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Recent Decisions

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RECENT DECISIONS

PERPETUITIES — RESTRAINT ON ALIENATION — OPTION TO PURCHASE LAND NOT VIOLATIVE OF RULE AGAINST PERPETUITIES. — Mr. and Mrs. Mattern executed a will by which they left all of their real estate to their nine children to be divided equally. The will contained the following exception: [H]owever, this bequest is made to our said named children with the provision that our son Chris Mattern shall have the right to purchase from each of the other children their interest in said real estate for the sum of $45.00 per acre. . . ." No time limit was specified in which the option was to be accepted. Shortly after the deaths of the parents, Chris Mattern sought to exercise his option. Several of the children refused to convey their interests and brought an action to quiet title on the theory that the option violated the rule against perpetuities in that it was a future interest not certain to vest within the prescribed length of time, and further, that it was an unlawful restraint of alienation. In a divided opinion, the Supreme Court of Texas reversed the Court of Civil Appeals and *held:* that the option was valid and did not offend either the rule against perpetuities or the rules against restraint of alienation so long as the option was exercised within a reasonable time. *Mattern v. Herzog,* 367 S.W.2d 312 (Tex. 1963).

With this decision the Texas court has succeeded in ameliorating some of the harshness of one of the most venerable fossils in the *reliquiarium* of real property law, the rule against perpetuities.

The rule against perpetuities was conceived in the Duke of Norfolk's Case in 1681[1] and exists today as a part of the jurisprudence of every jurisdiction in one form or another.[2] The most famous statement of the rule is that by Gray: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[3] The rule was first applied to options for the purchase of land in a case decided in 1882 which involved an option retained by a grantor (and his heirs or assigns) to repurchase from the grantee (and his heirs and assigns), land which had been conveyed in fee simple by deed.[4] The option was for a fixed price and was of unlimited duration. The court's holding that such unlimited future interests offended the rule against perpetuities has spawned a number of decisions in this country noteworthy only for their inconsistency.[5] Closely allied with the rule against perpetuities are the common law rules on restraints of alienation which currently enjoy universal, though not uniform, vitality.[6]

The basic purpose of all of these rules is to limit the extent to which an owner of land may control or restrict its future use and enjoyment. They are, in effect, a largely judicial attempt to strike a workable balance between the reasonable but conflicting interests of freedom in disposition of property, and the need of the community to make the most efficient possible use of limited land resources. However, there seems to be significant disagreement among the authorities as to the proper location of the fulcrum for this balancing process, particularly when the restraint takes the form of an option. The authors of the Restatement of Property have adopted a predictably conservative approach.

1 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1681).

2 See, *e.g.,* Gearhart v. West Lumber Co., 212 Ga. 25, 90 S.E.2d 10 (1955); CONN. GEN. STAT. REV. §§ 45-95 (1958); TEXAS CONST. Art. 1, § 26.

3 GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

4 London & South Western Ry. Co. v. Gomm, 20 Ch. Div. 562 (1882).

5 See, *e.g.,* Morgan v. Griffith Realty Co., 192 F.2d 597 (10th Cir. 1951), (option held void); Roemhild v. Jones, 239 F.2d 492 (8th Cir. 1957), (option held valid). Options to purchase contained in leases are generally regarded as exceptions to the rules on restraint of alienation and the rule against perpetuities. See, *e.g.,* Wing Inc. v. Arnold, 107 So.2d 765 (Fla. 1959).

6 See, RESTATEMENT, PROPERTY § 404 (1940); 6 AMERICAN LAW OF PROPERTY § 26 (1952).

> [T]he limitation of an option in favor of a person other than the conveyor [or, the reservation of an option to repurchase the whole or any part of the interest conveyed, made in favor of the conveyor] is invalid because of the rule against perpetuities when . . . such option
> a) may continue for a longer period than (a life in being and twenty-one years) and
> b) would create an interest in land . . . but for the rule against perpetuities.[7]

The editors of the American Law of Property take a vastly different position.

> [T]he rule against perpetuities is an instrument ill adapted to fixing limitations of reasonableness for options. It will do until a better is devised; but it is a reproach to our judicial system that none better has yet appeared.[8]

Simes, in his work on future interests states:

> Practical alienability might, in some instances, be restricted by such a contract [option], but its primary purpose is to enable a particular person to buy, not to prevent anyone from selling; and doubtless the owner could alienate his property subject to the option if he wished.[9]

Nor have the courts agreed. Probably the majority of courts which have considered the problem have held that options unembarrassed by time limits are void as either an unreasonable restraint of alienation[10] or an attempt to create a perpetuity.[11] But the opinions are by no means unanimous,[12] and a surprising number of courts which have been faced with fact situations similar to that in the *Mattern* case have simply made no mention of perpetuities or alienability.[13]

In order to conclude that an option violates the rule against perpetuities it must be first decided, *inter alia,* that an option is a nonvested, inheritable (or assignable) future interest in property.[14] However, to couch the question of validity in terms such as these creates a grave danger of being swayed by semantics. The more pertinent inquiry is, to what extent are land purchase options necessary or socially desirable?[15]

> [A]ll options offend the basic policy of the rule, but . . . this offense can be properly offset by the utilities of some options and this offsetting can make their validity important and desirable in a modern law not dominated by concepts. The problem then becomes one of balancing social utilities as to each type of option.[16]

The rule against perpetuities, hinged as it is on such concepts as "vesting" or "interest in land," is likely to do more mischief than good when applied to options. One immediate difficulty is that the rule takes no account of the effect of the option price. A fixed price option which, by its terms, is to endure for a considerable period, may well reduce the alienability of the property where the price is equal to or greater than the current market value; quite to the contrary, however, where the option price is less than the market value. The second objection to employment of the rule against perpetuities as a means of preventing abusive use of unlimited option agreements is the length of the term permissible under the rule; a life in being and twenty-one years.

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7 RESTATEMENT, PROPERTY §§ 393-94 (1940).
8 6 AMERICAN LAW OF PROPERTY § 24.56, at 143 (1952).
9 2 SIMES, FUTURE INTERESTS § 462, at 305 (1936).
10 See, *e.g.,* H. J. Lewis Oyster Co. v. West, 93 Conn. 518, 107 Atl. 138 (1919); Robertson v. Simmons, 322 S.W.2d 476 (Ky. 1959); Gange v. Hayes, 193 Or. 51, 237 P.2d 196 (1951).
11 See, *e.g.,* Rocky Mountain Fuel Co. v. Heflin, 148 Colo. 415, 366 P.2d 577 (1961); Neustadt v. Pearce, 145 Conn. 403, 143 A.2d 437 (1958); Turner v. Peacock, 153 Ga. 870, 113 S.E. 585 (1922).
12 *E.g.,* Lantis v. Cook, 342 Mich. 347, 69 N.W.2d 849 (1955); Windiate v. Lorman, 236 Mich. 531, 211 N.W. 62 (1926).
13 See, *e.g.,* Campbell v. Warnberg, 133 Kan. 246, 299 Pac. 583 (1931); Watson v. Riley, 101 Neb. 511, 164 N.W. 81 (1917).
14 If the option is neither inheritable nor assignable, it cannot extend beyond the allowable period of a life in being. If the option is either presently vested or not an interest in land, the rule against perpetuities has no application.
15 Short-term options violate neither the rules on restraints of alienation nor the rule against perpetuities.
16 5 POWELL, REAL PROPERTY ¶ 771, at 607 (1962).

> How long is too long for an option . . .? Certainly an option to last forever is too long. Nor can a plausible argument be made for one lasting a century; and if this is true, the application of the period of perpetuities to options cannot be justified, for . . . any competent attorney can stretch out this period to about a century by fixing the option period at twenty-one years after the death of the survivor of a dozen healthy babies.[17]

The third principal difficulty in application of the rule on perpetuities is the patently absurd requirement for absolute certainty, as of the moment when the instrument takes effect, that the interest will vest within the allowable period. Neither reasonable probabilities nor actual subsequent events are to be considered.[18] This is to say, in effect, that it is of no consequence that the option holder sought to exercise his right within a reasonable time, if by its terms the option might have lasted too long were it not for what actually subsequently transpired.[19] There is little to be said for so wooden a means of ordering the affairs of men.

The rules governing unreasonable restraints of alienation, on the other hand, are inherently more flexible than the rule against perpetuities and, for that reason, are far better suited to deal with any options which bid fair to do injury to the public interest.[20] Unfortunately, it is difficult to draw any general conclusions from the limited amount of case law dealing with options as restraints on alienation. It seems that each case stands or falls on its own peculiar combination of facts. For example, in the *Mattern* decision it was stated that "Options . . . do not fit into the usual classifications of restraints upon alienation."[21] The court then went on to say that the option to be valid must be exercised within a reasonable length of time, that the delay involved was not unreasonable, and, therefore, there had been no undue restraint of alienation. Although this approach provides much needed latitude, it has the disadvantage of almost total lack of predictability.

In the *Mattern* case, the Texas Court of Civil Appeals took the traditional stand on options not expressly limited in time.

> On the day when the testatrix died, by possibility appellee (Chris Mattern) might never be able or desirous of purchasing, or might die without having made any decision as to whether he wished to purchase. Also if appellee died without purchasing, his heirs, devisees or assigns by possibility might not desire to purchase, ad infinitum. . . . The very possibility that existed at the testator's death that the attempted right to purchase might not be exercised for any reason whatsoever, at any time, is fatal.[22]

In reversing, the Texas Supreme Court stated,

> [W]e hold that the makers of the will did not intend to give to Chris Mattern an option to purchase of indefinite duration but rather one which had to be exercised, if at all, during a reasonable period of time. . . .[23]

This, it is suggested, is an eminently sensible solution. It is perfectly idle to speculate as to what might have been when the facts are clearly otherwise. Certainly the *Mattern* opinion will not contravene the public policy on promotion of alienability, for the very purpose of the action is to secure immediate alienation. The Texas court achieved its end by construing a limitation of reasonable time into the will,

17 6 AMERICAN LAW OF PROPERTY § 24.56, at 141 (1952).

18 See, GRAY, THE RULE AGAINST PERPETUITIES §§ 214, 215, 629 (4th ed. 1942).

19 Several states have modified the common law rule against perpetuities to eliminate the need for absolute certainty of vesting, or to permit disposition of the interest to be affected by events subsequent to the creation of the interest. This is the so-called "wait and see" rule. *E.g.*, MASS. GEN. LAWS ANN. ch. 184A, § 1 (1955); VT. STAT. ANN. tit. 27, § 501 (1959).

20 Long-term options are more likely to be a deterrent to improvement of land than a restraint on its alienation since the land could be sold subject to the option, or the owner could join with the option holder to convey an unencumbered title, or the purchaser could contract with the option holder for a temporary forbearance or permanent release. The owner in possession, however, will probably not wish to improve his land only to have to surrender it to the option holder on demand.

21 Mattern v. Herzog, 367 S.W.2d 312, 319 (1963). The classifications referred to are disabling, promissory, and forfeiture restraints. See, RESTATEMENT, PROPERTY § 404 (1940).

22 Herzog v. Mattern, 359 S.W.2d 86, 90 (Tex. Civ. App. 1962).

23 Mattern v. Herzog, 367 S.W.2d 312, 318 (Tex. 1963).

not, however, a unique holding.[24] There are several other ways in which the same result could have been reached with equal aplomb and support of the authorities. Most of the cases which have found that options violate the rule against perpetuities, including the progenitor of all such decisions,[25] have involved options which by their terms were inheritable or assignable, and therefore, likely to endure far too long.[26] But where the option is simply given to a named party and no time limit is specified, it has been frequently held that the option is presumptively personal and cannot extend beyond some life in being, namely the option holder himself,[27] although it is not so clear that a lifetime option would not constitute an unreasonable restraint of alienation. There is some authority for the proposition that options are to be considered an exception to the rule against perpetuities.[28] In a few other cases it has been held that an option is either not an interest in land,[29] or is a presently vested interest,[30] both of which conclusions will avoid the rule. At least one court seems to have allowed an option to stand on the express basis of social utility,[31] whereas others have concluded that an option is not an absolute restraint to alienation and, therefore, not within the intent of the rules.[32] Finally, there are a number of decisions in which the question has been ignored entirely.[33]

The rule against perpetuities has demonstrated all of the indestructable perennial tenacity of crab grass, in spite of almost continual attack.[34] It seems then, that its existence must be endured at least for the time being. The *Mattern* case doubtless is not the herald of a new trend, but it does clearly show the danger in the use of options in which a time limit has not been unambiguously asserted. It is, in addition, further authority for the salvage of options improvidently drawn.

