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Recent Decisions

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CONSTITUTIONAL LAW — DUE PROCESS OF LAW — SELF-INCRIMINATION PRIVILEGE — MEMBERSHIP IN THE COMMUNIST PARTY HELD TO BE CRIMINAL OFFENSE — COMMUNIST PARTY REQUIRED TO REGISTER WITH THE ATTORNEY GENERAL. — Junius Scales was convicted under the membership clause of the Smith Act[1] of being a knowing member of an organization of persons who advocate the violent overthrow of the Government of the United States. The indictment charged that from 1946 to 1954 the Communist Party of the United States of America was such an organization and that throughout that period Scales was a member thereof, with knowledge of the Party's illegal purpose and a specific intent to accomplish the violent overthrow of the Government as speedily as circumstances would permit. On writ of certiorari the Supreme Court *held*: affirmed. Such membership when active may be made a criminal offense without violating the first or fifth amendments to the United States Constitution. *Scales v. United States,* 367 U.S. 203 (1961). In a companion case involving another conviction under the membership clause of the Smith Act, the Court reversed on the ground that the evidence of illegal advocacy by the organization of which petitioner had been charged with being a member (the Communist Party) was insufficient to support his conviction. *Noto v. United States,* 367 U.S. 290 (1961). In a third case decided the same day the Court affirmed an order of the Subversive Activities Control Board requiring the Communist Party of the United States of America (CPUSA) to register with the Attorney General as a "Communist-action organization" under §7 of the Subversive Activities Control Act of 1950.[2] The term "Communist-action organization" is defined in §3 of the Act as an organization which is "substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement." The Party must register. *Communist Party of the United States of America v. Subversive Activities Control Board,* 367 U.S. 1 (1961).

The validity of certain portions of the Smith Act was upheld by the Supreme Court in *Dennis v. United States*[3] in which the Court affirmed the convictions of 11 top Communist leaders. The Party leaders had been indicted for conspiring to organize a group of persons who advocate the violent overthrow of the Govern-

1 18 U.S.C. § 2385 (1959):

> Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or
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> Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or
>
> Whoever organizes or helps or attempts to organize any society, group or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; *or becomes or is a member of,* or affiliates with, *any such society, group, or assembly of persons, knowing the purposes thereof* —
>
> Shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.
>
> If two or more persons conspire to commit any offense named in this section, each shall be fined not more than $20,000 or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction. (italics added).

2 64 Stat. 987, 50 U.S.C. §§ 781-98 (1959).

3 341 U.S. 494 (1951).

ment of the United States and to teach and advocate the duty and necessity of the violent overthrow of the Government. Their convictions were affirmed on the ground that they had been found to have engaged in the conspiracy with the intent that such teaching and advocacy be of a principle of action and by language reasonably and ordinarily calculated to incite persons to action, and with the intent to cause the violent overthrow of the Government as speedily as circumstances would permit. Subsequently, in *Yates v. United States*[4] the Court emphasized that a distinction must be made between espousing and teaching, on a theoretical level, the duty and necessity of violent overthrow on the one hand, and illegally advocating such overthrow on the other. To be illegal, said the Court, advocacy must constitute incitement to action, though not necessarily to immediate action. Those to whom the advocacy is addressed must be urged to do something, either now or in the future, rather than merely to believe in something. Further, circumstances must reasonably justify apprehension that action will occur.[5] It was settled in *Dennis* and *Yates* that advocacy of the kind described in these cases is not constitutionally protected speech.

When the Supreme Court upheld its validity in *Dennis,* the Smith Act became one of the chief weapons used by the Government against the Communist movement in the United States.[6] But rarely has a prosecution been based on the Smith Act's membership clause.[7] Unlike other portions of the Smith Act, the membership clause does not proscribe the forms of speech which were held in *Dennis* and *Yates* to be not constitutionally protected. It proscribes neither the organizing of groups which are engaged in illegal advocacy in the *Dennis-Yates* sense, nor illegal advocacy itself, nor conspiring to accomplish these ends, but mere *membership* in an organization.[8] The validity of the membership clause had not been tested by the Supreme Court prior to the *Scales* case. Mr. Justice Harlan, writing for the majority, inferred, in addition to the statutory requirements that the organization be engaged in advocacy of the overthrow of the governement by violence and that defendant be a member thereof knowing its purpose, two additional elements necessary to constitute the membership offense: (1) that the defendant himself have a specific intent to bring about violent overthrow of the government as speedily as circumstances would permit; and (2) that he be an "active" member, as opposed to a nominal, passive or theoretical member. The Court pointed out that it was held in *Dennis* that the requirement of specific intent was fairly to be implied in the advocating-teaching and organizing provisions of the Smith Act, and it stated that this reasoning applies equally to the membership clause. The "active" requirement is fairly implied in the statute since it is doubtful that Congress intended to punish mere nominal or formal membership so severely. There are, then, four elements of the Smith Act's membership offense: (1) Active membership (2) in an organ-

4 354 U.S. 298 (1957).

5 The essence of the *Dennis* holding was that indoctrination of a group in preparation for future violent action, as well as exhortation to immediate action, by advocacy found to be directed to "action for the accomplishment" of forcible overthrow, to violence as "a rule or principle of action," and employing "language of incitement," . . . is not constitutionally protected when the group is of sufficient size and cohesiveness, is sufficiently oriented towards action, and other circumstances are such as reasonably to justify apprehension that action will occur. *Id.* at 321.

6 By June 1961, some 145 persons had been indicted under the Smith Act; some 30 convictions had been finally affirmed. N.Y. Times, June 11, 1961, § 4, p. 8, col. 3.

7 Besides *Scales* and *Noto,* it seems that only in Lightfoot v. United States, 228 F.2d 861 (7th Cir. 1956), did a prosecution based solely on the membership clause progress to the appellate level. *Lightfoot* reached the Supreme Court as a companion case to *Scales.* 350 U.S. 992. Both convictions were reversed, in Lightfoot v. United States, 355 U.S. 2 (1957) and Scales v. United States, 355 U.S. 1 (1957), without reaching the merits. On remand, the Government recently withdrew its charges against Lightfoot. Chicago Sun-Times, Nov. 16, 1961, p. 22, col. 1. Scales' second conviction was affirmed in the present case.

8 See note 1, *supra.*

ization which is engaged in illegal advocacy of violent overthrow in the *Dennis-Yates* sense, (3) with knowledge of the purposes thereof, and (4) with a specific intent to bring about that purpose, *i.e.,* violent overthrow of the government, as speedily as circumstances permit.

Since the Smith Act's membership clause created a criminal offense the gist of which is membership in an organization, *Scales* presented the Court with a close question as to whether the membership clause offends the due process clause of the fifth amendment,[9] in that it punishes guilt by association. The Court recognized this:

> In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity (here advocacy of violent overthrow) that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment. Membership, without more, in an organization engaged in illegal advocacy, it is now said, has not heretofore been recognized by this Court to be such a relationship. This claim stands, and we shall examine it. . . . [10]

The issue as phrased by the Court was whether the relationship between the fact of Scales' membership in the Party and the substantive illegal conduct in which the Party had been found to have been engaged (illegal advocacy of the type condemned in *Dennis* and *Yates*) was substantial enough that criminal liability could be predicated upon it. Of course, as the Court pointed out, certain associational relationships, *i.e.,* conspiracy and complicity, are criminally punishable.

But the majority recognized that mere membership may signify no more than assent, sympathy and moral encouragement, insufficient to be the basis of criminal liability on the ground either of complicity or of conspiracy. Yet the Court held that the Smith Act's membership clause did not offend due process, since, as interpreted, it reached only active members having a specific intent to bring about violent overthrow, and so did not proscribe mere nominal membership unaccompanied by significant action facilitating the organization's illegal activities or by an agreement to promote such activities.

Having thus met Scales' due process arguments, the Court quickly disposed of his first amendment claim. Noting that it had been settled in *Dennis* that the type of advocacy in which the Communist Party had been found to have been engaged in *Scales* was not constitutionally protected speech, and that combination to promote such advocacy was not such association as is protected by the first amendment, the Court stated:

> We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.[11]

The result of the *Scales* decision is that criminal liability is predicated neither on conspiracy nor on complicity, but upon "active" membership. In point of fact, Scales was indeed an active member of the Party. He was the Chairman of the North and South Carolina Districts of the Party, was active in recruiting new members, promoted the education, at secret Party schools, of selected young members, and was a director of one such school. Conceivably, where a person is as active in an organization found to be engaged in illegal advocacy in the *Dennis-Yates* sense as was Scales in the Communist Party, and where such person shares with the organization a specific intent to achieve the same unlawful end, that person might well be convicted of conspiracy to promote that unlawful end or of complicity in facilitating the organization's illegal activities. But *Scales* requires neither of these offenses to be charged or proved in order to convict under the membership

9 U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . . "

10 367 U.S. at 224. (footnote omitted.)

11 *Id.* at 229.

clause. "Active" membership alone must be proved, along with the requisite specific intent and knowledge. This aspect of the decision impelled Mr. Justice Douglas to dissent:

> There is here no charge of conspiracy, no charge of any overt act to overthrow the Government by force and violence, no charge of any other criminal act. The charge is being a "member" of the Communist Party, "well-knowing" that it advocated the overthrow of the Government by force and violence, "said defendant intending to bring about such overthrow by force and violence as speedily as circumstances would permit." This falls far short of a charge of conspiracy. Conspiracy rests not in intention alone but in agreement with one or more others to promote an unlawful project. . . . No charge of any kind or sort of agreement hitherto embraced in the concept of a conspiracy is made here.
>
> We legalize today guilt by association, sending a man to prison when he committed no unlawful act. . . .
>
> The case is not saved by showing that petitioner was an active member. None of the activity constitutes a crime.[12]

Not only does the *Scales* opinion not require that the member's activity constitute a crime other than membership itself, but it does not even require that his activity *facilitate* such other crime. The Court seems to have proceeded on the premise that any active member will necessarily facilitate the unlawful activities in which his organization is found to be engaged. This premise may well be the fact in some cases, especially where the member is as active as Scales was. But on the other hand, where an organization engages in both legal and illegal activities, as does the Communist Party, a member's activity, even though he shares with the organization a specific intent to accomplish the same unlawful end, may not substantially facilitate any of the organization's *illegal* activities. Thus an active member who has not been found to be either conspirator or accomplice, or to be guilty of any crime save membership in an organization thought to be evil, is criminally liable under the membership clause. Since Scales, in fact, was a most active member of the Party it may be said that on the facts of the case the Court has held that membership is punishable only when of such character as to in fact facilitate and further illegal advocacy in the *Dennis-Yates* sense. But the Court provided no express definition of the *kind* of activity required for conviction. As to the *amount* of activity required, the Court did not more than to approve as adequate the instructions given to the jury in Scales' trial: "To be active he must have devoted all, or a substantial part, of his time and efforts to the Party."[13]

The Court reversed the conviction under the membership clause in the *Noto* case, Mr. Justice Harlan again writing the majority opinion, but did not reach the question of the sufficiency of Noto's activity.[14] *Noto* therefore sheds no additional light on the issue of the quality and amount of activity on the part of a member which shall be necessary for conviction under the membership clause.

The *Scales* decision may well affect state courts' ideas of due process in prosecutions for sedition against the state.[15] If the federal government may, without offending due process, punish "active" membership in an organization which is engaged in illegal advocacy of violent overthrow, presumably a state may also punish such "active" membership, where the illegal advocacy is directed against the state government.

Apart from constitutional grounds, Scales made a strong statutory argument

12 *Id.* at 263-64.

13 *Id.* at 255 n.29.

14 Noto's conviction was reversed on the ground that the Government had not proved that the Communist Party, the organization of which Noto had been charged with being a member, had been engaged in illegal *Dennis-Yates* advocacy during the period named in the indictment.

15 The power of the states to proceed with such prosecutions was held in Uphaus v. Wyman, 360 U.S. 72 (1959) not to have been superseded by the Smith Act or by Pennsylvania v. Nelson, 350 U.S. 497 (1956), interpreting the latter case as having held that the Smith Act supersedes the enforcibility of only those state acts which proscribe advocacy of violent overthrow of the *federal* government.

for reversal. He claimed that §4(f) of the Subversive Activities Control Act, which is Title I of the Internal Security Act of 1950,[16] constituted a *pro tanto* repeal of the membership clause of the Smith Act by excluding from the reach of the clause membership in any Communist organization. Section 4(f) provides, in part:

> Neither the holding of office nor membership in any Communist organization by any person shall constitute per se a violation of subsection (a) or subsection (c) of this section or of any other criminal statute. . . .[17]

The Court rejected Scales' claim that a fair and literal reading of §4(f) gives rise to the conclusion that it repealed the membership clause, but Scales presented an additional argument, summed up by the Court as follows:

> The core of the Internal Security Act is its registration provisions (§§ 7 and 8), requiring disclosure of membership in the Communist Party following a valid final determination of the Subversive Activities Control Board as to the status of the Party. . . . The registration requirement would be rendered nugatory by a plea of self-incrimination and could only be saved by a valid grant of immunity from prosecution by reason of such disclosure. However, the immunity provided by the second sentence of § 4(f) is insufficient, in that it forbids only the use of the "fact of . . . registration" as evidence in any future prosecution, and not also its employment as a "lead" to other evidence. See *Counselman* v. *Hitchcock,* 142 U.S. 547; *Blau* v. *United States,* 340 U.S. 332. Therefore to effectuate the congressional purpose it becomes necessary to consider the first sentence of § 4(f) a *pro tanto* repealer of the membership clause of the Smith Act, thereby assuring effective immunity from the criminal consequences of registration in this instance.[18]

The Court disagreed with Scales' contention, however, and held that instead of repealing the membership clause, §4(f) modified it — in the direction of constitutionality.[19] The dissenters, speaking through Mr. Justice Brennan, agreed with Scales that Congress had intended by §4(f) to extend immunity from prosecution for any membership in a Communist organization,[20] lest the registration provisions of the Subversive Activities Control Act "be wrecked on the rock of the Self-Incrimination Clause of the Fifth Amendment."[21]

In support of its denial of Scales' contention concerning §4(f) the majority noted:

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16 64 Stat. 987, 50 U.S.C. §§ 781-98, 811-26 (1959).

