be of general public importance, and a 1906 Act, 34 Stat. 584, 592 (1906), applied it to any suit brought to restrain, set aside, or annul an order of the Interstate Commerce Commission. Congress borrowed this scheme and made it applicable to suits in which an interlocutory injunction was sought against the enforcement of state statutes by state officials. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 849 (1953); WRIGHT, *op. cit. supra* note 10, at 162-63.

20 WRIGHT, *op. cit. supra* note 10 at 157.

21 Webb v. State Univ. of New York, 120 F. Supp. 554, 558 (N.D.N.Y.), *appeal dismissed*, 348 U.S. 867 (1954).

22 See generally 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 52 (rev. ed. 1960); 1A MOORE, *op. cit. supra* note 16, § 0.205; WRIGHT, *op. cit. supra* note 10, §§ 48, 50.

23 Phillips v. United States, 312 U.S. 246, 250 (1941). See generally note, *The Three-Judge Court In Constitutional Litigation: A Procedural Anachronism* 27 U. CHI. L. REV. 555, 563-64 (1960); note, *The Three-Judge District Court And Appellate Review* 49 VA. L. REV. 538, 545-46 (1963). But see Currie, *supra* note 10, at 11-12; note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299, 305 (1963).

24 312 U.S. 246 (1941).

25 *Id.* at 251.

26 California Water Serv. Co. v. Redding, 304 U.S. 252 (1938); Ex parte Poresky, 290 U.S. 30 (1933).

27 Bailey v. Patterson, 369 U.S. 31 (1962) (per curiam).

A further restriction on the jurisdiction of three-judge courts developed in the area of so-called "supremacy clause" cases — a restriction difficult to explain in light of the policy considerations behind § 2281. Although the Court, in *Florida Lime Growers, Inc. v. Jacobsen,*[28] stated that "Section 2281 seems rather plainly to indicate a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality,"[29] there remained some uncertainty as to the need for three judges when it was argued that a state law conflicted with a federal statute. This is the problem which confronted the Court in *Wickham.* They were called upon to decide the scope of the phrase "upon the ground of the unconstitutionality of such statute" when a complaint under § 2281 alleges not the traditional due process, equal protection, commerce, or contract clause arguments, but rather that the state statute or regulation in question is pre-empted by or in conflict with some federal statute or regulation thereunder.[30]

Any claim of pre-emption or statutory conflict is grounded in the supremacy clause of the constitution.[31] Since § 2281 speaks of "unconstitutionality," it would appear that a supremacy clause complaint would fall within the ambit of cases intended to be covered by that section. Thus, when a three-judge district court made the first known classification of a supremacy clause claim in 1921, they found that supremacy clause cases were properly within the purview of § 266 of the Judicial Code, the predecessor of § 2281.[32] However, this reasoning was rejected in a series of Supreme Court cases which construed the three-judge statute to mean that the statutory panel was required only when a state statute was alleged to be in conflict with some section of the Constitution *other than* the supremacy clause.[33] The rationale behind such holdings was that com-

28 362 U.S. 73 (1960).

29 *Id.* at 76-77.

30 Swift & Co. v. Wickham, 382 U.S. 111, 120 (1965).

31 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

32 This injunction is not sought "upon the ground of the unconstitutionality of such statute," in the more common sense in which we speak of unconstitutionality. That there is a conflict between state and federal law does not always bring to mind the issue of the unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional. We think the present situation is fully within the spirit and fairly within the letter of section 266, and that the court, as now constituted, has power to hear and determine the application.

Michigan Cent. R.R. v. Michigan Pub. Util. Comm'n, 271 Fed. 319, 321 (E.D.Mich. 1921).

33 Each case built upon its predecessor(s) and thus the cases must be considered in chronological sequence. The first case perennially cited to support the proposition that three judges are not required in supremacy clause cases, Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922), did so by implication. A three-judge district court had granted a temporary injunction against the enforcement of a state statute on the dual grounds that it violated the commerce clause and a federal statute. Jurisdiction of the circuit court of appeals was sustained on the ground that the claim of conflict between the statutes gave the court a ground for jurisdiction, independent of the commerce clause claim, which standing alone

plaints alleging only a conflict between state and federal statutes involved mere matters of statutory construction rather than constitutional adjudication and hence the statutory panel was not required.[34]

It is submitted that the Supreme Court failed to give proper consideration in these cases to the nature of the supremacy clause claim in relation to the policy considerations behind the three-judge procedure.[35] Although he felt constrained to dismiss the case in favor of the "settled rule," Judge Friendly averred to these deeper considerations in his opinion in *Bell v. Waterfront Comm'n*[36] when he stated:

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would have given the Supreme Court exclusive jurisdiction of the appeal. The Supreme Court held:

> The attack upon the state statute because of its repugnancy to the federal statute required a consideration and construction of both statutes, and their application to the facts found. These considerations presented a ground of jurisdiction arising under a law of the United States, and was not dependent solely upon the application and construction of the Federal Constitution.

258 U.S. at 53.

Ex parte Buder, 271 U.S. 461 (1926), is also cited as authority for the proposition that a claim of conflict between state and federal statutes involves mere matters of statutory construction rather than direct attacks upon the constitutionality of the state statute within the purview of § 2281. A unanimous Court held the case was not properly one for three judges "because no state statute was assailed as being repugnant to the Constitution." 271 U.S. at 465. The Court said, "the claim that the tax is void rests, not upon a contention that the state statute under which it was laid is unconstitutional, but upon a contention that the statute is no longer in force." *Id.* at 466. Although the complaint in Buder did not explicitly invoke the supremacy clause, the defendant's answer alluded to it. Swift & Co. v. Wickham, 382 U.S. 111, 121 (1965).

The most oft-quoted statement of the supremacy clause exception appeared in Ex parte Bransford, 310 U.S. 354 (1940), a case which, like Buder, was an attempt to enjoin the collection of a state tax on national bank shares. The Court, in holding three judges unnecessary, stated:

> If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. *The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment.*

310 U.S. at 358-59. (Emphasis added.)

The Court cited the Buder and Lemke cases as authority for this proposition.

In Case v. Bowles, 327 U.S. 92 (1946), the Court said ". . . the complaint [requesting an injunction against a state statute] did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Price Control Act. Consequently a three-judge court is not required." 327 U.S. at 97. Bransford was cited as authority.

Finally, in Florida Lime Growers v. Jacobsen, 362 U.S. 73 (1960), the majority held that if a state statute was sought to be enjoined on constitutional grounds (commerce clause, equal protection clause), it did not matter that a "nonconstitutional" ground (pre-emption by the Federal Agriculture Marketing Agreement Act) was also asserted. Thus, by implication, an attack upon a state statute on the grounds of its inconsistency with a federal statute was held to be a "nonconstitutional" ground of attack.

The rule that supremacy clause cases were not within the purview of § 2281 was followed in a great number of cases. For a complete list of such cases prior to Florida Lime Growers, see *Annot.*, 4 L.Ed.2d 1931, 1962-65 (1960).

34 *Ibid.*

35 One commentator persuasively argues that the Lemke case involved an "incomplete analysis" of the supremacy clause issue and that such incomplete analysis has been seized upon and consistently followed in subsequent cases. This "incomplete analysis" was the bedrock upon which such cases as Buder and Bransford were decided and which ultimately became the crystallized manner for interpreting § 2281. 15 STAN. L. REV. 565, 569 n. 23 (1963. Accord, Note, *Three-Judge Court Practice Under Section 2281,* 53 GEO. L.J. 431, 445 (1965).

36 279 F.2d 853 (2d Cir. 1960).

> . . . the invalidity of state action derives from the supremacy clause, Article VI, whether the conflict is with the Constitution or with "Laws of the United States which shall be made in Pursuance thereof"; *and the evil at which § 2281 was directed would seem the same whether state action is sought to be enjoined as conflicting with a Federal statute or with the Constitution itself.*[37] (Emphasis added.)

A conflict between state and federal statutes involves a direct conflict between the particular state statute and the federal Constitution. The basis for the complaint in such a case is the constitutional argument that the supremacy clause recognizes the federal law as pre-empting the field and thus excludes state regulation designed to impede its operation.[38] Thus, given the presuppositions of the Three-Judge Act and the fact that an injunction in a supremacy clause case disrupts state action as much as an injunction on any other ground, there appears little justification for the supremacy clause exception.

Nonetheless, the supremacy clause exception to § 2281 remained unquestioned until 1962 when the Supreme Court decided *Kesler v. Department of Pub. Safety.*[39] The complaint in *Kesler* sought to enjoin the enforcement of a state financial responsibility law on the ground that it conflicted with a provision of the Federal Bankruptcy Act which allegedly pre-empted the field. A three-judge district court denied injunctive relief[40] and appeal was taken directly to the Supreme Court. The Supreme Court was thus squarely faced with the question of whether a supremacy clause case might properly be heard by a three-judge court. In refusing to dismiss the case for lack of a constitutional issue, although the complaint alleged solely a supremacy clause claim, the Court went to the jugular vein when it stated: "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281."[41] But then, rather than expressly rejecting the cases supporting the supremacy clause exception,[42] the Court formulated an anomalous rule which sought to dilute the supremacy clause exception while avoiding its express repudiation.[43] The Court distinguished *Kesler* from the earlier cases, *Ex parte Buder,*[44] *Ex parte Bransford,*[45] and *Case v. Bowles,*[46] on the ground that these cases involved preliminary matters of statutory construction whereas *Kesler* presented a "sole, immediate constitutional question."[47]

Kesler, in expanding the jurisdiction of the three-judge statute to reach some supremacy clause cases, was a definitive break from the restrictive language employed in the earlier decisions. However, *Kesler's* "immediate controversy"

37 *Id.* at 858.
38 Comment, 61 MICH. L. REV. 1528, 1535 (1963).
39 369 U.S. 153 (1962).
40 In re Kesler, 187 F. Supp. 277 (D. Utah 1960).
41 Kesler v. Department of Pub. Safety, 369 U.S. 153, 156 (1962).
42 See text accompanying notes 33, 34 *supra.*
43 Note, *Three-Judge Court Practice Under Section 2281,* 53 GEO. L. J. 431, 446 (1965).
44 271 U.S. 461 (1926).
45 310 U.S. 354 (1940).
46 327 U.S. 92 (1946).
47 369 U.S. 153, 158 (1962).

test has received a great deal of criticism on the ground that such a rule is "plainly unworkable."[48] The ink had hardly dried on the Court's opinion in *Kesler* when the rule it had formulated came before the Court for critical re-examination in *Wickham*.

The three-judge district court in *Swift & Co. v. Wickham*,[49] after dismissing the commerce clause and the fourteenth amendment claims as too insubstantial to support its jurisdiction,[50] was left with a complaint which sought to enjoin enforcement of the state law solely on the basis of its alleged repugnancy to the federal statute. Thus, the question of whether a court of three judges was required to hear the case under § 2281 turned upon the proper application of the *Kesler* decision. The district court, speaking through Judge Friendly, noted that *Kesler* had laid down "a very subtle rule" in supremacy clause cases dealing with federal statutory pre-emption and conflict between state and federal law.[51] However, the district court was uncertain as to the proper application of that rule in the situation before it.[52] Due to this uncertainty as to its jurisdiction, the court dismissed the complaint, "certifying out of abundant caution" that the original district judge, a member of the statutory panel, "individually arrived at the same conclusion."[53]

48 *Id.* at 178 (dissenting opinion). The Kesler rule has been critically denounced in a number of law review articles, *e.g.*, Currie, *supra* note 10, at 61-64 (1964); Note, *Three-Judge Court Practice Under Section 2281*, 53 GEO. L. J. 431, 444-48 (1965): Note, *The Three-Judge District Court: Scope And Procedure Under Section 2281*, 77 HARV. L. REV. 299, 313-15 (1963); Note, *The Three-Judge District Court And Appellate Review*, 49 VA. L. REV. 538, 553-55 (1963); 76 HARV. L. REV. 168 (1962); 15 STAN. L. REV. 565 (1963); 1962 U. ILL. L. FORUM 467; 111 U. PA. L. REV. 113 (1962). It has been argued that the opinion in Kesler "refutes the very test which it establishes." Kesler v. Department of Pub. Safety, 369 U.S. 153, 177 (1962) (dissenting opinion). After declaring that no issue of statutory construction was involved in the case, the Court devoted seventeen pages to an examination of the state statute and the Federal Bankruptcy Act before holding an injunction was proper.

49 230 F. Supp. 398 (S.D.N.Y. 1964).

50 The Supreme Court agreed with this finding. Swift & Co. v. Wickham, 382 U.S. 111, 114-15 (1965). See note 26 and accompanying text *supra*.

51 Swift & Co. v. Wickham, 230 F. Supp. 398, 409 (S.D.N.Y. 1964). The court was quoting from WRIGHT, *op. cit. supra* note 10, at 164-65:

> It was commonly supposed for years that the three-judge court statute does not apply where the claim is that a state statute conflicts with a federal statute which, by virtue of the Supremacy Clause, is controlling. The Supreme Court has qualified the cases which seemed to so hold with a very subtle rule. The earlier cases are explained on the theory that they involved a question of statutory construction as to the federal statute which had to be resolved before the Supremacy Clause came into effect, and it is held that if the case presents a sole immediate constitutional question as to the effect of the Supremacy Clause, and does not require preliminary construction of the federal statute, a three-judge court must be summoned (citing Kesler v. Department of Pub. Safety).

52 Finding itself unable to say with assurance whether its resolution of the merits of this case involved *less* statutory construction than had taken place in *Kesler*, the district court was left with the puzzling question how much *more* statutory construction than occurred in *Kesler* is necessary to deprive three judges of their jurisdiction.
Swift & Co. v. Wickham, 382 U.S. 111, 115 (1965).

53 230 F. Supp. 398, 410 (1964). Although a single district judge is without power to act in a case requiring three judges, the opposite is not true. Phillips v. United States, 312 U.S. 246, 254 (1941); Public Serv. Comm'n v. Brashear Lines, Inc., 312 U.S. 621, 626 (1941). The only consequence of erroneous retention of jurisdiction by a three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court. Bailey v. Patterson, 369 U.S. 31 (1962) (per curiam). Thus, the court in Swift thought the plaintiffs could adequately protect themselves against the uncertainty of the district court's jurisdiction by timely appeals to both the Court of Appeals and the Supreme Court. 230 F. Supp. at 410. Granted this may be true, such a procedure is cumbersome in

At this point, the Supreme Court was called upon to re-examine its holding in *Kesler* in view of the difficulty its rule presented to the lower federal courts.[54] Three years of sad experience with the rule had borne out Chief Justice Warren's prediction in his dissenting opinion in *Kesler* that the rule was "plainly unworkable."[55] The Court candidly admitted that they found the "application of the *Kesler* rule as elusive as did the District Court."[56] Since Kesler involved an important procedural principle, the Court reasoned that *stare decisis* did not constrain them to keep such a rule on the books once it proved unworkable in practice; thus the Court declared that *Kesler* should be *pro tanto* overruled.[57]

In explicating their reasons for overturning such a recent decision, the Court seized upon the opportunity to reinterpret § 2281. Two alternatives were presented to the Court. They could either adopt a broad view of § 2281 which would extend the *Kesler* holding to *all* suits to enjoin the enforcement of a state statute, whatever the federal ground; or they could adopt a restrictive view that no suits resting solely on "supremacy" grounds fall within the statute.[58]

Valid considerations would support the adoption of either view. For this reason the Court set out and weighed the various arguments for each side before reaching its decision to adopt the more restrictive view.[59] The broader reading of § 2281 commended itself as being more straightforward since courts could determine the necessity for a statutory tribunal solely by looking at the relief sought rather than distinguishing among different constitutional grounds. Similarly, when an injunction was sought on several grounds (as in *Wickham*) the proper composition of the court would not depend upon whether certain alleged constitutional grounds of attack proved insubstantial. Secondly, a broad view of § 2281 was clearly consistent with the statutory language. Finally, some policy considerations would support the broader view. State citizens and officials are just as likely to take offense at the voiding of state legislation on grounds of conflict with a federal statute as they would in a suit alleging direct conflict with the United States Constitution.

However, the Court found that a more restrictive reading of § 2281, though not compelled by the statutory language, was not an inappropriate reading of the statute. Such an interpretation was thought to be most consistent with the statute's structure, pre-*Kesler* precedent, and the section's historical purpose.[60] Finally, the restrictive interpretation was viewed as justified by sound

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unduly cluttering the dockets of two high courts of review. It is also contrary to the avowed purpose of § 2281, to expedite litigation. Decision on the merits ought not be postponed while the proper composition of the district court is litigated.

54 The Court noted that in Borden Co. v. Liddy, 309 F.2d 871, 874 (8th Cir. 1962), *cert. denied*, 372 U.S. 953 (1963) and American Travelers Club, Inc. v. Hostetter, 219 F. Supp. 95, 102, n.7 (S.D.N.Y. 1963), the courts sought to avoid dealing with Kesler's application. In a case in which the court did interpret Kesler, Bartlett & Co. v. State Corp. Comm'n, 223 F. Supp. 975, 980 (D.Kan. 1963), it did so with uncertainty.

55 Kesler v. Department of Pub. Safety, 369 U.S. 153, 178 (1962) (dissenting opinion).

56 Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).

57 *Ibid.*

58 *Id.* at 125.

59 These arguments will be summarized *infra*. For an elaboration of the Court's arguments, see 382 U.S. at 125-26 (1965).