John W. Beatty

CRIMINAL LAW — CONFESSIONS — REAFFIRMATION OF INADMISSIBLE CONFESSION ALSO HELD INADMISSIBLE. — Killough, arrested on suspicion of murdering his wife, signed a confession before being taken, some thirty-four hours following the arrest, before a committing magistrate. Following arraignment, he orally reaffirmed the written confession. The federal trial court held the first confession inadmissible under the *Mallory* rule,[1] which requires the automatic ex-

24 *E.g.*, Saraceno v. Carrano, 92 Conn. 563, 103 Atl. 631 (1918); *In re* Champion's Estate, 15 N.Y. Supp. 768 (1890).
25 London & South Western Ry. v. Gomm, 20 Ch. Div. 562 (1882).
26 See, *e.g.*, Barton v. Thaw, 246 Pa. 348, 92 Atl. 312 (1914); Skeen v. Clinchfield Coal Co., 137 Va. 397, 119 S.E.89 (1923); Starcher Bros. v. Duty, 61 W. Va. 373, 56 S.E. 524 (1907).
27 *E.g.*, Alamo School Dist. v. Jones, 182 Cal. App. 2d 180, 6 Cal. Rptr. 272 (1960); Weitzmann v. Weitzmann, 87 Ind. App. 236, 161 N.E. 385 (1928); Campbell v. Campbell, 313 Ky. 249, 230 S.W.2d 918.
28 *In re* Water Front on Upper N.Y. Bay, 246 N.Y. 1, 157 N.E. 911 (1927).
29 Dodd v. Rotterman, 330 Ill. 362, 161 N.E. 756 (1928); Koegh v. Peck, 316 Ill. 318, 147 N.E. 266 (1925); Mineral Land Investment Co. v. Bishop Iron Co., 134 Minn. 412, 159 N.W. 966 (1916).
30 People's St. Ry. v. Spencer, 156 Pa. 85, 27 Atl. 113 (1893); Wall v. Minneapolis, St. P. & S.S.M. Ry., 86 Wis. 48, 56 N.W. 367 (1893).
31 Gale v. York Center Community Cooperative, Inc., 21 Ill.2d 86, 171 N.E.2d 30 (1961).
32 Buck v. Walker, 115 Minn. 239, 132 N.W. 205 (1911); Epstein v. Belovsky, 233 N.Y. 524, 135 N.E. 902 (1922).
33 Daly v. Daly, 299 Ill. 268, 132 N.E. 495 (1921); Hornaday v. Hornaday, 229 N.C. 164, 47 S.E.2d 857 (1948).
34 See, Berg, *Long Term Options and the Rule Against Perpetuities*, 37 CALIF. L. REV. 1, 235, 419 (1949); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952).

1 Mallory v. United States, 354 U.S. 449 (1957).

clusion in federal trials of any inculpatory expression obtained during an illegal detention, but accepted the second on the basis of its voluntariness.[2] Subsequently the Court of Appeals for the District of Columbia Circuit, *held:* Manslaughter conviction reversed. The oral reaffirmation of the day-old confession obtained from the defendant without representation by counsel was inadmissible in a federal trial. *Killough v. United States,* 315 F. 2d 241 (D.C. Cir. 1962).

Contrary to the prediction of one authority, who felt that the abnormal expansion of the exclusionary principle during the nineteenth century would be followed by a period of deep reaction,[3] the *Killough* decision marks a further extension of that principle. Until the 1943 ruling in *McNabb v. United States,*[4] federal courts had looked upon confessions through the acid tests of voluntariness or trustworthiness, which became in time indistinguishable, rendering academic the inability of historians to agree as to the historically accurate one.[5] Until then, no distinction was drawn between confessions obtained prior to arraignment and those obtained after.[6] The *McNabb* holding, embryo to that finally crystallized in *Mallory,* marked the initial instance of a confession's inadmissibility being based upon the illegal detention during which it was obtained. Because of that Court's preoccupation with the other forms of coercion exerted in that case, however, the rule did not reach the maturity of automaticity until further expounded in *Upshaw v. United States,*[7] in which the criterion of the detention's illegality became Rule 5(a)[8] of the Federal Rules of Criminal Procedure,[9] and, finally, in *Mallory.* The rule, in its adult form, demanded the exclusion, regardless of whether or not coerced, of any confession procured during an illegal detention unless the delay in commitment occurred after the incriminating statement.[10] But the Court in those cases emphasized that such exclusions are not Constitutionally-based[11] but stem from that Court's inherent supervisory power over lower federal courts and federal law enforcement officers, enabling it to set, within its discretion, desirable admissibility standards without legislation.[12] The *Mallory* rule, then, and its *Killough* extension, are not applicable to state proceedings, wherein, to effect exclusion, the Court must still resort to the minimal standard of the Fourteenth Amendment, set out in *Brown v. Mississippi,*[13] and a long line of succeeding cases.[14] The suggestion has been made, however, that commitment without unnecessary delay might soon be held to be a due process requirement.[15]

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2 United States v. Killough, 193 F. Supp. 905 (D.D.C. 1961).
3 3 WIGMORE, EVIDENCE § 817 (3d ed. 1940).
4 McNabb v. United States, 318 U.S. 332 (1943).
5 INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 198 (3d ed. 1953).
6 72 YALE L.J. 1434, 1437-38 (1963).
7 335 U.S. 410 (1948).
8 FED. R. CRIM. P. 5(a):

> Appearance before the Commissioner — An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

9 *Supra* note 6, at 1440.
10 United States v. Mitchell, 322 U.S. 65 (1944).
11 McNabb v. United States, *supra* note 3, at 340.
12 INBAU & REID, *op. cit. supra* note 5, at 199.
13 Brown v. Mississippi, 297 U.S. 278 (1936).
14 *E.g.,* Reck v. Pate, 367 U.S. 433 (1961); Cicenia v. Lagay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958); Ashdown v. Utah, 357 U.S. 426 (1958); Fikes v. Alabama, 352 U.S. 191 (1957); Leyra v. Denno, 347 U.S. 556 (1954); Gallegos v. Nebraska, 342 U.S. 55 (1951); Lyons v. Oklahoma, 322 U.S. 596 (1944).
15 FELLMAN, THE DEFENDANT'S RIGHTS 178 (1958). MCCORMICK, EVIDENCE 250 (1954).

There are, then, two classes of confessions which a federal court will clearly exclude: those found to have been coerced, and those *ipso facto* inadmissible because acquired during a period of illegal detention. The reaffirmation of a confession of the former class presents, theoretically at least, little difficulty since it is to be judged by the very same criterion as the first, namely, its voluntariness,[16] although the coercion employed in obtaining the initial disclosure is to be considered along with all other circumstances.[17] Hence such reaffirmations have been deemed acceptable unless found to have been involuntary by their own circumstances or so intimately related to the reaffirmed confessions as to be inseparable therefrom.[18]

The significance of the *Killough* decision is that the reaffirmation was excluded not due to a link with a coerced confession but with one excluded by *Mallory,* although, it is true, the situation had been faced before. In *United States v. Bayer,*[19] the Supreme Court, assuming the first confession inadmissible under *McNabb* although it was never actually introduced at the trial, held the reaffirmation voluntary and therefore admissible, yet conceded that:

> [A]fter an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantage of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first.[20]

The *Killough* majority was able to dismiss *Bayer's* holding in a footnote, remarking that the six-month lapse between the two confessions in *Bayer* makes its inapplicability to *Killough* "obvious,"[21] while a dissenter argued for admissibility *a fortiori* since in *Killough* the magistrate's warnings were even fresher in the accused's mind.[22] A third stand on this point, and perhaps the most convincing, was set out in a concurring opinion which observed that, in any event, "*Mallory* supersedes *Bayer,* and its command cannot be avoided by expanding the rule of an earlier case."[23]

The strongest precedent for the *Killough* result, the first *Jackson v. United States*[24] opinion, held a postarraignment confession unacceptable in that "Jackson's signing of the document cannot in any way be considered an independent act based upon proper counsel or as occurring after time for deliberate reflection."[25] But on a second appeal, after a new trial, the confession was allowed on a finding that the accused had indeed been duly warned by a judge and represented by counsel,[26] the "time for deliberate reflection" factor apparently being minimized.

Two other decisions, uttered by the very same *Killough* court, passed upon the same issue. In *Goldsmith v. United States,*[27] the admissibility of the reaffirmation was predicated upon the fact that it occurred shortly after arraignment and that the accused had legal counsel prior to it. The court in *Naples v. United States*[28] did not have to face the admissibility aspect of the reaffirmation squarely since

16 Lyons v. Oklahoma, *supra* note 14.
17 *Id.* at 603.
18 Culombe v. Connecticut, 367 U.S. 568 (1961); Leyra v. Denno, *supra* note 14; Lyons v. Oklahoma, *supra* note 14.
19 331 U.S. 532 (1947).
20 *Id.* at 540. See 72 YALE L.J. 1434, at 1442 (1963): "The impact of the Commissioner's warning will be much weaker than it would have been absent a prior confession, for one cannot be expected effectively to deny, even after repeated warnings, that which he has just admitted."
21 315 F.2d 241, 244 n.4 (D.C. Cir. 1962).
22 *Id.* at 254.
23 *Id.* at 251.
24 Jackson v. United States, 273 F.2d 521 (D.C. Cir. 1959).
25 *Id.* at 523.
26 Jackson v. United States, 285 F.2d 675 (D.C. Cir. 1960).
27 Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960).
28 Naples v. United States, 307 F.2d 618 (D.C. Cir. 1962).

it was able to reverse the conviction on the basis of the initial confession. It did, however, intimate that the follow-up confession had been procured in a deliberate attempt to circumvent the *Mallory* rule.

If advice of counsel is to be taken as the decisive criterion, it is true, as the majority contends, that the *Killough* decision is not inconsistent with either the second *Jackson* opinion or *Goldsmith*, for both Jackson and Goldsmith had the aid of counsel, while Killough did not. But the treatment of the deliberation-time factor is not quite so uniform. While the majority finds support for the *Killough* result in the fact that the accused had such little time for deliberation between arraignment and reaffirmation, (and distinguishes *Bayer* primarily because in that case the time lapse was so much longer!), it fails directly to meet the point that both *Goldsmith* and *Jackson* based admissibility, in part at least, precisely on the fact that the second confessions occurred so shortly after arraignment when the magistrate's warnings were still ringing in the accuseds' ears.

Certainly the rationale behind the exclusion of *Killough*-type reaffirmations can be no stronger than, nor very different from, that underlying the *Mallory* rule itself, but, even at this late date, the justification for the latter is still not altogether clear. The judicial opinions and legal comments, taken together, suggest not a specific *raison d'être*, but a curious interplay of purposes.

First of all, clearly, the desire to avoid receiving involuntary confessions played a significant role. Indeed, it cannot be denied that the automatic rule which *Mallory* purports to wring from the *McNabb* opinion is actually a violent restatement of the *McNabb* teaching, if a restatement at all. The deliberately vague[29] *McNabb* ruling was initially thought by many to have said little more than that a prolonged detention was to be but an added consideration in passing on a confession's voluntariness.[30]

> The precise basis of the *McNabb* majority opinion was difficult to determine, because it recited facts about lack of schooling and worldly experience on defendants' part, uncomfortable conditions of their confinement, prolonged questioning, lack of legal advice, etc.[31]

The critical question left by *McNabb* as to whether delay in itself was reason enough for exclusion[32] was answered in the affirmative by *Upshaw's* explanation that *McNabb* was not a mere extension of the involuntariness doctrine.[33] But all three opinions, *McNabb, Upshaw* and *Mallory,* emphasize the important role extended detention might play in eliciting coerced confessions,[34] and the realization that third-degree practices are common even today[35] is undoubtably an important block in the rule's foundation. In any event, the idea has survived[36] that the main difference between a coerced confession and a *Mallory*-prohibited one is that the coercion in the latter is presumed.