17 SACA of 1950, § 4(f), 64 Stat. 992, 50 U.S.C. § 783(f) (1959).

18 367 U.S. at 210.

19 Although we think that the membership clause on its face goes beyond making mere Party membership a violation, in that it requires a showing both of illegal Party purposes and of a member's knowledge of such purposes, we regard the first sentence of § 4(f) as a clear warrant for construing the clause as requiring not only knowing membership, but active and purposive membership, purposive that is as to the organization's criminal ends. . . . By its terms, then, subsection (f) does not effect a *pro tanto* repeal of the membership clause; at most it modifies it. 367 U.S. at 209-210.

20 If the phraseology were that immunity is extended only to *"membership per se,"* there might be support for the argument that the immunity granted by § 4(f) extends only to nominal membership, excluding the type of active membership which we have here. But the statute does not say "membership *per se.*" . . . The kind of membership given immunity is not restricted. It may be nominal, short-term, long-term, dues-paying, non-dues-paying, inactive, or active membership. Every type of membership is included. . . . When Congress said that membership "shall not constitute *per se*" a violation of any criminal statute, it meant that additional conduct besides membership, whatever its nature, is necessary to constitute a violation. Only by transposing *per se* in § 4(f) and making it modify "membership" can the Court's argument be made plausible. That entails a substantial revision of the Act and a drastic dilution of rights of immunity which have been granted by it. 367 U.S. at 286-87.

21 *Id.* at 280.

> [T]he thrust of petitioner's argument cannot be limited to the membership clause, for it is equally applicable to any prosecution under any of a host of criminal provisions where Communist Party membership might provide an investigatory lead as to the elements of the crime.[22]

This point, not discussed at all by the dissenters, presents a serious problem. The dissenting justices cite *Counselman v. Hitchcock*,[23] and *Blau v. United States*[24] for the proposition that a Communist could not be compelled to register, since under the membership clause that would constitute admission of a crime, or would provide a link in the chain of evidence necessary to proof of crime, or would be an investigative lead to other incriminating evidence. But it seems that even if the membership clause were repealed, a member of the Party would remain equally justified in refusing to register, on the ground that registration would provide a link or an investigative lead which would tend to incriminate him under the other Smith Act offenses or under offenses created by the Subversive Activities Control Act itself.[25] Yet this argument does not so much seem to support the holding of the *Scales* majority on the effect of §4(f) as to point out a serious self-incrimination problem in the enforcement of the registration order which was affirmed in *Communist Party of the United States of America v. Subversive Activities Control Board*. The *Scales* decision does aggravate the problem, of course, since registration admits membership (and registration by an officer admits relatively active membership), and membership itself is the gist of the membership clause offense.

The heart of the Subversive Activities Control Act is the provision in §7 that organizations which are found by the Subversive Activities Control Board to be either Communist-action or Communist-front organizations must register with the Attorney General. In *CPUSA v. SACB* the Court affirmed an order of the Board requiring the Communist Party to register as a Communist-action organization. The Act provides that registration as such an organization shall be accompanied by the filing of a registration statement, in such form and manner as the Attorney General shall prescribe, containing, among other things, the name and address of each individual who was an officer or member of the organization at any time during the twelve months preceding the filing of the statement.[26] The Attorney General has ordered that such registration-statement be made on Form ISA-1,[27] which requires that the statement be signed by the partners, officers, directors, and members of the governing body of the registering organization. If the organization fails to submit its registration statement within 30 days after a final order to do so, it is the duty of certain officers to file the statement;[28] if these officers fail to do so, individual members must then register themselves.[29] Heavy penalties are provided for failure to register or file on the part of organization, officer or individual member, and each day of failure constitutes a separate offense.[30] The self-incrimination problems involved in these provisions are obvious.

Writing for the majority in *CPUSA*, Mr. Justice Frankfurter restricted the decision solely to the requirement that the *Party* register, holding that questions concerning registration by *officers* or individual *members* (as well as those concerning the validity of the restrictions and disabilities which become effective upon registration as against the organization and its members) were premature. The Court held that the requirement of registration and its attendant disclosure did not offend the first amendment. The Court further held, and on this point split five to four,

22 *Id.* at 211. (footnote omitted.)
23 142 U.S. 547 (1892).
24 340 U.S. 159 (1950).
25 SACA of 1950, §§ 4-6, 64 Stat. 991, 50 U.S.C. §§ 783-85 (1959).
26 SACA of 1950, § 7(d), 64 Stat. 993, 50 U.S.C. § 786(d) (1959).
27 28 C.F.R. § 11.200 (Supp. 1961).
28 SACA of 1950, § 7(h), 64 Stat. 995, 50 U.S.C. § 786(h) (1959). Implemented by the Attorney General at 28 C.F.R. 11.205 (Supp. 1961).
29 SACA of 1950, § 8, 64 Stat. 995, 50 U.S.C. § 787 (1959).
30 SACA of 1950, § 15, 64 Stat. 1002, 50 U.S.C. § 794 (1959).

that the contention that the officers who must sign the Attorney General's Form ISA-1 are forced thereby to incriminate themselves was also prematurely raised. These officers, the Court stated, either might comply with the registration requirement or, in lieu of furnishing the required information, could file statements claiming the self-incrimination privilege. "Whatever proceeding may be taken after and if the privilege is claimed will provide an adequate forum for litigation of that issue."[31]

Expressing the view that adjudication of this claim of the privilege against self-incrimination made on behalf of the officers required to sign Form ISA-1 should not be put off to a later date, Mr. Justice Brennan, dissenting in part, stated that future claim of the privilege would be self-defeating because, "if the admission of officership in the Communist Party is incriminating, then a claim of privilege by name would amount to the very same admission. . . ."[32] Although a claim of the self-incrimination privilege may always arouse suspicion, the Justice felt that "registration is unique because of the initial burden it puts on the potential defendant to come forward and claim the privilege."[33] Mr. Justice Douglas, also of the opinion that the self-incrimination issue was ripe for adjudication, expressed the view that the fifth amendment not only prevents compelling Party officers to sign the registration statement, but also prevents the compulsory disclosure of membership in the Party, which would be the effect of filing a statement containing names of all members.[34]

The Smith Act and the Subversive Activities Control Act do not proscribe by name either the Communist Party or membership in the Party. Yet as a practical matter both are aimed at Communism. When, as a result of a finding that the Party is a Communist-action organization, a person is forced to register the Party as one of its officers, or his name is included on a membership list which the Government requires the Party to file, he is threatened with prosecution under the Smith Act. He is not thus proved to have committed any crime, but membership in the Party is "the start of every prosecution whether it be for active 'membership' as in *Scales* . . . or for conspiracy to teach the doctrine, as in *Dennis*. . . ."[35] If the person were asked if he were a member, he could refuse to answer on the ground that his answer would furnish a link in the chain of evidence needed in prosecutions for violation of the Smith Act.[36] It seems that, in the words of Mr. Justice Douglas, "Congress (past or present) is attempting to have its cake and eat it too."[37] If registration and disclosure are to be compelled in the interest of bringing out into the open the Communist movement within the United States and protecting the public from unwitting collaboration with it, the fifth amendment demands corresponding immunity from criminal prosecution. Perhaps the Court will rule, after further litigation, that registration and disclosure do indeed demand corresponding immunity. But its failure to do so in *CPUSA* has left the law, not to mention the Communist Party and its officers, in an unnecessary state of uncertainty.

Paul J. Driscoll

31 367 U.S. at 107.
32 *Id.* at 195.
33 *Id.* at 196.
34 At the time this article was written the Communist Party had not yet registered. The Party obtained a stay of the CPUSA v. SACB decision until the Court could pass on the Party's petition for rehearing, but the petition was denied. Wall St. Journal, Oct. 10, 1961, p. 1, col. 3. The deadline then set for registration of the Party was November 20, 1961. Party officials had indicated their intention not to register — at least not to the required extent of disclosing the names of members. The Department of Justice had disclosed that if the Party failed to register it would move against the Party itself, which would be subject to a $10,000 fine for each day of failure to register.
35 CPUSA v. SACB, 367 U.S. 1, 181. (Footnote omitted.)
36 Blau v. United States, 340 U.S. 159 (1950).
37 CPUSA v. SACB, 367 U.S. 1, 190.

CONSTITUTIONAL LAW — FREEDOM OF SPEECH AND ASSOCIATION — REFUSAL TO ANSWER PERTINENT QUESTIONS OF AUTHORIZED COMMITTEE OF INQUIRY AS BASIS FOR DENIAL OF ADMISSION TO BAR OR DISBARMENT NOT UNCONSTITUTIONAL AS DENIAL OF FIRST AMENDMENT GUARANTEES. — The California Business and Professions Code requires that applicants for admission to the bar must be of good moral character and may not advocate the overthrow of the Government of the United States or of California by force or violence or other unconstitutional means. The petitioner, when before the Committee investigating applicants for admission to the bar, refused to answer any questions concerning past Communist affiliations on the grounds that such questions were beyond the authority of the Committee, that the investigation was precluded by an earlier disposition of the case, and that under the protection of the first amendment the answers to the questions were unnecessary. The Supreme Court of the United States *held:* the investigation and questions were within the authority of the Committee and pertinent thereto. The protection of the first amendment did not excuse the applicant from answering. *Konigsberg v. State Bar of California,* 366 U.S. 36 (1961).

In Illinois, in addition to the possession of good moral character, the applicant must conscientiously swear to support the Constitution of the United States and of Illinois. In circumstances similar to those above described, petitioner refused to answer certain questions asked by the Committee on Fitness and Character. In the face of uncontroverted evidence tending to show applicant's good moral character and fitness, the Committee denied certification because his refusal to answer its questions obstructed a complete investigation. On certiorari before the Supreme Court, *held:* absent any arbitrary or discriminatory action, the Committee's procedure was not inconsistent with the Constitution and the case turned on the rule of *Konigsberg. In re Anastaplo,* 366 U.S. 82 (1961).

The third case to be treated in this comment differs from the other two in that the sanction imposed upon the refusal to answer relevant questions was disbarment. A Judicial Inquiry considering unethical practices in New York City sought certain information from the petitioner which he refused to give on the basis of the state's privilege against self-incrimination. The Supreme Court *held:* there was no violation of the due process or equal protection provisions of the United States Constitution. The Court's review was said to be limited to those questions. *Cohen v. Hurley,* 366 U.S. 117 (1961).

Konigsberg is not a stranger to the Supreme Court. He was before the Court in 1957 and it was then determined that he could not be denied admission to the bar on the basis of failing to satisfy the statutory pre-requisites, where the record of the Committee hearings showed a wealth of evidence indicating that he met the state's demands. It was held that testimony tending to prove that he had been a member of the Communist Party, that he had criticized certain public officials and their policies, and that he refused to answer questions relating to Communist affiliations, could not justify a conclusion by the Committee that he did not come up to the statutory standard required for admission.[1]

The Supreme Court in the earlier decision did not decide whether the mere refusal to answer was a valid basis on which to impose the sanction.[2]

These three cases are similar in that each involves the refusal to answer questions as a basis for imposing a sanction.[3] The validity of this foundation for the action taken is not solely a question of a duty of the person asked, but also of the power or authority of the Committee to ask the questions. The extent to which one must respond to the inquiries of another depends on the extent to which the

1 Konigsberg v. State Bar of California, 353 U.S. 252 (1957).
2 *Ibid.*
3 Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961); Cohen v. Hurley, 366 U.S. 117 (1961).

answer demanded is a legitimate concern of the one seeking the information. To say that it is the business of the bar association to know whether a prospective member is a Communist, or whether a present member is an "ambulance chaser," does not completely solve the problem. The ultimate concern in this respect of the bar association and of the judiciary is that of having *fit* individuals practice law. The fitness of an individual in turn depends on his qualities as a person and upon his devotion to the institutions on which this country is based.

The power of government to investigate, like the power to tax, is the power to destroy. Therefore, it is essential that the liberties of individuals be protected and that the power of the government to investigate be confined to those matters properly within governmental concern. For this reason the Supreme Court, in *Watkins v. United States,* struck down the conviction of one accused of violating a statute making it a criminal offense to obstruct the investigation of a Congressional Committee.[4] In that case the authorization of the House of Representatives inadequately defined what it was that was to concern the Un-American Activities Committee. The party who was asked the questions was unable to determine the relation of the particular question to the area of investigation.

Similarly, when the legislature of New Hampshire attempted to make the attorney-general a one man committee to investigate subversive persons and organizations, the Supreme Court held that the rigors of due process demanded that the conviction for contempt for refusal to answer be reversed because the area to be investigated was insufficiently described. The scope of the definition in the statute was broad enough to include an investigation into conduct remotely related to actual subversion performed independent of any conscious intent to partake in such activity.[5] In such a situation conviction for refusal to answer such questions would be a deprivation of first amendment guarantees.