60 *Id.* at 128.

policy considerations. With an eye toward ease of judicial administration, the Court was persuaded to return to the traditional *Buder-Bransford-Case* rule.[61] Such a constrictive interpretation of § 2281 was believed justified on the ground that it would make for the more efficient operation of the lower federal courts.

Little issue can be taken with *Wickham*'s rejection of the *Kesler* rule. The rule is patently unsupportable. Mr. Justice Frankfurter was attempting to do the impossible in *Kesler*. He sought to condemn the supremacy clause exception to § 2281 while simultaneously avoiding an express repudiation of the cases which gave rise to it. To do this, Frankfurter carved out a counter-exception to the supremacy clause exception in framing his "immediate controversy" test.[62] Precedent was distinguished as involving preliminary matters of statutory construction. However, the rule Frankfurter formulated refutes the very test which it establishes since it is difficult to conceive of any pre-emption case which "would not call for an initial interpretation of the legislation or an inquiry into its purpose or policy before a court could determine if the state and federal statutes are in conflict."[63] Frankfurter's attempt in *Kesler* to harmonize with precedent while allowing some supremacy clause cases to come within the ambit of § 2281 resulted in a test which just would not work.

Thus, the *Wickham* decision was clearly correct in rejecting the *Kesler* rule as a test in the supremacy clause area. However, *Wickham* did more than strike down a complicated and confused procedural rule; it attacked the basic premise of the *Kesler* decision, *viz.* that some supremacy clause cases *are* worthy of a three-judge court.[64] Although the rule *Kesler* formulated may have been a poor one, it is submitted that its basic premise was nonetheless sound and hence *Wickham* incorrectly returned to a restrictive construction of § 2281.

The *Wickham* rule that supremacy clause cases are not within the purview of § 2281, though easier in application than the *Kesler* rule, avoids the basic problem to which *Kesler* addressed itself. That basic question is: *Is it a sound idea to eliminate supremacy clause cases from the scope of § 2281? Kesler*'s answer was that an unfrivolous claim of unconstitutionality based on the supremacy clause ought not be carved out from the comprehensive language of § 2281.[65] The Court in *Wickham* was more concerned with striking down *Kesler*'s "unworkable" rule than in probing the deeper question of the basic premise behind such a rule. The majority's position in *Wickham* — rejecting *all* supremacy clause cases — is one solution, but not the best solution.

Mr. Justice Douglas' dissenting remarks appear to address themselves to the deeper issue involved in the case. *Kesler* turned upon whether a challenge based on the supremacy clause stood on any different grounds than a challenge based on any other provision of the Constitution. *Kesler* decided that it did not. Given the language of § 2281, an issue based on the "unconstitutionality" of a state statute can be just as clearly raised by a conflict between a state statute

61 *Id.* at 126.
62 Note, *The Three-Judge District Court: Scope And Procedure Under Section 2281*, 77 HARV. L. REV. 299, 313 (1963).
63 Kesler v. Department of Pub. Safety, 369 U.S. 153, 176 (1962) (dissenting opinion of Warren, C.J.).
64 See text accompanying note 41 *supra.*
65 369 U.S. 153, 156 (1962).

and a federal law as by a conflict between a state statute and any other provision of the Constitution.[66] The *Wickham* majority would render the supremacy clause a "second-class citizen" of the Constitution if their view prevails that a supremacy clause attack is not a constitutional attack within the meaning of "unconstitutionality" in § 2281. There appear to be no reasonable grounds for not according the supremacy clause equal dignity with the due process, equal protection, commerce, or contracts clauses — all of which have been held to support a claim of unconstitutionality within the scope of § 2281.

The *Wickham* majority also felt that cases involving alleged incompatibility between state and federal statutes do not involve the same serious problems of federalism which gave rise to the original three-judge statute and hence that the statutory tribunal is not needed in such cases.[67] History clearly refutes this argument. Some of the most heated controversies in constitutional adjudication have involved conflicts between state and federal statutes.[68] At first blush, a controversy over conflicting state and federal regulations dealing with the labeling of stuffed turkeys seems an insignificant case, hardly worthy of a court of three judges. However, pre-emption or conflict of a state law with a federal law is a constantly recurring problem which arises in a variety of contexts.[69] When a single federal judge grants injunctive relief against the operation of a state statute in such a case, utilizing the supremacy clause as the basis for requiring the state statute to give way, that injunction is just as efficacious in bringing a halt to an entire state regulatory scheme as in cases where substantive due process grounds are advanced.

The Three-Judge Act, if it is to serve any useful purpose, must be acclimated to the times. Federal interference with state regulation of railroads and public utilities may be a thing of the past, but such problems as racial discrimination, legislative apportionment, and even the labeling of stuffed turkeys are their modern day counterparts, raising like problems of state dignity.[70] The same delicate problems of federalism are at issue. The three-judge procedure was enacted to preserve the fine balance inherent in federal-state relations, guaranteeing to the states reasonable freedom in their local affairs, while preserving

66 Swift & Co. v. Wickham, 382 U.S. 111, 129 (1965) (dissenting opinion).

67 *Id.* at 127. The thesis that the controversies three-judge courts were designed to meet are largely a thing of the past has received a great deal of law review treatment. *E.g.*, Note, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555 (1960); 15 STAN. L. REV. 565, 573 (1963). See also HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 848-54 (1953). But see, note, *The Three-Judge District Court: Scope And Procedure Under Section 2281*, 77 HARV. L. REV. 299, 303 (1963).

68 The earliest known case is Cohens v. Virginia 19 U.S. (6 Wheat.) 264 (1821), the famous lottery case, in which a law of Virginia and an Act of Congress came into conflict.

69 Swift & Co. v. Wickham, 382 U.S. 111, 131 (1965) (dissenting opinion). See *e.g.*, Cloverleaf Co. v. Patterson, 315 U.S. 148 (1942), where a federal court injunction in a pre-emption case suspended Alabama's program for control of renovated butter. The dissent in this case called the decision in favor of pre-emption "purely destructive legislation." *Id.* at 179. For other pre-emption cases, see Campbell v. Hussey, 368 U.S. 297 (1961); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); General Elec. Co. v. Callahan, 294 F.2d 60 (1st Cir. 1961), *petition for cert. dismissed*, 369 U.S. 832 (1962); Williams v. Ball, 294 F.2d 94 (2d Cir. 1961); Bell v. Waterfront Comm'n, 279 F.2d 853 (2d Cir. 1960).

70 Note, *The Three-Judge District Court: Scope And Procedure Under Section 2281*, 77 HARV. L. REV. 299, 303 (1963).

constitutional rights.[71] The decade of the 1960's is an era in which the federal government is increasingly advancing into areas heretofore within the exclusive domain of the states. In a very real sense the fruitful areas for conflict in the future would appear to be in the area of federal pre-emption, claims grounded in the supremacy clause. Since the resolution of these conflicts between state and federal statutes involve the same problems of federalism encountered in other constitutional adjudication which gave birth to the Three-Judge Act, there is no reason in either history or policy for denying the statutory panel in such cases. It is submitted that in holding that three-judge courts are not required in supremacy clause cases involving only federal-state statutory conflicts, the Supreme Court in *Swift & Co. v. Wickham* unduly returned to a restrictive reading of § 2281, inconsistent with that statute's language, history, and purpose.

Stephen R. Lamantia

INSURANCE LAW — CANCELLATION — TO CANCEL AN AUTOMOBILE LIABILITY POLICY, NOTICE MUST BE BOTH GIVEN AND EFFECTIVE WITHIN THE PERIOD DURING WHICH CANCELLATION IS PERMITTED WITHOUT CAUSE. — Mr. Ross Langdon heard a loud crash in front of his home. He went out, found his own automobile undamaged, and reported to a passing police officer that an automobile in the vicinity must have been struck. Mr. Langdon assisted the owner of the damaged vehicle and telephoned the police for her. At a hearing where he appeared against the motorist, it was discovered that Mr. Langdon was mistakenly listed as the owner of the damaged automobile. Subsequently, he was informed that his license was to be suspended for failure to file an accident report. Langdon later learned that his automobile insurance had been cancelled and that he had been placed in the Assigned Risk Pool.[1] His policy provided:

> 16. . . . This policy may be canceled by the company by mailing to the insured . . . at the address shown in this policy written notice stating when not less than ten days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the . . . effective date and hour of cancelation stated in the notice shall become the end of the policy period.
>
> 17. . . . After this policy has been in effect for sixty days . . . the company shall not exercise its right to cancel the insurance [except for cause].[2]

The policy was issued July 6, 1964 for a one year period. On August 31, 1964 a cancellation notice was sent which stated that the policy is "hereby CANCELLED as of 12:01 A.M. the 10 day of September, 1964."[3] On appeal

71 Note, *The Three-Judge District Court And Appellate Review*, 49 VA. L. REV. 538, 545 (1963).

1 Langdon v. Maryland Cas. Co., 357 F.2d 819 (D.C. Cir. 1966); Brief for Appellant, p. 2.

2 Brief for Appellant, p. 5 (joint appendix), Langdon v. Maryland Cas. Co., 357 F.2d 819 (D.C. Cir. 1966).

3 Langdon v. Maryland Cas. Co., 357 F.2d 819 (D.C. Cir. 1966).

from a judgment finding the cancellation effective, the United States Court of Appeals for the District of Columbia Circuit reversed and *held:* the phrase "exercises its right to cancel" refers to the date when coverage under the policy actually ceases and, since this occurred more than sixty days after the issuance of the policy, the cancellation was invalid and of no effect. *Langdon v. Maryland Cas. Co.*, 357 F.2d 819 (D.C. Cir. 1966).

Cancellation of insurance policies is an old and honorable subject. The fundamental principle is that insurance is a contract and it is to be governed by the terms of the policy. It is, however, a special type of contract and courts have interpreted it most strictly against the insurance company.[4] This is not only because the company wrote the policy, but also because the insured is commonly thought helpless in the face of standardized contracts. Due deference is given to the great loss that is possible if an individual is deprived of insurance protection.[5]

The ramifications of adherence to a policy of strictly interpreting insurance contracts are manifest in the allowable methods of cancellation. At common law, insurance companies had a right to terminate coverage *eo instanti.* Most policies today contain a clause specifying that cancellation is effective only after a notice has been given and five, ten, twenty or thirty days have passed. Frequently, this is in response to a statute requiring a specified number of days pass before cancellation will be effective.[6] The rationale of a provision requiring such a period recently was expressed:

> Cancellation of an insurance contract, upon which the insured is relying for protection, is drastic action, and the requirement of five days' notice is obviously to enable the insured to secure insurance protection from some other company.[7]

A problem which frequently arises in the cancellation of automobile liability policies is the form and sufficiency of the cancellation notice.[8] The context in which this problem usually arises is where an attempt is made to cancel and the company gives the five- or ten-day notice period prescribed in the policy. However, the period of time given does not satisfy the terms of the policy since

4 *E.g.*, Farmers Mut. Hail Ins. Co. v. Minton, 279 S.W.2d 523 (Mo. App. 1955); Griffin v. General Acc. Fire & Life Assur. Co., 94 Ohio App. 403, 116 N.E.2d 41 (1953); Brewer v. Maryland Cas. Co., 245 S.W.2d 532 (Tex. Civ. App. 1952). See 6 APPLEMAN, INSURANCE LAW AND PRACTICE § 4181 (1942, Supp. 1965) (strict compliance with the terms of the policy is necessary). *But see* Kuvin, *Misconstruction of Insurance Policies,* 433 INS. L. J. 102 (1959) (arguing that courts have failed to interpret policies as written).

5 The policy provisions in Langdon represent a significant, self-imposed limitation on the part of the insurance company. Previously, cancellation without cause was possible provided the requisite notice was given and premiums were returned. Now, after sixty days, the policy in Langdon is incontestable except for cause or acts leading to the suspension of a driver's license. See Young, *Insurance Contracts: The Discontinuance Question,* 30 INS. COUNSEL J. 146, 150 (1963).

6 See, *E.g.*, LA. REV. STAT. § 22:636 (1959) (provides a five-day notice period and makes proper deposit in the mail sufficient). N.Y. VEHICLE AND TRAFFIC LAW § 313 (cancellation clause provision of the New York Compulsory Insurance Law). See also D. C. CODE § 35-712 (1961) (applying to sickness and accident policies, a five-day period with mailing is sufficient).

7 Columbia Cas. Co. v. Wright, 235 F.2d 462, 464 (4th Cir. 1956).

8 See 8 APPLEMAN, *op. cit. supra* note 4, §§ 5012-5015; 6 COUCH, CYCLOPEDIA OF INSURANCE LAW §§ 1439, 1442 (1930, Supp. 1965).

the company erroneously counts the first day,[9] or counts from the day of mailing instead of from the day of receipt,[10] or includes a Sunday or Holiday in the time,[11] or attempts to make cancellation effective immediately.[12] The majority response to such a mistake gives effect to the cancellation notice:

> The rule is well settled in this and other jurisdictions, that, when the notice declares that the cancellation is presently operative, or fixes a time shorter than that prescribed, where the policy requires a certain number of days' notice, it becomes effective at the expiration of the prescribed period.[13]

The reason courts have allowed coverage to terminate after the full period of time has passed is that "the mischief sought to be remedied was that resulting from terminating the policy without according the assured ample time within which to negotiate for other insurance in its stead."[14] Thus, when the time specified in the policy expires, coverage can be terminated without any real detriment to the insured. This majority response provides the first key concept necessary to an understanding of the *Langdon* decision: the purpose of the ten-day notice is solely to enable the insured to obtain other protection and coverage terminates at the end of ten full days.

Not all courts have followed this majority view. At the other end of the spectrum, courts look closely at the contract provision. They hold the notice provision to be a condition precedent requiring strict compliance by the insurer. Pennsylvania has held that where a notice was given at 6 P.M. in the evening and cancellation was to take effect at 12:01 A.M. nine days later, the cancellation was ineffective and the policy remained in force since the company fell six hours short of compliance with the ten-day requirement.[15] South Carolina followed this approach and held that a notice which provided only four of the five required days was ineffective.[16] A third state accepting the minority approach that inexact cancellation has no effect, even on the expiration of the correct number of days, is Maryland. The court, in *Langdon,* held that the law of Maryland was to apply since it was the same as the law of the District of Columbia.[17] In *American Fire Ins. Co. v. Brooks,*[18] the Maryland court dealt with a five-day notice which was received only one day before it was to be effective. The court held the notice "nugatory and void,"[19] refusing to give it any effect. The insurer was held liable for a later loss under the policy. In

9 Silvernail v. American Fire and Cas. Co., 80 So.2d 707 (Fla. 1955). See generally, interpreting N. Y. GENERAL CONSTRUCTION LAW § 20, Union Mut. Life Ins. Co. v. Kevie, 17 App. Div.2d 109, 232 N.Y.S.2d 678 (1962), *aff'd,* 13 N.Y.2d 971, 194 N.E.2d 686 (1963) (the first day is not to be included). 6 COUCH, *op. cit. supra* note 6, § 1437.

10 General Union Fire Ins. Co. v. Fred G. Clarke Co., 116 Md. 622, 82 Atl. 974 (1911). See generally 3 APPLEMAN, *op. cit. supra* note 4, § 1815.

11 Seaboard Mut. Cas. Co. v. Profit, 108 F.2d 597 (4th Cir. 1940).

12 Hanover Fire Ins. Co. v. Wood, 209 Ala. 380, 96 So. 250 (1923).

13 Black v. Travelers Ins. Co., 231 Ala. 415, 416, 165 So. 221, 222 (1936).

14 Warren v. Franklin Fire Ins. Co., 161 Iowa 440, 442, 143 N.W. 554, 555 (1913). See generally 6 COUCH, *op. cit. supra* note 6, § 1437, at 5087.

15 Hanna v. Reliance Ins. Co., 402 Pa. 205, 166 A.2d 877 (1961).

16 Hamilton Ridge Lumber Corp. v. Boston Ins. Co., 133 S.C. 472, 131 S.E. 22 (1925).

17 Langdon v. Maryland Cas. Co., 357 F.2d 819 (D.C. Cir. 1966).

18 83 Md. 22, 34 Atl. 373 (1896).

19 *Id.* at 35, 34 Atl. at 376 (1896).

German Union Life Ins. Co. v. Fred G. Clarke Co.,[20] the Maryland court was again faced with a five-day notice provision. Here there were only three days from receipt to date of cancellation. Relying on the condition precedent reasoning that exact compliance was necessary, the court held: "There must be a present purpose carried out, not a mere intent of future action."[21]

In *Langdon,* the District of Columbia Circuit impliedly[22] accepted the minority interpretation that a notice stating a period of time shorter than that required is invalid and does not effect cancellation at any time. A curious feature of the *Langdon* policy, and one only occasionally found elsewhere, was the phrase: "stating when *not less than* ten days thereafter such cancelation shall be effective."[23] (Emphasis added.) This is where the difficulty began. The court said:

> Adoption of appellee's interpretation of clause 17 would mean that the company could send a notice of cancellation without cause before the expiration of the 60 day period, but not to take effect for another 20, or 30, or even 50 days. This would substantially lessen the protection accorded the insured by clause 17 — that after passage of 60 days he no longer need fear unexplained or arbitrary termination of his policy.[24]

The reason for the phrase "not less than" is unclear. Its only apparent effect is to allow the insurance company to collect a premium for an additional period of time. However, it is usually the company's desire to terminate coverage as quickly as possible, and a simple ten-day limit between notice and effective cancellation would serve this purpose. Were it not for this ambiguity, *Langdon* might well have been decided differently. In keeping with insurer's desires for fair interpretations of policy language, it is submitted that this phrase should be stricken from future policies. Faced with this questionable phrase, the court had firm ground on which to base its decision in favor of the insured.