Secondly is the view, perhaps the most popular, that the *Mallory* rule was designed as a sanction imposed on law enforcement officers for violation of Rule 5(a),[37] the belief that only by rendering the fruits of police illegality useless can that rule be effectively enforced. The Supreme Court has denied the use of exclusion

29 Hogan and Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue,* 47 GEO. L.J. 1, 5 (1958).
30 *Id.* at 6.
31 MAGUIRE, EVIDENCE OF GUILT 155, n.2 (1959).
32 MCCORMICK, *op. cit. supra* note 15, at 247.
33 Upshaw v. United States, *supra* note 7, at 412.
34 BEANEY, RIGHT TO COUNSEL IN AMERICAN COURTS 211 (1955). See Reck v. Pate, 367 U.S. 433, 447 (1961): "Experience . . . teaches that confessions born of long detention under conditions of stress, confusion and anxiety are extremely unreliable."
35 MCCORMICK, *op. cit. supra* note 15, at 229.
36 Hogan & Snee, *supra* note 29, at 28. See 3 WIGMORE, EVIDENCE § 851 (Supp. 1962). Professor Wigmore cites as a corollary to *Upshaw* that, nothing more appearing, it will be assumed that such illegal detention was for the inducement of a confession.
37 Hogan & Snee, *supra* note 29, at 29.

> as a punitive measure against unrelated wrongdoing by the police. Our duty in shaping rules of evidence relates to the propriety of admitting evidence. This power is not to be used as an indirect mode of disciplining misconduct.[38]

The *Mallory* decision, however, listed the inadmissibility rule as a means "adequately to enforce the congressional requirement of prompt arraignment."[39] This was reiterated by the *Killough* majority in its statement that "the exclusionary rules are the only effective deterrent to police wrongdoing."[40] Whether one agrees that the foregoing is a valid purpose will depend, of course, on where he feels the line should be drawn to maintain that precarious balance between the individual's rights and the efficient protection of society, a balance which, argues the dissenter, is upset by *Killough*.[41] The danger is such that any prospective enlargement of protection for the accused must be sharply and critically examined, for

> [W]e sometimes tend to forget that every extension of the rights of the individual in the criminal field must necessarily and proportionately diminish the ability of society as a whole to protect itself against the criminal.[42]

The feeling remains strong that the automatic exclusion called for by *Mallory* is too dear a price to pay for police discipline.[43]

A third proffered rationale attributes the rules of exclusion to a judicial desire to protect "the citizen against the violation of his *privileges* of immunity from bodily manhandling by the police, and from the other undue . . . pressures . . . of the third degree."[44] This view occupies a sort of middle-ground between the first two in that, while relying wholly on neither voluntariness nor police discipline, it does suggest both these elements insofar as the protection of these privileges must in part be to prevent coercion and such protection presupposes the means to preclude police violations. While all three rationales present a difference in emphasis rather than in kind, the third comes closest to *McNabb's* concern for "maintaining civilized standards of procedure and evidence."[45] Adherents of all three views should agree, however, with the statement that the rule prevents the appearance of court complicity by refusing to allow government illegality to "debase the processes of justice."[46]

The *Killough* holding, it must be remembered, is hardly as automatic as that of *Mallory*. While *Mallory* excludes all confessions obtained during a period of illegal detention, *Killough* does not do the same for reaffirmations of such confessions. Two factors are indispensable: 1) a lack of counsel,[47] and 2) an insufficient time lapse between the two confessions to override the presumption that the second was the fruit of the first.[48] The former circumstance clearly weighed the heavier, and its presence in the *Killough* case was "decisive,"[49] although lack of counsel before[50] or after[51] arraignment has been held not to be a violation of

38 United States v. Mitchell, *supra* note 10, at 70-71.
39 Mallory v. United States, *supra* note 1, at 453.
40 315 F.2d 241, 253 (D.C. Cir. 1962).
41 *Id.* at 260 (dissenting opinion).
42 McGarr, *The Exclusionary Rule: An Ill-Conceived and Ineffective Remedy*, in POLICE POWER AND INDIVIDUAL FREEDOM 100 (Sowle ed. 1962).
43 See 3 WIGMORE, EVIDENCE § 851 (3d ed. 1940):

> But, it is argued, there are abuses by the police. Very true — here and there, at least. It does not follow, however, that a stricter rule of exclusion for confessions is the proper remedy. . . . The first remedy is to improve police personnel. The second one is to provide a means of speedy confession which shall be less susceptible to abuses, while still taking advantage of the inherent psychological situation.

44 MAGUIRE, *op. cit. supra* note 31, at 229.
45 McNabb v. United States, *supra* note 4, at 341.
46 Hogan & Snee, *supra* note 29, at 32.
47 See 315 F.2d 241, 243 (D.C. Cir. 1962).
48 See 315 F.2d 241, 244 (D.C. Cir. 1962).
49 31 GEO. WASH. L. REV. 859 (1963).
50 Cicenia v. Lagay, *supra* note 14; Crooker v. California, *supra* note 14; Ashdown v. Utah, *supra* note 14.
51 United States v. Moore, 290 F.2d 436, 439 (2d Cir. 1961).

due process. But strong dissents have called for the presence of counsel at all stages of interrogation,[52] in spite of the persistent claim that such a procedure would cripple police investigation. The counsel issue is thus but another aspect of the dialogue concerning the maintenance of that "precarious balance" already mentioned.

> This presents a real dilemma in a free society. To subject one without counsel to questioning . . . is a real peril to individual freedom. To bring in a lawyer means a real peril to solution of the crime, because . . . any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.[53]

Regardless of whether due process requires pre-trial counsel,[54] however, it seems clear that the *Killough* majority consider legal representation an important component of civilized procedural standards, since absence of counsel in *Killough* was the only substantial factual difference from *Goldsmith* and *Jackson.*

Because the time lapses between confession and reaffirmation in these three cases were so similar, however, it is arguable that the significance of that element was merely supplementary to the counsel issue, and was emphasized by the *Killough* court only to reinforce a conclusion already assured by the latter.

Perhaps the most disconcerting element in *Killough* is that, despite its obvious dependence upon these two factual circumstances, the court is reluctant to concede *Killough's* applicability to any situation not identical with or at least closely parallel to the situation before it.

> [N]owhere have we said that a posthearing confession, following one illegally procured before the hearing, must necessarily await the entry of counsel; nor do we predetermine that the passage of no amount of time could remove the taint of a confession obtained in defiance of the exclusionary rule.[55]

With such a guardrail qualification, then, the opinion sets the stage for an *ad hoc* determination of reaffirmance situations. After setting out these two factors as the hinges of inadmissibility, it withholds sufficient clarifying lubrication to enable the courtroom door to slam shut on such reaffirmations with authority and uniformity.

It is, of course, too early to assess *Killough's* impact. Despite its hedging, however, the footings have been laid, and it is likely that its mandate will be extended rather than restricted. In *United States v. Smith,*[56] the sole instance of a *Killough* situation to date, the trial court for the District of Columbia, in one short paragraph, refused to admit in a prosecution for murder the oral reaffirmations of a confession obtained in defiance of Rule 5(a), holding that there was not present between the two "either a sufficient lapse of time, or the meaningful advice of counsel. . . . There was in short, no event . . . sufficiently decisive to erase the effects of the first confession."[57] The indication seems to be that the courts will come to matter-of-factly disallow reaffirmation when the two critical elements are found not present.

It has been said that future generations will be puzzled looking back upon a system of criminal procedure which will not permit a single question to be asked of a defendant at his trial without his consent yet tolerates the most one-sided struggle during the pre-trial interrogation.[58] Professor Wigmore has suggested that the interrogating be carried on by a skilled magistrate, as is done in other "civilized countries."[59] For the present, the *Killough* reasoning strikes one as both a desirable

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52 *E.g.,* Culombe v. Connecticut, *supra* note 18 (dissenting opinion); Crooker v. California, *supra* note 14, at 447 (dissenting opinion): "He has the right to receive the benefit of the advice of his own counsel at the trial. . . . That same right should extend to the pre-trial stage."

53 Watts v. Indiana, 338 U.S. 49, 59 (1949).

54 Beaney, *op. cit. supra* note 34, at 211: "To attack a coerced statement or confession effectively, counsel must appear earlier than he does at present."

55 315 F.2d 241, 246 (D.C. Cir. 1962).

56 United States v. Smith, 31 F.R.D. 553 (D.D.C. 1962).

57 *Id.* at 561.

58 Hogan & Snee, *supra* note 29, at 25-26.

59 3 Wigmore, *op. cit. supra* note 3, at § 851.

and necessary corollary to the *Mallory* rule, for the right which it and Rule 5(a) affords the accused is worth little if it can be "vitiated by a transparent ruse of the type here employed."[60]

Fernand N. Dutile

LABOR RELATIONS — UNFAIR LABOR PRACTICES — UNION PICKETING TO FORCE EMPLOYER'S ACCEPTANCE OF "HOT-CARGO" CLAUSE NOT UNLAWFUL IN CONSTRUCTION INDUSTRY, BUT EMPLOYER MAY BREACH CLAUSE WITH IMPUNITY. — In a recent circuit court case, Local 383 had picketed the general contractor to secure a collective bargaining agreement which contained a "hot-cargo" clause providing that any subcontracted construction work would be made subject to the terms of the agreement. There were existing subcontracts with nonunion subcontractors. On petition for review of a National Labor Relations Board order to cease and desist from engaging in picketing found unlawful under section 8(b)(4)(A)-(B),[1] it was *held:* order reversed, case remanded for dismissal. Picketing by a construction union against a general contractor to secure an agreement to cease doing business with certain persons is not unlawful, since the construction-industry proviso of section 8(e),[2] and section 8(b)(4)(A), authorize use of coercion to secure such agreements, and section 8(b)(4)(B) only proscribes coercion to enforce them. *Construction Laborers Local 383 v. NLRB,* 323 F.2d 422 (9th Cir. 1963).

In a recent district court case, Local 48 sued the Hardy Corporation for alleged violation of a "hot-cargo" provision voluntarily and legally entered into by the parties under the construction-industry proviso of section 8(e), seeking enforcement of the provision and damages for its breach. No picketing or work stoppages had been induced by the union. *Held:* specific enforcement by the court, or an award in damages for the breach, would be "coercion or restraint" violative of section 8(b)(4)(ii)(B); the provision may be "enforced" only by voluntary compliance of the employer, without union conduct prohibited by section 8(b)(4). *Local 48, Sheet Metal Workers v. Hardy Corporation,* 218 F. Supp. 556 (N.D. Ala. 1963).

A "hot-cargo" clause may be best described in terms of section 8(e) of the

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60 12 CATHOLIC U. L. REV. 55, 57 (1963).

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1 Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4)(A)-(B), 73 Stat. 542 (1959), 29 U.S.C. § 158(b)(4) (Supp. IV 1963), amending 61 Stat. 141 (1947), which makes it an unfair labor practice for

> a labor organization or its agents —
>
> (4)(i) to engage in, or to induce or encourage . . . a strike or a refusal . . . to use . . . or otherwise . . . handle or work on any goods, . . . or to perform any services; or (ii) to threaten, coerce, or restrain any person . . . , where in either case an object thereof is — (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e); (B) forcing or requiring any person . . . to cease doing business with any other person . . . .

2 Labor Management Relations Act (Taft-Hartley Act) § 8(e), 73 Stat. 543 (1959), 29 U.S.C. § 158(e) (Supp. IV 1963), which provides:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided,* That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction . . . or other works: *Provided further,* That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms . . . shall not include persons . . . in the apparel and clothing industry: *Provided further,* That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

amended Labor Management Relations Act, as an agreement, express or implied, whereby the employer agrees to cease or refrain from handling the products of any other employer, or to cease doing business with any other person.[3]

The interrelationship between such clauses and secondary boycotts has clouded the labor relations arena since 1947.[4] It was not until 1958, in *Local 1976, United Brotherhood of Carpenters v. NLRB*,[5] commonly known as *Sand Door*, that the Supreme Court considered the question of whether a "hot-cargo" clause in the agreement would serve as a defense to a secondary boycott charge under section 8(b)(4).[6] In the majority opinion by Justice Frankfurter, the Court held that such clause was not a defense to a charge against the union of inducing a secondary boycott, but added that the Taft-Hartley Act does not make such clauses illegal and that the employer's voluntary compliance with such a provision immunizes the union from any unfair labor practice charge stemming from any ensuing secondary boycott.

In 1959, Congress acted to plug the loopholes remaining after *Sand Door*;[7] section 8(b)(4) was substantially revised[8] and a new section, 8(e),[9] was added. Section 8(e) makes it an unfair labor practice for a union and an employer to enter into agreements which we may classify as "hot-cargo" clauses. A proviso excepts unions in the building and construction trades in certain circumstances. The extensions and ramifications of this construction industry proviso are considered in these two recent decisions.