Two years later the Court set out what must be shown in order that investigatory functions may be carried out without violating the Constitution. In *Barenblatt v. United States*[6] and in *Uphaus v. Wyman,*[7] it was held sufficient that the governmental committee be shown to be validly authorized to investigate a given area and that the particular questions be shown to be pertinent to the inquiry. In each of the three cases under discussion it appeared that the investigation had been validly authorized and that the questions asked were relevant thereto.[8]

It has been held that mere membership in the Communist Party at some past date when the Party was allowed on the ballot and not viewed in a distinct light is not a basis on which membership in the bar may be constitutionally denied.[9] Therefore it is relevant to ask what would the result have been if the petitioners in *Konigsberg* and in *Anastaplo* had answered in the affirmative the questions concerning Communist affiliations? The dissent of Justice Black in the second *Konigsberg* case contains the clear answer — this would not be a constitutional basis of exclusion.[10] Such an answer would, however, initiate a line of inquiry as to the nature of the membership. This, as is pointed out by the record of the Committee proceedings in *Anastaplo,*[11] would have a bearing on the applicant's position regarding violent overthrow of the government and the required oath. In this context it would be a preliminary question to a relevant line of inquiry. In the event the applicant had responded in the affirmative, it would then become incumbent upon the Committee to attempt to determine the nature of the member-

4 354 U.S. 178 (1957).
5 Sweezy v. New Hampshire, 354 U.S. 234 (1957).
6 360 U.S. 109 (1959).
7 360 U.S. 72 (1959).
8 CAL. BUS. & PROF. CODE § 6046; ILL. REV. STAT. (Smith-Hurd 1951), Ch. 110, par. 259.58, Rule 58, § IX; Ch. 13, par. 4; N.Y. Judiciary Laws § 90.
9 Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).
10 Konigsberg v. State Bar of California, note 3 *supra.*
11 See In re Anastaplo, 366 U.S. 82, 92, n. 14.

ship and the effect thereof on the applicant's ability to comply with the statutory requirements for admission.

In the event that the applicant answered the question to the effect that he was not a Communist, then it would appear that, if contradicted or impeached, the credibility of his answer would come into issue as bearing on his good moral character.[12] In this context the question would also be relevant to an authorized investigation.

In each case the investigation was authorized by either the mandate of the legislature or the rules of practice of the judiciary.[13] In each instance the questions asked went to the crux of the investigation, *i.e.*, the fitness of the individual to practice law.[14] Refusal to answer the questions was grounded in the first amendment in two of the cases,[15] and on a state privilege against self-incrimination in the third.[16] The first amendment problem was resolved in favor of the states by application of the so-called "balancing test." The state-privilege-against-self-incrimination issue was determined as not extending to this type of situation in view of an attorney's capacity as an officer of the court and a court's historic supervisory and regulatory powers over the attorneys practicing before it.[17] So long as due process is not violated, the state may define the extent of its privilege as it sees fit.[18]

The use of the balancing test, whereby the interest of the state in having the desired information is weighed against the individual's interest in unrestricted liberty to say what he wants and to associate with whom he pleases, has resulted in sharp conflict between the majority and the other members of the Court. While the use of the test is definitely the rule,[19] Justice Black makes an incisive argument against it. He relies heavily on the history of events leading to the drafting of the Constitution and the evils which the framers sought to preclude. It would appear that the basic objection to the test is, as he points out, its extension to its logical limit.[20] This would be to say that there is nothing in which the state does not have an interest superior to that of the individual. Note that the subordination of the individual's interests to the general interest is no stranger to the law — nuisances are abated or not on the basis of their effect on the common good. However, the "balancing test" has the capacity to make an empty shell of the first amendment, and has the unhappy feature of making constitutional decisions turn, to an ever greater degree, on the predilections of the Court's membership at a particular time.

The absolutism, which Justice Black says was really the intention of the Founding Fathers in regard to the freedoms within the amendment,[21] does not appear to be the solution. Despite the abhorrence of prior restraint, seditious libel, and licensing legislation which the members of the Constitutional Convention

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12 *Ibid.*

13 Note 8, *supra.*

14 Note 3, *supra.* In the *Konigsberg* case and in the *Anastaplo* case the questions refused answers went to the applicants' devotion to the law and its process for orderly change; in *Cohen* they went to the existence of unethical practices.

15 Konigsberg v. State Bar of California, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961).

16 Cohen v. Hurley, 366 U.S. 117 (1961).

17 *Ibid.*

18 Knapp v. Schweitzer, 357 U.S. 371 (1958); Twining v. New Jersey, 211 U.S. 78 (1908).

19 Wilkinson v. United States, 365 U.S. 399 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); Barenblatt v. United States, 360 U.S. 109 (1959); National Ass'n For Advancement of Colored People v. Alabama, 357 U.S. 449 (1958); Watkins v. United States, 354 U.S. 178 (1957).

20 Konigsberg v. State Bar of California, 366 U.S. 36(1961); In re Anastaplo, 366 U.S. 82 (1961).

21 See Mr. Justice Black's dissent in Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

undoubtedly had, it seems unlikely that their distaste was so great as to lead them to remove all limitation from the right of free speech. As with the "balancing test," the literal interpretation appears unsatisfactory when forced to its logical conclusion.

The "clear and present danger" test expounded by Justice Holmes[22] is a valid basis on which to determine problems arising in the interpretation of the first amendment. In effect this test amounts to a middle ground between the "absolutism" theory and the logical extension of the "balancing test." What the "clear and present danger" test really says is that constitutional protection extends to a certain degree and thereafter it does not. The line of demarcation is fixed at the point where there is found to exist as a matter of fact, a "clear and present danger that the speech will bring about evils which Congress has a right to prevent."

The value of this approach to questions involving the first amendment is the additional certainty inherent in the test. Whether or not the protection of the Constitution covers the particular expression depends on the answer to a factual question. It does not depend on what weight is accorded the state's interest in having the information as opposed to the weight that is to be accorded to the individual's interest in suppressing the information. The "clear and present danger" test removes the judicial weighing and in its place employs a factual question.

In *Cohen v. Hurley*, the majority attempted to distinguish between the rights of the petitioner as a citizen at large and the rights of the petitioner as an attorney in light of his responsibilities as an officer of the court.[23] This distinction, as the Court implies, is based not on whether due process applies to lawyers, but rather on the definition of due process. Due process amounts to those procedural safeguards as are necessary to comport with fundamental fairness. What is required by fundamental fairness is to be determined on the basis of the situation presented, in light of what procedural safeguards have been historically required.

Justice Black complains[24] that lawyers are hereby singled out as a group, and that more stringent requirements are applied to that group than are applied to other people. Thus he concludes that under such a test lawyers are denied due process and equal protection. It appears however that if, as is the law, due process is determined by what procedures are fundamentally fair in the particular situation, in light of historical requirements, then due process in one situation does not require the same procedures that it may in another.

What process is required in the particular situation becomes the next concern. Should a judicial inquiry be able to impose such a severe sanction as disbarment because of failure to respond to relevant questions?

The courts have long been recognized as having supervisory powers over those attorneys who practice before them.[25] This dates from the days of the early English common law. That some of this supervisory responsibility was delegated to the Inns of the Court is well recognized. In this country the responsibility of the Inns is shouldered by the bar associations and the courts.

Since attorneys are recognized as standing in a special relationship to the court and because of the disciplinary authority that is historically a prerogative of the judiciary, it appears that, that which is required in these circumstances comports with due process.

The California statute provides that "no person who advocates the overthrow of the Government of the United States or of the State of California by force, or violence, or other unconstitutional means shall be a member of the bar."[26] The basis for the petitioner's exclusion in *Konigsberg* was that he refused to answer pertinent questions put to him by an authorized Committee and thereby obstructed its investigation. The aim of the investigation was to determine the fitness of the

22 Schenck v. United States, 249 U.S. 47 (1919).
23 Cohen v. Hurley, 366 U.S. 117 (1961).
24 See Mr. Justice Black's dissent in Cohen v. Hurley, 366 U.S. 117 (1961).
25 People ex. rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).
26 CAL. BUS. & PROF. CODE § 6064.1.

candidate, as has been previously mentioned. It is suggested by the dissents in *Konigsberg* that the result of the denial on the ground stated has the effect of shifting the burden of proving non-advocacy to the applicant. This appears not to be the case because, as the majority points out, the holding is couched in terms of obstruction, and thus implies that the Committee has the responsibility to show advocacy rather than the applicant to demonstrate non-advocacy.[27] Further, there is a basis for the position that this is not the type of case at which the rule of *Speiser v. Randall* is directed.[28]

It would appear that significance of these cases lies in their further indication of the existing judicial climate. After the decision in *Pennsylvania v. Nelson,*[29] it appeared that state sedition laws were no longer of any effect because of the dominance of the federal legislation in that field. As a result of *Uphaus v. Wyman,*[30] it is now understood that the impact of *Pennsylvania v. Nelson* was to render such state statutes invalid insofar as they attempted to proscribe sedition against the federal government, but not as such statutes apply to sedition against the state.

Similarly, due process was held to have been violated in *Slochower v. Board of Higher Education,*[31] where a professor was dismissed from his position because of a claim of privilege based on the fifth amendment before a Congressional Committee. Two years later the Court upheld the discharge of a school teacher over a due process objection.[32] The discharge relied on a statutory definition of incompetency which included the refusal to answer relevant questions. A like situation arose in regard to a public employee and the Court found no violation of due process.[33]

When the *Konigsberg* case was first decided it remained uncertain whether a sanction could be attached to a refusal to answer the questions of a bar association committee relating to Communist affiliations. This was especially so in light of the Court's holding in the *Schware* case.[34] The cases treated in this comment indicate the state of the law in that regard, and in relation to other questions relevant to a valid investigation wherein answers were refused. The previous uncertainty has been removed.

William E. Kelly

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — EVIDENCE SEIZED BY STATE POLICE OFFICERS DURING SEARCH OF RENTED PREMISES IN ABSENCE OF TENANT AND WITHOUT A WARRANT BUT WITH LANDLORD'S CONSENT HELD INADMISSIBLE IN A FEDERAL PROSECUTION. — Chapman was arrested and convicted for the illegal operation of an unlicensed distillery[1] in a rented house. The landlord visited the rented premises one Sunday and noticed a strong odor of mash emanating from the house. He informed local police of his observations and they accompanied him to the house. Receiving no response to knocks and blocked from a view of the interior by drawn shades, the officers, with the landlord's permission, entered the house through an unlocked window. Upon entering, the officers found a complete distillery and sent for federal agents. Chapman was arrested when he arrived at the house.

27 Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

28 Speiser v. Randall, 357 U.S. 513, 527 (1958). The doctrine enunciated by *Speiser v. Randall* is that requiring a taxpayer, in order to qualify for a state tax exemption, to sustain the burden of proof that he did not advocate the violent overthrow of the government violates the due process clause of the fourteenth amendment.

29 350 U.S. 497 (1956).

30 360 U.S. 22 (1959).

31 350 U.S. 551 (1956).

32 Beilan v. Board of Public Education, 357 U.S. 399 (1958).

33 Nelson v. Los Angeles County, 362 U.S. 1 (1960); *Cf.* Lerner v. Casey, 357 U.S. 468 (1957).

34 Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

1 INT. REV. CODE OF 1954 §§ 5601, 5606.

Thereafter the federal agents arrived and took custody of Chapman and samples of the mash. Neither the local nor the federal officers had warrants of any kind. Chapman's motion to suppress the evidence obtained by the search was denied by the trial court. The Court of Appeals for the Fifth Circuit affirmed. On certiorari to the United States Supreme Court, *held,* reversed. State police officers' search of rented premises, without a search warrant, in the absence of tenant but with the consent of the landlord, was unlawful and evidence seized during such search was inadmissible in federal prosecution. *Chapman v. United States,* 365 U.S. 610 (1961).

The Government did not contend that the search and seizure met the standards of the fourth amendment. It relied, instead, on the alleged common law rule that a landlord has an absolute right to enter the rented premises to view waste. The Court rejected this argument because the Government failed to cite any cases on point and because of its own reluctance to import into the area of search and seizure the "subtle" and "largely historical" distinctions of property law.[2] The Court also refused to find that the landlord had complied with the provisions of a Georgia statute.[3] It said that, before the entry, the landlord did not know that the premises were being used for the illegal operation of a distillery. It noted, too, that he had not exercised his statutory option to forfeit the tenancy for such a cause.[4] Having dismissed these contentions, the Court rested its decision on the law of search and seizure.

In the eighteenth century, English courts issued "general warrants"[5] which permitted certain officers to conduct searches for certain illegally possessed goods in any place where they might be found. The broad and onerous scope of police intrusion which resulted was brought to a halt by *Entick v. Carrington,*[6] which declared these general warrants invalid. The colonists in America had also experienced the burden of the general warrant.[7] Against this historical background, the fourth amendment to the Constitution[8] was framed and adopted. The amendment was intended to protect the security of the individual and his home against the power of the federal government; more particularly, it was general warrants that the framers had in mind.[9] One significant limitation on this "right of privacy" was deemed necessary. A limited search could be authorized by a judicial warrant specifically describing the premises to be searched and the items sought. A warrant could be issued only on a showing of probably cause. From this qualification it can be deduced that a search and seizure should be invalid unless a warrant authorizes it,[10] barring only exceptions justified by "absolute necessity."[11]

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2 365 U.S. at 617.

3 The unlawful manufacture, sale, or keeping for sale or disposition of any of the liquors and beverages mentioned in section 58-101, contrary to the law of the State shall, at the option of the landlord, work a forfeiture of the rights of any lessee or tenant under any lease or contract for rent of the premises where such unlawful act is performed by the lessee or tenant, or by any agent, servant, clerk or employee of the lessee or tenant with the latter's knowledge or permission. GA. CODE § 58-106 (1933).

4 365 U.S. at 617.

5 See Boyd v. United States, 116 U.S. 616, 624-630 (1885); United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

6 2 Wils. K.B. 275, 95 Eng. Rep. 807 (K.B. 1765).

7 Paxton's Case, Quincey 51 (Mass. 1761).

8 The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

9 United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

10 See Davis v. United States, 328 U.S. 582 (1945); Gouled v. United States, 255 U.S. 298, 304-306 (1920); Weeks v. United States, 232 U.S. 383 (1913).

11 Carroll v. United States, 267 U.S. 132 (1924); Reifsnyder v. Lee, 44 Iowa 101 (1876); Closson v. Morrison, 47 N.H. 482 (1867).