A case relied upon by the dissent casts doubt on the proposition that the law of Maryland holds a notice to be of no effect merely because it contains an insufficient number of days. The Fourth Circuit, in *Seaboard Mut. Cas. Co. v. Profit,*[25] applying the law of Maryland, contended that Maryland followed the majority position. The court held a notice effective, contending it complied with the contract despite the fact that it was never actually received by the insured and that it contained an insufficient number of days for notice as required by the policy. The court decided that the earlier Maryland cases were not exceptions to the general rule, holding that "a notice of immediate cancellation defective in point of time becomes operative upon the expiration of the period

20 116 Md. 622, 82 Atl. 974 (1911).
21 *Id.* at 626, 82 Atl. at 975 (1911).
22 The court, in a footnote, said it refrained from passing on this question, 357 F.2d at 821 (D.C. Cir. 1966). However, the court said that it accepted Maryland law as being the same as that of the District of Columbia, disregarding the dissent's suggestion that the *All States* decision be followed, and viewed exact compliance with the ten-day provision essential, refusing to give it effect at the end of the period as do cases following the majority position, 357 F.2d at 820 (D.C. Cir. 1966).
23 *Ibid.*
24 *Ibid.*
25 108 F.2d 597 (4th Cir. 1940).

prescribed in the policy."[26] It distinguished the earlier Maryland cases as involving only an "intent to cancel."[27] Such reasoning seems clearly incorrect. Both the earlier Maryland cases and *Seaboard* were of the same type with a notice that gave an incorrect number of days. Yet, the federal court was unwilling to follow the Maryland cases and it gave effect to the notice contending it followed the "current of authority."[28]

One of the *Langdon* court's own cases is on point. Although not an insurance contract, and thus free of the toning influence of insurance reasoning, it spoke to a notice provision in a contract:

> The contract set the period that the notice must run. The Service Station agreed by contract that ten days sufficiently protected its position. It was notified in clear terms that the Standard Company was terminating the contract. . . . By giving the letter this effect, the Service Station received fully the protection to which it agreed, the period of notice is determined by the appropriate contract provision, and the Standard Company's definite, meaningful act is not an empty gesture. To hold that the letter had no effect because it mistakenly set a period short of that required would make a modern application of the brittle fifteenth century common law. The rule which we adopt, that a notice, good in all other respects, such as being definite rather than a mere statement of future intention, is not made totally ineffective because it states a period shorter than the contract requires, is in accordance with the authorities.[29]

While the dissent thought such reasoning applicable and decisive in *Langdon,* the majority did not follow it.

This discussion of the minority position, rejected by the *Langdon* dissent, illustrates the second element necessary to an understanding of the *Langdon* decision. Its basic premise is a strict interpretation of the contract. Its result is to hold, as did *Langdon,* a notice ineffective that does not comply exactly with the policy.

A third concept is needed to complete an understanding of ten-day cancellation provisions. This is the majority doctrine,[30] as illustrated by *Seaboard Mut. Cas. Co. v. Profit,*[31] that receipt of the notice, when expressly made unnecessary by the policy, is not needed for effective cancellation.[32] The obvious reason that mere mailing of notice is declared sufficient by the policy is to protect the insurance company from a claim of ineffectiveness because of non-

26 *Id.* at 600.

27 The court said: "[T]he rule was applied in both cases to a notice of cancellation which was construed to be not a notice that a policy had been cancelled, but a notice of an intent to cancel in the future. . . . [Maryland cases] merely hold that all prospective notices are nugatory." Seaboard Mut. Cas. Co. v. Profit, 108 F.2d 597, 599-600 (4th Cir. 1940).

28 *Id.* at 600.

29 All States Serv. Station v. Standard Oil Co., 120 F.2d 714, 715 (D. C. Cir. 1941).

30 *E.g.,* Superior Ins. Co. v. Restituto, 124 F. Supp. 392 (S.D. Cal. 1954); Westmoreland v. General Acc. and Life Assur. Co., 144 Conn. 265, 129 A.2d 623 (1957); Grimes v. State Auto Mut. Ins. Co., 95 Ohio App. 254, 118 N.E.2d 841 (1953).

31 108 F.2d 597 (4th Cir. 1940). See notes 13 and 24 and accompanying text *supra.*

32 Curiously, the court in Seaboard reasoned that if notice with an incorrect date was sufficient to deprive one of protection, one not received should likewise operate:

> It is manifest that a notice, which fully complies with the time interval in the policy, if mailed but not received, furnishes no greater actual notice to the insured

receipt. The majority of courts will give effect to a notice containing an insufficient number of days on the premise that these days are merely to enable one to obtain other insurance and the company's obligation under the policy ends when they have run. But the majority are further willing to give effect to this notice even if it is not received.

The problem presented by these majority rules in working on the same subject is: how is one to buy other insurance if he has never received actual notice of termination? Highly critical of the majority position that allows a notice mailed but unreceived to be sufficient because of the terms of the policy is *Koehn v. Central Nat'l Life Ins. Co.*[33] In *Koehn,* the Kansas Supreme Court stated:

> The rationale . . . is that the express terms of the contract uphold the sufficiency of a notice deposited in the mail, and that such provision, being unambiguous, must be enforced by the courts as written. . . . [T]he parties, by their contract, in effect constitute the government. . . . This is, of course, a fiction.[34]

The *Koehn* court construed a standard clause identical to the one in *Langdon* and said: "[I]f the 'standard cancellation clause' were interpreted as propounded by the insurance company [to make mailing without receipt sufficient], it would be a violation of the public policy of the state."[35] Despite this persuasive reasoning, the majority still adhere to the rule, holding a non-received notice sufficient when it is allowed by the standardized, non-negotiated contract.

At this point, it is proper to examine the underlying reason Mr. Langdon demanded that his present policy remain in force. At first glance, it would appear he is insisting on a narrow interpretation as a matter of principle since no accident occurred for which the insurance company is attempting to disclaim liability. In reality, he is being placed under a substantial disability. Mr. Langdon rightly contends that being placed in the Assigned Risk Plan, where coverage is available only for the legal minimums, will deny him the coverage necessary in this modern world of large jury verdicts.[36] Were the problems to occur in New York, or another state where compulsory insurance laws are in effect, his failure to secure other insurance within ten days would force his surrender of the automobile license and a new registration certificate could not be issued for thirty days. Were he to operate the automobile within this period, he would be subject to criminal penalties.[37]

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than a notice defective in point of time, and it is equally clear that a defective notice, if received and construed to take effect only after the lapse of the full time, gives precisely the same protection as a notice which is correct in its contents. 108 F.2d 597, 599 (4th Cir. 1940).

I.e., you lose if you receive notice and you lose if you don't.

33 354 P.2d 352 (Kan. 1960).

34 *Id.* at 356.

35 *Id.* at 359.

36 Brief for Appellant, pp. 15, 16, Langdon v. Maryland Cas. Co., 357 F.2d 819 (D.C. Cir. 1966).

37 New York law, N.Y. VEHICLE AND TRAFFIC LAW §§ 310-321, and decisions also strongly emphasize the fact that the ten-day provision (recently extended to twenty) is designed to enable one to obtain other insurance, thus, at least in part prescinding from a strict contract approach and looking to the public policy arguments. *E.g.,* Teeter v.

The precise question presented in *Langdon* was: Does cancellation occur when notice is given, or when it takes effect? Explaining cancellation of insurance policies, the Illinois Court of Appeals has stated:

> The courts of this State have construed insurance policies as "cancelled" and the act of the insurance company to be a "cancellation," when the insurance company sends a written notice, in which it positively and affirmatively indicates to the insured that it is the intention of the company that the policy shall cease to be binding as such upon the expiration of a stipulated number of days from the time when this intention is made known to the insured.[38]

Langdon's contention was that "cancel," as used in the policy, refers not to the date of the giving of notice, but the day notice becomes effective. A Kentucky case reached the opposite result. In *Continental Ins. Co. v. Daniel,*[39] the issue was whether a necessary condition of cancellation, return of the premium, had occurred. The jury found that the company had not returned the premium and the Kentucky Court of Appeals held against the insurer. It approved the contention that

> the act of cancellation should take place and notice and tender be given and made, and five days after this the cancellation takes effect, and the policy is then no longer in force. . . . [This] seems to imply that the act of cancellation precedes the notice, but the cancellation is not to take effect until five days after the giving of the notice of the cancellation.[40]

Applied to *Langdon,* this would mean that the act of cancellation took place within the allotted time and was sufficient. Only the effect of cancellation occurred beyond the required period.

However, a case even more directly on point reaches the same result as did the *Langdon* court. In *Young v. Union Life Ins. Co.,*[41] a life insurance policy provided that the policy would be incontestable after one year except for non-payment of premiums. The company discovered that fraudulent answers had been given in the application, and delivered notice before the end of the year, advising of cancellation. It did not tender back the first year's premium. The company had the privilege of cancelling anytime within the first year on returning the pro-rata premiums. There was a grace period of one month and the insured died before the grace period expired. The Illinois Court of Appeals held the attempted cancellation ineffective, saying:

> We are of the opinion that the trial judge was right . . . inasmuch as it was a notice to terminate the policy at a future time . . . a time when, under

Allstate Ins. Co., 9 App Div.2d 176, 192 N.Y.S.2d 610 (1959), *aff'd,* 9 N.Y.2d 655, 173 N.E.2d 47, 212 N.Y.S.2d 71 (1961). This case held that the common law right of recission *ab initio* did not survive adoption of the compulsory insurance law. For a discussion of the Assigned Risk plan in New York, see Aetna Cas. and Sur. Co. v. O'Connor, 8 App. Div.2d 530, 190 N.Y.S.2d 795 (1959), *aff'd,* 8 N.Y.2d 359, 170 N.E.2d 681, 207 N.Y.S. 2d 679 (1960).

38 Klim v. Johnson, 148 N.E.2d 828, 831 (Ill. App. 1958).

39 78 S.W. 866 (Ky. Ct. App. 1904).

40 78 S.W. 866, 868 (Ky. Ct. App. 1904).

41 202 Ill. App. 321 (1916).

> the incontestable clause, the policy would be incapable of termination by the defendant.[42]

The reason for the insurance company's action was clear. As the court said: "It cannot at one and the same time consider the policy alive for the purpose of earning premium, and dead for the purpose of avoiding a loss."[43] The case establishes, as does *Langdon,* that a notice given within the incontestable period, but effective beyond the period, does not satisfy the terms of the policy.

The *Langdon* question is one of insurance contract ambiguity. If liability policies are not to contain express provisions governing whether cancellation for the purpose of the incontestability clause is the date of notice or the date of effect, a resolution must be sought in competing practical considerations. It seems beyond question that the ten-day provision was intended as a protective measure so that an insured would not face a period without coverage. This purpose was satisfied in *Langdon* as an opportunity to purchase other insurance did exist for ten days. The second concept, that insurance policies are to be construed strictly against the insurer, is a solid and well established rule of construction. Standing alone, it is strong enough to compel the *Langdon* result. The third concept is conclusive against the insurer. The majority position, that a contract provision allowing mailing of notice to be sufficient despite non-receipt, places a heavy burden on the insured. This provision effectively destroys any advantage the insured person could hope to have by a ten-day notice provision. As the *Koehn* case points out,[44] such a provision is so heavy a penalty that it may well be invalid as against public policy. Under the influence of these considerations, an insurer should not be allowed to claim the benefit of ambiguous interpretation where he has prepared the insurance contract. The *Langdon* court correctly finds the balance weighted in favor of the insured.

Gerard K. Sandweg

LABOR LAW — FINING MEMBER FOR REFUSING TO PARTICIPATE IN A STRIKE ACTION IS A UNION UNFAIR LABOR PRACTICE. — In February of 1959, UAW Local 248 struck the Allis-Chalmers Corporation at West Allis, Wisconsin. During the strike, which had been ratified in accordance with the union constitution, 175 out of 7400 employees crossed the union picket lines and continued to work. The union warned those employees of possible union disciplinary action for their failure to abide by union rules. When the strike terminated, the union fined each employee who returned to work during the strike up to one hundred dollars. In February of 1962, Local 248 again struck the West Allis works of Allis-Chalmers. Thirty employees out of 5500 in the bargaining unit refused to participate in this strike. At the same time, UAW Local 401 struck Allis-Chalmers at its LaCrosse works. There, four out of 625 employees continued to work. Those employees who refused to engage in the strike action were fined by the locals.

42 *Id.* at 328.
43 *Id.* at 330.
44 See notes 33-35 and accompanying text *supra.*

In none of these cases did the union attempt to collect the fines by threatening employment status. However, Allis-Chalmers contended that the mere imposition of a fine on these member employees constituted a violation of § 8(b)(1)(A) of the Taft-Hartley Act.[1] It charged that this disciplinary action restrained and coerced the employees in their right to refrain from concerted activities guaranteed by § 7 of the act.[2] The National Labor Relations Board dismissed the employer's complaint.[3] The United States Court of Appeals for the Seventh Circuit unanimously affirmed the decision of the Board. However, upon rehearing *en banc,* a majority of the court (Chief Judge Hastings and Judges Kiley and Swygert dissenting) withdrew the prior opinion and *held:* a labor union is guilty of an unfair labor practice under § 8(b)(1)(A) of the Taft-Hartley Act when it fines a member for refusing to participate in an authorized strike action. *Allis-Chalmers Mfg. Co. v. NLRB* (7th Cir. 1966).

Section 8(b)(1)(A) of the Taft-Hartley Act provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . .[4]

The language of § 7 clearly provides that employees have a right to refrain from concerted activity.[5] The question the court addressed itself to in *Allis-Chalmers* was not whether an employee has a right to refuse to strike, which is clearly guaranteed by § 7,[6] but whether imposition of a fine for refusing to strike restrains and coerces a union member in his exercise of rights guaranteed under § 7. Resolution of this question is fraught with conflicting considerations. Historically, a policy of non-intervention in the internal affairs of voluntary associations such as churches, lodges, and labor unions was strictly followed.[7] However, modern evolution of the labor union as a "quasi-public institution" distinguished it from other voluntary associations. Abuses of power by labor organizations created a public reaction resulting in legislation affecting their internal affairs.[8] There are limits, however, to the degree of regulation which will be allowed in the name of public interest. The problem is essentially one of

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1 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1964).
2 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).
3 Allis-Chalmers Mfg. Co., 149 N.L.R.B. No. 10 (1964).
4 61 Stat. 141 (1947) 29 U.S.C. § 158(b)(1)(A) (1964).
5 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964). Section 7 states:
> Employees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities . . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3). . . .

6 NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953); Bell Aircraft Corp., 105 N.L.R.B. 755 (1953).
7 *E.g.,* Mayer v. Journeymen Stone-Cutters' Ass'n, 47 N.J. Eq. 519, 20 Atl. 492 (1890); Thomas v. Musical Mut. Protective Union, 121 N.Y. 45, 24 N.E. 24 (1890). See generally Summers, *Legal Limitations on Union Discipline,* 64 HARV. L. REV. 1049, 1051 (1951).
8 See generally Aaron & Komaroff, *Statutory Regulation of Internal Union Affairs,* 44 ILL. L. REV. 425, 426 (1949).

balancing the conflicting interests of employee freedom and union power.[9] Professor Summers maintains that unions must have power to discipline members by expulsion and fine if they are to face management as a united and effective force.[10] But it is equally important that members be protected from the coercive and arbitrary use of this power by the unions.[11] It is to this situation that Congress responded in the Taft-Hartley Act of 1947.[12]

The majority of the court in *Allis-Chalmers* found no necessity to examine the legislative history of the act, stating "the statutes in question present no ambiguities whatsoever. . . ."[13] The main thrust of the majority opinion was an affirmation of the plain meaning of the language of § 8(b)(1)(A).[14] It is submitted, however, that the language of a statute purporting to guarantee employee freedom to engage in or refuse to engage in concerted activity while at the same time preserving union authority to discipline members cannot be summarily dismissed as unambiguous. On the contrary, as Judge Swygert stated in his dissenting opinion, "words generally have different shades of meaning, and the dominant meaning — the one the legislative body intended — can often be ascertained only by considering the process out of which it evolved."[15]

To determine what forms of union conduct Congress intended to declare unlawful under § 8(b)(1)(A), it is necessary to ascertain what is meant by the terms "restrain or coerce" when applied to union conduct.[16] Though by no means conclusive, the legislative history of the act sheds some light on this question. The NLRB's view is that "the legislative history strongly suggests that Congress was interested in eliminating physical violence and intimidation by the unions or their representatives, as well as the use by unions of threats of economic action against individuals in an effort to compel them to join."[17] This view is buttressed by the statement of an ardent supporter of the Taft-Hartley Act, Senator Ball: "we are not trying to interfere with the internal affairs of a union which is already organized. All we are trying to cover is the

9 "The Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck. . . ." United Bhd. of Carpenters v. NLRB, 357 U.S. 93, 99-100 (1958). See NLRB v. Drivers Local 639 (Curtis Bros.), 362 U.S. 274, 280 (1960); NLRB v. Truck Drivers Local 449, 353 U.S. 87, 96 (1957). See generally 1 THE LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, 295 (1948) [hereinafter referred to as LEGIS. HIST.].