The court in *Local 383* considers the first question: must the employer voluntarily agree to the inclusion of a hot-cargo clause in the collective bargaining agreement, or may he be "coerced" into "agreement" by union picketing? In upholding union coercion (presumably strikes as well as picketing) to secure a hot-cargo clause, the court said:

> It may well be that § 8(e) itself is addressed only to voluntary agreements; it is not § 8(e) but § 8(b)(4)(A) which prohibits coercion. However, (A) prohibits it only where the object of the coercion is an agreement which is "prohibited" by § 8(e) from being voluntarily reached. The effect of the proviso is to exclude from that prohibition the subcontracting clause here at issue, and the two sections read together, as they are intended to be

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3 *Ibid.* See Notes and Comments, *Hot-Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97 (1963), where such clauses are described as "an agreement between an employer and a union which requires that the employer cease or refrain from doing business with another person when that other person's labor policies are objectionable to the contracting union." That the term "hot goods" may be more appropriate, see Apruzzese, *Prehire and the Local Building Contractor*, 48 Geo. L.J. 387, 397 (1959-60).

4 Prior to 1959, the secondary boycott provision, Labor Management Relations Act (Taft-Hartley Act) § 8(b)(4), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4) (1958), made it an unfair labor practice for a labor organization

> (4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, . . . or otherwise handle or work on any goods, . . . or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer . . . to join any labor or employer organization or any employer or other person to cease using . . . the products of any producer . . . or to cease doing business with any other person . . .

See generally Farmer, *The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions*, 48 Geo. L.J. 327 (1959-60); St. Antoine, *Secondary Boycotts and Hot Cargo: A Study in a Balance of Power*, 40 U. Det. L.J. 189 (1962); Notes and Comments, *Hot-Cargo Clauses: The Scope of Section 8(e)*, 71 Yale L.J. 158 (1961).

5 357 U.S. 93 (1958).

6 See statute cited note 4 *supra*.

7 See generally St. Antoine, *supra* note 4, at 196-98; Notes and Comments, *Hot-Cargo Agreements Under the National Labor Relations Act: An Analysis of Section 8(e)*, 38 N.Y.U.L. Rev. 97, 103-05 (1963).

8 See statute cited note 1 *supra*.

9 See statute cited note 2 *supra*.

> read, say most clearly that if such an agreement may voluntarily be reached, picketing to secure it is not made unlawful.[10]

The Board's principal contention, that even under the 8(e) proviso such clause must be voluntarily agreed to by the employer, is rejected.[11] All except one of the few district courts which have considered this question agree with *Local 383*.[12]

The most pertinent legislative history on Congressional intent as to sections 8(b)(4) and 8(e) are the remarks of the then Senator Kennedy, conference chairman:

> The first proviso under new section 8(e) . . . [is] to preserve the present state of the law with respect to picketing at the site of a construction project and with respect to the validity of agreements relating to the contracting of work to be done at the site of a construction project.
>
> This proviso . . . leaves unaffected the law developed under section 8(b)(4). . . .
>
> Agreements by which a contractor . . . promises not to subcontract work on a construction site to a nonunion contractor appear to be legal today. They will not be unlawful under section 8(e). . . . Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable.
>
> It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract.[13]

Two facts should be noted. First, while the section 8(e) proviso does not mention section 8(b)(4), section 8(b)(4)(A) does specifically apply to "any agreement which is prohibited by section 8(e)."[14] Second, *Sand Door* did not consider the questions involved in *Local 383* and in *Local 48*. Neither picketing to acquire such a clause, nor court enforcement of one legally entered into, were there in question. However, *Sand Door* did recognize a distinction between the agreement itself and the time when the employer must decide to boycott, indicating that at the latter time the employer must make a free choice whether or not to boycott, regardless of any contractual provision.[15]

Section 8(b)(4) was amended in 1959. Prior to that time, and when interpreted in *Sand Door,* the secondary boycott provision prohibited strikes and employee boycotts where the object was "(A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person."[16] This terminology was carried over into section 8(b)(4)(B) of the amended Act.[17] The new subsection (A) prohibits such coercion where an object thereof is "forcing or requiring any

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10 323 F.2d at 424.

11 See decision of NLRB in this case, Construction Laborers Local 383, 137 N.L.R.B. 149 (1962). Brief for NLRB, p. 27, Construction Laborers Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963), states the Board's view that "to construe the statute as condemning coercive enforcement . . . but condoning coercion as a means of obtaining such agreements would . . . be to pay observance to slavish literalism and to frustrate the Congressional objective."

12 Cuneo v. International Union of Operating Engineers, 216 F. Supp. 173 (D. N.J. 1963); Cuneo v. District Council of Carpenters, 207 F. Supp. 932 (D. N.J. 1962); Kennedy v. Construction Laborers' Local 383, 199 F. Supp. 775 (D. Ariz. 1961); Lebus v. Local 60, United Association of Journeymen, 193 F. Supp. 392 (E.D. La. 1961). *Contra,* Knapp v. Building Trades Council, 48 L.R.R.M. 2788, 43 CCH Lab. Cas. 17115 (D. Minn. 1961).

13 105 Cong. Rec. 17900 (1959), reprinted in II Legislative History of LMRDA 1433 (1959). To the same effect, see H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. 39-40 (1959), 105 Cong. Rec. 18126-27 (1959), reprinted in II Legislative History of LMRDA 943-44 (1959).

14 See statute cited note 1 *supra.*

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> [I]t seems most probable that the freedom of choice . . . contemplated by § 8(b)(4)(A) is a *freedom of choice at the time the question* whether to boycott or not *arises in a concrete situation.* . . . Such a choice, free from the prohibited pressures . . . must as a matter of federal policy be available to the secondary employer *notwithstanding any private agreement entered into between the parties.* 357 U.S. at 105. (Emphasis added.)

16 See statute cited note 4 *supra.*

17 See statute cited note 1 *supra.*

employer . . . to enter into any agreement which is prohibited by section 8(e)."[18]

The court in *Local 383* interprets section 8(b)(4) in conjunction with section 8(e) to provide "three degrees of permissibility" respecting picketing in connection with agreements to cease doing business with certain persons:

> (1) As to the garment industry, picketing to secure and to enforce is permissible; (2) as to the construction industry, picketing to secure is permissible but (under § 8(b)(4)(B)) picketing to enforce is proscribed; (3) as to all other industries, picketing both to secure and to enforce is proscribed.[19]

As already indicated, this is not the first case which applies section 8(b)(4)(A) to the acquisition of hot-cargo clauses, and section 8(b)(4)(B) to the enforcement thereof.[20] In *Lebus v. Local 60, United Association of Journeymen,*[21] denying a temporary injunction to restrain picketing to force an employer in the construction trade to agree to a "hot-cargo" clause, it is said:

> Whatever the wisdom of the policy, the clear text of § 8(b)(4)(A) denies the union its traditional weapons only when it would use them to secure an *illegal* agreement, and neither § 8(e), which "shall not apply" to such an agreement, nor any other provision, condemns the so-called "subcontractor clause" in bargaining contracts. . . . [T]he fact is that striking to obtain a subcontractor agreement was not illegal when the Taft-Hartley Act was amended in 1959.[22]

In two district court cases arising in New Jersey, it has been decided that coercion (strikes or work stoppages) to obtain "hot cargo" clauses does not violate either subsections (A) or (B) when within the limits of the construction proviso of section 8 (e). In *Cuneo v. District Council of Carpenters,*[23] the court rejected the argument that a clause lawful under the 8(e) proviso could not be secured by coercion:

> Since subsection (e) . . . by its terms expressly excepts [such] a contract . . . , the strike to force the inclusion of the clause in the contract is . . . not an unfair labor practice. The employment of coercion (strike) to secure the inclusion of a *lawful* clause . . . is no more an unfair practice than would be the employment of similar pressure to obtain the inclusion of a higher wage rate in such an agreement.[24]

When concerned, in *Cuneo v. International Union of Operating Engineers,*[25] with coercion of a contractors' association to secure a subcontractor clause, the court relied on the prior case as to the alleged subsection (A) violation, and said as to the alleged violation of subsection (B): "Since the proviso in section 8(e) . . . protects, under section 8(b)(4)(A), work stoppages to obtain a subcontractor clause, such action . . . cannot be unlawful under section 8(b)(4)(B). . . . Otherwise, the proviso in section 8(e) would be rendered meaningless."[26]

In *Kennedy v. Construction Laborers & Local 383,*[27] the *Local 383* circuit court case was presented to the district court on the Board's application for a temporary injunction. The court found no violation of subsection (A): "It is quite obvious that Congress, when enacting (A) intended to proscribe only those agreements which were prohibited by subsection (e). This is the direct mandate of the legislation."[28] It was held, however, that there was reasonable cause to believe that the

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18 See statute cited note 1 *supra.*
19 323 F.2d at 425.
20 See cases cited note 12 *supra.* Probably the first judicial notice of this distinction was taken by Judge Wright in Lebus v. International Union of Operating Engineers, Local 406, 188 F. Supp. 392, 396 n.5 (E.D. La. 1960) (dictum).
21 193 F. Supp. 392 (E.D. La. 1961).
22 *Id.* at 393.
23 207 F. Supp. 932 (D.N.J. 1962).
24 *Id.* at 939.
25 216 F. Supp. 173(D.N.J. 1963).
26 *Id.* at 175.
27 199 F. Supp. 775 (D. Ariz. 1961).
28 *Id.* at 779.

unions had violated subsection (B), and the temporary injunction was permitted, the court saying:

> A strike against a general contractor . . . to require the subcontractor to observe union standards is an unfair labor practice within the provisions of the former section, with which this legislation is practically identical. . . . Since picketing to *enforce* the provisions of such an agreement is prohibited by the Act, it *naturally follows* that picketing to *obtain* such an agreement would . . . be prohibited.[29]

Obviously, the Ninth Circuit Court of Appeals, distinguishing between acquisition and enforcement, fails to agree with this "naturally following" premise. In regard to the alleged violation of section 8(b)(4)(B), *Local 383* says:

> The clear implication is that only subsection (A) deals with picketing to secure agreements to cease, and from this follows the more rational construction that if subsection (A), which deals directly with this type of picketing does not make it unlawful in a particular case it will not be made unlawful by subsection (B).[30]

Unfortunately, reliance upon implications indicates a basic ambiguity in the Act; they often act as double-edged swords, capable of cutting either way. An example may be found in interpretation of Congressional history. The conference committee, considering the various proposed bills, finally adopted the present subsection (A), but at the same time it deleted from subsection (B) the phrase "or agree to cease" which had appeared in the House version. The House managers explained that the restrictions thereby imposed "were included in the other provisions dealing with prohibitions against entering into 'hot-cargo' agreements, and therefore their retention in section 8(b)(4)(B) would constitute a duplication of language. . . ."[31] The Board implies from this, that if the deleted phrase would have been a duplication, then the reach of subsection 8(b)(4)(A), obviously the "other" provision, must be coextensive with that of subsection (B).[32] By the express language of subsection (A) the court understands that, while the deleted phrase would have been a duplication in cases involving other industries (which are now prohibited from *acquisition* picketing by subsection (A)), this does not extend the prohibition to those industries (construction and garment) which are expressly exempted, through the 8(e) proviso, from the reach of subsection (A).

Senator Goldwater stated his view of the effect of the 1959 amendments on the issue in *Local 383:*

> The new provision is silent with respect to the lawfulness of coercion or restraint — economic or otherwise — by one party to compel the other party to enter into, or even to bargain about entering into such an agreement. This question was one of those left unresolved . . . prior to this new legislation. . . . It is the intention of Congress that the new legislation leave it in the same unresolved status under the building construction industry exemption and that the Board and the courts decide the issue . . . as if these new amendments contained in section 8(e) had not been enacted and in accordance with the previously applicable law.[33]

Local 383's interpretation depends not on the "silent" section 8(e) alone, but the express terminology in subsection (A).

This decision overlooks a prime consideration which was not directly before it. The Board quite correctly points out that, if the general contractor can be forced to accede to this subcontractor clause, and (assuming) the union can enforce it by lawful means, thus compelling the general contractor to subcontract only to those subcontractors who comply with the collective bargaining agreement, there is little doubt that the union has then transmitted to the moment of boycott, through the contract, some of the pressures from which *Sand Door* had protected the general

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29 *Id.* at 781. (Emphasis added.)
30 323 F.2d at 426.
31 H.R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. 38 (1959), 105 Cong. Rec. 18115, 18126 (1959).
32 Brief for NLRB, pp. 21-22, Construction Laborers Local 383 v. NLRB, 323 F.2d 422 (9th Cir. 1963).
33 105 Cong. Rec. 19772 (1959).

contractor. Of course, if the union cannot enforce it, no pressure is transmitted. Nor did *Sand Door,* concerned with strikes, specifically protect the general contractor from other lawful means of enforcement.