The freedom of a person's house from search without a warrant not incident to a valid arrest, had received no judicial explication until the case of *Agnello v. United States*. It was there said that "belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."[12] This seemed to be the rule until 1937 when the Court, instead of repeating what it had said in *Agnello,* spoke in terms of time and the practicability of obtaining a search warrant.[13] Although the Court held in this instance that the search and seizure without a warrant was illegal and therefore that the admission into evidence of the fruits of that search was error, there remained a hint that matters of convenience in obtaining a warrant would be relevant.[14]

Ten years later, the Court stated that "it is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants whenever reasonably practicable."[15] In saying this, the Court seemed to equate "unreasonable" searches with those where the arresting officers might reasonably have been expected to obtain a search warrant. Searches were said to be "reasonable" not only where made with a warrant, or where the lack of a warrant was excused by absolute necessity, but also where a warrant could not have been got without reasonable practicability.

Faced with a case in which police had arrested the accused and then had thoroughly searched his office for illegal matter, without a search warrant, the Court has declared that "what is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test."[16] In thus laying aside the history behind the fourth amendment, the Court held that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case."[17] In setting down this test, the Court explicitly overruled the practicability test of *Trupiano*.[18] The Court had found a way in which it might say that a search without a warrant, not incident to a valid arrest, was reasonable and without regard for the element of absolute necessity. Mr. Justice Frankfurter's vigorous dissent pointed out the shift which the majority was making away from the historical meaning of "unreasonable" searches.[19] Prime importance was attached to the circumstances under which the search was made. Two results seem to flow from *Rabinowitz*: (1) because of the lack of any real criteria, each case will be decided on an *ad hoc* basis; and (2), more importantly, this uncertainty in the law could, in many instances, allow the Court to find that the realities of effective law enforcement outweigh the citizen's interest in his privacy. The tendency of the Court to do so has been recently indicated.[20]

In deciding *Chapman,* the Court examined the facts from two angles. By deeming *Taylor v. United States*[21] and *Johnson v. United States*[22] "closely relevant,"[23] the Court followed the line of reasoning which had led to the holding in *Trupiano*. It was emphasized in both *Taylor* and *Johnson* that warrants could

12 Agnello v. United States, 269 U.S. 20, 33 (1925).
13 Taylor v. United States, 286 U.S. 1 (1932).
14 *Id.* at 6.
15 Trupiano v. United States, 334 U.S. 699, 705 (1947).
16 United States v. Rabinowitz, 339 U.S. 56, 63 (1950).
17 *Id.* at 66.
18 *Ibid.*
19 *Id.* at 68-86.
20 *Chapman* at 623; United States v. Rabinowitz, 339 U.S. 56, 65 (1950).
21 286 U.S. 1 (1932).
22 333 U.S. 10 (1947).
23 365 U.S. at 618.

have been secured. The element of time was mentioned frequently in those decisions. On the other hand, had the Court examined the "total atmosphere" of the factual situation in *Chapman,* it might well have found that the search was reasonable.

It is thought that the lack of clarity which Justice Frankfurter speaks of in his concurring opinion[24] is produced by the concurrence of two factors; (1) the Court did not explicitly rely on *Trupiano,* although the line of reasoning followed in the first part of the opinion did proceed from the standpoint of determining whether or not it was reasonably practicable for the Georgia police to have armed themselves with a search warrant and (2) the Court refused to find that, under the circumstances, that is, the total atmosphere of the case, the search could be termed reasonable. In short, the majority seemed to ignore the fact that *Trupiano* was overruled by *United States v. Rabinowitz.*[25] Compounding the confusion, the Court rested its decision on the reasoning of *Johnson*[26] which was weakened by *Rabinowitz.* By its implicit recognition of the test in *Trupiano* and its silence as to the status of the holding in *Rabinowitz,* the Court posed a dilemma for the lower courts and law enforcement officers concerning the elements which must be considered by them in deciding when a search, not incident to a valid arrest, is permissible without a warrant. The question of whether the Court will apply the unreasonableness test of *Trupiano* or of *Rabinowitz,* or a combination of the two, plainly presents itself for consideration by police and the lower courts. It is thought that at least fragments of *Trupiano* remain to puzzle those who need clarity.

Perhaps it would be wise to ask whether or not a test or formula for deciding the validity of a search without a warrant not incident to a valid arrest is appropriate. Unaccompanied by tests, the meaning of the words, "unreasonable searches and seizures," is understandable in the light of history.[27] The citizen's interest in security from police interference is certainly regarded as paramount. This interest is to be served by a liberal interpretation of the fourth amendment by the courts in favor of the right to be free from undue police intrusion and surveillance.[28] However, any formula which is devised to determine the reasonableness of a search without warrant must, of necessity, inhibit the right of the individual to his privacy. The tests contained in *Trupiano* and *Rabinowitz* are good examples of the gradual encroachments upon the citizen's privacy which can result. To the recognized exception of absolute necessity, *Trupiano* added the element of the time which authorities had to secure a warrant. The Court in *Rabinowitz* said that considerations other than time were also important and that "some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential."[29] These decisions reveal the understandable concern of the Court for effective law enforcement, but the case for efficiency should not be allowed to endanger substantial private rights. Warrants are required in order to prevent the police from indiscriminately rummaging through the private effects of an individual before the reasons for such an undertaking have been fully presented to a magistrate for his detached and disinterested judgment on the need for it.[30] Without this orderly process, enthusiastic law enforcement has been shown to seriously interfere with the citizen's security and privacy.[31]

The Court in the present case has indeed created a "quagmire"[32] but the

24 *Ibid.*
25 339 U.S. 56 (1950).
26 333 U.S. 10 (1947).
27 Boyd v. United States, 116 U.S. 616 (1885).
28 United States v. Rabinowitz, 339 U.S. 56, 56 (1950); Gouled v. United States, 255 U.S. 298, 304 (1920).
29 339 U.S. at 65.
30 *Ibid.*
31 Trupiano v. United States, 334 U.S. 699 (1947); Johnson v. United States, 333 U.S. 10 (1947).
32 365 U.S. at 622 (dissenting opinion).

questions which remain unanswered may provide the Court with the opportunity to re-examine the wiseness of formulating tests to distinguish the reasonable from the unreasonable search. Tests fulfill a desire for clarity but it is also felt that they move away from the historical reasons for the fourth amendment and invade the domain of privacy by increasing the number of instances when search of a person's house without a warrant and not incident to a valid arrest can be conducted. However, it is thought that, if some kind of standard is desirable in order to guide the lower courts and police, the test set down in *Trupiano* hues closer to the exception of necessity than does the rule contained in *Rabinowitz.*

George W. Vander Vennet, Jr.

CONTRACTS — THIRD PARTY BENEFICIARY — DONEE BENEFICIARY MAY ENFORCE INSURANCE CONTRACT — Before boarding a plane to take aerial photographs for the defendant, Physicians News Service, Inc., plaintiff's husband had entered into an alleged oral contract with the defendant, whereby the latter was to procure, at its expense, a $50,000 insurance policy on his life, with the plaintiff as the sole beneficiary. While performing the contract, plaintiff's husband was killed when the plane crashed. The defendant did not purchase the insurance policy and the petitioner sued as a third party beneficiary. She had a $50,000 verdict but the trial court held her to be a mere incidental beneficiary, since the defendant had undertaken no duty to the petitioner, and granted the defendant's motion to dismiss the complaint. *Weiner v. Physicians News Service, Inc.,* 27 Misc. 2d 470, 211 N.Y.S. 2d 429 (Sup. Ct. 1960). On appeal, *held:* judgment modified on the grounds that petitioner was a donee beneficiary and entitled to recover. Yet, a new trial was granted, since the Appellate Division of the New York Supreme Court thought that the verdict was against the weight of the evidence. *Weiner v. Physicians News Service, Inc.,* 214 N.Y.S. 2d 474 (Sup. Ct. 1961).

Professor Corbin[1] has defined a donee beneficiary as a "third party to whom a promised performance comes without cost to himself as a donation from the promisee." Professor Williston[2] has adopted the description employed by the Restatement of Contracts[3] which states that:

> (1) Where the performance of a promise in a contract will benefit a person other than the promisee, that person is, except as stated in Subsection (3):
> (a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary;

The wisdom of utilizing the word "donee" has been questioned, since it does not convey the true meaning of the third party's enforceable right against the promisor.[4]

The third party beneficiary doctrine has had an interesting history in New York. There, as early as 1806, in a case in which a party promised to deliver a cherry desk to the purchaser's wife, it was decided that the wife could recover.[5] In the middle of the nineteenth century a New York court declared, in a situation where a third party was allowed to enforce a promise made by the defendants

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1 CORBIN, CONTRACTS § 782 (1951).
2 2 WILLISTON, CONTRACTS § 356 (third ed. 1959).
3 RESTATEMENT, CONTRACTS § 133 (1932).
4 By calling him a donee the Restatement does not imply that the intention of the promisee was to make a gift to him, but in effect attaches that label to him for the lack of any other. In these miscellaneous cases, which are neither cases of paying debts or making gifts, the right of the beneficiary depends upon there being 'an object to confer on him a right against the promisor.' FULLER, BASIC CONTRACT LAW 551 (1947).
5 Schermerhorn v. Vanderheyden, 1 Johns. R. 139 (N.Y. Sup. Ct. 1806).

with another to try to collect a bill of exchange and apply it to a check owed to the third party, that as a general rule a third party, from whom no consideration has passed, could sue and recover on a promise exacted on his behalf.[6]

However, in order to allow a third party to benefit from a contract entered into by two others for his behalf, another theory was soon introduced in New York. The court in *Trotter v. Hughes*[7] reasoned that in a situation where a grantee of the mortgagor bought subject to the mortgage, the mortgagee could recover by subrogation against the grantee debtor.

The case of *Lawrence v. Fox*[8] actually did not create any new rule of law. It merely reaffirmed the right, lost for a while due to the influence of such cases as *Trotter v. Hughes,* of a third party to enforce a promise made by two others for his benefit. There, a person, Holley, loaned $300 to the defendant in consideration for the latter's promise to pay $300 the next day to the plaintiff, to whom Holley was indebted. The court, after stating that "such enforcement does not depend on any relationship between the parties,"[9] concluded that the defendant was liable to the third party beneficiary. The principle embodied in the subrogation theory was weakened further in *Thorp v. The Keokuk Coal Co.*[10] There, the defendant agreed with mortgagor to pay the mortgagee's mortgage note and the court reasoned that such a promise was enforceable by the mortgagee, stating:

> But since it has become settled that the promise of the grantee brings him into direct privity with the mortgagee, so that the latter can, at law, sue upon his promise, I can perceive no reason for invoking the doctrine of equitable subrogation as the sole ground for his liability in equity.[11]

However, New York reverted to the subrogation method in *Vrooman v. Turner,*[12] where a grantee took subject to a mortgage and the court held that a mere stranger, the mortgagee, could not claim the benefit of a contract made by two others. In discussing the need for privity the court said:

> A legal obligation or duty of the promise to him, will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing as evidence of the intent of the latter to benefit him, and creating a privity by substitution with the promisor.[13]

This view persisted for several years with case after case denying recovery to a third party due to the absence of a legal or equitable obligation owed by the promisee to the third party.[14] It has been suggested that this requirement explains many of the inconsistencies in the New York cases as regards the right of a donee beneficiary.[15]

The New York courts gradually relaxed this rule by enlarging upon a doctrine

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6 Delaware & H. Canal Co. v. Westchester Co. Bank, 4 Denio 97 (N.Y. Sup. Ct. 1847).
7 12 N.Y. 74 (1854).
8 20 N.Y. 268 (1859).
9 *Id.* at 271.
10 48 N.Y. 253 (1872).
11 *Id.* at 258.
12 69 N.Y. 280 (1877).
13 *Id.* at 284.
14 Durnherr v. Rau, 135 N.Y. 219, 222, 32 N.E. 49, 50 (1892): "[A]ccording to our decisions no legal or equitable obligation, of which the law can take cognizance, was created in favor of the wife against the husband or his property by these circumstances." Wife was not allowed to recover dower rights on a deed executed by her husband with the grantee whereby the latter agreed to pay all incumbrances on the premises by mortgage or otherwise. Townsend v. Rackham, 143 N.Y. 516, 522, 38 N.E. 731, 733 (1894): "[T]he action (cannot) be sustained by the third person in the absence of any liability in his favor due to grow from the one to whom the promise was made." Third person cannot take advantage of a promise by a mortgagor to pay a specified part of the money to him after the satisfaction of the mortgage by the mortgagee when the latter owed him nothing.
15 4 CORBIN, *op. cit. supra* note 1, § 827:
"In practically all the cases the plaintiff actually got judgment if he was in fact intended by the promisee as a beneficiary, but the attempts made to reconcile the decisions with the reasoning in *Vrooman v. Turner* are inconsistent and unsuccessful."

previously announced in *Todd v. Webber.*[16] There, the New York Court of Appeals was confronted, not with a creditor-debtor or mortgagor-mortgagee situation, but with an inter-family relationship. It held that an illegitimate child should be allowed to enforce a promise, made by her putative father to her mother and grandmother, whereby in return for services rendered to the child he would provide for her in his will. The idea was soon developed that a third party could recover, if related to the promisee by blood or marriage.[17]

The view has been expressed that *Seaver v. Ransom*[18] operated as the "opening wedge for the recognition of the donee beneficiary in New York."[19] There, a husband promised his wife, who was about to die and who desired to leave her house and lot to her niece, that if she would forego this wish and sign the will which he had prepared, he would make a sufficient provision for the niece in his own will to make up the difference. He failed to do so and the niece instituted a suit on the promise. The Court of Appeals decided that she should recover and that the degree of relation should not be the sole basis for denying relief to the third party. This court recognized the tendency of New York courts to permit donee beneficiaries to collect and declared that "the doctrine of *Lawrence v. Fox* is progressive, not retrograde."[20]

The doctrine expressed in *Seaver v. Ransom* was a major step forward in the recognition of practically all contract beneficiaries and it would seem safe to say that a donee beneficiary will be protected in New York today. The general attitude was noted in *Merchants Mut. Cas. Co. v. United States F & Guar. Co.,*[21] where a surety company was found liable to a third party for insurance premiums on its bond given to the city of Buffalo wherein it promised to pay all lawful claims to third persons arising out of the contract. This court reviewed the leading cases in this field, namely *Lawrence v. Fox* and *Seaver v. Ransom,* and concluded that a clearly designated beneficiary was seldom left without a remedy.