10 Summers, *supra* note 7, at 1049.

11 See generally Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 834-35 (1960); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 YALE L.J. 1327 (1958).

12 Twelve years later, Congress was still trying to complete this task in the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519 (1959), 29 U.S.C. § 401 (1964).

13 Allis-Chalmers Mfg. Co. v. N.L.R.B. (7th Cir. 1966).

14 *Ibid.*

15 *Ibid.*

16 This question is not a new one. In a case coming before the NLRB soon after the passage of the Taft-Hartley Act, the Board said, "The Act contains no affirmative definition of the terms 'restraint' and 'coercion' as they are used in Section 8(b)(1). . . ." Sunset Line & Twine Co., 79 N.L.R.B. 1487, 1504 (1948).

17 National Maritime Union of America, 78 N.L.R.B. 971, 985 (1948), *aff'd*, 175 F.2d 686 (2d Cir. 1949); *rev'd in part*, Alloy Mfg. Co., 119 N.L.R.B. 307 (1957). See Curtis Bros., 362 U.S. 274, 287, 290 (1960). *But cf.* PETRO, HOW THE NLRB REPEALED TAFT-HARTLEY 51 (1958).

coercive and restraining acts of the union in its effort to organize unorganized employees."[18]

Congress never specifically addressed itself to the problem of a union fining members who refuse to strike. In the congressional debates, when proponents of the act indicated what type of conduct would be circumscribed, they referred to forms of economic coercion which amounted to threats to a worker's job security.[19] Thus, the legislative history indicates that imposing fines for violating an internal union rule requiring members to participate in strike actions was not intended to be classified as an unfair practice under § 8(b)(1)(A).

Before turning to the judicial interpretations of § 8(b)(1)(A), an important distinction must be made. While § 7 preserves an area of free action for the employee, it is clear that his freedom to engage in or refrain from concerted action will often be limited because of his status as a union member. It is important to recognize the distinction between a worker's rights and duties as an employee and his rights and duties as a member of a labor organization — the two are entirely distinct. By working for an employer, the employee enters into a relationship with certain attendant rights and duties. An entirely different relationship arises when an employee freely chooses to join a union. He then assumes the responsibilities of a member of that organization, subjecting himself to its rules and regulations.[20]

In yielding his power to bargain directly with the employer as a consequence of joining the union, the member voluntarily restricts his § 7 freedom. The union representative, acting for the members in arriving at a compromise in a collective bargaining negotiation, exercises a degree of choice and discretion which is denied to the individual member.[21] While members will ultimately be called upon to ratify the action of their representative, an individual member gives up his freedom to bargain directly with the employer. Once the majority votes for union representation, individual contracts with the employer will not be allowed to surmount or defeat collective agreements.[22] Often, an employee's right to strike, guaranteed by § 7, will be waived in a collective bargaining agreement even though the employee did not vote for the agreement.[23]

18 2 LEGIS. HIST. 1200. For other statements of Senator Ball concerning the scope of the Act, see 2 LEGIS. HIST. 1018—20; 2 LEGIS. HIST. 1141. For relevant statements by Senator Taft, see 2 LEGIS. HIST. 1205-06.

19 See Curtis Bros., 362 U.S. 274, 286 (1960). The Supreme Court has been cautious, absent clear statutory language, in interpreting labor legislation so as to curtail the rights of unions. But "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions." NLRB v. Insurance Agents' Union, 361 U.S. 477, 498 (1960).

20 In NLRB v. United Auto. Workers, 320 F.2d 12 (1st Cir. 1963), the court accepted this distinction when it said, "At this point [when he becomes a member] . . . the employee takes off the protective mantle of Section 7's 'refrain' provision and renders himself amenable to the reasonable internal regulations of the organization with which he chooses to cast his lot. . . ." *Id.* at 15. See Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954). In his dissent in Allis-Chalmers, Chief Judge Hastings reasoned,

> It does not necessarily follow that *an employee who is a union member* may claim the same right of self-organization for collective bargaining purposes and at the same time claim the right to belong to the labor organization on his own terms.

Allis-Chalmers Mfg. Co. v. NLRB (7th Cir. 1966).

21 Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

22 J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

23 Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1955). See Humphrey v. Moore, 375 U.S. 335 (1964).

Section 8(b)(1)(A) protects the union's right to *prescribe its own rules with respect to the acquisition or retention of membership.* It has been seen that a worker who joins a union assumes new obligations and duties. Underlying this is the assumption that there is an area of action reserved to the unions in which they may properly discipline members who fail to fulfill their membership obligations.[24] In *Minneapolis Star & Tribune,*[25] the union fined a member five hundred dollars for failing to picket. The Board held that this fine was a form of coercion, but not the type of coercion Congress intended to prohibit. The Board stated that imposition of a fine for a member's refusal to abide by union rules is not, in itself, proscribed activity. In *NLRB v. Amalgamated Local 286, UAW,*[26] no violation of § 8(b)(1)(A) was found where union members were threatened with loss of insurance coverage for failure to pay a union-imposed fine growing out of their refusal to make a mandatory contribution to the union building fund. The court reasoned that insurance coverage was a benefit attendant to the employee's membership and that withdrawal of such benefits by the union was wholly within its "right to regulate its internal affairs."[27] In *Wisconsin Motors,*[28] the union fined members for exceeding a production quota ceiling. The Board upheld the fine as a proper exercise of union power on the grounds that the employees, by joining the union, elected to subject themselves to its rules and regulations. The Board stated, "[I]nternal union disciplines were not among the restraints intended to be encompassed by the section."[29]

However, the union's power to direct its own internal affairs is not unlimited. In *Charles Skura,*[30] the Board held that fining a union member who filed a charge against the union with the NLRB before exhausting all internal remedies violated § 8(b)(1)(A). In that case, the union argued that requiring a member to exhaust all internal remedies open to him was a legitimate exercise of the union's right to regulate its internal affairs. The Board rejected this argument, holding that the overriding public interest in seeing that every union member has ready access to the NLRB made the union's conduct unfair.[31]

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24 "The proviso of Section 8(b)(1)(A) of that act . . . is a clear indication that Congress did not intend the Board's policing of union unfair labor practices to encompass general supervision of intra-union administration." NLRB v. Local 3, Retail, Wholesale & Dep't Store Union, 216 F.2d 285, 288 (2d Cir. 1954). See *e.g.,* International Ass'n of Machinists v. Gonzales, 356 U.S. 617 (1958); Parks v. International Bhd. of Elec. Workers, 314 F.2d 886 (4th Cir.), *cert. denied,* 372 U.S. 976 (1963); American Newspaper Publishers Ass'n v. NLRB, 193 F.2d 782 (7th Cir. 1951), *aff'd,* 345 U.S. 100 (1953). See also Sugerman, *The Rights of the Individual Employee Under the Taft-Hartley Act,* N.Y.U. 3RD CONFERENCE ON LABOR LAW 357-58 (1950).

25 109 N.L.R.B. 727 (1954).

26 222 F.2d 95 (7th Cir. 1955).

27 *Id.* at 98.

28 Wisconsin Motors Corp., 145 N.L.R.B. 1097 (1964), *sub nom.,* UAW Local 283 v. Scofield, 382 U.S. 205 (1965). (Court limited its consideration to questions of jurisdiction and denied the union leave to intervene). *Contra,* Associated Home Builders of Greater East Bay v. NLRB, 352 F.2d 745 (9th Cir. 1965). The question of production ceiling quotas is treated in 39 N.Y.U.L. REV. 558 (1964).

29 *Id.* at 1100.

30 Operating Eng'rs, Local 138 (Charles Skura), 148 N.L.R.B. 679 (1964). See generally note, 40 NOTRE DAME LAWYER 86, 96 (1964).

31 *Id.* at 683. In H. B. Roberts, 148 N.L.R.B. 674 (1964), the Board relied on the *Skura* principle in finding an unfair labor practice where the union fined a member for filing a charge against the union before exhausting all internal union remedies. *Cf.* NLRB v.

In *Great Atl. & Pac. Tea Co.*,[32] the union had an employee removed from his job for failure to tender his delinquent dues and to pay a fine imposed for this delinquency under a union security agreement. The NLRB held that "assessments and fines imposed for various reasons are not 'periodic dues' within the meaning of the Act and that their imposition restrains and coerces employees in violation of § 8(b)(1)(A) of the Act."[33] The crux of the unfair labor practice in the *Great Atl. & Pac. Tea Co.* case was that the member's employment was conditioned upon payment of the fine. The Board had no quarrel with imposition of the fine, since this grew out of a strictly internal affair. However, as soon as the union entered the sphere of the employer-employee relationship by attempting to affect the member's job status, it committed an unfair labor practice. In *Union Starch & Refining Co. v. NLRB*,[34] the court declared that failure to conform to a union regulation may not result in the employee's discharge from employment except where he has failed to pay periodic dues or initiation fees under § 8(b)(2) of the act.[35] Where an employee was fined five hundred dollars for dual unionism, the court held that the union's efforts to have him discharged from his job for refusing to pay the fine restrained and coerced the employee in the exercise of his right to refrain from concerted activity.[36] The same result obtained when the union sought an employee's discharge for failure to pay a fine resulting from his non-attendance at union meetings[37] and where the fine resulted from the employee's refusal to picket.[38]

These cases indicate that while imposition of a fine is not "economic coercion" *per se*, the moment the union seeks to affect its members' employment status to coerce payment, it violates § 8(b)(1)(A).[39] A recent Board decision states this principle clearly. In *Tawas Tube Prods.*,[40] the local union expelled a member for filing and supporting a decertification petition against the international union. In finding no violation of § 8(b)(1)(A), the Board emphasized two points: there was no attempt by the union to affect the

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Die & Tool Makers Lodge 113, 231 F.2d 298 (7th Cir. 1956); Virginia-Carolina Freight Lines, Inc., 155 N.L.R.B. No. 52 (1965).

32 110 N.L.R.B. 918 (1954).

33 *Id.* at 922.

34 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951).

35 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1964).

36 NLRB v. International Ass'n of Machinists, 203 F.2d 173 (9th Cir. 1953).

37 Electric Auto-Lite Co., 92 N.L.R.B. 1073 (1950), *enforced*, 196 F.2d 500 (6th Cir. 1952); Packinghouse Workers Union, 142 N.L.R.B. 768 (1963).

38 Eclipse Lumber Co., 95 N.L.R.B. 464 (1951), *enforced*, 199 F.2d 684 (9th Cir. 1952). *Cf.* NLRB v. Bell Aircraft Corp., 206 F.2d 235 (2d Cir. 1953).

39 In NLRB v. Miranda Fuel Co., 326 F.2d 172 (2d Cir. 1963), the court rejected the theory that a union action which *merely* adversely affects the terms or conditions of employment of a member is an unfair labor practice. In this case, the union sought to have an employee's seniority reduced for a minor violation of a collective bargaining agreement, though his action was authorized by the company. The court said, "discrimination for reasons wholly unrelated to 'union membership, loyalty, the acknowledgment of union authority, or the performance of union obligations,' is not sufficient to support findings . . ." of an unfair labor practice. *Id.* at 175. For a further discussion of *Miranda*, see 39 NOTRE DAME LAWYER 617 (1964). See generally Figueroa v. National Maritime Union 342 F.2d 400 (2d Cir. 1965).

40 151 N.L.R.B. No. 9 (1965).

employee's job status; and the basis of the expulsion was within a legitimate area of union discipline.[41]

One case disagrees with this analysis. The issue presented in *Allen Bradley Co. v. NLRB*[42] was whether the company could legitimately insist on bargaining with the union over the question of restricting the union's power to discipline members who refuse to strike. The court stated:

> Section 7 protects an employee in his right to refrain from concerted activities and this includes, of course, the right to refuse to participate in or recognize a strike. Coercion or interference with that right, whether by the employer or by the union, is made an unfair labor practice by the terms of the Act.[43]

In very plain language, the *Allen Bradley* court made it clear that it considered imposition of a fine against a member who refuses to strike an activity unrelated to the *acquisition or retention of membership* and, as such, an unprotected union activity under § 8(b)(1)(A).[44] It is significant, however, that in citing the authoritative basis for its opinion, the majority in *Allis-Chalmers* could find only this one case squarely in its corner. Nevertheless, the *Allen-Bradley* decision was viewed as dispositive of the issue.[45] The dissent, however, rejected the language relied on by the majority as mere "gratuitous statements" which were not controlling.[46] The authority of *Allen-Bradley* is indeed open to attack because the issue in that case concerned contract negotiation. The court's remarks relating to the union's right to fine a member for refusing to strike were only collateral to the question which the court was required to decide. And, as in *Allis-Chalmers,* the court cited no authority to substantiate its remarks.

The legislative history of the Taft-Hartley Act strongly indicates that the type of pressure used by the union in *Allis-Chalmers* was not "coercive" as defined by § 8(b)(1)(A). In addition, courts have been cautious in intruding upon the union's right to regulate its internal affairs. Underlying this is the distinction between a worker's rights and duties relative to his employer and the separate rights and duties which a worker assumes when he becomes a union member. It is here that a special relationship arises between the worker and the union, subjecting the worker to the union's right to control its internal affairs. As long as the union does not intrude into the sphere of the employee-employer relationship by seeking to affect the member's job status, the union may discipline the member for a breach of his duty to the union.

In *Allis-Chalmers,* the union made no attempt to affect the members'

41 *Ibid.* The Board distinguished this case from *Skura,* 148 N.L.R.B. 679 (1964), finding no overriding policy interest in permitting a member to question his union's certification. On the contrary, it took the position that the union's very existence was being threatened by the member's conduct. Thus, strong action by the union would be justified. Whether or not the Board validly distinguished this case from *Skura,* it still accurately illustrates a test used to ascertain the presence of *restraint or coercion.* See generally Cox, *supra* note 11, at 835.

42 286 F.2d 442 (7th Cir. 1961), *reversing* 127 N.L.R.B. 44 (1960).

43 *Id.* at 445.

44 "It [the union] goes beyond any permissible limit when it imposes a sanction upon a member because of his exercise of a right guaranteed by the Act." *Id.* at 446.

45 Allis-Chalmers Mfg. Co. v. N.L.R.B. (7th Cir. 1966).

46 *Ibid.*

employment status. The members were fined for refusing to participate in a union activity which was required of all members by union rules. This is not a restraint of the members' exercise of their § 7 rights to refrain from concerted activity, because upon joining the union they elected to be subjected to reasonable internal rules. Undeniably, by allowing unions to fine members under their right to regulate internal affairs, we are, in fact, reducing the freedom which members may effectively exercise. In most instances, a fine or the threat of a fine will be sufficient to dissuade a union member from effectively exercising his rights preserved by § 7. But Congress has opted for a national labor policy which allows labor organizations to protect their bargaining power from fragmentation. Under this existing labor policy, unions should have the right to fine members who refuse to participate in a strike action.

John Thomas Harty

ANTITRUST — LIMITATION OF ACTIONS — PENDENCY OF GOVERNMENT CASE SUSPENDS RUNNING OF LIMITATIONS IN PRIVATE ACTION WHEN ALLEGATIONS OF BOTH CASES ARE SUBSTANTIALLY THE SAME UNDER SECTION 5 (B), CLAYTON ACT. — On September 28, 1956, plaintiffs, a partnership engaged in wholesale distribution of refined petroleum products and one of its partners,[1] brought an action for treble damages under § 4 of the Clayton Act[2] in the Federal District Court for the Southern District of California. They alleged injury to their business proximately resulting from a combination or conspiracy among defendants — seven companies engaged in producing, refining and marketing gasoline and other hydrocarbon substances in interstate commerce — to exclude and prevent plaintiffs from engaging in the wholesale distribution of gasoline in Southern California in violation of §§ 1[3] and 2[4] of the Sherman Act. Defendants asserted, by way of an affirmative defense, that plaintiffs' action was barred by the California one-year statute of limitations applicable to suits for statutory penalties or forfeitures.[5] Plaintiffs conceded

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1 A separate trial on the question of whether one of two partners of a dissolved partnership may bring a suit in the partnership name without joining the other party as a party plaintiff held: it was allowed since the prosecution of a treble-damage suit for claimed injury to the partnership business allegedly caused by violation of the federal antitrust laws is an act appropriate for winding up partnership affairs within the California code. Leh v. General Petroleum Corp., 165 F. Supp. 933 (S.D. Cal. 1958), noted in 73 HARV. L. REV. 411 (1959).

2 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964).

3 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. § 1 (1964).

4 26 Stat. 209 (1890), as amended, 69 Stat. 282 (1955), 15 U.S.C. § 2 (1964).