The court in *Local 48* considers this second question; whether such a "hot-cargo" subcontractor provision, lawfully entered into under the construction industry proviso, can be avoided by the general contractor at a later date without subjecting himself to court enforcement or liability for breach of contract. The question is answered affirmatively.[34]

Once again *Sand Door* is important. In *Local 48* the district court notes that *Sand Door* enunciated the Congressional policy of preserving to the employer, regardless of any contractual provision to the contrary, a certain freedom of choice to be exercised by him in deciding whether or not to engage in the boycott of any other person. But the *Sand Door* majority also said:

> It does not necessarily follow from the fact that the unions cannot invoke the contractual provision in the manner in which they sought to do so in the present cases that it may not, in some *totally different context* not now before the Court, still have legal radiations affecting the relations between the parties. All we need now say is that the contract *cannot be enforced by the means specifically prohibited in § 8(b)(4)(A)*.[35]

The union contends in *Local 48* that court enforcement or damages for breach of a hot-cargo provision legally entered into under section 8(e) are, in view of *Sand Door:* (1) a "totally different context"; (2) the "legal radiations" therein contemplated; and (3) not prohibited by the amended legislation,[36] section 8(b)(4)(B).

The *Local 48* court finds it significant, in section 8(e), that the second proviso exempts certain garment industry hot-cargo agreements not only from the prohibition of this section but also from section 8(b)(4)(B); also, that the third proviso exempts the protected garment industry agreements from any prohibitions of the Act against enforcement of the agreements.[37] No specific attempt was made by Congress to provide the same protection under the construction industry proviso. Hence, the court concludes, the net effect is that

> unions are still prohibited from exerting the pressures specified in subsection 8(b)(4) where the object of such conduct is to *either acquire or enforce* a hot cargo agreement with an employer in the construction industry.[38]

The cases cited by the court for this proposition unanimously agree that union pressures prohibited by section 8(b)(4)(B) cannot be employed to *enforce* a hot-cargo agreement in the construction industry. They do not hold that a union suit for specific enforcement or damages is one of those prohibited pressures. Nor do they make convincing precedent, in light of the reversal of the Board's decision in *Local 383,* for the proposition that those pressures which would be prohibited in enforcing are also prohibited in acquiring "hot-cargo" agreements.

One case holds it to be an unfair labor practice to *picket to enforce,* through

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34 218 F. Supp. 556 (N.D. Ala. 1963). The district court also held that "under the circumstances here involved, the mere filing and maintaining of this lawsuit by the plaintiff is not an unfair labor practice under Section 8(b)(4)(ii)(B). . . ." *Id.* at 562.

35 357 U.S. at 108. (Emphasis added.)

36 Senator Goldwater seems to agree with this contention:

> Thus, although employers and unions who are under this exemption may lawfully enter into such agreements, and *may resort to the courts for their enforcement* under applicable principles of contract law, no coercion or restraint — economic or otherwise — may be used by any party to such agreement, even if entered into voluntarily by both parties, to compel the other party to live up to the contract or to refrain from breaching it. 105 CONG. REC. 19772 (1959). (Emphasis added.)

37 See statute cited note 2 *supra.*

38 218 F. Supp. at 561. (Emphasis added.) Cases cited by the court in support of this sweeping conclusion are: NLRB v. International Union of Operating Engineers, Local 12, 293 F.2d 319 (9th Cir. 1961); NLRB v. Bangor Building Trades Council, 278 F.2d 287 (1st Cir. 1960); Lebus v. International Union of Operating Engineers, Local 406, 188 F. Supp. 392 (E.D. La. 1960); Laborers Local 383, 137 N.L.R.B. 149 (1962).

inducement of work stoppages, a subcontractor clause.[39] Another case, dealing with section 8(b)(4)(A) as it existed before the 1959 amendments, finds an unfair practice in *striking* against the general contractor to *enforce* compliance with the agreement.[40] The third case cited, relying on these two other cases, holds that the 8(e) proviso does not authorize *strikes to enforce* such provisions.[41]

From these cases, and on the premise that hot-cargo agreements were not judicially enforceable before the 1959 amendments, the *Local 48* court concludes:

> Judicial enforcement . . . would constitute a more subtle form of coercion than a threatened strike or picket, but it is coercion.[42] . . . [It] would result in "coercion" or "restraint" of the free will of the employer . . . violative of Section 8(b)(4)(ii)(B). . . .[43]

Under this interpretation of the construction industry proviso, the existence of a hot-cargo provision has few "legal radiations"; it can be entered into under section 8(e), the employer may voluntarily comply with it without violating the Act, and the union may persuade the employer to comply as long as the pressures prohibited by subsection (B) are not used as "persuasion."

Several points should be made about the *Local 48* decision. The court attached significance to the different treatment given to the construction and garment industries. Arguably, Congress did not intend to prohibit judicial enforcement; Senator Goldwater said that the parties under the construction proviso "may resort to the courts for their enforcement under applicable principles of contract law."[44] The intended distinction could be that the garment exemptions, unlike those for the construction industry, also protect it from the *Sand Door* law. Even without accepting this distinction, arguably the "subtle form of coercion" sought by the union is not prohibited by section 8(b)(4). The Act, through this section, makes it an unfair practice for a "labor organization or its agents,"[45] not for a court, to coerce the employer. In *NLRB v. Insurance Agents' International*,[46] the Supreme Court made it clear that prohibitions against economic weapons on the part of unions should not be added to the Act without rather specific charter.[47] The Court added: "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions. See § 8(b)(4). . . ."[48] The fact remains that this "rather specific" section does not expressly prohibit enforcement of the hot-cargo provision by a federal court. Congress thought enough of these two industries to make special provision for them in section 8(e), and Representative Thompson said this was "necessary to avoid serious damage to the pattern of collective bargaining in these industries."[49] The *Local 48* court is forced to set federal policy for one of two specially protected industries, and in so doing effectively nullifies any benefit the union could derive from engaging in collective bargaining on hot-cargo agreements.

Assuming that the decisions in both *Local 383* and *Local 48* become accepted law, we find that "hot-cargo" clauses within the construction industry proviso of section 8(e) are lawful, and the union may secure the clause for the contract by

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39 Lebus v. International Union of Operating Engineers, Local 406, 188 F. Supp. 392 (E.D. La. 1960).

40 NLRB v. Bangor Building Trades Council, 278 F.2d 287 (1st Cir. 1960). (Unions must hope for voluntary compliance.)

41 NLRB v. International Union of Operating Engineers, Local 12, 293 F.2d 319 (9th Cir. 1961).

42 In a footnote, the court relies on the following definition, 218 F. Supp. at 561 n.2:

> *Coerce* — "(1) to restrain by force, especially by law or authority; to repress, curb; (2) to compel to any action; (3) to enforce, as to *coerce* obedience." Webster's New Collegiate Dictionary (1960).

43 218 F. Supp. at 561.

44 105 Cong. Rec. 19772 (1959).

45 See statute cited note 1 *supra*.

46 361 U.S. 477 (1960).

47 *Id.* at 499.

48 *Id.* at 498.

49 105 Cong. Rec. 18134 (1959).

pressuring the general contractor through the means (strikes, picketing, etc.) usually prohibited by section 8(b)(4). But once the clause is in the contract, the contractor may disregard it, for the union is powerless not only to enforce it but also to sue for breach of contract if the clause is breached. The union must rely on the general contractor to voluntarily execute the provision.

The wisdom of allowing federal labor-relations policy to develop in this vein must be questioned. If Congress, through the 1959 amendments, intended merely that the construction industry should remain free from the general prohibition of section 8(e), relying on voluntary enforcement of such hot-cargo clauses, it is quite inconsistent to allow the unions to use coercive pressures to acquire the clause in the first place. Disruption of labor relations at the bargaining tables serves little useful purpose if the employer-contractor does not want, and will not voluntarily comply with, the hot-cargo clause. On the other hand, if union pressures may be brought to bear on the contractor during the bargaining process to obtain the clause, and its resulting benefits for the union and its members, it should become a legitimate and enforceable part of the contract achieved through the collective bargaining process. Court enforcement, in the end, would result in the same cessation of business with the other person as that which cannot be obtained through the usual union "threats, restraints, and coercion"; yet it would not have the disruptive effects of these other pressures. Whichever policy prevails, such policy decisions are for the Congress to determine; the 1959 amendments fail to adequately state this determination.[50]

Michael D. Sullivan

CONSTITUTIONAL LAW — CRIMINAL LAW — SEARCH AND SEIZURE — FEDERAL STANDARDS OF REASONABLENESS APPLICABLE TO STATE SEARCH AND SEIZURE. — State officers were led to the trail of a dope "connection" man by an informer. During their surveillance of this man, they observed an automobile rendezvous with defendant. The officers' pursuit of defendant was interrupted when he made a U-turn in the middle of the block. Fearing that the evidence would be destroyed, the officers immediately procured defendant's name and address from the Department of Motor Vehicles' license records and proceeded to the given address without procuring a search warrant. A passkey was obtained from defendant's landlord and the apartment was entered without prior announcement. One officer in defendant's presence walked over to the kitchen doorway and spotted a green leafy substance, which he recognized as marijuana, on the kitchen sink. Defendant and his wife were arrested for, and later convicted of, possession of narcotics.

Defendants protested that the evidence was procured as the result of an illegal search and should be excluded under the exclusionary directive of *Mapp v. Ohio*.[1] The search and seizure judged by state standards was held to be reasonable.[2] On certiorari from the California Supreme Court, the United States Supreme Court *held:* affirmed the conviction and said that state standards of reasonableness will be respected insofar as they are consistent with federal standards of reasonableness. *Ker v. California*, 374 U.S. 23 (1963).

Formerly only the federal courts were under the exclusionary directive, that is, that evidence seized in violation of the Fourth Amendment's proscription of unreasonable searches was to be excluded from the purview of federal courts.[3] While

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50 Representative Roosevelt recognized that the enactment of section 8(e) was not the final word:

> I wish to emphasize a very telling fact that many legal problems lie ahead. . . . The need to exempt two given trade union groups is the best argument I know to prove this point. 105 CONG. REC. 18142 (1959).

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1 367 U.S. 643 (1961).
2 People v. Ker, 195 Cal.App.2d 246, 15 Cal.Rptr. 767 (1961).
3 Weeks v. United States, 232 U.S. 383 (1914).

Wolf v. Colorado[4] did not require the states to exclude the evidence, it did make the Fourth Amendment applicable to the states through the Fourteenth Amendment. Presumably this was to avoid needless friction in the area of federal-state relations.[5] The failure of approximately one-half the states to adopt the exclusionary rule on their own initiative[6] and the fact that the right to privacy can only be effectively enforced by the exclusionary rule, led to the exclusionary directive in *Mapp v. Ohio*.[7]

Mapp left open the question of whether federal[8] or state standards of reasonableness should be the test of a valid search and seizure.[9] One can easily surmise that a state bent on thwarting the exclusionary directive could do so by setting very low standards of reasonableness. *Mapp* then opened the door to nonuniformity among the states and possibly fifty separate tests of what constitutes a reasonable search and seizure.[10] *Ker* is an attempt to solve the problem of nonuniformity, but it may have left the situation where it was.

There are two competing policy considerations entwined in the exclusionary rule: 1) the right to privacy and 2) the need for effective law enforcement at the local level.[11] There are those who argue that local crime situations cannot be controlled by one uniform standard, since, for example, in certain locales the police have to resort to less than reasonable searches in order to effectively enforce the law.[12] Though it is doubtful that one's right to privacy should depend on his choice of residence, the Supreme Court apparently provided for this situation in *Ker:*

> The States are not thereby precluded from developing workable rules governing arrests, searches, and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.[13]

For the proposition on who has standing to complain, the court cited *Jones v. United States*.[14] *Jones* altered the rule that only those who claimed ownership or a sufficient interest in the property searched could complain, to the rule that an invitee, a guest, or anyone legitimately on the property may complain of the unreasonableness of the search and seizure. Thus *Ker* not only solved the problem of what standards of reasonableness are to be applied, it also informed the states as to who had standing to complain.