Yet, problems still arise in this area of the law due to the importance which some courts in New York place upon the necessity of a close family relationship between the parties involved. For instance, in the case of *In re Deyo's Estate,*[22] the court sustained the right of a surviving beneficiary to take a United States bond in opposition to the deceased's estate and stated that "contracts made for the benefit of third parties are recognized and will be enforced at the instance of the donee beneficiary. . . . This is especially true where the beneficiary is a close relative." Also, in *In re Pincus' Estate,*[23] the court, faced with a situation where the promisee and the third party claimant were brothers-in-law, stressed the need for some degree of privity in the form of a moral or legal obligation before concluding that the doctrine of *Lawrence v. Fox* was progressive and that the promisee by "coupling his obligation to his wife with the benefit to her brother, created

16 95 N.Y. 181 (1884).

17 Buchanan v. Tilden, 158 N.Y. 109, 52 N.E. 724 (1899). A wife was allowed to sue on a contract made by her husband with a third person to pay her certain moneys in the event of success in contesting a will. Borland v. Welch, 162 N.Y. 104, 110, 56 N.E. 556, 557, 558 (1900):

> Courts of equity, generally speaking, will not enforce a specific performance of agreements, at the instance of volunteers. They make an exception, however, to this rule, in favor of a wife and children; and the reason for this exception is, that for them the settlor is under a natural and moral obligation to provide.
>
> The Court refused to permit collateral relatives to recover on a marriage settlement, but recognized the rights of a wife and a child, who were third parties, to enforce such a contract.

18 224 N.Y. 233, 110 N.E. 639 (1918).

19 2 WILLISTON, *op. cit. supra* note 2, § 357.

20 Lawrence v. Fox, *supra* note 18 at 240.

21 253 App. Div. 151, 2 N.Y.S.2d 370 (Sup. Ct. 1938).

22 180 Misc. 32, 40, 42 N.Y.C.2d 379, 387 (Surr. Ct. 1943).

23 202 Misc. 482, 489, 107 N.Y.S.2d 736, 743 (Surr. Ct. 1951).

joint rights which are enforceable against the estate in favor of each of the beneficiaries."

Professor Corbin has criticized the idea that an obligation must be owed to a third party by the promisee and has declared that it is "the expression of donative intent" that is the important factor. He states:

> It is the expression of donative intent by the promisee and the fact that the promisor has contracted to perform to the benefit of the third party that create a right in him. Close relationship may indeed be evidence of donative intent, showing the reason or motive that induced the promisee to buy the promise. But such intent can be shown by other kinds of evidence, and proof of relationship can be and often has been dispensed with.[24]

Likewise, the objection that there is often no intention on the part of the promisor to benefit the third party is not valid, since the motive or intent of the promisor is immaterial due to the fact that his primary purpose is in receiving the consideration given by the promisee, not in aiding the third party.[25]

Another relaxation of the *Vrooman v. Turner* doctrine occurred in the situations wherein the promisee was a municipality and the third party, one of its inhabitants, was allowed to recover on a contract entered into by the city with another, usually a general contractor, for damages incurred in the performance or non-performance of the contract.[26] A case often thought as being in contradiction to this group is *H.R. Moch v. Rensselaer Water Co.*,[27] wherein a city inhabitant, who was unable to extinguish a fire in his building due to an inadequate supply of water and pressure from the city hydrants, sued the water company on its contract with the city. Relief was denied by the court, since there was an essential element missing in this contract. Writing for the court, Judge Cardozo stated:

> The cases that have applied the rule of *Lawrence v. Fox* to contracts made by a city for the benefit of the public are not at war with this conclusion. Through them all there runs a unifying principle: the presence of an intention to compensate the individual members of the public in the event of a default.[28]

Laborers have also followed the avenue established by *Seaver v. Ransom* in order to assert their rights as donee beneficiaries on contracts executed by their employers with other parties. For instance, in *Fata v. Healy Co.*,[29] where a contractor entered into a construction contract with the city, a laborer was allowed to enforce the statutory provision that an employer must pay the prevailing wage rate.

The New York Court of Appeals, in *McClare v. Mass. & Ins. Co.*,[30] where the State Athletic Commission compelled a surety company to execute a bond promising to pay an obligation of an Athletic Club arising out of a boxing exhibi-

24 4 CORBIN, *op. cit. supra* note 1, § 785.

25 4 CORBIN, *op. cit. supra* note 1, § 776; Cf. Ronzo v. Vernon Industries, 195 Misc. 873, 874, 91 N.Y.S. 2d 52, 54 (Sup. Ct. 1949): "To permit a third party donee beneficiary to enforce a contract against the promisor, it appears only necessary that the intention of the contracting parties was clearly to benefit the third party." Plaintiff's promise of forebearance to sue on a note against a corporation, which promise was made to the mortgagee of the corporation's assets, was properly interposed as a defense by the corporation as donee beneficiary of the promise.

26 Rigney v. N.Y.C.H.R.R.R. Co., 271 NY.. 37, 111 N.E. 226 (1916). Resident recovered on a contract executed by the contractor with the city for injuries sustained by a change of grade. Farnsworth v. Boro Oil & Gas Co., 216 N.Y. 40, 109 N. E. 860 (1915). A city inhabitant was permitted to enjoin a gas company from raising rates above the price provided for in contract with the city. Smyth v. City of New York, 203 N.Y. 106, 96 N.E. 409 (1911). Landowners were allowed to enforce a contract whereby the contractor promised city to pay damages incurred by the landowners. Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211 (1906). City inhabitant was allowed to enjoin water company from raising rates above the amount specified in a contract with the municipality.

27 247 N.Y. 160, 159 N.E. 896 (1928).

28 *Id.* at 166.

29 289 N.Y. 401, 46 N.E. 2d 339 (1943).

30 266 N.Y. 371, 195 N.E. 15 (1935).

tion and a printer recovered his bill against the surety company, examined the cases in this area and concluded that the rights of a third party beneficiary were no longer dependent on a requirement of some obligation or duty running from the promisee to the third party beneficiary. Yet, many discrepancies exist and will continue to arise in New York due to the fact that:

> Some of the older decisions, that the Court of Appeals now generally passes by in silence, still cause confusion in decisions of various Appellate Divisions and numerous lower courts. Not every hopeful plaintiff who asserts that he has rights under a contract made by other parties should be sustained; but his claim should in no case be denied on the bare ground that he is a mere donee to whom the promisee owed nothing.[31]

In the instant case the lower court held that the promisor, the Physicians News Service, Inc., assumed no duty to the petitioner. The Supreme Court, Appellate Term, utilized a different test to determine whether the third party should be permitted to recover. It followed the reasoning announced in *Johnson v. Holmes Tuttle Lincoln-Mercury*,[32] wherein an injured party was compensated as a third party beneficiary for the failure of an automobile salesman to fulfill his promise to obtain liability insurance for a purchaser, who was involved in the accident. There, it was decided that if an intent to benefit the third party is evident from the contract, the third party should recover.

It is submitted that, in line with case and secondary authority, the reclassification of the petitioner as a donee beneficiary was correct. Indeed, it is only reasonable to conclude that her husband, by exacting this promise, meant to confer a right upon her against the promisor, the defendant.

Paul K. Rooney

INCOME TAX — ALIMONY — SPECIFIC DESIGNATION OF PORTION OF PAYMENT AS CHILD SUPPORT REQUIRED IN ORDER TO MAKE PORTION TAXABLE TO HUSBAND. — Int. Rev. Code of 1954, § 215, permits a husband to deduct from his gross income payments includible under section 71 in the gross income of his wife. Section 71 (a) makes includible in the gross income of the wife payments imposed on the husband by a decree of divorce or legal separation by a written agreement incident to such divorce or separation; or by a written agreement, not incident to a decree of divorce or legal separation, executed after the effective date of the 1954 Code. The written decree or written agreement must impose the obligation because of the marital or family relationship. The payments must be periodic within the meaning of section 71.[1] Additionally, section 71 (a) makes includible in a wife's income those payments the husband is ordered to make for her support and maintenance by a decree entered after March 1, 1954.

Section 71 (b) prevents the husband from deducting "that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of the minor children of the husband. The key word is "*fix*." Its interpretation has given rise to variant views in numerous cases since inclusion of substantially the same provisions in the Revenue Act of 1942.[2] The Supreme Court of the United States recently passed on its meaning for the first time. A divorced taxpayer agreed to make periodic payments to his former wife. The agreement provided that the payments were to "be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue," if any of the parties' three children should marry, become emancipated, or die. The Commissioner contended that this provision *fixed* one-half (one-sixth multiplied by three, the number of

31 4 CORBIN, *op. cit. supra* note 1, § 827.
32 160 Cal. App. 2d 290, 325 P.2d 193 (1958).

1 INST. REV. CODE OF 1954, § 71(c).
2 REV. ACT OF 1942, § 120.

children) of the total payments as payable for the support of the children. The Tax Court affirmed the Commissioner's view, disallowing the deduction to the husband;[3] the United States Court of Appeals for the Second Circuit reversed.[4] On certiorari the Supreme Court *held*: affirmed. The agreement did not *specifically designate* a portion of the payments as child support. *Commissioner v. Lester*, 366 U.S. 299 (1961).

The Revenue Act of 1942[5] added provisions to the Int. Rev. Code of 1939,[6] designed to change the prevailing rule that prevented deduction of alimony payments,[7] except where the divorce decree, the settlement, and state law operated as a complete discharge of the liability for support.[8] The Court placed heavy emphasis on the legislative history of that act in an effort to determine precisely what Congress meant by the word *fix*. The Senate passed a similar provision in 1941 that contained the words *specifically designate* instead of *fix*.[9] This bill was not enacted into law. In the legislative history of the 1942 Act, however, Congress used the word *fix* and the words *specifically designate* interchangeably.[10] Despite this, it would seem that one term is as difficult to apply to concrete facts as the other. An agreement that could be said to *fix* a sum as allocable for child support could probably be said to *specifically designate* the sum, and vice versa. Also, the Court found that congressional purpose was manifested in statements indicating a desire to alleviate uncertainty as to tax consequences in payments to a divorced spouse.[11] These statements are primarily allusions to the uncertainty of the former requirement that a payment, in order to be deductible, had to operate under state law as a complete discharge of liability for support. The overall purpose of the act that they disclose does, however, suggest an interpretation of the word *fix* in a manner permitting certainty as to who will pay the tax on payments to the wife.

In 1954, Congress changed some of the provisions relating to alimony payments. However, the provision relating to payments to the support of minor chil-

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3 Jerry Lester, 32 T.C. 1156 (1959).
4 279 F.2d 354 (2d Cir. 1960).
5 Rev. Act of 1942, § 120.
6 Int. Rev. Code of 1939, § 22(k).
7 Douglas v. Willcuts, 296 U.S. 1 (1935).
8 Helvering v. Fitch, 309 U.S. 149 (1940).
9 H.R. 5417, 77th Cong., 1st Sess., § 117(a) (1941).
10 Much of the legislative history is general in language. H.R. Rep. No. 2333, 77th Cong., 2d Sess. 73 (1942) states:

> Moreover, the portion of such payments *going to* the support of minor children of the husband does not constitute income to the wife nor a deduction to the husband. (emphasis added.)

However, the Report later indicates that the word "fix" and the words "specifically designate" were considered synonymous:

> Section 22(k) and section 171 do not apply to that part of any periodic payment under section 22(k) . . . which, by terms of the decree or written instrument . . . is *specifically designated* as a sum payable for the support of minor children of the husband. If an amount or portion is so *fixed*. . . . (emphasis added) *Id.* at 74.

11 S. Rep. No. 673, 77th Cong., 2d Sess. 32 (1942) states:

> In addition, the amended sections will produce uniformity in treatment of amounts paid in the nature or in lieu of alimony regardless of the variances in the laws of different states concerning the existence and continuance of any obligation to pay alimony. In this respect the amendments are designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse. . . .

The following appears at 103 Cong. Rec. 7267 (1941) (remarks of Senator George):

> Mr. President, this is the alimony provision, which I explained somewhat in detail. It is inserted in the bill for the purpose of ironing out the differences which have grown up by virtue of differing state laws and also for the purpose of making certain when the payment of alimony or separate maintenance is taxable to the husband rather than to the wife; that is, to make it clear where it is taxable.

dren[12] was taken verbatim from the 1939 Code.[13] The interpretation that had been given to the word *fix* by many courts between 1942 and 1954 was rejected in *Lester*. The courts had been permitting allocation of a portion of the alimony payments for support of minor children to be implied in circumstances similar to those involved in *Lester*.

In *Harold N. Fleming*,[14] the agreement provided that the wife was to be paid $200 a month until a date approximately five years subsequent to the divorce. If the child died before the expiration of five years, the payments were to be reduced by $100 per month. After the five year period expired, the payments were to be $100 per month until the child reached his majority. If the child died prior to reaching his majority, but after expiration of the five year period, the payments were to cease entirely. The court held that $100 a month was "fixed" as child support within the meaning of the statute. In another case,[15] a husband agreed to pay $1500 a month for the support of his wife and two children. A reduction of $833.33 a month was permitted if the wife remarried. In the event of the death of a child, a reduction of $416.66 a month for each child dying was permitted. The Court held that there had been a *"sufficient designation"* of half of the monthly payment for the support of the children.

Whether Congress was satisfied with this interpretation does not appear from the congressional reports relevant to the enactment of the 1954 Code.[16] This lack of congressional discussion of prior interpretation of the word *fix* made it unnecessary for the Court to consider whether or not the prior interpretation had special sanction because of the verbatim reenactment of the section.