5 CAL. CODE CIV. PROC. § 340(1) (West Supp. 1965). Before a uniform four year federal statute of limitations was added to the Clayton Act in 1955, state limitation provisions were used. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); Hoskins Coal & Dock Corp., v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951), *cert. denied,* 342 U.S. 947 (1952). These statutes varied from one to ten years in length. Thus, success of plaintiff's suit rested on the fortuity of location and local interpretation of statutes which were never meant to govern federal antitrust litigation. Note, *Antitrust Enforcement By Private Parties: Analysis of Developments In the Treble Damage Suit,* 61 YALE L.J. 1010, 1030 (1952). Once it was determined that the state limitation provision governed, it became a question of whether the action was characterized as a penalty, with a short limitation period, or an action on a statutory liability other than a penalty, with a longer period. The weight of authority considers the action compensatory. *E.g.,* Bertha Bldg. Corp. v. National Theatres Corp., 269 F.2d 785 (2d Cir. 1959), *cert. denied,* 361

that their cause of action accrued no later than February 1954, and that the four-year limitation provision added to the Clayton Act in 1955,[6] was not applicable to a right of action accruing in 1954. But plaintiffs contended that the governing provision was the California three-year statute of limitations respecting actions on a statutory liability other than a penalty,[7] and that in any event the running of the statute of limitations was suspended by § 5(b) of the Clayton Act,[8] due to a civil antitrust proceeding commenced by the United States in 1950 which was still pending when plaintiffs filed their complaint.[9] The district court upheld the defense of limitations and dismissed the complaint, holding that the one-year statute governed.[10] In addition, the court held the plaintiffs were not entitled to the benefit of § 5(b) because the period of the alleged conspiracy in their case differed from the period of the alleged conspiracy in the Government proceeding, and the defendants in both cases were not the same; therefore, this action was not "based in whole or in part on any matter complained of in said proceeding."[11] The United States Court of Appeals for the Ninth Circuit affirmed.[12] The United States Supreme Court granted certiorari limited to the question of the applicability of § 5(b).[13] The Court, in reversing, *held:* a comparison of the complaints in the Government's civil antitrust case and in the instant case disclosed that this case was based in part on matters of which the Government complained, so that the pendency of the Government case suspended the running of the period of limitations in the case at bar, notwithstanding the fact that there were differences in the defendants named in the two cases and in the period of conspiracies alleged. *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965).

The Supreme Court has repeatedly recognized "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action."[14] It has also stated,

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U.S. 960 (1960); Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 193 F. Supp. 401 (S.D. N.Y. 1961). See Vold, *Are Threefold Damages Under The Anti-Trust Act Penal Or Compensatory?* 28 Ky. L.J. 117 (1940). See also Note, *Federal Statutes Without Limitations Provisions,* 53 COLUM. L. REV. 68 (1953); Note, *Treble Damage Time Limitations: Federalism Rampant,* 60 YALE L.J. 553 (1951).

6 Clayton Act § 4B, 69 Stat. 283 (1955), 15 U.S.C. § 15(b) (1964). This section was enacted June 7, 1955 and took effect January 7, 1956. Treble-damage suits whose cause of action accrued prior to 1956 are at the present time quite rare.

7 CAL. CODE CIV. PROC. § 338(1) (West Supp. 1965).

8 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16(b) (1964). Section 5(b) states:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

9 United States v. Standard Oil Co. of California, Civil No. 11584-C (S.D. Cal. 1958) (consent judgment).

10 Leh v. General Petroleum Corp., 208 F. Supp. 289 (S.D. Cal. 1962).

11 *Ibid.*

12 Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964).

13 379 U.S. 877 (1964).

14 Lawlor v. National Screen Serv. 349 U.S. 322, 329 (1955).

> Congress has, by legislative fiat, determined that such prohibited activies are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public.[15]

Thus, "as between enforcement action by government agencies and by private parties, there are a number of reasons to believe that action by private parties is both more desirable and more effective."[16] The effectiveness of the role that private action plays in the enforcement of the antitrust laws was recognized by Congress in passing § 4 of the Clayton Act which allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ." to sue for treble damages, the cost of the suit, and a reasonable attorney's fee.[17] This section has spawned

> a curious combination of public regulatory and private compensatory law. While parties sue to enforce federal antitrust policy, recovery hinges upon a showing that violations cause injury to plaintiffs. Even where a valid cause of action exists, defenses common to civil litigation may bar suit. . . .[18]

Thus, Congress, in enacting §§ 4 and 16 of the Clayton Act, had a much broader goal than merely making provision for alleviation of individual grievances resulting from violations of the antitrust laws. Rather, it was the legislative intent that an individual, by securing redress for himself, would thereby supplement governmental enforcement in the antitrust field.[19]

Private litigation has increased tremendously since the end of World War II. No doubt this increase can be explained by the potential financial rewards of a successful suit.[20] However, a disadvantage resulting from this seemingly advantageous means of private enforcement is the fact that "big money makes substantial law out of what may have appeared to be small questions. . . . The multiplication of big money by three draws into issue all manner and maneuver of the private antitrust suit."[21]

During the past few years, a direct result of this tendency to overempha-

15 Radovich v. National Football League 352 U.S. 445, 453-54 (1957).

16 Loevinger, *Private Action — The Strongest Pillar Of Antitrust,* 3 ANTITRUST BULL. 167, 168 (1958); see *e.g.,* Bruice's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); United States v. Standard Ultramarine & Color Co., 137 F. Supp. 167 (S.D.N.Y. 1955).

17 38 Stat. 731 (1914), 15 U.S.C. § 15 (1964), superseding similar provisions in the Sherman Act, 26 Stat. 210 (1890) and 28 Stat. 570 (1894) which were restricted in operation to the particular act cited. Private suits for injunction are authorized by § 16 of the Clayton Act, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964). For an excellent discussion of the role of the private treble-damage suit in antitrust enforcement, see Note, *Antitrust Enforcement By Private Parties: Analysis of Developments In the Treble Damage Suit,* 61 YALE L.J. 1010 (1952). Incorporated cities, Chattanooga Foundry Works v. Atlanta, 203 U.S. 390 (1906), and states, State of Georgia v. Evans, 316 U.S. 159 (1942), but not the United States, United States v. Cooper Corp., 312 U.S. 600 (1941), are "persons" within the meaning of Clayton Act § 4 and can sue for treble damages.

18 Note, *Antitrust Enforcement By Private Parties: Analysis Of Developments In The Treble Damage Suit,* 61 YALE L.J. 1010, 1011 (1952).

19 MacIntyre, *The Role Of The Private Litigant In Antitrust Enforcement,* 7 ANTITRUST BULL. 113 (1962).

20 Plaintiffs' amended complaint in Leh stated damages in the sum of $245,000.00 which trebled results in a potential recovery of $735,000.00. Appendix to Brief for Respondents, p. 23.

21 Matteoni, *An Antitrust Argument: Whether A Federal Trade Commission Order Is Within The Ambit Of The Clayton Act's Section 5,* 40 NOTRE DAME LAWYER 158 (1965).

size small points of law has been extensive litigation over the interpretation of both paragraphs of § 5 of the Clayton Act.[22] "The primary intent of that section is to make the private litigant's weapon more effective"[23] by easing the burden of maintaining private suits. Section 5(a) allows a final judgment or decree rendered in a suit by the United States and holding a defendant in violation of the antitrust laws to be prima facie evidence in a private antitrust action against such defendant "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."[24] This does not relieve the private plaintiff of the necessity of preparing his proof nor does it shift the burden of proof; the judgment is admissible simply as an evidentiary item that may be rebutted. However, once a judgment is introduced, its influence on juries may go far beyond the prima facie effect contemplated by the statute.[25]

One impediment to the use of § 5(a) by the private litigant is that it is usually unavailable since most Government actions result in nolo contendere pleas or consent decrees before testimony is taken, and thus do not provide judgments that qualify under § 5(a) since these types are exempted by the concluding proviso to the section.[26] Congress hoped that by relieving the private litigant of the necessity of again proving the facts in the government's case, that the overwhelming handicap in favor of monopoly would be reduced, thereby

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22 Section 5(a), 38 Stat. 731 (1914), as amended, 69 Stat. 283 (1955), 15 U.S.C. § 16(a) (1964), provides:

> A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

For text of § 5(b), see note 8 *supra.*

23 Matteoni, *supra* note 21, at 158. Section 5 of the Clayton Act was adopted in response to President Wilson's 1914 plea to Congress to enact a law designed to make it easier for antitrust victims to collect damages through private lawsuits, since preparing an antitrust case against a major corporate defendant was a larger task than most injured persons could undertake. He recommended that Congress "agree in giving private individuals . . . the right to found their [antitrust] suits for redress upon the facts and judgments proved and entered in suits by the Government" and also "that the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 CONG. REC. 1964 63d Cong., 2d Sess. (1914). See also Dix, *Decrees And Judgments Under Section 5 Of The Clayton Antitrust Law,* 30 GEO. L.J. 331 (1942).

24 In commenting on the purposes to be served by § 5(a), the Supreme Court said: "We think that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951). Prior to passage of the Clayton Act, a judgment from a Government action was not admissible in a subsequent private suit. Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117 (C.C.E.D.N.C. 1910).

25 Note, *Antitrust Enforcement By Private Parties: Analysis Of Development In The Treble Damage Suit,* 61 YALE L.J. 1010, 1040 (1952).

26 Consent decrees are not admissible by the terms of § 5(a). 5 U.S.C. § 16(a) (1964). Courts have treated pleas of nolo contendere as "consent decrees" for § 5(a) purposes. See, *e.g.,* Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366 (D. Minn. 1939), *aff'd,* 119 F.2d 747 (8th Cir.), *cert. denied,* 314 U.S. 644 (1941). As to whether a guilty plea is to be considered a "consent judgment" within the proviso, see Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964); N.W. Elec. Power Co-op. v. General Elec. Co., 30 F.R.D. 557 (W.D. Mo. 1961). *Contra,* City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964).

achieving a more effective enforcement of the antitrust laws. Subsequent interpretations of § 5(a) by the courts defeated this congressional policy. The section was designed to be merely a rule of evidence — the facts proved in the Government case were to be accepted as prima facie for the private suit — but it has been misapplied as an estoppel statute depriving litigants of the evidentiary benefits it was intended to provide. The unfortunate effect of these interpretations, limiting § 5(a) as though it were merely an estoppel statute, has been to almost totally reduce its usefulness as an implement of antitrust policy.[27]

In contrast to the somewhat limited scope of § 5(a), § 5(b) presents a totally independent and different kind of statutory aid to the private litigant.[28] Section 5(b) provides for the suspension of the applicable statute of limitations during the pendency of a prior Government proceeding and for one year thereafter in every private cause of action arising under the antitrust laws as long as the private action is "based in whole or in part on any matter complained of in" the Government proceeding.[29] Whereas § 5(a) is unavailable if a Government prosecution ends in a consent decree or if a nolo contendere plea is entered[30] and permits the use of Government judgments and decrees as prima facie evidence only as to matters actually decided in the Government suit, the tolling provision suspends the statute of limitations during the pendency[31] of the Government prosecution as to matters complained of "whether or not they are actually decided."[32]

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27 Hardy, *The Evisceration of Section 5 of the Clayton Act,* 49 GEO. L.J. 44 (1960). See also Note, *Government Judgments as Evidence in Private Anti-Trust Proceedings: Section 5 of the Clayton Act,* 46 ILL. L. REV. 765 (1951).

28 The committee reports on the 1955 amendment to Section 5, plainly intimated a broader reason for tolling the statute of limitations. By 1955, the Supreme Court had pointed to the limited practical value of the prima facie evidence to a private suitor. . . . The real importance of government proceedings that accrues today to private suitors is the availability to them of the government's case against the defendant. Section 5(b) enables 'a plaintiff to take advantage of facts uncovered' as a result of the government proceedings.

New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 359 (3d Cir. 1964), *aff'd,* 381 U.S. 311 (1965).

29 15 U.S.C. § 16(b) (1964). There are also other grounds upon which the statute of limitations may be suspended. Thus, the fraudulent concealment of the existence of a cause of action based upon § 4 of the Clayton Act suspends the four-year statute of limitations provided in §§ 4B and 5(b) of the Act. Westinghouse Elec. Corp. v. City of Burlington, 326 F.2d 691 (D.C. Cir. 1964); Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575 (9th Cir. 1964); Allis-Chalmers Mfg. Co. v. Commonwealth Edison Co., 315 F.2d 558 (7th Cir. 1963); Public Serv. Co. of New Mexico v. General Elec. Co., 315 F.2d 306 (10th Cir.), *cert. denied,* 374 U.S. 809 (1963); Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962), *cert. denied,* 373 U.S. 909 (1963); Kansas City v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 373 U.S. 914 (1963).

30 See note 26 *supra.*

31 For purposes of § 5(b), a Government suit ceases to pend and the statute of limitations begins to run again "when the violations charged in that suit have been resolved and accorded finality by Court decision." Tague v. Balaban, 146 F. Supp. 356, 361 (N.D. Ill. 1956). See Grengs v. Twentieth Century Fox Film Corp., 232 F.2d 325 (7th Cir.), *cert. denied,* 352 U.S. 871 (1956); Valuskis v. Loew's Inc., 140 F. Supp. 34 (S.D. Cal. 1956); Leonia Amusement Corp. v. Loew's Inc., 117 F. Supp. 747 (S.D.N.Y. 1953). A consent decree has been held not to terminate the "pendency" of a Government suit. Twentieth Century Fox Film Corp. v. Brookside Theatre Corp., 194 F.2d 846 (8th Cir.), *cert. denied,* 343 U.S. 942 (1952); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1950). *Contra,* Sun Theatre Corp. v. R.K.O. Radio Pictures, 213 F.2d 284 (7th Cir. 1954); Manny v. Warner Bros. Pictures, Inc., 116 F. Supp. 807 (S.D. Cal. 1953).

32 New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 357 (3d Cir. 1964), *aff'd,* 381 U.S. 311 (1965).

The initial determination of the applicability of § 5(b) is limited to a comparison of the two complaints — the Government's and the private litigant's — on their face.[33] "Obviously suspension of the running of the statute of limitations pending resolution of the government action may not be made to turn on whether the United States is successful in proving the allegations of its complaint."[34] "Otherwise the plaintiff in a private party case would never know at what stage of a Government case the tolling began. A plaintiff should not have to guess at his peril the intention underlying the normal meanings of words."[35] Thus the "test is not the relief ultimately granted, but what the government complained of, regardless of whether the charges are ever supported and despite the fact that they may have been completely without any foundation."[36] "Equally, the availability of § 5(b) to the private claimant may not be made dependent on his ability to prove his case, however fatal failure may prove to his hopes of success on the merits."[37]

Until very recently there had been considerable authority for the view that § 5(b) was available only when § 5(a) was, and that the two sections were co-extensive.[38] Thus, § 5(b) could operate to suspend the statute of limitations only when the prior Government decree would be potentially admissible as prima facie evidence under the conditions imposed by § 5(a).[39] The potentially harmful effect of viewing these two sections as interdependent was expurgated recently by the United States Supreme Court in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing*[40] in its decision on whether administrative (Federal Trade Commission) proceedings toll the statute of limitations under § 5(b) to the same extent as do judicial proceedings.

In *Proper v. John Bene & Sons*[41] it was held that FTC orders could not serve as prima facie evidence in a subsequent private action. These proceedings were not considered civil or criminal proceedings brought by or on behalf of the United States as required by § 5(a) because the FTC was an investigatory rather than a judicial body.[42] When the question of an FTC proceeding as tolling the statute of limitations was finally advanced in the courts, a majority,[43]

33 Leh v. General Petroleum Corp., 382 U.S. 54, 65 (1965).
34 *Ibid.*
35 United Banana Co. v. United Fruit Co., 172 F. Supp. 580, 589 (D. Conn. 1959).
36 Radio Corp. of America v. Rauland Corp., 186 F. Supp. 704, 709-10 (N.D. Ill. 1956).
37 Leh v. General Petroleum Corp., 382 U.S. 54, 66 (1965).
38 Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964); Steiner v. Twentieth Century Fox Film Corp., 232 F.2d 190 (9th Cir. 1956); Sun Theatre Corp. v. R.K.O. Radio Pictures, Inc., 213 F.2d 284 (7th Cir. 1954); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 223 F. Supp. 967 (D. Me. 1963); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963), *aff'd,* 346 F.2d 661 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965); Momand v. Universal Film Exch., Inc., 43 F. Supp. 996 (D. Mass. 1942), *aff'd,* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949).
39 Since judgments there could not serve as prima facie evidence here, those proceedings cannot toll the statute of limitations for the benefit of this plaintiff. This is clear from the juxtaposition of the two paragraphs which together constitute Section 5 of the Clayton Act.
Momand v. Universal Film Exch., 43 F. Supp. 996, 1012 (D. Mass. 1942).
40 381 U.S. 311 (1965).
41 295 Fed. 729 (E.D.N.Y. 1923).
42 *Ibid.*
43 Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725 (8th Cir. 1964); Farmington Dowel Prods. Co. v. Forster Mfg. Co., 223 F. Supp. 967 (D. Me. 1963); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 223 F. Supp. 712 (E.D. Tenn. 1963), *aff'd,* 346 F.2d 661 (6th Cir.), *cert. denied,* 382 U.S. 904 (1965).

by extending *Proper*'s literal reading of the requirements for admissibility, held that FTC proceedings could not toll the statute of limitations either. The Supreme Court, in *Minnesota Mining*, held that regardless of whether FTC proceedings were admissible under § 5(a) or not, they did operate to toll the statute of limitations because they are civil proceedings within § 5(b).[44] The court pointed out that differences in the statutory language of the two sections were apparent and suggested that they were not "wholly interdependent."[45] In addition, when the congressional policies underlying the two sections were examined, it became "even more apparent that the applicability of § 5(a) to Federal Trade Commission actions should not control the question whether such proceedings toll the statute of limitations."[46] The need for this severability was demonstrated in the words of District Judge Augelli in *Minnesota Mining:*

> It certainly would seem not to have been the Congressional intent to have plaintiff's rights turn on the fortuitous circumstance of which agency initiated the action. To permit a plaintiff to take advantage of facts uncovered as a result of a Department of Justice proceeding, but not as a result of a Federal Trade Commission proceeding brought under the same statute, does not seem logical.[47]

The interpretation given to § 5(b) by the Court in *Minnesota Mining* is perfectly consistent with the legislature's intent in enacting the section. Whatever ambiguities may be found in the legislative history of the provision as to other questions, "it is plain that in § 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions."[48]

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44 381 U.S. 311 (1964). The Court stated, "Even if we assumed *arguendo* that § 5(a) is inapplicable to Commission proceedings — a question upon which we venture no opinion. . . ." *Id.* at 318. The Court, in holding that an FTC order is within § 5(b), has made it easier to find that a controverted agency command is also within § 5(a). See Matteoni 7 *supra* note 21. The lower court had held that FTC proceedings fulfilled both parts of § 5. New Jersey Wood Finishing v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 357 (3d Cir. 1964). See Rockefeller, *The Supreme Court And The Private Antitrust Plaintiff*, 7 B.C. IND & COM L.R. 279 (1966).