Since the Court specifically stated that the states were to be allowed to formulate their own rules, *Ker* should forestall fears that the Supreme Court is attempting to make the Federal Rules of Criminal Procedure applicable to the states. Yet, what has the court done to uniformity here? If leeway is to be allowed for local situations, are we not going to see fifty different standards of reasonableness again? The Court's own words were, "Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."[15] Does the Court mean that deviations from federal standards are to be allowed if the

4 338 U.S. 25 (1949).
5 Note, 29 BROOKLYN L. REV. 98, 105 (1962).
6 Elkins v. United States, 364 U.S. 206 (1960).
7 367 U.S. 643 (1961). The argument on whether the exclusionary rule was a constitutional mandate or a rule of evidence was also settled by *Mapp*. 23 OHIO ST. L.J. 147, 150 (1962).
8 For a good discussion of the federal standards of reasonableness, see note, 28 BROOKLYN L. REV. 302 (1962).
9 *Compare* Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963) (state standards of reasonableness applicable), *with* Commonwealth v. Spofford, 343 Mass. 703, 180 N.E.2d 673 (1962) (federal standards of reasonableness applicable).
10 Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185, 203 (1961).
11 40 N.C.L. REV. 314 (1962).
12 *Ibid.*
13 Ker v. California, 374 U.S. 23, 34 (1963).
14 462 U.S. 257 (1960), noted in 15 ALA. L. REV. 575 (1963).
15 Ker. v. California, 374 U.S. 23, 34 (1963).

deviations are reasonable, or that it is going to apply federal standards regardless of the situation, but that it was thought best to assuage the fears of local law enforcement officials by merely making the statement? The latter intention seems doubtful because of talk that a decision as to reasonableness cannot depend on a definition, but rather on an *ad hoc* determination of the facts and circumstances surrounding the search and seizure.[16]

It is suggested that the Court left this question open to avoid federal-state friction in the hope that the states would act of their own accord. The Court then would be free to give either a liberal or conservative interpretation to this question as the situation presents itself in the future. The local exception question has been robbed of some of its luster by successful operation of the F.B.I. under the federal standards of reasonableness[17] and the experience of California with the exclusionary rule before *Mapp* and *Ker* were handed down.[18]

Another problem that will plague the courts as a result of *Ker* is one that is still plaguing them as a result of *Mapp*—the possible retroactive applicability of the decisions.[19] The problem is not as acute for *Ker* because it is logical for the courts to treat its retroactivity in the same way they treated the problem of the retroactivity of *Mapp*. The crux of the problem is how to treat state decisions since *Mapp* which have not utilized federal standards of reasonableness.

Those convicted with illegally seized evidence prior to *Mapp* and those convicted with evidence secured in violation of federal standards of reasonableness, were convicted with incriminating evidence.[20] If the police were required to procure the evidence in accordance with federal standards of reasonableness, it is more than likely that the evidence could have been seized legally. Thus to apply the rule retroactively will probably set guilty defendants free. Yet, one whose past conviction was obtained by illegally seized evidence has had his constitutional rights violated just as has one whose rights were violated after *Mapp* or *Ker*.[21] Innumerable practical problems militate against the retroactive application of the decisions; some of which are lack of evidence in the record as to the reasonableness of the search or seizure, loss of witnesses, and disappearance of the evidence itself. Ultimately the Supreme Court will have to decide the retroactivity issue.[22]

One might add that *Mapp* and *Ker* were retroactive applications in that the holdings were applied to searches and seizures that had taken place before these rules became the law. This militates against only a prospective application. A lower federal court denied a writ of habeas corpus even though it applied *Ker* retroactively to 1953.[23] The court may have been willing to apply the decision in *Ker* retroactively when it agreed that the search was reasonable under federal standards, but it may not be willing to apply the decision retroactively when it calls for a reversal. A Minnesota case refused to hear argument on appeal as to the applicability of *Mapp* and *Ker* when the defendant had failed to raise objection as to the admissibility of the evidence at his pre-*Mapp* trial.[24] The Supreme Court can be criticized for not at least giving dictum as to their present feelings as to the retroactivity of *Mapp* and *Ker* lest the ensuing speculation in the courts work injustice.

Ker should enhance federal-state police cooperation. If federal standards are

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16 *Id.* at 33.
17 23 Ohio St. L.J. 147, 151 (1962).
18 Traynor, *Mapp v. Ohio At Large in the Fifty States,* 1962 Duke L.J. 319 (1962).
19 See Editorial Note, 16 Rutgers L. Rev. 587 (1961-62).
20 *Id.* at 594.
21 New York's solution has been to deny reopening of the case if the appellate process had effectively ended at the time of Mapp. People v. Muller, 11 N.Y.2d 154, 182 N.E.2d 99, 227 N.Y.S.2d 421 (1962). If the trial was still in the appellate stage at the time *Mapp* was decided, the defendant was allowed to reopen for argument on the exclusionary issue. People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).
22 29 Brooklyn L.R. 98, 102 (1962).
23 Sisk v. Lane, 219 F. Supp. 507 (N.D. Ind. 1963).
24 State v. Tahash, 123 N.W.2d 207 (Minn. 1963).

applicable, federal courts could utilize evidence seized exclusively by state officials whereas formerly the federal courts could not utilize evidence seized illegally by state officials.[25] This cooperation was restricted under the present dichotomy of federal-state standards of reasonableness. *Ker* may also solve a problem that has plagued the states since *Mapp:* should a state exclude evidence seized by officers of a sister state as the result of an illegal search?[26] Since the federal standard of *Elkins v. United States*[27] will not allow federal courts to utilize evidence seized entirely by state officials in an illegal search, states should not be permitted to do so.

Under *Ker* the trial court is still to have the initial determination of the reasonableness of the search. Then where necessary the federal court will make an independent determination.

> While this Court does not sit in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness, the fundamental — *i.e.,* constitutional — criteria established by this court have been respected.[28]

The reasonableness of a search and seizure is a factual question about which reasonable men may differ. For example, eight judges in *Ker* agreed that federal standards of reasonableness should apply to search and seizure in the state courts, but four disagreed on the reasonableness of the questioned search.[29] Surely the disagreement shown in our highest Court will be multiplied fifty times over by state determinations of this factual question. The already overcrowded federal dockets will be further inundated by ofttimes unfounded claims in the hope that a different hearing will decide the factual question to the defendant's advantage. And, if the Supreme Court sets about to overturn state decisions, hoped-for harmonious federal-state relations will not be fostered.

Since the Fourth Amendment has been made applicable to the states through the Fourteenth Amendment, it seems untenable that the remainder of the Bill of Rights should not be so applicable.[30] At least the Fifth Amendment's proscription of self-incrimination should apply, because the exclusionary policy consideration here is the same as that connected with the Fourth Amendment. *Mallory v. United States*[31] held that a confession obtained during a period of illegal detention was to be excluded from the purview of federal courts because the situation was most likely to lead to self-incrimination. The Court excluded the confession because the illegal detention violated Federal Rule 5a, but since the extension of the first exclusionary rule to the states in *Mapp v. Ohio*[32] it seems more probable than not, that the mandate of the Fifth Amendment will be applied to the states via the *Mallory* exclusionary rule. Assuming that *Mallory* then is the federal standard of admissibility under the Fifth Amendment, and that the rule of *Mallory* is applied to the states, like the rule of *Weeks* was in *Mapp,* then probably the federal courts in applying *Ker* should only tolerate the same kind of standard as to illegal detention as that utilized in the federal courts with potential exception allowed for local fact situations.

In short *Ker* was the only decision possible if the right of privacy was to be guaranteed to state citizens. Although *Ker* recognized the possibility that local situations may call for deviations from federal standards of reasonableness, the Court failed to sufficiently spell out its intentions in this matter. *Ker* will further elevate

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25 Elkins v. United States, 364 U.S. 206 (1960).
26 *Compare,* People v. Winterheld, 366 Mich. 428, 115 N.W.2d 80 (1962), *with* Young v. Commonwealth, 313 S.W.2d 580 (Ky. 1958).
27 Elkins v. United States, 364 U.S. 206 (1960).
28 Ker v. California, 374 U.S. 23, 34 (1963).
29 Ker v. California, 374 U.S. 23 (1963).
30 33 Miss. L.J. 133, 135 (1961).
31 Mallory v. United States, 354 U.S. 449 (1957).
32 Mapp v. Ohio, *supra* note 7.

the level of police practices—a movement that was initiated in the states by *Mapp*. The difficulty with *Ker* is that the Court has not bound itself by the record in the state court. Thus the Court has abrogated the usual appellate process of deciding questions of law only, for one where both questions of law and fact may be decided. Friction in the area of federal-state relations may be further intensified. Although *Ker* has left the area with many open questions (retroactivity, entire Bill of Rights, etc.), the effective guaranty of the right of privacy may at long last have been given to every United States citizen.

John A. Hauter

CONTEMPT — CRIMINAL PUNISHMENT — REFUSAL TO ANSWER QUESTION FOLLOWING PUNISHMENT FOR EARLIER, IDENTICAL REFUSAL IN SAME PROCEEDING IS GROUNDS FOR SIMILAR PUNISHMENT. — Aurelius Cirillo was called as a witness before the Grand Jury pursuant to an investigation into the attempted strangulation of one Gallo. Cirillo, after having been granted immunity, answered various questions but insisted he could not remember what he did between noon and seven p.m. on August 20, 1961 — the probable time of the attempt. Cirillo was found guilty of criminal contempt[1] and was sentenced to thirty days in jail plus a 250-dollar fine.[2] Having served the full thirty days and paid the fine, Cirillo was brought again before the same Grand Jury, refused to answer the same questions insisting he couldn't remember, and was again sentenced for criminal contempt. The Appellate Division of the Supreme Court affirmed[3] and on appeal to the Court of Appeals it was *held:* affirmed. The second refusal constituted a separate and distinct act of contempt, and as such was deserving of a separate punishment. *In the Matter of the Second Additional Grand Jury v. Cirillo,* 12 N.Y.2d 206, 188 N.E.2d 138 (1963).

This case represents the majority, if not the unanimous, opinion of the courts in the area of successive contemptuous refusals to answer identical questions in the same proceeding when criminal punishment intervenes.[4] Since each contemptuous refusal is dealt with as a different criminal contempt,[5] there must be some basis upon which one refusal is distinguishable from another; in other words, the acts must be separate and distinct. Not all successive contemptuous refusals to answer are considered separate punishable acts;[6] therefore a method or test of distinction is essential. The method employed in the instant case, has rarely, if ever, been questioned by the courts.[7]

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1 N.Y. JUDICIARY LAW § 750:

> A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others. . . .
>
> 5. Contumacious and wilful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory. . . .

2 N.Y. JUDICIARY LAW, § 751:

> Punishment for a contempt, specified in section seven hundred and fifty, may be by fine, not exceeding two hundred and fifty dollars, or by imprisonment, not exceeding thirty days . . . or both, in the discretion of the court.

3 In the Matter of Second Additional Grand Jury v. Cirillo, 16 App. Div. 2d 605, 230 N. Y.S.2d 303 (1962).

4 Of five cases found exactly on point, none reached a different result. *Ex Parte* Stice, 70 Cal. 51, 11 Pac. 459 (1886); State v. Kasherman, 177 Minn. 200, 224 N.W. 838, *cert. denied* 280 U.S. 602 (1929); Matter of Ward, 295 Mich. 742, 295 N.W. 483 (1940); *In Re* Amato, 204 Misc. 454, 124 N.Y.S.2d 726 (Sup. Ct. 1953); State v. Dominguez, 228 La. 284, 82 So.2d 12 (1955).

5 That the same refusals can be considered both civil and criminal contempt, thereby subjecting the witness to two separate punishments, see State v. Mirman, 99 Ohio App. 382, 133 N.E.2d 796 (1955).

6 Successive refusals on the same day are considered only one contempt. People v. Riela, 7 N.Y.2d 571, 166 N.E.2d 840 (1960); People *ex rel.* Amarente v. McDonnell, 100 N.Y.S.2d 463 (Sup. Ct. 1950).

7 See cases cited note 4, *supra.*

The earliest cited case, *Ex Parte Stice,*[8] involved a witness who refused to be sworn at trial, was punished, returned and refused to be sworn again. The court, in upholding the second punishment, found that the second refusal was a separate and punishable contempt; but no reasons were given for so holding.