Three decisions, all occurring subsequent to 1954, were discussed by the Court. These cases represented two views. In *Weil v. Comm'r.*[17] the husband agreed to pay his wife $800 a month. The agreement provided that as long as the wife received the payments she would "live with and properly maintain, care for and educate the children." If the wife remarried, the payments were to be reduced to $400 a month, subject to further reduction of $200 a month upon the death, marriage or establishment of independent residence by each of the couple's two children. Except for the provisions in case remarriage occurred, the agreement did not indicate what portion of the payment might have been attributable to the children. In fact, the agreement went on to provide, "There shall be no revision in the payments herein provided for to be made to the Wife by reason of the death or majority of the children or either of them or by reason of the fact that they then no longer reside with the Wife. . . ." The Court held:

> We hold that sums are "payable for the support of minor children" when they are to be used for that purpose only. Accordingly, if sums are to be considered "payable for the support of minor children," their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein.[18]

The case was not as stringent in requiring specification as *Lester*, however, because the Court went on to state:

> It is quite true that the agreement must be read as a whole, Mandel v. Commission, 7 Cir., 185 F.2d 50; Budd v. Commissioner, 6 Cir., 177 F. 2d 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children . . . [19]

Weil seemed to require language restricting the wife's use of a portion of the

12 INT. REV. CODE OF 1954, § 71(b).
13 INT. REV. CODE OF 1939, § 22(k), added by § 117, Rev. Act of 1942.
14 14 T.C. 1308 (1950).
15 Mandel v. Comm'r., P-H Tax Ct. Mem. 49105, *aff'd.*, 185 F.2d 50 (7th Cir. 1950).
16 3 U.S. CODE CONG. & AD. NEWS 4157, 4805 (1954).
17 240 F.2d 584 (2d Cir. 1951), *reversing* 22 T.C. 212 (1956).
18 *Id.* at 588.
19 *Id.* at 588.

payments to the support of the children. But it gave approval to the practice of interpreting the agreement as a whole in order to determine if the requisite designation was made.[20]

In *Eisinger v. Comm'r.*,[21] the agreement provided for the husband to pay $125 a week to the wife. If the wife remarried, the payment was to be reduced to $62.50 ($31.25 for each of the couple's two children). Reductions of $31.25 were permitted for each child who died. In case the wife neglected to support the children, the husband could support them and deduct the costs from the payments he was required to make to the wife. The agreement specifically stated that "it is the intention of the parties that when both children shall have attained the age of 21," the husband shall pay alimony of $62.50 per week. The Court held that sufficient designation of the money was made to preclude deduction by the husband. *Weil* was distinguished, because *Eisinger* contained an additional number of provisions indicating specific designation. It was pointed out that the agreement should be read as a whole to determine whether or not a portion of the payments have been fixed for child support. Language from *Weil* to this effect was quoted.

In *Metcalf v. Comm'r.*,[22] the facts were stipulated. In July of 1950 the wife filed for divorce. In September a decree *pendente lite* for custody of the five children and support of $150 per week was awarded the wife. Three days prior to the divorce, an agreement was entered into providing for division of the property, for the wife's custody of the five children, and for a continuance of the obligation of the husband to pay $150 a week to the wife for support of herself and the five children. The agreement provided that as each child married, died, reached 21, or became self-supporting, the payments were to be reduced by $25.00 a week. On the remarriage of the wife, the payments were to be reduced by $25.00 per week. In disallowing $125 of the husband's deduction, the Court said:

> We believe the proper rule to be that it is sufficient if the parties, by their agreement, have shown a clear intention to distinquish in the periodic payments between what is paid to the wife because of her undertaking to support the children, and what is for herself, independent of that undertaking. In the case at bar . . . we find this readily apparent.

The Court mentioned that the whole agreement must be taken into consideration. It felt that on this basis, the case was almost identical with *Eisinger*.

Metcalf v. Comm'r.[23] and *Eisinger v. Comm'r.*[24] reached results contrary to *Weil v. Comm'r.*[25] However, the different results were reached partially because of different facts. There were certain elements the courts agreed on. The entire agreement was to be examined to determine whether requisite specification existed. In *Weil*, the Court agreed with the Commissioner's statement that it is necessary to find in the agreement "sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the

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20 A similar holding in Deitsch v. Comm'r. 249 F.2d 534 (6th Cir. 1957), *reversing* 26 T.C. 751 (1956), was not cited by the Supreme Court. This case involved payments to the wife of $250 a month until the oldest of two children reached 18. From that time until the youngest child reached 18, the payments were to be $125.00 monthly. The payments were to be reduced by one-half if one child died, and discontinued entirely if both children died. The court held that the agreement did not sufficiently fix a portion of the payment as child support, thus permitting the deduction to the husband. The court stated:

> Only that part of such payment that the decree or instrument fixes as payable for the support of the children is excepted under section 22(k). The term "fix" is not ambiguous. It therefore must be construed in its usual sense of to assign precisely. . . . *Id.* at 536.

Although this language is very strong, subsequent language approved the examining of the entire agreement to determine if funds were "sufficiently earmarked" for child support.

21 250 F.2d 303 (9th Cir. 1957), *affirming* P-H Tax Ct. Mem. 56048 (1956).

22 271 F.2d 288 (1st Cir. 1959), *affirming* 31 T.C. 596 (1959).

23 31 T.C. 596, *aff'd.*, 271 F.2d 288 (9th Cir. 1959).

24 P-H Tax Ct. Mem. 56048 (1956), *aff'd.*, 250 F.2d 303 (9th Cir. 1957).

25 22 T.C. 212 (1956), *rev'd.*, 240 F.2d 584 (2d Cir. 1957).

children."[26] This does not seem much different from the statement in *Metcalf* that there must be "shown a clear intention to distinguish in the periodic payments between what is paid to the wife because of her undertaking to support the children, and what is for herself, independent of that undertaking. It must be said, however, that, despite the similarity in some of the general language, more is involved in the divergent outcomes than a difference in facts. Any difference in facts is a cumulative difference rather than one of character: there are sufficient facts in all three cases to infer what the parties thought the cost of supporting the children would be. The additional element involved is one of difference of opinion in statutory interpretation. The Court in *Eisinger* made this statement:

> The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children,* with sufficient certainty and specificity to readily determine which is which. . . . (the statute is satisfied).[27]

Compare the above statement with the following from *Weil*:

> We hold that sums are "payable for the support of minor children" when they are to be used for that purpose only. Accordingly, if the sums are to be considered "payable for the support of minor children," their use must be restricted to that purpose, and the wife must have no beneficial interest therein.[28]

The first statement requires words indicating the manner in which the payment is allocated; the second statement requires a fixing of the money as usable only for child support. The *Weil* case was decided by the Second Circuit in 1957. *Lester* came to the Second Circuit early in 1960.[29] Judge Lumbard was the only judge sitting in *Lester* who also heard the *Weil* case. The provision in question afforded a basis for holding that the agreement disclosed which portion of the payments had been allocated as child support, and which portion was considered alimony; it did not provide a basis for holding that a portion of the payment was restricted in use, and that the wife had no beneficial interest therein. It read:

> In the event that any of the children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall on the happening of each such event be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue and be payable in accordance with the terms and provisions hereof.

The Court, making many of the same observations that the Supreme Court made, declared, in effect, that the agreement would have to restrict the use of a portion of the money by the wife to child support. Building on the laguage of *Weil,* above quoted, the Court stated:

> Unless we have misapprehended its meaning, Congress intended to tax the wife on all the payments unless the agreement itself declared in what proportion she must allocate them to the children.[30]

Much of the Supreme Court opinion is not particularly helpful in terms of concrete definitions. It mentions several times that the portion must be "fixed" or "specifically designated." The Court stated that "a sufficiently clear purpose is not enough," but went on to declare that "that section requires that their action be clear and specific."[31] Two statements made by the Court are more helpful. The Court stated that "the allocation to child support made therein must be 'specifically designated' and not left to determination by inference or conjecture."[32] The opinion earlier states that "the agreement must *expressly* specify. . . . "[33] In view of these statements and the facts of the case itself, it would seem that all

26 240 F.2d 584, 588 (2d Cir. 1957).
27 250 F.2d 303, 308 (9th Cir. 1957).
28 240 F.2d 584, 587 (2d Cir. 1957).
29 Commissioner v. Lester, 279 F.2d 354 (2d Cir. 1960).
30 *Id.* at 357.
31 366 U.S. 299, 306 (1961).
32 *Id.* at 306. (emphasis added.)
33 *Id.* at 303 (emphasis added.)

agreements, no matter how clearly they indicate that an amount is included because it is a cost that will be incurred in caring for the children, will not contain the requisite specific designation unless they also require the wife to actually spend that amount on the children. Whether the wife can be ordered under local law to spend the money in accordance with the agreement is irrelevant for tax purposes.[34] The only requirement for tax purposes is that the agreement expressly state that a portion is to be used for the support of the children, not leaving the entire payment to "the unfettered command of the wife."[35]

The decision may accomplish two worthwhile objectives:

1. The express specification required to defeat the husband's deduction will enable a husband to make more definite provision for his children without running the risk of tax losses.[36]
2. Congressional intent may be implemented by the establishment of certainty in the area of alimony payments. However, one could fairly entertain some misgivings concerning the capacity of *Lester* to alleviate uncertainty in this area. A statement in *Weil* indicates why:

> The cases construing and applying the terms of the statute have been numerous. In the bewildering maze of different types of separation agreements, containing a great variety of clauses requiring payments to the wife for her own maintenance and for the support of her minor children. . . . [37]

A similar statement is found in *Deitsch*:

> It would be futile to review the numerous Tax Court decisions relied upon by counsel for both parties. They are in general based upon settlement contracts with provisions different in detail from those presented here.[38]

Thus the myriad factual patterns that could present themselves make it difficult to forsee the ultimate effect of the Supreme Court's decision. Requiring express words cannot completely eliminate the necessity of determining the meaning of the many ambiguous agreements that will continue to appear. However, it must be admitted that the majority of cases that were formerly in doubt will now be governed by the rule in *Lester*, without requiring resort to litigation.[39]

Richard C. Wilbur

PATENT LAW — PATENT MONOPOLY DOES NOT EXTEND TO REPLACEMENT OF UNPATENTED ELEMENTS OF PATENTED COMBINATION — United States Letters Patent 2,569,724 were issued to Harry A. Mackie and Stanley Duluk and assigned to the General Motors Corporation. Convertible Top Replacement Company was licensed under a territorial grant for the Commonwealth of Massachusetts, receiving right, title and interest in the patent, including all rights of action for

34 *Id.* at 304.

35 *Id.* at 303.

36 In Eisinger v. Comm'r., 250 F.2d 303 (9th Cir. 1957) the court stated at 307:

> The husband saw to it that if the wife failed to use her support money for the support of the children, the husband could pay to the children or for them and deduct such amounts from the wife's "alimony payments." This was a laudable agreement on the part of both for the benefit of their children. It establishes in our minds how the parties regarded the payments.

For behaving so "laudably," the husband lost his deduction. *Lester* should permit this kind of an agreement to exist without precluding full deduction by the husband.

37 249 F.2d 534, 536 (2d Cir. 1957).

38 Deitsch v. Comm'r., *supra* note 20 at 536 (6th Cir. 1957).

39 See Comm'r. v. Gertrude Haber, 8 A.F.T.R. 5060 (2d Cir. 1961), *reversing*, by stipulation on the authority of *Lester, Haber*, P-H Tax Ct. Mem. 60084 (1960). The Tax Court had permitted inference of allocation of part of the payment for child support from an agreement clearly indicating what part of the payment was being made because of the children.

infringement. The Mackie-Duluk patent is for a combination of elements[1] — for a "Convertible Folding Top with Automatic Seal at Rear Quarter." The normal life of the fabric portion of the top is two or three years; the frame is designed to last for the entire life of the car. The Aro Manufacturing Company manufactures and sells, for replacement purposes, the fabric portions of convertible tops, including replacement tops for convertible automobiles equipped with Mackie-Duluk tops. Convertible Top brought suit against Aro for direct and contributory infringement of the Mackie-Duluk patent. The District Court[2] found that the patent was valid[3] and infringed. Aro was enjoined from further infringement, and the question of damages for past infringement was referred to a master. The Court of Appeals affirmed,[4] and the Supreme Court granted certiorari.[5] *Held:* Reversed. Maintaining the "use of the whole" of the patented combination, through replacement of spent, unpatented parts, one at a time, either of the same element repeatedly or different elements successively, does not constitute reconstruction. It is no more than the lawful right of the owner to repair his property. *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 365 U.S. 336 (1961).

The basis for the patent system is found in the Constitutional provision: "The Congress shall have power . . . *To promote the progress of science* and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[6] From this it can be concluded that "The primary purpose of the patent system is not the reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure."[7] The patentee is granted "nothing more than a means of preventing others, except under license from the patentee, from appropriating his invention"[8] for a period of seventeen years, in return for disclosing his invention to the public. At the end of this statutory seventeen-year monopoly, the rights covered by the patent become public property, the patentee losing all monopolistic control over them.

A patent may be granted for "A new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof,"[9] unless the subject matter sought to be patented differs so little from the prior art "that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject

1 The patent contains ten claims. Claims 1-9 all begin: "In a convertible automoble body, the *combination*. . . . " (Emphasis added.) Claim 10 does not specifically claim a "combination" but lists five separate elements, clearly in combination. The first claim reads:

> 1. In a convertible automobile body, the combination of a lower metal body structure or tonneau having a body panel, a folding bow structure supported by the tonneau and having flexible top material supported by the bows and having the top material at the rear quarter extending down and supported by said panel on the inside and considerably below the top of the metal body or tonneau, a sealing strip of rubber with a leaning in rubber fin secured to the top of the side of the tonneau at the belt line and arranged to engage the outside of the folding top material when the top is raised, and a wiping arm secured to a bow and operating so that the wiping arm is caused to wipe the inside lower portion of the top material in raising the top and press the top material against the inside of the sealing strip when the top is raised.