45 *Id.* at 316.

46 *Id.* at 317.

47 New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 216 F. Supp. 507, 510 (D.N.J. 1963).

48 Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 317 (1965). When Congress amended § 5 in 1955 to establish a uniform federal statute of limitations and to enable the government to bring damage suits, it apparently recognized that the legal process of the Government proceeding can uncover much which points the way for the subsequent plaintiff. This is shown by the fact that the amendment suspended the statute of limitations for an additional year beyond the conclusion of the Government case.

As the Senate Report pointed out:

> There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings. . . .

S. REP. No. 619, 84th Cong., 1st Sess. 6 (1955).

The favorable reaction to the use of § 5(b) by private litigants, evidenced by the Court's liberalizing interpretation in *Minnesota Mining,* was bound to evoke further clarifications by the Court on its application. One such construction was given almost immediately in *Leh.* The question presented for the Court's determination was a clarification of the phrase, "based in whole or in part on any matter complained of"[49] in the Government proceeding. Although this phrase seems plain enough, it had received different interpretations as to the degree of specificity with which a private litigant's complaint must mirror that of the Government before the statute of limitations is suspended by operation of § 5(b). This split of authority is yet another example of how big money makes big law.

In *Leh,* the plaintiffs' complaint differed in two significant respects from the complaint in *United States v. Standard Oil Co. of California,*[50] the Government proceeding relied upon to suspend the statute of limitations by the plaintiffs in *Leh.* The Government complaint in *Standard Oil* charged that eight defendants had conspired to restrain and monopolize interstate commerce in the Pacific States area in violation of §§ 1 and 2 of the Sherman Act, beginning in 1936 and continuing until 1950, the date suit was filed.[51] Similarly, plaintiffs' amended complaint in *Leh* also charged a conspiracy to violate §§ 1 and 2 of the Sherman Act. But plaintiffs in *Leh* alleged a conspiracy commencing in 1948 (the year in which they commenced business) and continuing until the filing of the complaint in 1956. In *Leh,* there were also different defendants in the two suits; two of the defendants in the Government proceeding were not named as defendants in the private suit and one additional defendant was named in *Leh* who was not a Government defendant, though dismissed from the case before this litigation commenced. The issue presented for determination was whether this variance between the two suits was substantial enough to deprive the plaintiffs of the use of § 5(b) so as not to toll the statute of limitations.

The courts have uniformly held that the tolling effect of § 5(b) does not extend to defendants who were not parties to the Government action.[52] There was no conflict with this rule in *Leh* since all the named defendants in the private case were also defendants in the prior Government proceeding.[53]

The rule applied by the lower courts in *Leh* which led to dismissal of the complaint was that of the Ninth Circuit as expressed in *Steiner v. Twentieth Century Fox Film Corp.*:[54]

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49 15 U.S.C. § 16(b) (1964).

50 Civil No. 11584-C (S.D. Cal. 1958) (consent judgment).

51 Leh v. General Petroleum Corp., 382 U.S. 54, 60 (1965).

52 Sun Theatre Corp. v. R.K.O. Radio Pictures, 213 F.2d 284 (7th Cir. 1954); Charles Rubenstein, Inc. v. Columbia Pictures Corp., 176 F. Supp. 527 (D. Minn. 1959), *aff'd,* 289 F.2d 418 (8th Cir. 1961); Levy v. Paramount Pictures, Inc., 104 F. Supp. 787 (N.D. Cal. 1952); Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446 (D. Utah 1950); Momand v. Universal Film Exch., 43 F. Supp. 996 (D. Mass. 1942), *aff'd,* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 (1949).

53 The one additional defendant in Leh who was not one in the Government suit had been dismissed from the case prior to the ruling on the statute of limitations defense. Leh v. General Petroleum Corp., 382 U.S. 54, 61 n.4 (1965).

54 232 F.2d 190 (9th Cir. 1956).

> General allegations of conduct in violation of the antitrust laws unrelated to the same conduct alleged in a public suit are insufficient to toll the running of a statute of limitations. A greater similarity is needed than that the same conspiracies are alleged. The *same means must be used to achieve the same objectives of the same conspiracies by the same defendants.* A further basis for this holding is the fact that private civil antitrust actions are not founded upon the conspiracy, but rather the overt acts done in furtherance of it causing injury.[55] (Emphasis added.)

This rule was based on the interdependence on § 5(a) and § 5(b) and thus viewed the scope of § 5(b) as determined by the principles of collateral estoppel applicable under § 5(a).[56] Thus, the Court's interpretation of § 5(b) in *Minnesota Mining* "sweeps away much of the foundation for the *Steiner* view . . . of § 5(b)."[57] Even before *Minnesota Mining,* the Ninth Circuit, while holding the *Steiner* test had been met,[58] expressed doubts as to its validity:

> Nor, in view of the disposition which we have made of this matter do we find it necessary to pass upon plaintiff's contention that the *Steiner* case was wrongly decided. The cogent arguments made in support of that contention we leave for determination in some future litigation in which such a decision may be required.[59]

In view of the Court's opinion of the efficacy of § 5(b), expressed so thoroughly in *Minnesota Mining,* it is apparent that the *Steiner* view would not appeal to the Court when a further opportunity to interpret the section was presented. Predictably, the Court accorded more favorable treatment to the Tenth Circuit's rule formulated in *Union Carbide & Carbon Corp. v. Nisley.*[60] When *Nisley* was decided, there was ample authority[61] for construing § 5(a) and § 5(b) as interdependent, but the *Nisley* court did not think that they were "necessarily co-extensive in their frame of reference."[62] It did not view the tolling provisions of § 5(b) as confined to or governed by the eviden-

55 *Id.* at 196. "[I]t is not altogether clear whether *Steiner* holds that a private claim for damages must have in common with a Government proceeding *identical* overt acts on the part of the defendants. . . . [A]t the very least . . . [they] would have to be the same *kind* of acts. . . . Any strict requirement of literal identity . . . would render the statute unworkable in many cases." Wiprud, *Antitrust Treble Damage Suits Against Electrical Manufacturers: The Statute of Limitations and Other Hurdles,* 57 NW. U.L. REV. 29, 45-46 (1962). In applying this rule the lower court in Leh stated: "[T]here were not only different overt acts charged, but different conspiracies, occurring at different times, between different parties." 330 F.2d 288, 301 (9th Cir. 1964).

56 See notes 38 & 39 *supra.*

57 Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

58 Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190 (9th Cir. 1964).

59 *Id.* at 219-20 n.58. The district court in Goldwyn, while granting partial summary judgment for defendants, had held that the Steiner test was not met because there were additional defendants in the private suit, not parties to the Government suit. "Enough has been said to show that the tests of the Steiner case . . . are not satisfied by the Goldwyn complaint." Samual Goldwyn Productions, Inc. v. Fox West Coast Theatres Corp., 146 F. Supp. 905, 908 (N.D. Cal. 1956). The circuit court in Leh recognized that "the Steiner case and this circuit seem to go further than other circuits in holding that the words of the statute 'any matter complained of,' refers to overt acts of the defendants complained of by the United States in its antitrust proceedings, not just the conspiracy behind the overt acts." 330 F.2d 288, 301 n.15 (9th Cir. 1964).

60 300 F.2d 561 (10th Cir. 1961), *petition for cert. dismissed,* 371 U.S. 801 (1963).

61 See cases cited note 38 *supra.*

62 300 F.2d 561, 569 (10th Cir. 1962).

tiary rules of estoppel necessarily prevalent in § 5(a).[63] According to the *Nisley* court, if *Steiner's* interpretation were accepted:

> [A] Section 4 plaintiff would be put to the necessity of bringing suit on the same conspiracy alleged in the government suit, or suffer the bar of the statute as to every overt act not complained of in the government suit. This interpretation would lead to a multiplicity of suits with duplication of proof. It would add to the burdens of the private suitor to the harassment of the defendants. We do not think Congress intended any such result. Rather, we think Section 5(b), as amended, was intended to suspend the running of the statute on a Section 4 claim during the pendency of a government-instituted suit *which complained of all, or a part of* the means relied upon by the private plaintiff to effectuate the same general combination and conspiracy.
>
> These private suits alleged substantially the same conspiracy against the same defendants as in the government suit. They relied upon the same documentary and oral proof to establish the conspiracy, and they also relied "in part" on the same means for the effectuation of the same conspiracy. *There was substantial identity of subject matter,* and this was sufficient to suspend the running of the statute.[64] (Emphasis added.)

There is no doubt that this test of "substantial identity of subject matter" is more commensurate with the legislative purposes behind § 5(b) than the *Steiner* test.[65] If § 5(b) were narrowly construed, a well-advised plaintiff would sue as soon as the filing of the Government suit made it appear that he might have a cause of action. He would not risk the possibility that the statute of limitations would be running against his claim during the pendency of the Government suit. As a consequence, the defendant in the Government suit would likely find that he was a defendant in many private suits brought by plaintiffs anxious to protect their rights of action. This could not be the result which Congress intended.[66]

The Court, in *Leh,* while approving of the *Nisley* view of § 5(b), adopted what might be termed a "plain meaning" view as to how § 5(b) must be interpreted:

> Rather, effect must be given to the broad terms of the statute itself — "based *in whole or in part* on *any matter* complained of" . . . — read in light of Congress' "belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[67]

This newest interpretation of § 5(b) is in accord with the Court's view that

63 *Id.* at 570.
64 *Ibid.*
65 See note 48 *supra.*
66 Brief for Appellant, Leh v. General Petroleum Corp., pp. 13-14. "Tolling the statute of limitations protects the plaintiff while his right of action ripens, and rewards him for withholding his suit at a time when it is the policy of the law to free the defendant from its annoyance." Christensen v. Paramount Pictures, Inc., 95 F. Supp. 446, 454 (D. Utah 1950).
67 Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965). Recently the Court has enumerated the test to be used in determining whether, under a given set of facts, a statute of limitations is to be tolled: "[T]he basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." Burnet v. New York Cent. R.R., 380 U.S. 424, 427 (1965).

"government proceedings are recognized as a major source of evidence for private parties."[68] The Court viewed the disparities between the defendants in the *Standard Oil* case and in *Leh,* and the overlap in the time periods of the two conspiracies as not affecting the substantial identity of the two complaints.[69] "To require more detailed duplication of claims would be to resurrect the collateral estoppel approach declared in *Steiner* and rejected by this Court in *Minnesota Mining.*"[70]

Although the construction of § 5(b) in *Leh* will increase the availability of this section to the private plaintiff, as he pursues his role in the public-private enforcement of the nation's antitrust laws, it will still be incumbent on a plaintiff to allege facts in his complaint with a sufficient degree of particularity so that it may be readily ascertained from a reading of the complaint that his action is based in whole or in part upon a previous Government proceeding. The Court will not be able to

> resort to guesswork or speculation on what the plaintiff did or did not intend. The rules of pleading have not been reduced to the degree where the facts necessary, in whole or in part, to the plaintiff's case are left for surmise and conjecture.[71]

On the other hand, the Court's holding that the allegations of the private plaintiff's complaint may be looked at only for reasons of comparison may have far-reaching implications. "What a private plaintiff may in good faith allege in his complaint is frequently quite different from what he may ultimately prove, even in cases where his proof is sufficient to sustain recovery but for the statutory bar."[72] It is conceivable that an expert pleader could draft a private treble damage complaint in such a way as to make its allegations "nontraversable for purposes of limitations."[73] However, this aspect was only given cursory consideration by the Court in *Leh:*

> Doubtlessly, care must be exercised to insure that reliance upon the government proceeding is not mere sham and that the matters complained of in the government suit bear a real relation to the private plaintiff's claim for relief. But the courts must not allow a legitimate concern that invocation of § 5(b) be made in good faith to lead them into a niggardly construction of the statutory language here in question.[74]

Though the effects of the Court's liberal view of § 5 in particular, and private antitrust litigation in general, remain to be seen — the *Leh* decision,

68 Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 319 (1965). See Bicks, *The Department of Justice and Private Treble Damage Actions,* 4 ANTITRUST BULL. 5 (1959); Loevinger, *Handling a Plaintiff's Antitrust Damage Suit,* 4 ANTITRUST BULL. 29 (1959).

69 Leh v. General Petroleum Corp., 382 U.S. 54, 63-64 (1965). "In suits of this kind, the absence of complete identity of defendants may be explained on several grounds unrelated to the question of whether the private claimant's suit is based on matters of which the Government complained." *Ibid.*

70 Leh v. General Petroleum Corp., 382 U.S. 54, 65 (1965).

71 Tague v. Balaban, 146 F. Supp. 356, 359 (N.D. Ill. 1956).

72 Petition for Rehearing, Leh v. General Petroleum Corp., p. 3.

73 *Ibid.*

74 Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

and its predecessor, *Minnesota Mining,* cannot help but be of benefit to all future treble-damage suits. Now that an FTC order can operate under § 5(b) to suspend the statute of limitations, it is conceivable that "soon an order of one of its sister agencies may also be considered within the scope of section 5."[75]

In view of the clear congressional policy in favor of the integral role that the private plaintiff is to play in the scheme of the public-private enforcement of the antitrust laws, as shown initially in 1914 by the enactment of § 4 of the Clayton Act, and subsequently in the 1955 amendments, the Court's decision in *Leh* must be viewed as a significant contribution to antitrust law.

Clifford A. Roe, Jr.

EVIDENCE — STATUTE GOVERNING MOTION FOR SUPPRESSION OF EVIDENCE SEIZED UNDER A SEARCH WARRANT CONSTRUED TO PERMIT INQUIRY INTO TRUTHFULNESS OF FACTS ALLEGED IN AFFIDAVIT UPON WHICH THE WARRANT WAS ISSUED — Patrolman Ralph secured a search warrant to examine the premises occupied by the defendant to obtain evidence on a violation of a New York Penal Law provision forbidding policy gambling.[1] The warrant was issued, based only on the officer's sworn testimony that a confidential informant had told him of placing bets with the defendant at that location and that the officer himself had observed persons at the defendant's apartment handing him money and slips of paper. The issuing magistrate made no inquiry into the officer's observations or the informant's reliability. The New York City Criminal Court granted the defendant's pretrial motion to suppress evidence alleged by defendant to have been procured through an unlawful search.[2] This resulted from the testimony of defendant's wife and another witness that defendant was not at the apartment at any of the times the officer allegedly observed him. On appeal by the People, the Appellate Term reversed and ordered a new hearing because the Criminal Court had made no findings of fact.[3] The New York Court of Appeals, Chief Judge Desmond giving the opinion, *held:* the New York Code should be construed to permit an inquiry as to whether the search warrant affidavit's statements were perjurious.[4] *People v. Alfinito,* 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

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75 Matteoni, *An Antitrust Argument: Whether A Federal Trade Commission Order Is Within The Ambit of the Clayton Act's Section 5,* 40 NOTRE DAME LAWYER 158, 169 (1965). "Section 11 [of the Clayton Act] permits the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board and the Federal Reserve Board, where antitrust transgressions arise in the areas under their special jurisdiction, to also enforce sections 2, 3, 7 and 8 of the Clayton Act." *Ibid.*

1 N. Y. PEN. LAW § 974-75 (1944).

2 People v. Alfinito, Crim. No. 1340, New York City Mun. Ct. (1964).

3 Decision not reported.

4 Two other issues were present in the case. Assuming that the facts set forth in the affidavit are subject to inquiry, who has the burden of proof on a motion to suppress evidence obtained under a search warrant valid on its face where the defendant alleges that probable cause was lacking? This is a crucial question since a successful motion to suppress the warrant often dooms the prosecution to failure as much of its case often rests upon evidence procured during such a search. While the Supreme Court has never ruled on this point, two important cases do give the outline of the present law on the subject. In Brinegar v. United States, 338 U.S. 160 (1949), which involved a search without a warrant, the Court assumed that the

A search warrant is an order in writing, in the name of the people (or the state or commonwealth, according to local practice), signed by a magistrate, and directed to a peace officer, commanding him to search for personal property and bring it before a magistrate.[5] Search warrants appear to have been unknown at common law.[6] The original search warrants, issued under Charles II,[7] were called writs of assistance. They were blanket authorizations to customs agents for searches of any place on mere suspicion. James Otis referred to them as "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book."[8] As a result of this experience, the fourth amendment was included in the Constitution to prohibit unreasonable searches and seizures.[9]

Government had the burden of proof in showing probable cause, as well as proof necessary to establish guilt. On the other hand, in Jones v. United States, 362 U.S. 257 (1960), which involved a search conducted under a warrant valid on its face, the Court held that the party challenging the validity of the search should carry the burden of proving its invalidity. Without question, the general rule is that the party seeking to invalidate the warrant has the burden of showing that the warrant was in fact invalid, and so any evidence obtained under its authority would be inadmissible. *E.g.*, Anderson v. United States, 344 F.2d 792 (8th Cir. 1965); State v. Coolidge, 106 N.H. 186, 208 A.2d 322 (1965); People v. Catrambone, 41 Misc.2d 282, 245 N.Y.S.2d 742 (Sup. Ct. 1963). To this rule there are certain exceptions. Where the evidence sought to be admitted was seized without a warrant, the burden is on the government, be it state or federal, to establish that there was probable cause for the search. *E.g.*, United States v. Rivera, 321 F.2d 704 (2d Cir. 1963); Plazola v. United States, 291 F.2d 56 (9th Cir. 1961); People v. Allen, 45 Misc.2d 739, 257 N.Y.S.2d 757 (Sup. Ct. 1965). Where the attack is on the grounds that a warrant was issued where there was less than probable cause, it is the defendant who must sustain the burden of proof. Two other exceptions to the general rule exist. Where the search is based on consent, the burden of proving consent to search and seizure is on the government. See United States v. Hilbrich, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965); United States v. Gregory, 204 F. Supp. 884 (S.D.N.Y. 1962). It must also show that the consent was unequivocal and voluntary, free from duress and coercion. See United States v. Roche, 36 F.R.D. 413 (D. Conn. 1965). The final exception to the rule is that where the defendant is successful and shows that the search was in fact illegal, the government has the burden of showing that any other evidence presented by it had an origin independent of the illegal search. See United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); United States v. Lipshitz, 132 F. Supp. 519 (E.D.N.Y. 1955). The motion to suppress evidence is to be made prior to the trial, but in the absence of such motion a district court, in its discretion, may entertain an objection to the evidence at the trial. See Gilbert v. United States, 307 F.2d 322 (9th Cir. 1962); *but see* United States v. Nicholas, 319 F.2d 697 (2d Cir.), *cert. denied*, 375 U.S. 933 (1963) (motion held to be untimely). Therefore, the Alfinito decision, which placed the burden of proof on the person attacking the warrant is consistent with nearly all precedent on the subject.