In *State v. Kasherman,*[9] the Supreme Court of Minnesota was faced with the problem of whether the second punishment or refusal to answer identical Grand Jury questions involved double jeopardy, when the first sentence had already been served. The double jeopardy argument was met by stating that punishment for contempt is to compel obedience to the court and not to punish for a crime; therefore double jeopardy would not apply. In disposing of the further argument that since the questions were the same the offense was identical, the court rather cryptically replied: "If the identity of the questions makes for the conclusion that the same matter was under consideration, there is no suggestion that it was not properly so."[10] The court's answer to the double jeopardy argument introduces a theory — that refusals to answer are civil and not criminal contempts — that is not pertinent to this discussion since the punishment in the instant case is in fact criminal.[11] The second answer is directed at the more pressing problem of distinguishing the identical refusals. As noted, the court found they were distinguishable, but with no serious discussion.

Eleven years later in *Matter of Ward,*[12] a Michigan case, the *Stice* and *Kasherman* decisions furnished grounds for an unequivocal holding that a second successive contemptuous refusal to answer identical Grand Jury questions was an act deserving of criminal punishment although punishment had been served for the first refusal. In 1953 a New York court in *In Re Amato*[13] upheld the second conviction of a witness who had refused to testify to the same Grand Jury questions that caused the earlier commitment for criminal contempt. The Court here said:

> The principle is well established that separate and distinct acts of contumacious and wilful refusal to answer legal and proper interrogatories is a separate and distinct act of criminal contempt, even though the witness may already have been punished for his refusal to answer the same or substantially the same questions. It is equally well settled that if a series of acts constitutes but one contempt, there cannot be separate and distinct punishments for each act in the series. . . . [T]he test for determining whether contumacious acts constitute separate and distinct contempts is not whether there has been a previous adjudication for contempt, but "whether the subsequent contemptuous act is so interwoven with the previous conduct that it is inseparable therefrom." *Gautreaux v. Gautreaux,* 220 La. 564, 579, 57 So.2d 188, 193.[14]

In effect the New York court says that *even if* the first refusals have been punished, the second refusals can also be punished provided they are separable. The test here employed does not consider as important the intervening punishment, but rather the separability or inseparability of the two acts.

It is clear, then, that while the supporting authorities listed above reach the same result, only the *Amato* case attempts to reason out that result in terms of a workable test. Until *Amato,* there seemed to be no question but that these suc-

8 70 Cal. 51, 11 Pac. 459 (1886).
9 177 Minn. 200, 224 N.W. 838, *cert. denied* 280 U.S. 602 (1929).
10 *Id.,* 224 N.W. at 839.
11 The civil contempt power, used to compel obedience to the court, is remedial and therefore subject to wide discretionary use on the part of the court. Criminal contempt power, used to vindicate the authority of the court, is more strictly construed in line with ordinary criminal procedures. Since the line between the two is admittedly vague, especially when dealing with refusals to testify, it has been felt that the kind of punishment imposed, whether civil or criminal, is within the discretion of the court. Here, however, the refusals are necessarily criminal by statute, and are limited in punishment by statute. See DANGEL, CONTEMPT, § 12 (1939); 26 TEMP. L.Q. 83 (1952).
12 295 Mich. 742, 295 N.W. 483 (1940).
13 204 Misc. 454, 124 N.Y.S.2d 726 (Sup. Ct. 1953).
14 *Id.,* 124 N.Y.S.2d at 728.

cessive refusals to testify were separate punishable acts. In that case, however, the court was confronted with the seemingly conflicting line of New York cases holding that successive refusals on the same day constituted only one punishable criminal contempt.[15] In distinguishing the two lines, the test was used: those refusals on the same day were inseparable acts; the refusals in *Amato* were on different days, and so were separate and distinct. That the refusals were on different days seemingly establishes the necessary "separability." Successive refusals to answer, then, are adjudged to be separate and distinct providing they are far enough apart. Thus, remoteness in time lies at the heart of the *Amato* test.

The Court of Appeals, while citing all of the above cases, relied most heavily on the *Amato* case. The court was confronted with the same divergent lines of cases — one holding numerous refusals on the same day to be only one contempt,[16] and the other holding successive refusals on different days when punishment intervenes to be separate acts[17] — and adopted the *Amato* view in distinguishing them. The court, however, conceded that such a distinction "may seem arbitrary." The dissent in the instant case asserts that not only is this arbitrary, it is also a danger to one's rights:

> It makes little difference whether a person is asked the same or related questions 17 times on one day, or on 17 different days. In each instance he should be found guilty of but a single criminal contempt. Otherwise, it will be possible on successive identical charges to incarcerate a man permanently unless he answers his interrogators in a manner satisfactory to the District Attorney or the court.[18]

This seems to be the logical implication of the test employed — instead of repeating the same question on one occasion, the interrogator only has to wait a sufficient time to make his next question "count." He would wield a fearful weapon. The majority says that such a situation of "numerous or onerous" contempt adjudications which deny due process can be dealt with when such a case arises. If, however, a different test is used than that found in *Amato*, a test which does not rest on the objectionable grounds of distinction through remoteness in time, then such a case need never arise.

The Supreme Court of the United States has dealt with the general area of successive refusals to testify as constituting contempt in *Yates v. United States.*[19] Although that case did not deal with the precise problem here presented, it points up an interesting view of successive refusals which in cases similar in facts to the instant decision may prove helpful. The defendant Yates was called as a witness in a federal prosecution for conspiracy to violate the Smith Act. On June 26 she refused to answer four questions as to whether friends of hers were Communist. She was held in contempt and detained in prison until she should answer. She was called back on June 30, refused to answer the same questions — eleven of them — and was held in criminal contempt for each refusal. The Supreme Court reduced the eleven punishments to one and went even further to find only one "continuous contempt" between June 26 and June 30: "Having once carved out an area of refusal, petitioner remained within its boundaries in all her subsequent refusals."[20] The court nevertheless held that a civil and criminal contempt could be imposed for the same act. The importance of this case here is to note that the "area of refusal" rationale directly conflicts with the "separate and distinct" test as based on inseparability of the acts. For, under the former, there is no difference between refusals on the same day and on successive days. Remoteness

15 People *ex rel.* Amarente v. McDonnell, *supra* note 6.
16 People v. Riela, *supra* note 6.
17 *Ex Parte* Stice, *supra* note 8; State v. Kasherman, *supra* note 9; Matter of Ward, *supra* note 12.
18 In the Matter of the Second Additional Grand Jury v. Cirillo, 12 N.Y.2d 206, 188 N.E.2d 138, 141 (1963).
19 355 U.S. 66 (1957).
20 *Id.* at 73-74.

of time does not establish a new contempt. The "area of refusal" rationale, rather, supports the dissent's view in *Cirillo* that refusals on successive days should establish only one contempt. Therefore the test used in *Yates* would seem to overturn that "established principle of law" enunciated in *Amato* — that one who has been criminally punished for contumacious refusal to answer can again be criminally punished for a later refusal to answer an identical question in the same proceeding. However, this does not necessarily follow. A different test could reach the same result but not conflict with *Yates.* An analysis of a series of Louisiana contempt cases which deals with the problem of successive punishments shows how this is so.

These cases, while not differing in result from the present decision, when taken together establish an altogether different basis for holding the witness amenable to the second successive punishment. It has been already shown that the test applied in the *Amato* case was used as the basis for the holding in the instant decision. That test was taken from the Louisiana case of *Gautreaux v. Gautreaux.*[21] There, an attorney, who, having filed with the court a petition containing indecent language, arose and violently objected to the court's expunging of the petition from the records. Failing to desist upon being so ordered, the court found him guilty of criminal contempt and sentenced him to jail. Immediately thereafter the judge resumed reading the order so expunging the petition, the attorney again abused the court, and was sentenced to another term in jail. The Supreme Court of Louisiana found only one contempt, and so upheld only one punishment. The dissent pointed out that sentencing intervened and so two contempts should be found. On rehearing the court reaffirmed its earlier view, stating that the one contempt was based on the "continuing contemptuous and abusive attitude" of the attorney, so that the intervening sentence — not served — had no bearing. The sentencing did not break the chain of conduct for which the attorney was guilty. From this state of the facts the court formulated the test: that the subsequent contemptuous act, if inseparable from the previous conduct, is only a continuation of the contempt and not a new one. It is clear then, that if this test be the proper one on the facts of the *Gautreaux* case,[22] it is certainly not to be taken as authority for binding the instant case. An attorney who is abusive and violent is not at all like the recalcitrant witness. In the former case, to distinguish separate acts on the basis of remoteness in time has at least some validity. One who kills in the heat of passion commits manslaughter,[23] but if he has time to "cool off" the requisite *mens rea* is present to establish murder.[24] Thus the emotional state of an individual and the changes therein can be measured in terms of time. One outbreak which ceases, then begins again, can be said to be two outbreaks. In the latter case, there is nothing by which to judge two separate refusals to testify except *mere time.* That is, the test must be arbitrary to the point of line drawing at two hours between the two refusals, or four hours, or four days or four weeks. Seemingly the line is drawn at present at "different days." As was seen from the *Yates* case, supra, this could run into problems which would necessitate drawing the line at some other point in time. Nevertheless, it is clear than the *Amato* situation does not call for the use of a test which arose in the *Gautreaux* situation.

Under this test, as applied to the *Amato* case, the fact of intervening punishment is of no consequence. This fact, however, is actually of prime importance. Consider another Louisiana case, *State v. Gray,*[25] in which a witness was called to testify at a criminal trial, refused, and was found guilty of criminal contempt. He was sentenced to ten days in jail, and immediately commenced to serve it.

21 220 La. 564, 57 So.2d 188 (1952).
22 For a different view, see United States v. Bollenbach, 125 F.2d 458 (2nd Cir. 1942), in which two nonconcurrent punishments were upheld on similar facts.
23 CLARK & MARSHALL, CRIMES § 10.11 at 620 (6th ed. 1958).
24 *Id.* at 632.
25 225 La. 38, 72 So.2d 3 (1954).

On the same afternoon he was removed from jail and taken back before the court. He again refused to testify, and again was sentenced for criminal contempt non-concurrently. The Supreme Court found that the refusals were not separate and distinct, but constituted only one contempt. The court would not allow contempts to be multiplied in this manner. Therefore, while defendant served his term of punishment he could not be subject to another contempt for refusing to answer the same questions. Note, however, the following language of the court:

> We do not wish to be understood as holding that a person who has been held guilty of and sentenced for contempt and who serves the sentence imposed on him cannot be punished if he afterwards repeats the offense.[26]

The *Gray* case, then, highlights the importance of the fully served criminal sentence in trying to arrive at an answer to the problem of successive refusals to answer identical questions.[27] The Supreme Court of Louisiana then went on to explain why such emphasis is needed:

> The policy of the law in punishing a person for contempt is to impress him with the dignity of the Court and its authority in issuing its orders and seeing that they are carried out, and when he contemptuously violates any of these orders he is given punishment so that in his more serious and sober moments he may reflect on his conduct and attitude toward the Court, realize his error and submit himself to its dignity and to the order he was called on to obey. If after this he remains adamant he again becomes amenable for his repetition of the offense. He cannot, however, while he is serving sentence for one offense be cited and sentenced as again being in contempt for that same offense.[28]

In other words, an offense once vindicated is erased. The court upon recalling the witness then has a right to assume that he will answer. Therefore the intervening punishment, as between any other two criminal acts, effectively establishes the separate and distinct character of the two.

There is a reason for this difference in emphasis between the Louisiana case and the two New York cases. In the *Amato* and *Cirillo* decisions the courts were forced to distinguish a type of case which found one contempt only in successive refusals to answer on the same day, no punishment intervening. This turned them from the real issue at hand, raised by the dissent in *Cirillo*, of the danger of multiplying contempts and punishments by repeated questioning. The Louisiana court, on the other hand, met this problem first, and so came up with a theory that allowed a new punishment after serving out a former term, while at the same time preventing multiplication of contempts.

There is, in fact, some indication in the *Cirillo* case that even though that distinction had to be made, the majority was aware of the value of intervening punishment. In the course of enunciating the sound policy that one should not get immunity from subsequent contempts by serving a term of punishment, the court said: "The State has a right to his truthful testimony and has a right to try again to get it after he has once been found guilty of contempt and punished."[29] This language could well lead one to believe that the New York court, if faced with a case similar to that of *State v. Gray,* would follow the reasoning of that decision, thereby avoiding the problems of line drawing inherent in the test of inseparability used in *Cirillo.*

It is now easier to see how the test formulated in the *Yates* case — the area of refusal establishing one continuing contempt — can be reconciled with the result of the *Cirillo* case. Under *Yates* multiplication of contempts by repeated questioning in the same proceeding is prevented by the holding that the area of refusal once carved out by the first refusals stands for the rest of that proceeding.