2 Convertible Top Replacement Co. v. Aro Mfg. Co., 119 U.S.P.Q. 122 (D. Mass. 1958).

3 *Id.* at 123: "Mackie-Duluk was a substantial and enlightened step, filling a long-felt want, in a field in which defendants have produced, with one exception, only paper patents, the most emphasized being foreign, which did not even purport to what Mackie-Duluk accomplished."

4 Aro Mfg. Co. v. Convertible Top Replacement Co., 270 F.2d 200 (1st Cir. 1959).

5 362 U.S. 902 (1960).

6 U.S. CONST. art. I, § 8.

7 Sinclair & Carroll Co. v. Interchemical Corp., 325 U.S. 327, 330-31 (1945).

8 Special Equipment Co. v. Coe, 324 U.S. 370, 378 (1945).

9 66 Stat. 797, 35 U.S.C. § 101 (1952).

matter pertains."[10] A combination consisting of known elements, of themselves unpatentable, can be patented if as a combination they produce new and useful results. Together they must be more than a mere aggregation of elements performing no new or different function — the concert of the elements must in some way exceed the sum of its parts.[11]

Since every element in the combination is considered essential to the combination, a person cannot directly infringe a combination patent unless he makes the whole combination.[12] The patentee's monopoly over a combination patent would be restricted severely if a supplier was allowed to furnish articles especially for use in the patented combination, supplying the very essence of what was patented, to a large market. The number of immediate or direct infringers, the ultimate consumers, might be large, but if they had each committed an inconsequential infringement, suit against each would be impractical. This has been recognized by the courts, and, through "an expression of both law and morals,"[13] the doctrine of contributory infringement has arisen.[14] The 1952 Patent Act,[15] statutorily defining "infringement" for the first time,[16] grants recovery against those guilty of contributory infringement.[17] It must be noted that unless there is a direct infringement of the patent, there can be no contributory infringement.[18]

Once the article covered by the patent has been sold to another, the purchaser obtains a right to use and sell the patented article.[19] If an unpatented element in the combination wears out before the combination as a whole is destroyed, a problem arises as to when the replacement of this element constitutes permissable "repair" by the purchaser and when it constitutes "reconstruction" of the patent.

In *Wilson v. Simpson*,[20] "doubtless the leading case . . . that deals with the distinction"[21] between repair and reconstruction, the purchaser of a patented planing machine replaced detachable blades which were unpatented elements of the patented

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10 *Id.* at § 103.

11 Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp., 340 U.S. 147 (1950).

> While this Court has sustained combination patents, it never has ventured to give a precise and comprehensive definition of the test to be applied in such cases. . . . It is agreed that the key to patentability of a mechanical device that brings old factors into cooperation is presence or lack of invention. In course of time the profession came to employ the term "combination" to imply its presence and the term "aggregation" to signify its absence. . . . The more aggregation of a number of old parts or elements which, in the aggregation, perform or produce no new or different function or operation than theretofore performed or produced by them is not patentable invention. . . . The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. *Id.* at 150-52.

12 See, *e.g.*, Texas Co. v. Anderson-Prichard Refining Corp., 122 F.2d 829 (10th Cir. 1941).

13 Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 677 (1944) (dissenting opinion): "[T]he doctrine of contributory infringement is an expression of both law and morals. It is but one more phase of a more comprehending doctrine of legal liability enforced by this Court."

14 See, Roberts, *Contributory Infringement of Patent Rights*, 12 HARV. L. REV. 35 (1898).

15 66 Stat. 792 (1952), 35 U.S.C. §§ 1-293.

16 See Frederico, *Commentary on the New Patent Act*, 35 U.S.C.A. (1952).

17 66 Stat. 811 (1952), 35 U.S.C. § 271(c).

18 "But the mere manufacture of a separate element of a patented combination, unless such manufacture be proved to have been conducted for the purpose, and with the intent, of aiding infringement, is not, in itself, infringement." Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 677 (1944) (dissenting opinion).

19 See, *e.g.*, United States v. Univis Lens Co., 316 U.S. 241 (1942); Bloomer v. McQuewan, 55 U.S. (14 How.) 539 (1852).

20 50 U.S. (9 How.) 109 (1850).

21 365 U.S. 336, 342.

combination. The knives had a life of 60-90 days in contrast to the life of several years for the machine as a whole. The Court held that there was no infringement, because the replacement of even an essential element of the combination is only repairing the machine for use. The Court, however, limited permissible repairs to the replacement of those elements which were contemplated by the inventor to be replaced during the life of the machine as a whole.

> The right . . . to replace the cutter-knives is not because they were of perishable materials, but because the inventor of the machine has so arranged them . . . that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others. The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions, they are put into the structure. . . . [B]eyond the duration of them a purchaser . . . has not a longer use. But if another constituent part is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain . . . that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used.[22]

Following *Wilson,* the courts formulated a number of tests to determine whether the replacement of an unpatented element of a patented combination amounted to repair or reconstruction. Among the factors considered were: the importance of the replaced element in relation to the inventive concept;[23] the relative cost of the unpatented component with respect to the cost of the combination;[24] the relative life of the replaced component to the useful life of the combination;[25] and the structural domination of the parts replaced with respect to the combination as a whole.[26]

In *Aro,* the entire Court[27] agreed with the premise that Aro would be guilty of contributory infringement of the Mackie-Duluk patent "if, but only if, such a replacement by the purchaser himself would constitute *direct* infringement."[28] Or, the issue was, "more specifically, whether such replacement by the car owner is infringing reconstruction or permissible repair."[29]

Justice Whittaker, writing for the majority, said that without a specific claim of the fabric or its shape in the patent, the fabric could be treated as no more than an unpatented component of a patented combination. He refused to "ascribe to one element of the patented combination the status of the patented invention itself,"[30] and would not hold that, because the fabric was essential to the combination, to replace it would amount to infringement.

Justice Whittaker considered the patented combination, as a whole, validly in the hands of the convertible automobile owner, with the determinative question

22 Wilson v. Simpson, 50 U.S. (9 How.) 109, 125-26 (1850).
23 See, *e.g.,* Davis Electrical Works v. Edison Electric Light Co., 60 F. 276 (1st Cir. 1894).
24 See, *e.g.,* El Dorado Foundry, Machine & Supply Co. v. Fluid Packed Pump Co., 81 F.2d 782 (8th Cir. 1936).
25 See, *e.g.,* Micromatic Hone Corp. v. Mid-West Abrasive Co., 177 F.2d 934 (6th Cir. 1949).
26 See, *e.g.,* Automotive Parts Co. v. Wisconsin Axle Co., 81 F.2d 125 (6th Cir. 1935).
27 There were four opinions: the majority opinion written by Justice Whittaker; a concurring opinion by Justice Black; an opinion by Justice Brennan in which he concurred in the result; and the dissenting opinion of Justice Harlan. Justices Frankfurter and Stewart joined in the dissent.
28 365 U.S. 336, 341.
29 *Id.* at 342.
30 *Id.* at 344-45.

being: "[W]hether the owner of a combination patent, comprised entirely of unpatented elements has a patent monopoly on the manufacture, sale, or use of the several unpatented components of the patented combination."[31]

The majority in *Aro* followed the policy of the two *Mercoid* decisions:[32] the patentee should not be allowed to monopolize the sale of unpatented components of a patented combination. In those cases the patent was for a combination furnace stoker system. The right to make the combination, the entirety of which was made by neither the patentee nor his licensee, was conditioned on the purchaser's buying his stoker switch from the licensee. The Mercoid Corporation made stoker switches whose sole purpose was for use in the patented combination. The Supreme Court recognized that the Mercoid Corporation was guilty of contributory infringement of the patent but refused to grant recovery because the patentee was misusing his patent by extending his monopoly to the unpatented elements — a reward the Court felt was not a valid extension of the patent monopoly. Justice Douglas, writing for the majority, said: "The patent is for the combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly."[33]

Adhering to the policy of the two *Mercoid* decisions, Justice Whittaker reasoned that "no element, not of itself separately patented, that constitutes one of the elements in a combination patent is entitled to patent monopoly."[34] The question remained, whether the replacement of the convertible top fabric amounted to permissible "repair" or infringing "reconstruction." Following the reasoning of *Wilson v. Simpson*,[35] as interpreted by Judge Learned Hand — "The [patent] monopolist cannot prevent those to whom he sells from . . . reconditioning articles worn by use *unless they in fact make a new article*"[36] — the majority concluded that "mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property."[37] This, according to the majority, is a "plain and practical test."[38]

Justice Brennan, concurring in the result, disagreed with the test applied by the majority and said that "there are circumstances in which the replacement of a single unpatented component of a patented combination *short of a second creation of the patented entity* may constitute a reconstruction. . . . There is no single test to which all must yield; rather the determination is to be based upon . . . a number of factors."[39] Justice Harlan, in his dissenting opinion, also disagreed with the test applied by the Court: "[T]here is no single yardstick for determining whether particular substitutions of new for original unpatented parts of a patented com-

31 *Id.* at 342.

32 Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661 (1944); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680 (1944).

33 Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 667 (1944).

34 365 U.S. 336, 345.

35 50 U.S. (9 How.) 109 (1850).

36 United States v. Aluminum Co. of America, 148 F.2d 416, 425 (2d Cir. 1945) (dictum). (Emphasis added.)

37 365 U.S. 336, 346.

38 *Id.* at 343.

39 *Id.* at 362-63 (concurring opinion). (Emphasis added.) The factors to be weighed, according to Justice Brennan, are the ones that have been applied by the courts in previous "repair-reconstruction" cases. See notes 23-26 *supra* and accompanying text.

The District Court in Aro did not set down a specific test: "Whether the test be that of substantial reconstruction or domination of the part replaced, or frequency of replacement, . . . replacing the fabric is not permissive repair." 119 U.S.P.Q. at 124-25.

The Court of Appeals applied the same test as Justices Harlan and Brennan: "When replacement of a patented component of a patented combination constitutes a legitimate repair and when it constitutes a forbidden reconstruction . . . is difficult to determine and cannot be determined by the application of any verbal formula. Each case must be decided on its own facts, pretty much as an individual instance." 270 F.2d at 205.

bination amount to permissible repair or forbidden reconstruction."[40]

Justice Black, in a concurring opinion, criticized the opinions of Justices Harlan and Brennan, because they introduced "wholly unnecessary and undesirable confusions, intricacies and complexities"[41] into the question of determining "repair" or "reconstruction."

The opinions of Justices Harlan and Brennan differ from one another with respect to the application of Federal Rule of Civil Procedure 52(a)[42] in determining "repair" or "reconstruction." Justice Brennan said that the question is "so far a question of law as to relieve appellate review from the restraints"[43] of this rule, while the dissent refused to make an independent judgment, concluding that the lower courts applied the appropriate standards. According to the dissent, the Court was "compelled by the dictates of good sense or by Rule 52(a)"[44] to give deference to the "judgments fairly and reasonably reached in two lower courts."[45]

The patentee can attempt to monopolize the sale of unpatented components of his patented combination in two ways: (1) by attempting to monopolize the sale of components as a condition for the initial construction of the combination, as in *Mercoid;* or (2) by attempting to monopolize the sale of parts to replace worn-out elements, as in *Aro.* Section 271 of the 1952 Patent Act, defining infringement, was included to eliminate the effects of *Mercoid,*[46] so that thereafter the patentee could dominate the sale of unpatented component parts and not "be denied relief or deemed guilty of misuse or illegal extension of the patent right"[47] — as long as the component part is not a staple article of commerce.

That no blanket monopoly was intended to be given by the 1952 Patent Act for the sale of replacement parts can be seen from the testimony of the chief draftsman of section 271, Mr. Giles Rich, when he was questioned as to whether the manufacturer of unpatented replacement parts would be guilty of contributory infringement of patents on the original article. There would be liability for infringement, said Mr. Rich, "depending on the *kind of part*"[48] supplied, or if the replacement part "is *in substance the very thing* which was invented."[49] This answer reflects no more than the permissible "repair" versus infringing "reconstruction" test that theretofore had been applied. In other words, the Act was intended to eliminate the effects of *Mercoid,* but it did not meet the question as to whether the replacement of unpatented elements would amount to contributory infringement.

40 365 U.S. 336, 372 (dissenting opinion).

41 *Id.* at 346 (concurring opinion).

42 FED. R. CIV. P. 52(a): "In all actions tried upon the facts without a jury . . . the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . . *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." (Emphasis added.)

43 365 U.S. 336, 367 (concurring opinion).

44 *Id.* at 380 (dissenting opinion).

45 *Ibid.*

46 Mr. Giles Rich, the chief draftsman of section 231 of H.R. 3760, which eventually became section 271 of the 1952 Patent Act, testified concerning the effects of this section: "[I]t would alleviate the confusion that has arisen as a result of the Mercoid case." *Hearings on H.R. 3760 Before Subcommittee 3 of the House Committee on the Judiciary,* 82d Cong., 1st Sess. 161 (1951).

47 66 Stat. 811, 35 U.S.C. § 271(d):

> No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement.

48 Hearings on H.R. 3760, *supra* note 46 at 153.

49 *Ibid.*

The Justice Department filed a brief amicus curiae in *Aro*. It conceded that the questions to be answered were primarily ones of substantive patent law, but said that the issues "must be resolved in relation to the provisions and policy of the antitrust laws."[50] The Justice Department took the approach that "the patentee would be given . . . [a] partial monopoly over the unpatented materials [which has been] held not to be within the legitimate scope of the patent monopoly,"[51] and therefore urged reversal.