The Alfinito holding that any fair doubt arising from testimony at the suppressal hearing should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing the warrant is also in complete agreement with modern thinking on the subject. In federal courts, there is a presumption that the United States Commissioner has properly performed his duty in issuing the search warrant. United States v. Haskins, 345 F.2d 111 (6th Cir. 1965). Issuing state officials have the benefit of the same presumption. State v. Kelly, 99 Ariz. 136, 407 P.2d 95 (1965). Likewise, a presumption of regularity attends actions of policemen. Chappell v. United States, 342 F.2d 935 (D.C. Cir. 1965). State v. Tacker, 407 P.2d 851 (Ore. 1965), held that though in a particular case it may not be easy to determine when an affidavit for a search warrant demonstrates the existence of probable cause, resolution of doubtful or marginal cases should be largely determined by a preference to be accorded to the warrant. This is a typical court reaction in doubtful cases.

5 Camden County Beverage Co. v. Blair, 46 F.2d 648 (D.N.J. 1930).

6 Buckley v. Beaulieu, 104 Me. 56, 71 Atl. 70 (1908).

7 An act to prevent frauds and concealments of his Majesty's customs and subsidies, 12 Car. 2, c. 19 (1660).

8 Cooley On Constitutional Limitations 368 (5th ed. 1883).

9 The fourth amendment denounces only such searches and seizures as are "unreasonable," and is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted and in a manner to conserve public interests as well as the rights of individuals. Carroll v. United States, 267 U.S. 132 (1925). The states likewise followed

Whether a search is unreasonable involves a substantive determination turning on the circumstances presented by the particular situation.[10] An unreasonable search has been defined as an examination or inspection of one's premises or person without authority of law for the purpose of discovering stolen, contraband or illicit property, or for some evidence of guilt to be used in prosecution of a criminal action.[11] The right protected by the fourth amendment is the right to feel secure in one's home from unwarranted intrusions by law enforcement officers.

Today, emphasis has shifted from protection of the right to privacy and security to protection of the individual from the use of illegally seized evidence in a trial. In *Weeks v. United States,*[12] the Supreme Court held that in a federal prosecution, the fourth amendment barred the use of evidence secured through an illegal search and seizure.[13] The *Weeks* rule reached its logical extension in *Mapp v. Ohio,*[14] which held that all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court. This decision followed closely on the heels of another Supreme Court decision[15] which overruled the "silver platter" doctrine of *Lustig v. United States,*[16] by which evidence illegally seized by state officials was excluded from the federal courts only if federal officers had participated in the search. As the result of these three decisions, any evidence illegally obtained by any officer of the law is inadmissible in *any* court.

For issuance of a search warrant, certain essentials are required. Searches conducted under the authority of a search warrant issued in full compliance with all of the constitutional requirements are not unreasonable and so are not prohibited by the Constitution.[17] A search warrant can be issued only on information obtained prior to issuance, and its validity must rest on the affidavits made at that time.[18] A search warrant must usually be issued upon the authority of a written affidavit sufficient on its face to show the existence of probable cause for a belief that a crime has been committed and that evidence in relation to that crime may be secured by a search of the place named in the affidavit.[19] The warrant is not lawfully issued unless the grounds upon which it is based are supported by the oath or affirmation of the complaining party.[20]

Both state and federal constitutions require that a search warrant must

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suit in limiting permissible searches by state law enforcement officers. See, *e.g.,* COLO. CONST. art. II, § 7. See also the relevant state constitutional provisions in INDEX DIGEST OF STATE CONSTITUTIONS 921 (2d ed. 1959).

10 State v. Contursi, 44 N.J. 422, 209 A.2d 829 (1965).

11 People v. De Cesare, 220 Mich. 417, 190 N.W. 302 (1922).

12 232 U.S. 383 (1914).

13 *Ibid.*

14 367 U.S. 643 (1961).

15 Elkins v. United States, 364 U.S. 206 (1960).

16 338 U.S. 74 (1949).

17 Gouled v. United States, 255 U.S. 298 (1921).

18 *In re* Phoenix Cereal Beverage Co., 58 F.2d 953 (2d Cir. 1932).

19 State v. Conwell, 96 Me. 172, 51 Atl. 873 (1902). See also statutes cited note 9 *supra.*

20 State v. Griswold, 67 Conn. 290, 34 Atl. 1046 (1896). At common law, justices of the peace had the general authority to issue search warrants for stolen goods. Jones v. German, 2 Q.B. 417 (1897). However, a recent case held that the issuance of a search warrant is not subject to delegation to a trial commissioner and any such warrant so issued is void. Slone v. Commonwealth, 377 S.W.2d 51 (Ky. Ct. App. 1964).

contain a particular description of the place or premises to be searched.[21] If the affiant's name is not stated in the supporting affidavit, the warrant is fatally defective.[22] This requirement makes someone responsible for the facts alleged and enables an aggrieved person to probe and challenge the warrant's legality. Search warrants must also particularly describe the thing to be seized with such certainty so that the officer charged with execution will be left with no discretion respecting the property to be taken.[23]

The major requirement is probable cause. What constitutes probable cause seems incapable of precise definition. It is less than certainty or proof, but more than suspicion or possibility.[24] Facts alleged to show probable cause are sufficient if they would warrant a prudent and cautious man in believing an offense has been committed.[25] Probable cause has been defined as the existence of such facts and circumstances as would excite an honest belief in a reasonable mind, acting on all the facts and circumstances within the knowledge of the issuing magistrate, that the charge made by the applicant for the warrant is true.[26] Under the majority rule,[27] an affidavit or verified complaint, to be sufficient, must be so definite that the accuser will be liable in an action for damages[28] or guilty of perjury if it be false in any material allegation.[29]

There is a diversity of views on whether or not a court will allow the affiant to base his belief on hearsay. A majority will allow such affidavits based on information and belief,[30] but other courts require a statement of the facts and sources of information upon which the belief is based.[31] At any rate, the affiant's information must be shown to be based on more than rumor or suspicion.[32]

The issue in *Alfinito* was whether or not the truth of the facts alleged in the affidavit upon which the warrant was issued were challengeable by the accused. This is related to the problem of whether or not the issuing magistrate's determination of probable cause is reviewable.[33] As a general rule, if one can

21 Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

22 *E.g.*, King v. United States, 282 F.2d 398 (4th Cir. 1960); Howard v. State, 199 Md. 529, 87 A.2d 161 (1952).

23 *E.g.*, Marron v. United States, 275 U.S. 192 (1927); United States v. Guido, 251 F.2d 1 (7th Cir. 1958).

24 Goodman v. State, 178 Md. 1, 11 A.2d 635 (1940).

25 *E.g.*, Carroll v. United States, 267 U.S. 132 (1925); Goodman v. State, 178 Md. 1, 11 A.2d 635 (1940). See also Dumbra v. United States, 268 U.S. 435 (1925).

26 Goodman v. State, 178 Md. 1, 11 A.2d 635 (1940).

27 While a majority rule is perceptible, there is a wide divergence of views taken on the matter of issuance of search warrants generally. See Annot., 100 A.L.R.2d 527 (1965).

28 *E.g.*, Wallace v. State, 199 Ind. 317, 157 N.E. 657 (1927); Sullivan v. Commonwealth, 304 Ky. 780, 202 S.W.2d 619 (1947).

29 *E.g.*, People v. Savanna Lodge No. 1095, Loyal Order Of Moose, 344 Ill. App. 278, 100 N.E.2d 632 (1951); Burns v. State, 92 Okla. Cr. 24, 220 P.2d 473 (1950).

30 *E.g.*, Rugendort v. United States, 376 U.S. 528 (1964); Jones v. United States, 362 U.S. 257 (1960); Galena v. Municipal Court, 47 Cal. Rptr. 88, 237 Cal. App. 2d 684 (1965).

31 *E.g.*, Duncan v. Commonwealth, 297 Ky. 217, 179 S.W.2d 899 (1944); Allen v. State, 178 Md. 269, 13 A.2d 352 (1940).

32 *E.g.*, Walker v. Commonwealth, 261 S.W.2d 635 (Ky. 1953); Elardo v. State, 164 Miss. 628, 145 So. 615 (1933). For a collection of the various holdings on the probable cause requirement, see Annot., 14 A.L.R.2d 605 (1950). Probable cause for a search arises out of the "total atmosphere of the case" which includes the affiant's personal knowledge, informers, character and so forth. State v. Tanzola, 83 N.J. Super. 40, 198 A.2d 811 (1964).

33 The two situations are distinguishable. In the Alfinito case, the attack was on the truth of the facts in the affidavits, but in this situation, the problem is whether or not an affidavit valid on its face presented probable cause for issuance of a warrant.

be drawn from the maze of divergent cases, in a federal proceeding to contravert or quash a search warrant, the commissioner's determination of facts tending to show probable cause is unreviewable since he is acting in a judicial capacity.[34] His finding is conclusive unless arbitrary.[35] Other cases have held, however, that in reviewing the commissioner's determination of probable cause, the court must make its own judgment on the basis of information brought to the commissioner's attention by the affidavit or otherwise.[36]

Just as there is no real consensus in federal courts, it is also difficult to formulate a general rule from state court decisions. Some hold the court must determine whether the statutory procedure has been substantially followed and whether the court issuing the search warrant had sufficient grounds upon which to base its decision.[37] However, it is generally held that, though in a particular case it may be difficult to determine when the affidavit demonstrates the existence of probable cause, resolution of doubtful or marginal cases in the area should largely be determined by the preference accorded to such warrants.[38] Some state courts hold that appellate courts, in reviewing the issuing judge's determination of probable cause, must affirm if there is substantial basis for that determination.[39] Others hold that since the decision finding probable cause involves a mixed question of constitutional law and fact, and the appellate court is the arbiter of constitutional issues, it must make an independent appraisal of the facts and circumstances in each case to determine whether the magistrate who issued the warrant could reasonably have found from the proof before him that there was a sufficient showing of probable cause.[40] In some, but not all jurisdictions, the legality of a search warrant may be questioned or reviewed by a motion to quash. In such cases, many jurisdictions view the magistrate's ruling in denying the motion as final and conclusive with respect to the defendant's right to attack the warrant for lack of probable cause.[41] However, other courts feel the fact that a magistrate's seal appears on a search warrant does not preclude the court from inquiring into its issuance.[42]

There are a multitude of ways a search warrant may be attacked. While

34 *E.g.*, United States v. Nagle, 34 F.2d 952 (2d. Cir. 1929); United States v. Ephraim, 8 F.2d 512 (1st Cir. 1925). Of course, any questions of law involved in the issuance are reviewable. Giles v. United States, 284 Fed. 208 (1st Cir. 1922).

35 *E.g.*, United States v. Brunett, 53 F.2d 219 (8th Cir. 1931); United States v. Nagle, 34 F.2d 952 (2d Cir. 1929). See also People v. Sullivan, 40 Misc. 2d 278, 242 N.Y.S.2d 988 (N.Y. City Ct. 1963).

36 *E.g.*, Schoeneman v. United States, 317 F.2d 173 (D.C. Cir. 1963); United States v. Romano, 241 F. Supp. 933 (D. Me. 1965).

37 *E.g.*, State v. Kelly, 99 Ariz. 136, 407 P.2d 95 (1965); Booze v. State, 390 P.2d 691 (Okla. 1964).

38 *E.g.*, United States v. Ventresca, 380 U.S. 102 (1965); State v. Tacker, 407 P.2d 851 (Ore. 1965).

39 *E.g.*, State v. DeNegris, 153 Conn. 5, 212 A.2d 894 (1965); State v. Tacker, 407 P.2d 851 (Ore. 1965). Technical requirements of elaborate specificity once exacted under common law pleading rules have no proper place in this area. United States v. Ventresca, 380 U.S. 102 (1965); State v. Tacker, 407 P.2d 851 (Ore. 1965).

40 *E.g.*, Carroll v. United States, 267 U.S. 132 (1925); People v. Fino, 14 N.Y.2d 160, 199 N.E.2d 151, 250 N.Y.S.2d 47 (1964).

41 People v. Prisco, 36 Misc. 2d 357, 232 N.Y.S.2d 837 (Cy. Ct. 1962).

42 *E.g.*, People v. Keener, 191 Cal. App. 2d 62, 12 Cal. Rptr. 859 (1961).

the decisions lack harmony, certain distinct approaches are distinguishable.[43] A motion for return of illegally seized property, while usually allowed in federal courts, are disallowed in many state jurisdictions.[44] An original suit for return of seized goods and a quashing of the warrant or a preliminary motion to quash the warrant are also available remedies.[45] A motion to vacate, an objection to the introduction of evidence obtained by a search warrant, and a writ of prohibition may be the appropriate remedy, depending upon the jurisdiction. Finally, although a writ of habeas corpus is usually available in federal courts, it is often unavailable in state courts.[46]

Decisions on the question of whether or not averments in an application for a search warrant can be controverted reveal a definite split between federal and state rulings, neither group being even internally harmonious. As a general rule — if one can truly be found — if the warrant is valid on its face, no attack upon it can be made by the accused.[47] Mississippi goes even further and holds

43 At common law, there was no appeal from the action of a magistrate in issuing search warrants. United States v. Maresca, 266 Fed. 713 (2d Cir. 1920). See United States v. Setaro, 37 F.2d 134 (2d Cir. 1930) (in federal courts, such seized property must be returned on proper application); United States v. Leiser, 16 F.R.D. 199 (D. Mass. 1954) (propriety of seizure may be attacked by owner seeking to recover his property). But see Application of Silfa, 18 Misc.2d 800, 162 N.Y.S.2d 75 (Sup. Ct. 1957) (in some state courts, public officials will not be compelled to return such property if it is being held in good faith to be used as evidence in a court). Other cases allow different remedies. See Dowling v. Collins, 10 F.2d (6th Cir.), *cert. denied,* 270 U.S. 660 (1926) (preliminary motion to quash warrant or original suit for return of property); *In re* Search Warrant of Premises 781 Midland Ave., Yonkers, 39 Misc.2d 802, 242 N.Y.S.2d 139 (Sup. Ct. 1963) (motion to vacate may always be used to test propriety of seizure in rem); Bailey v. State, 157 Tex. Cr. 315, 248 S.W.2d 144 (1952) (objection to introduction of evidence). A common holding is that the decision to issue the search warrant may be questioned only in the manner prescribed by statute and where that is not done, the defendant is precluded from controverting the facts stated in the affidavit upon which the warrant was issued. People v. Nelson, 171 Cal. App. 2d 356, 340 P.2d 718 (1959). In at least one instance, a state court has held that a writ of habeas corpus by a state supreme court could not be used by an accused to challenge the admissibility of evidence allegedly seized illegally. *In re* Sterling, 47 Cal. Rptr. 205, 407 P.2d 5 (1965). However, in *In re* Harris, 16 Cal. Rptr. 889, 366 P.2d 305 (1961), the court said, "If the violation of a petitioner's constitutional rights by the use of illegally seized evidence had any bearing on the issue of his guilt, there should be no doubt that habeas corpus would be available." 16 Cal. Rptr. at 892, 366 P.2d 305, 308 (1961). A final instance where the issue of the legality may arise is in the situation where there is by statute, criminal liability of an affiant for malicious procurement of a search warrant, IOWA CODE ANN. § 751.38 (1950), a magistrate for issuing a warrant without supporting affidavit, N.C. GEN. STAT. § 15-27 (1953), an officer willfully exceeding the authority of the search warrant, FLA. STAT. ANN. § 933.17 (1944), or an officer with either an invalid warrant or no warrant at all, IDAHO CODE ANN. § 18-703 (1948). For other statutes, see Mapp v. Ohio, 367 U.S. 643, 652 (1961).