26 *Id.,* 72 So.2d at 6.
27 In State v. Dominguez, 228 La. 284, 82 So.2d 12 (1955) this same court found two contempts when punishments intervened.
28 State v. Gray, *supra* note 24 at 7.
29 In the Matter of Second Additional Grand Jury v. Cirillo, 12 N.Y.2d 206, 188 N.E.2d 138, 140, 237 N.Y.S.2d 709 (1963).

If, however, the recalcitrant witness is punished for criminal contempt and serves his term, the former area of refusal may be considered terminated — since the court may so assume by the vindication of its authority — and the same question asked again. A refusal then might be considered a reopening of the area, and so subject to another criminal punishment. Under this view there can be no onerous punishment. Incarceration of a recalcitrant witness under the civil contempt power — to compel obedience to the court — may last as long as the proceeding, but no more.[30] This is allowed because the witness holds the keys to his freedom in his pocket. If the same contempt is considered both civil and criminal — as in *Yates* — the longest the witness can be kept in jail is the length of the proceeding plus the maximum term for criminal contempt. Under the proposed view of criminal contempts the longest a witness may be kept in jail is the length of the proceeding plus the maximum term for criminal contempt. This is true because he can only be punished again after serving the previous term. A thirty-day proceeding thus subjects him to three ten-day punishments — if that be the maximum — plus ten more days for refusal to answer on the last day. It therefore becomes no more onerous than any other acceptable form of contempt power.

John M. Lamont

FEDERAL ESTATE TAX — TRANSFERS IN LIFETIME — FAMILY AGREEMENT NOT COMPROMISE BUT VOLUNTARY PROPERTY REARRANGEMENT. — The immediate family of the then recently and suddenly deceased J. Harrington Walker, comprised of a widow, two daughters, and three sons, was confronted with an unusual quandary in 1919, the year of his death, in that they had to make a choice between his will, executed the previous year, and an as yet unexecuted will meant to replace it. Mr. Walker had instructed his attorney to draft the new will, incorporating some modifications of his dispositive program. This was accomplished but death intervened before this plan could be given legal effect by compliance with the formalities required by the statute of wills. Within a fortnight following his untimely death, the family was assembled by the lawyer. Neither document was seen by nor the contents disclosed to them, and they were asked to make a binding choice of the two. Private deliberations produced the unanimous election to implement the wishes of the deceased by choosing to abide by the provisions of the unexecuted will. A document of assent and cooperation was immediately prepared in longhand and signed by the entire family. The estate in question had a gross evaluation of slightly less than five million dollars in Canadian and American assets.

The modifications embodied in this second instrument were directed toward the establishment of trusts for the benefit of Mrs. Walker and her children. At the expiration of their life interests in the respective trusts, the subsequent devolution to their heirs was covered in detail. The executed will had bestowed fee interests upon the family members. Among those taking under this family settlement arrangement was a daughter, Elizabeth Walker, a girl of sixteen. Her financial position and that of her mother and sister were enhanced under the provisions of the elected instrument, while the portions of her brothers suffered substantially. Upon the death of Elizabeth Walker Vease in 1952, testate, the estate tax return filed did not list an American or Canadian trust in which she held a life estate, the trust corpus having been received from her deceased father's estate under the system concluded as described above. The Commissioner in asserting a tax deficiency of $374,243.55 sought inclusion of these trusts under 26 U.S.C.A. (I.R.C. 1939), section 811(c)(1)(B,C), (2).[1] The Tax Court held for the taxpayer.

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30 People v. Den Uyl, 323 Mich. 490, 35 N.W.2d 467 (1949).

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1 811. GROSS ESTATE The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all

The Ninth Circuit Court of Appeals *held*: reversed, agreeing with the Commissioner that the trusts resulted from transfers to trustees by decedent in her lifetime of her property, and not from transfers to trustees from the estate of her father made by reason of her standing as his heir. The case was sent back to the Tax Court for additional determinations. *Commissioner v. Vease,* 314 F.2d 79 (9th Cir. 1963).

In reaching a result adverse to the respondent Vease, the court distinguishes the well-established *Lyeth* rule. Lyeth, a disinherited relative, took issue with the generous three-million-dollar bequest intended to preserve the records of the early life of Mary Baker Eddy, the founder of the Christian Science religion, as provided in the will of his grandmother, which was to his almost total exclusion. Through negotiation and the pressure of inchoate legal action contesting his grandmother's testamentary competence, Lyeth received a sizeable settlement. The Commissioner of Internal Revenue protested that the amounts thus received rightfully were to be adjudged income for the then current year and impressed his tax. The Supreme Court ruled in favor of the taxpayer holding: that a receipt of property assumes the nature of the underlying claim upon which it is based.[2] Hence, the money Lyeth received was not income and taxable as such, but money received as his standing as an heir. Though Lyeth made his claim upon income tax grounds, wide recognition has been given the above state rule in federal estate and gift taxation situations.[3]

The Tax Court viewed the entire transaction of the Walker heirs as indistinguishable from the *Lyeth* case and ruled that Elizabeth Walker Vease took because of her standing as an heir of her father, J. Harrington Walker:

> It does not seem possible to distinguish the *Lyeth* case from the present one in principle. . . . In that case property of a decedent was distributed to a taxpayer according to a compromise agreement of the interested parties and contrary to a will. The Supreme Court looked through the compromise agreement to the actual fact that "what he [the taxpayer] got from the estate came to him because he was heir." In this case the decedent, Elizabeth, received a life estate in the trust with a limited power of appointment, and she received that because that was what her father directed that she should receive out of his residuary estate. . . . Clearly, what this decedent got from the estate of Walker came to her because she was an heir.[4]

The money was eligible for the exclusion under the appropriate sections of the

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property real or personal, tangible or intangible, wherever situated, except real property situated outside the United States — . . . .

(c) TRANSFERS IN CONTEMPLATION OF OR TAKING EFFECT AT DEATH

(1) General Rule — To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise — . . . .

(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death

(i) the possession or enjoyment of, or the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

(C) intended to take effect in possession or enjoyment at or after his death. . . .

(2) TRANSFERS TAKING EFFECT AT DEATH — TRANSFERS PRIOR TO OCTOBER 8, 1949 — An interest in property of which the decedent made a transfer, on or before October 7, 1949, intended to take effect in possession or enjoyment at or after his death shall not be included in his gross estate under paragraph (1) (C) of this subsection unless the decedent has retained a reversionary interest in the property, arising by the express terms of the instrument of transfer and not by operation of law, and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per centum of the value of such property. . . .

2 Lyeth v. Hoey, 305 U.S. 188 (1938).

3 1 MERTENS, LAW OF FEDERAL GIFT AND ESTATE TAXATION 229 § 4.20 (1959).

4 35 T. C. 1184 (1961).

Internal Revenue Code[5] as Elizabeth held her life estate in the trusts by inheritance.

The Ninth Circuit distinguished *Vease* from *Lyeth* by virtue of their findings that, "In each [prior application of *Lyeth*], the property ultimately received was in settlement of some theretofore unsatisfied challenge or claim, asserted either by an heir or a beneficiary under a previous will."[6] The language of *Lyeth* is not explicit on this point, and the language of *Lyeth* tends to show that the Ninth Circuit finding is an unrelated consequence of the case and not an articulate precedential directive:

> The question present is whether property received by petitioner from the estate of a decedent in compromise of his claim as an heir is taxable as income. . . . In exempting from the income tax the value of property acquired by "bequest, devise or inheritance," Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent's estate. . . .
>
> We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, and it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status which commanded the agreement and was recognized by it.[7]

The Walkers concededly did not challenge their father's first will or any provision therein to arrive at the threshold of this amicable, arms-length, family agreement, which in the opinion of the Commissioner and the Ninth Circuit majority, amounted to no more than a redistribution of money had and received under the first will and thus taxable.[8] Compromise, indeed, is found in the actual signing of this family agreement by each and every member present, having a standing under the first will. The widow, by way of example, could have refused signature on the agreement, as could have any of the other heirs, and forced the remaining heirs to take under the first will. In signing, she and all the heirs did in effect *compromise under a previous will*[9] and qualify for the saving graces of the *Lyeth* rule.

The most important prior application of the *Lyeth* rule in which there was no challenge or assertion of a claim as deemed a requisite by the Ninth Circuit was litigation involving this same will as drawn by J. Harrington Walker, *Benfield v. United States*.[10] Benfield was the trustee for the deceased widow's estate in an income tax determination. The Court of Claims in rendering its decision regarding the double documents and ultimate transfer of funds said:

> In the instant case there was no legal conflict between the heirs. The settlement agreement was voluntary and amicable. Under these circumstances, we think that whatever additional amount she [Mrs. Walker] received under the agreement was merely a gift and consequently not taxable. In any event being an heir in fact, we think there is no substantial difference in the effect of the agreement in the instant case from that made in Lyeth v. Hoey, *supra*, and that she was consequently entitled to hold all she received thereunder free from tax.[11]

This clear statement in Benfield was distinguished by a footnote cite in *Vease*[12] to the effect that if additional money received by Mrs. Walker was a gift, she could not be taking as an heir under the first will.

What has been held to be a *compromise* of rights under a will in the past? Judge Learned Hand said the forbearance that serves as consideration for support of a contractual promise as defined in the Restatement of Contracts is adequate

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5 See note 1 *supra*.
6 Commissioner v. Vease, 314 F.2d 79, 86 (9th Cir. 1963).
7 Lyeth v. Hoey, 305 U.S. 188, 189, 194, 196 (1938).
8 Commissioner v. Vease, 314 F.2d 79, 87, (9th Cir. 1963).
9 MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (3rd ed. 1961) defines Compromise: "(b) a settlement by arbitration or by consent reached by mutual concessions; a reciprocal abatement of extreme demands or rights, resulting in an agreement."
10 Benfield v. United States, 27 F. Supp. 56 (Ct.Cl. 1939).
11 *Id.* at 63.
12 Commissioner v. Vease, 314 F.2d 79 n.14 (9th Cir. 1963).

to qualify.[13] This was a dissent in a case wherein testator told his wife that the provisions for their young sons were small because he wanted her to make the provisions necessary for their well-being, "and do the right thing." The son threatened suit and his surrender of the claim was a valid consideration for the compromise. The case was decided against the son on other grounds.[14] This was written by Judge Hand very soon after *Lyeth v. Hoey.*

The reasons for wishing to avoid the legal arena and its attendant white lights in the search of truth regarding the testamentary competence of a deceased benefactor may be those of respect and sentiment.[15] The vicissitudes of a lawsuit might well promote a pragmatic consideration of costs and outcome, affording strong inducement to compromise. There is always the possibility that those holding the favored position are in accord with those about to contest.[16] Between these outer limits fall others, as difficult to catalog as most human behavior, but nonetheless present. The detailed steps taken by the Walker family are worthy of more consideration than these diverse instances.

Contravention of the long-standing public policy manifested through the common law's contempt for vexacious litigation lurks upon the periphery of *Vease.* Faced with a comparable situation, as posed by the Walkers, would, could counsel in good faith suggest feigned disagreement? Paradoxically, how else could the burden of proof be sustained by the respondent taxpayers under the rationale of the Ninth Circuit?

The mischief the Commissioner seeks to prevent, and his wish was implemented by this decision, is bier-side coups, altering dispositions made under wills to the marked tax advantage of the agreeable heirs. The writer submits the threat is more imaginary than real; *Benfield* has been strictly confined to its facts and easily distinguished when cited by taxpayers[17] and the Tax Court wished to confine *Vease* to its facts and make it sui generis.[18] The therapeutic benefits of the decision of the Court of Appeals are of questionable merit in lieu of the disquieting effects that will result in subsequent applications of the *Lyeth* rule.

John T. Mulvihill

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13 Restatement, Contracts § 76(b)(1932):

> Any consideration that is not a promise is sufficient to satisfy the requirement of § 19(c), except the following: . . . .
> (b) The surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity . . .

14 Houseman v. Commissioner, 105 F.2d 973 (2d Cir. 1939).

15 Smithsonian Institute v. Meech, 169 U.S. 398, 415 (1898).

16 Paul, Selected Studies in Federal Taxation 313, 314 (Second Series 1938).

17 See Harrison v. Commissioner, 119 F.2d 963, 969 (7th Cir. 1941); Mertz v. Hickey, 68 F. Supp. 159, 162 (N.D.N.Y. 1946).

18 35 T.C. 1184, 1201 (1961).