44 See, *e.g.,* United States v. Setaro, 37 F.2d 134 (2d Cir. 1930); Application of Silva, 18 Misc.2d 800, 162 N.Y.S.2d 75 (Cy. Ct. 1957).

45 *E.g.,* Dowling v. Collins, 10 F.2d 62 (6th Cir.), *cert. denied,* 270 U.S. 660 (1926); *In re* Search Warrant of Premises 781 Midland Ave., Yonkers, 39 Misc.2d 802, 242 N.Y.S.2d 139 (Sup. Ct. 1963).

46 The question of who may challenge the warrant presents less of a problem. While one court has held that any interested person may controvert probable cause for issuing a warrant, People v. Kempner, 208 N.Y. 16, 101 N.E. 794 (1913), another has held that one whose home has been invaded by virtue of a search warrant issued without sufficient facts, may make a motion to vacate. People v. Politana, 17 App. Div.2d 503, 235 N.Y.S.2d 712 (1962). The usual case holds that the owner of goods seized by illegal search and seizure has standing to raise the objection, even though the premises searched were not his. *E.g.,* United States v. Walker, 197 F.2d 287 (2d. Cir.), *cert. denied,* 344 U.S. 877 (1952); State v. Wade, 89 N.J. Super. 139, 214 A.2d 411 (1965).

47 *E.g.,* Tischler v. State, 206 Md. 386, 111 A.2d 655 (1955); Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943); Johnson v. State, 163 Tex. Crim. 101, 289 S.W.2d 249 (1956).

that the whole question of the sufficiency of the affidavit is concluded by the decision of the issuing magistrate.[48] Cornelius has summarized this position:

> The defendant at the trial may not dispute or controvert the averments in the affidavit for the search warrant for the purpose of invalidating the search, nor may he cross-examine the person who made the affidavit as to the truth of such averments.[49]

He further explained:

> Some courts have held that, unless the statute otherwise provides as for example the federal code, that where an affidavit is filed or testimony taken for the issuance of a search warrant and the affidavit or testimony makes out a prima facie case of probable cause, the same cannot be controverted or disputed and the warrant thereby nullified. The cases have even gone so far as to hold that the complainant himself will not be allowed to dispute the truth of the averments he made in the affidavit so as to vitiate a criminal warrant and where a statute required the affidavit to be made by a reputable citizen the defendant will not be permitted to go behind the face of the affidavit and show that it was not so made.[50]

Courts have held that the accused cannot inquire as to whether or not the facts stated in the affidavit were known to the affiant at the time he made the affidavit,[51] nor if they were based on information or belief.[52] Other courts have held that the accused cannot question the means by which the affiant's knowledge was gained,[53] although there is some authority to the contrary on this point.[54] Where the affidavit is required to be made by a credible person, the accused cannot attack the warrant collaterally by showing that the affiant was not such a person.[55] Where states have statutes which allow the affidavits to be challenged by the accused, the statutory procedure must be strictly followed.[56]

48 Armstrong v. State, 195 Miss. 300, 15 So. 2d 438 (1943). See also People v. Sullivan, 40 Misc. 2d 278, 242 N.Y.S.2d 988 (Cy. Ct. 1963).

49 CORNELIUS, THE LAW OF SEARCH AND SEIZURE 428-29 (2d ed. 1930).

50 *Id.* at 425-27. Lest one feel that only pre-Mapp cases arrive at this conclusion, witness Dunn v. Municipal Court, 34 Cal. Rptr. 251, 220 Cal. App. 2d 917 (1963) and Jackson v. State, 365 S.W.2d 935 (Tex. Crim. App. 1963), *cert. denied,* 375 U.S. 956 (1963), holding that a reviewing court can only invalidate a search warrant if the supporting affidavit fails as a matter of law, where the warrant is not otherwise defective and that a trial court may not go behind the affidavit and search warrant to determine the falsity of facts stated therein in order to invalidate a search warrant valid on its face and such rule applies where the affiant's testimony is relied upon to show the falsity of his affidavit for the issuance of the search warrant and also where the testimony of other witnesses is relied on to show the falsity of such affidavit. United States v. Nagle, 34 F.2d 952 (2d Cir. 1929), held that the existence of probable cause cannot be negatived by the mere denial by a defendant of the facts sworn to in the affidavit.

51 *E.g.,* Southard v. State, 297 P.2d 585 (Okla. 1956); Head v. Commonwealth, 199 Ky. 222, 250 S.W. 848 (1923).

52 *E.g.,* Cahill v. State, 38 Okla. Cr. 236, 260 Pac. 91 (1927); Dikes v. State, 120 Tex. Cr. 127, 48 S.W.2d 259 (1932).

53 *E.g.,* Thornton v. Commonwealth, 245 Ky. 336, 53 S.W.2d 707 (1932); Nance v. State, 50 Okla. Cr. 17, 294 Pac. 1097 (1931).

54 *E.g.,* White v. Commonwealth, 221 Ky. 535, 299 S.W. 168 (1927); People v. Brown, 40 Misc. 2d 35, 242 N.Y.S.2d 555 (N.Y. City Ct. 1963).

55 Torres v. State, 161 Tex. Cr. 480, 278 S.W.2d 853 (1955).

56 *E.g.,* People v. Peterson, 43 Cal. Rptr. 457, 233 Cal. App. 2d 481 (1965); People v. Brown, 40 Misc. 2d 35, 242 N.Y.S.2d 555 (N.Y. City Ct. 1963). In some states the state legislatures have seen fit to remove this problem from the judiciary and have enacted legislation specifically allowing the validity of the warrant to be attacked by the accused. As

Although the majority of state courts have held that the aggrieved person cannot challenge the truthfulness of facts alleged by the affiant or the existence of probable cause, the rule is otherwise in federal courts. In the federal system, false facts given by the affiant vitiate the search warrant.[57] Although the Supreme Court, in *Rugendorf v. United States*,[58] stated that it had never directly passed on the extent to which a court may permit an inquiry into the facts when the search warrant is valid on its face and when the allegations of the underlying affidavit established probable cause, it assumed an attack upon the truthfulness of the affidavit could be made. Federal Rule 41(e) provides that on a motion for the return of seized property or to suppress evidence, "the judge shall receive evidence on any issue of fact necessary to the decision of the motion."[59] The procedures provided for in Rule 41(e) are supplemented by the rule of *State v. Hurst*,[60] which held that one convicted by illegally seized evidence could seek habeas corpus in federal courts to secure a discharge long after conviction became final.[61]

The interpretation placed on the New York Criminal Procedure statute in *Alfinito* is in line with the more modern thinking on the subject. As Chief Judge Desmond correctly stated:

> Modern thought which produced the decision in *Mapp v. Ohio* . . . would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured. Our duty is to fashion a rule which will prevent such a violation of the citizen's rights and at the same time avoid creating a situation where

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the Alfinito case points out, New York is one of these states. NEW YORK CODE OF CRIM. PROC. § 813(c) provides:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion. . . .

See also, People v. Nelson, 171 Cal. App. 2d 356, 340 P.2d 718 (1959).

57 *E.g.*, King v. United States, 282 F.2d 398 (4th Cir. 1960); United States v. Nagle, 34 F.2d 952 (2d Cir. 1929).

58 376 U.S. 528, 531-32 (1964).

59 FED. R. CRIM. P. 41(e) provides:

> Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion.

This rule expressly superseded the Federal Espionage Act of June 15, 1917, which provided: "If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness." Espionage Act of 1917, ch. 30, 40 Stat. 228, 229 (1917). Rule 41 is not as explicit, but appears to achieve the same result.

60 325 F.2d 891 (9th Cir. 1964).

61 *Ibid.* Similarly, Circuit Judge Marshall, dissenting in United States v. Fay, 333 F.2d 12 (2d Cir. 1964), said: "If a state court should nevertheless admit such evidence [illegally seized evidence] in a post-Mapp trial, no one could possibly contend that federal habeas corpus would not lie." 333 F.2d at 27. This would appear to substantiate the federal view previously stated.

> overstrict rules would invalidate numerous warrants simply because witnesses can later be found to swear to the opposite of what the officer swore when he procured the warrant.[62]

Holding that the statute is to be construed to permit inquiry into whether or not the statements in the affidavit were perjurious fashions just such a rule.

There are valid reasons on both sides of the problem of whether or not the issuance of a search warrant should be challengeable, either generally by a charge that there was no probable cause or specifically that the facts alleged were in fact false. The major argument against allowing the defendant to attack the issuance of a warrant was expressed by one court in the following manner:

> To our minds, any other rule would not only bring about confusion and disorder in determining the competency of evidence procured under search warrants valid upon their face and predicated upon affidavits from which the magistrate could determine that "probable cause" was shown, but in many cases the issue of defendant's guilt or innocence would be lost sight of in an inquiry whether affiants had committed perjury in making the affidavit upon which the search warrant was based, although upon its face the affidavit was sufficient and perfectly regular. In such cases it seems that orderly trials must postpone investigation of affiant's good faith to another time and tribunal.[63]

An attack on a search warrant was struck down in a similar case where the court said:

> Any other rule would encourage unauthorized attacks upon the correctness or truth of statements contained in such affidavits, and would bring about interminable confusion and disorder in determining the competency of evidence procured under search warrants valid upon their faces.[64]

There is no doubt that such attacks on the warrant would take more of the courts' time, already at a premium, and hence increase the cost of administering a judicial system which is already expensive.

Law enforcement officers also are against subjecting the warrant to attack because they feel there is a very real danger that their sources of information may be exposed and thus eliminated. The ability of enforcement officials to give an informer appropriate assurances of anonymity is often an essential prerequisite to inducing his assistance and cooperation. Depriving the law enforcement community of the ability to give such assurances could swiftly choke off sources of information. If the officer were required to divulge the sources of his confidential information, "the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is."[65] Attorney General Jackson regarded "the keeping of faith with confidential informants as an indispensable condition of

62 People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243, 246 (1965).
63 Ware v. State, 110 Tex. Cr. 114, 7 S.W.2d 551, 554 (1928).
64 Bowen v. Commonwealth, 199 Ky. 400, 251 S.W. 625 (1923).
65 1959 CRIM. L. REV. 16. It can readily be seen why law enforcement officers seek liberal standards of probable cause on which search warrants may be issued. In 1965, the number of murders in the United States increased by 6% over the previous year, robbery by 5% and crime of all types increased by 8% in the suburbs. Time, March 18, 1966, p. 29.

[the F.B.I.'s] future efficiency."[66] In the more serious criminal cases, the informant literally risks his life in volunteering information. "Once an informant is known," Mr. Justice Clark observed in *Roviaro v. United States*,[67] "the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue removal, once visited upon the informer Larunda, has been found obsolete."[68]

The only time the basis for issuance of a warrant will be challenged is where the search has ultimately borne fruitful results. Only if some incriminating evidence has been found will the accused even challenge the warrant and then such evidence will not be admitted when it can be shown that it was illegally obtained. Thus, there is little possibility of bringing about a true miscarriage of justice. While we are not willing to allow law enforcement officers to use techniques usually associated with the criminal element or tyranny, there is some strength to this argument that there is very little danger of convicting an innocent party even where the basis for the issuance of the search warrant is questionable. Chief Judge Traynor has said:

> Unlike the denial of the right to counsel, the knowing use of perjured testimony or suppression of evidence, the use of an involuntary confession, or as in this case, the denial of an opportunity to present a defense, the use of illegally seized evidence carries with it no risk of convicting an innocent person. . . . The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack.[69]

Admittedly the success or failure of a search is immaterial to the question of whether probable cause existed for issuance of the warrant. A search is not made lawful by virtue of what it turns up.[70] But there is no reason why the condition and characteristics of the items uncovered in a search may not be used to confirm the authenticity of the affidavit made *prior* to the event.[71]

Although there are compelling reasons why courts should not allow a subsequent attack on the issuance of the search warrant, there are even more compelling reasons for allowing the determination of probable cause and the truthfulness of the facts alleged in the affidavit to be controverted. The fourth amendment is evidence of our commitment to the principle that blanket search warrants issued on mere suspicion are not to be tolerated. The right protected is really twofold: it is the right to the privacy and security in one's home and it is also the right against self-incrimination.[72] In *Standford v. State*,[73] the

66 40 OPS. ATT'Y GEN. 45, 46-47 (1949).
67 353 U.S. 53 (1957).
68 *Id.* at 67. *But see* Rugendorf v. United States, 376 U.S. 528 (1964).
69 *In re* Harris, 56 Cal. 2d 879, 883-84, 16 Cal. Rptr. 889, 892, 366 P.2d 305, 308 (1961).
70 See United States v. Di Re, 332 U.S. 581, 595 (1948).
71 See Brief for Appellee, p. 46, People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).
72 The fifth amendment states that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.
73 379 U.S. 476 (1965).

Supreme Court held that the first, fourth and fifth amendments to the Constitution are related and safeguard not only privacy and protection against self-incrimination but conscience, human dignity and freedom of expression as well. The Court, in *Boyd v. United States,*[74] considered the fourth and fifth amendments as "running almost into each other."[75] In *Mapp v. Ohio,*[76] the Court used both of these amendments to reach its decision. Other recent cases have emphasized the increased commitment to the principle of protecting individual rights. In *Gideon v. Wainwright,*[77] the Court held that the appointment of counsel is a fundamental right, essential to a fair trial. *Escobedo v. Illinois,*[78] where the Court made affirmative advice to an arrestee of his right to counsel before taking his confession a prerequisite to its later admissibility, is another recent example of this commitment to protecting individual rights. We want to give an accused every possible chance to prove his innocence. The requirement of proof "beyond a reasonable doubt" is only part of this commitment.

The main argument for allowing the defendant to challenge the validity of a warrant is that it will curb overzealous officers from acting upon mere suspicion. Law enforcement officers are quick to learn when courts will not acquiesce in their procedures. Therefore, to allow the warrant to be challenged will mean that enforcement officers will have to be more thorough in their investigations. It has been said that "the ignoble shortcut to conviction left open to the State [referring to the use of illegally obtained evidence] tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."[79] Likewise, by allowing enforcement officers to use a perjured affidavit to procure a search warrant would be aiding in the deterioration of the law enforcement community itself. When any police force can use such shortcuts, it becomes lazy and less efficient. Coerced confessions and illegally seized evidence are types of enforcement shortcuts which can and do corrode our judicial system.[80] Mr. Justice Frankfurter, speaking for the Court in *McNabb v. United States,*[81] said:

> A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.[82]

The final argument, and perhaps ultimately the most persuasive, is that

74 116 U.S. 616 (1886).
75 *Id.* at 630.
76 367 U.S. 643 (1961).
77 372 U.S. 335 (1963).
78 378 U.S. 478 (1964).
79 Mapp v. Ohio, 367 U.S. 643, 660 (1961).
80 This is one reason that coerced confessions are not condoned. Glueck, after scholarly investigation, found "that such methods, [referring to the so-called "third degree"] aside from their brutality, tend in the long run to defeat their own purpose; they encourage inefficiency on the part of the police." GLUECK, CRIME AND JUSTICE 76 (1936).
81 318 U.S. 332 (1943).
82 *Id.* at 343.

the lie should not be more effective than the fist. In *Mapp* the evidence ultimately held to be inadmissible was obtained by knocking down a door to enter the defendant's house.[83] If such evidence is inadmissible, is there any justification for a different result where entrance was gained and the evidence then obtained by a police officer committing perjury? There can be but one answer — in both cases the evidence should be inadmissible. Given our commitment to the principle that law enforcement officers are not free to enter private premises to search at their whim, we cannot condone such activity. In *Mapp,* the defendant was allowed to introduce evidence showing the policeman's illegal entry — the defendant in the *Alfinito* situation should likewise "be permitted to effectuate his constitutional rights by being afforded an opportunity to prove that the policeman submitted a perjured or recklessly false affidavit."[84]

One may easily realize how various state and federal courts could arrive at diametrically opposed decisions. On the one hand is the interest in effective law enforcement and on the other the protection of individual rights. There is possibly no answer to the argument that to allow such challenges to statements in the affidavits upon which search warrants are based would take an endless amount of time and hopelessly confuse the issues in a case. However, as in many areas of the law, the competing interests must be balanced. Given our commitment to the protection of individual rights, even in the face of what appears, at times, to be more effective means of law enforcement, the balancing must ultimately result in the decision reached in *Alfinito.* The rights of the individual must prevail. The Supreme Court, in *Mapp,* has made perhaps the most appropriate argument for the *Alfinito* decision. It said:

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the character of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States,* 277 U.S. 438, 485 (1928): "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement.[85]

The policy adopted by the Court of Appeals of New York in *Alfinito* protects the individual from unreasonable searches and seizures and insures that the law enforcement officials will not become overzealous or lazy in their investigative procedures.

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83 367 U.S. 643 (1961).
84 Brief for the New York Civil Liberties Union as Amicus Curiae, p. 6, People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).
85 367 U.S. 643, 659 (1961).