Since the monopoly granted by the patent laws is not in keeping with the general policy of the United States against monopolies, they have been construed narrowly by the courts.[52] The patent owner should be protected "in the enjoyment of just what he has been granted,"[53] but there is "no constitutional or statutory authority for giving it [the patent] additional value by bringing into its monopoly all or any of its unpatented parts."[54]

The Court in the instant case said that the owner of the automobile does not make the combination top until the patented "entity, viewed as a whole, has become spent."[55] The dissenting opinion and the opinion of Justice Brennan called for a series of tests to see if the part could be renewed. The basis for their conclusions was that in some combinations there is a part so important, or so essential to the very combination, that this part should be given patent protection. In other words, they would recognize that under some conditions the patent should be recognized as protecting the very part itself, and not merely the combination as a whole. *Mercoid* did not allow this, and although the effects of *Mercoid* with respect to the monopolization of component parts as a requisite to the making of a *new* combination, have evidently been eliminated, the reasoning behind the two *Mercoid* decisions is quite useful in determining whether the monopoly should extend to replacement parts, a situation not explicitly covered in the statutory definition of infringement.

> The fact that an unpatented part of a combination patent may distinguish the invention does not draw to it the privileges of a patent. That may be done only in the manner provided by law. However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device.[56]

Applying this reasoning of *Mercoid* to a situation involving replacement parts, it can be argued that patent protection should not be given to an element of the patented combination unless that element is in itself patented. "One royalty to one patentee for one sale is enough under our patent law as written."[57]

For the majority in *Aro,* the problem to be solved was whether the patentee could prevent the owner of a patented combination from maintaining that combination, as long as he in fact did not make a new article. Or could the patentee ascribe to an essential, but unpatented, "element of the patented combination the status of the patented invention in itself?"[58] On the other hand, the opinions of Justices Brennan and Harlan focused on the *part* replaced in relation to the combination as a whole to determine "repair" or "reconstruction."

The patentee in the *Aro* situation is not prevented from selling the unpatented replacement part on the open market, but he cannot compel the convertible owner to buy from him, nor will public policy allow him a monopoly

50 Brief for the Justice Department as Amicus Curiae, p. 9.
51 *Id.* at 11.
52 See, *e.g.,* Precision Instrument Co. v. Automotive Maintainance Machinery Co., 324 U.S. 806 (1945).
53 Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 680 (1944) (dissenting opinion).
54 *Ibid.*
55 365 U.S. 336, 346.
56 Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680, 684 (1944).
57 365 U.S. 336, 360 (concurring opinion).
58 *Id.* at 344-45.

"to derive his profits, not from the invention on which the law gives a monopoly, but from the unpatented supplies"[59] necessary for the purchaser to maintain his property.

Since the invalidity of a patent is a defense in an infringement suit,[60] the courts often do not reach the question whether there has been infringement, but instead strike down the patent on grounds of invalidity. In spite of the statutory command that "A patent shall be presumed valid,"[61] in recent years, courts have held patents invalid in a majority of cases decided.[62] This situation has caused Justice Jackson to comment: "[T]he only valid patent is one that this Court has not been able to get its hands on."[63]

The validity of the Mackie-Duluk patent was not challenged in the Supreme Court, but there are indications, especially in the opinion of Justice Black,[64] that this patent may well have been held invalid, had that question been at issue.

The question of the validity of the patent should have no bearing on the test applied to determine whether infringement has occurred in these "repair-reconstruction" cases. If the part supplied is indeed new and useful, amounting to an invention or discovery, the patentee could have afforded himself the protection of the patent laws. Since "form may be . . . subject for a patent,"[65] had the patentees wished to monopolize the sale of the replacement fabric in *Aro,* they could have done so in the same manner as they used to obtain the monopoly on the combination as a whole — by availing themselves of the patent laws and obtaining a patent on their invention. Not having obtained a patent on the fabric, they could not assert a monopoly on its sale. "The patent monopoly is not enlarged by reason of the fact that it would be more convenient to the patentee to have it so, or because he cannot avail himself of its benefits within the limits of the grant."[66]

The *Aro* Court re-examined the limits of the patent monopoly in an effort to determine how far the patentee will be allowed to go in monopolizing his invention. The test applied by the Court to this situation involving replacement parts — whether the combination was made anew — is in keeping with the general attitude against the extension of monopolies, but whether this test will preclude "undesirable confusions, intricacies or complexities"[67] from its application is questionable. This decision should not be construed as an attack by the Court on the patent system, but rather as a recognition of patent rights when validly asserted, and an attack on the attempt to monopolize unpatented articles under the guise of patent protection. This decision, by giving direction in a confusing area of law, should be considered as an effort to uphold the integrity of the patent system.

Harold E. McKee

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59 Brief for the Justice Department as Amicus Curiae, p. 12.
60 66 Stat. 812(1952), 35 U.S.C. § 282.
61 *Ibid.*
62 A study prepared for the Senate Subcommittee on Patents, Trademarks and Copyrights shows that in the period 1949-58 there were a total of 1014 findings on the validity of patents in the district courts. In 525 of these cases, more than one-half of the total, the patent was found invalid. STAFF OF SENATE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, SEN. COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., AN ANALYSIS OF PATENT LITIGATION STATISTICS (Comm. Print 1961).
63 Jungerson v. Otsby & Barton Co., 335 U.S. 560, 572 (1949) (dissenting opinion).
64 "The District Court held that this aggregation of nonpatentable parts was patentable as having achieved a new result. . . . I shall act on that assumption although I am not sure in just what respect the aggregation of the common components could possibly have served a new purpose or have been the result of anything more than the simplest childlike mechanical skill." Aro. Mfg. Co., Inc. v. Convertible Top Replacement Co., Inc., 365 U.S. 336, 351 (1961) (concurring opinion of Justice Black).
65 Wilson v. Simpson, 50 U.S. (9 How.) 109, 124 (1850).
66 B.B. Chemical Co. v. Ellis, 314 U.S. 495, 498 (1942).
67 365 U.S. 336, 346 (concurring opinion).

REAL PROPERTY — TITLE TO LAND — PURCHASER'S SUBVENDEE HELD BARRED BY LACHES FROM ASSERTING CLAIM AGAINST VENDOR'S ASSIGNEE DESPITE PAYMENT OF MINERAL TAXES FOR TWENTY-SEVEN YEARS AFTER RECONVEYANCE. — In 1916 one Spann took a conveyance of 103.7 acres of land with vendor's lien retained to insure the payment of purchase money notes, and three years later Spann conveyed to Whiteside, a party to this action, an undivided one-half interest in any minerals in or on the land. This conveyance to Whiteside was by quitclaim deed, and was duly recorded by him. The purchase money notes were extended from time to time by Webster, a successor in title to Spann's grantor. In 1932, approximately 10 years after the last note had originally been due, Spann reconveyed the property to Webster in consideration for the cancellation of the purchase money notes. This conveyance was duly recorded, but Whiteside, the sub-vendee, received no notice of the reconveyance at that time. In fact, he did not become aware of it until immediately before he filed an answer in this suit, some twenty-seven years after the conveyance. In an action to try title to the land, both sides moved for a summary judgment. The motion of the plaintiff Bell (a successor in title to the vendor, Webster) was granted. The Supreme Court of Texas affirmed. *Held:* The sub-vendee, Whiteside, had an equitable right to protect his interest in the property by tendering payment of the purchase money notes within a reasonable time after the recission of the vendor; but since the vendor had been under no duty to give notice of his rescission to the sub-vendee, the sub-vendee had failed to act within a reasonable time and was now barred by the doctrine of laches from asserting his right to the mineral interest. *Whiteside v. Bell,* 347 S.W. 2d 568 (Tex. 1961).

The usual rule with respect to a purchase money lien is that one who takes such a lien has only an equitable right which can be destroyed by a subsequent sale to a bona fide purchaser for value.[1] The lien can come into existence in any one of three ways: it can be implied in equity, provided for by statute, or contained on the face of the deed or notes.[2] Some states, Texas included, regard the lien as "title reserved," *i.e.,* the vendor retains a title superior to that of the vendee and has a right to rescind upon default by the purchaser in his payments on the purchase money notes.[3] The question, then, was not whether the vendor had the right to accept a reconveyance from the purchaser after the latter's default, since this is a well-settled rule of law in Texas,[4] but rather, whether the redemptive rights of the sub-vendee can be cut off by laches without giving him notice of the reconveyance. There is no doubt that if the sub-vendee tenders payment of the notes within a reasonable time after the vendor has rescinded or has announced his intention to do so, the sub-vendee may thereby protect his interest in the land. This was conceded by the court in the majority opinion.[5]

Whiteside, the sub-vendee, conceded that he was aware of the outstanding lien at the time he took the quitclaim deed from Spann. Under the somewhat peculiar rule of the Texas courts, one who takes by a quitclaim deed is not considered a bona fide purchaser for value.[6] This means that Whiteside's purchase did not destroy the lien with respect to his mineral interest, or, to analogize to mortgage procedure, Whiteside took the mineral interest "subject to" the lien.[7] It is important to note, however, that the quitclaim deed executed by Spann to

1 1 GLENN, MORTGAGES § 14, at 66 (1943).
2 1 GLENN, *op. cit. supra* note 1, at 69.
3 Bound v. Dillard, 140 S.W.2d 520 (Tex. Civ. App. 1940).
4 Lanier v. Faust, 81 Tex. 186, 16 S.W. 994 (1891); Hamblen v. Folks & Walsh, 70 Tex. 137, 7 S.W. 834 (1888); Burgess v. Millican, 50 Tex. 397 (1880).
5 347 S.W.2d 568, 570, citing R. B. Spencer & Co. v. May, 78 S.W.2d (Tex. Civ. App. 1935). See also, State v. Forest Lawn Lot Owners Assoc., 152 Tex. 41, 254 S.W.2d 87 (1953); Howell v. Townsend, 217 S.W. 975 (Tex. Civ. App. 1920).
6 Rule v. Richards, 149 S.W. 1073 (Tex. Civ. App. 1912); Clark v. Altizer, 145 S.W. 1041 (Tex. Civ. App. 1912); Smith v. Cook, 142 S.W. 26 (Tex. Civ. App. 1912).
7 Brooks v. Erbar, 186 S.W.2d 372 (Tex. Civ. App. 1945); Homeland Realty Co. v. Wheelock, 119 S.W.2d 167 (Tex. Civ. App. 1938).

Whiteside was recorded shortly after the conveyance. This is important, because if the original vendor had searched the record before taking the reconveyance from Spann, as he was bound to do at his peril,[8] he would immediately have become aware of the sub-vendee's interest in the land. The sub-vendee, on the other hand, would not learn of the reconveyance through his title search, because the reconveyance would not have been recorded until after he had received his interest, and it would seem to be unreasonable to require the sub-vendee to have notice of a subsequent transfer of the same property by his predecessor in title.[9] To do so would mean that the sub-vendee would have to make periodic checks of his grantor's chain of title, and this would indeed be a burdensome task.

Another rule of law which had a direct bearing upon the outcome of the case was the doctrine of laches. "Laches is principally an inequity of permitting a claim to be enforced."[10] Knowledge, unreasonable delay, and change of position are essential elements.[11] The mere passage of time is insufficient to justify the application of laches,[12] and the doctrine will not be applied to one who has been justifiably ignorant of the facts creating his right or cause of action.[13]

The first question to be answered in the determination of this case was whether the vendor was bound to give notice to the sub-vendee of his rescission. The lower court held that, as a matter of law, the reconveyance to the vendor constituted a rescission. That the vendor had the right to rescind is not questioned; the question is whether this rescission cuts off the rights of an interested party having no notice of it. Since the sub-vendee acquired whatever rights he might have from the vendee, it is often said that the sub-vendee who takes with notice of the original lien, "stands in the shoes of the vendee."[14] From this point of view, it is clear that the only remedy open to the sub-vendee is to tender the unpaid purchase price to the vendor.[15] But how can the sub-vendee be expected to step forward and protect his rights when he has no reason to suspect that they are in jeopardy? True enough, the sub-vendee had knowledge of the outstanding notes of the vendee, but did he not have the right to assume that they were not in default until he received information to the contrary? It is well settled that if the vendor had brought a suit for the rescission, rather than rescission by a private agreement as in this case, the sub-vendee would not have been bound by the decision in the action unless he had been named as a party in the suit.[16] In his treatise on mortgages, Glenn states that "there is no reason in principle, why the vendor should not be treated as a mortgagee in every sense of the word."[17] The majority seems

8 Buckalow v. Butcher-Arthur, Inc., 214 S.W.2d 184 (Tex. Civ. App. 1948). This case held that the consequence of the purchaser's failure to investigate title to land is that he is charged with the knowledge he would have acquired had he made the search.

9 White v. McGregor, 92 Tex. 556, 50 S.W. 564 (1889); Wirt's Heirs v. Vick, 203 S.W. 63 (Tex. Civ. App. 1918).

10 BLACK, LAW DICTIONARY 1016 (4th ed. 1951). See also, Brady v. Garrett, 66 S.W.2d 502 (Tex. Civ. App. 1933).

11 Pearson v. American Fidelity & Casualty Co., 321 S.W.2d 620 (Tex. Civ. App. 1959).

12 Byrnes v. Standard, 6 Ill.App.2d 441, 128 N.E.2d 658 (1955); Hodge v. Kennady, 198 Va. 416, 94 S.E.2d 274 (1956).

13 Alexander v. Phillips Petroleum Co., 130 F.2d 593 (10th Cir. 1942).

14 10 TEXAS L. REV. 244 (1931). This article contains an interesting analysis of the case of Yett v. Houston Farms Development Co., 41 S.W.2d 305, (Tex. Civ. App. 1931). In that case M conveyed to T, with vendor's lien retained, and T later conveyed a seven-eighths mineral interest to D. T. being in default, he reconveyed to M in consideration of the cancellation of the lien. In an action to try title, the court held that the rescission was binding upon the sub-vendee. It appears in the facts of the case, however, that at the time of the rescission the sub-vendee was insolvent and would have been unable to tender payment of the lien. It is intersting to note that this case was not cited in the instant case.

15 Foster v. Powers, 64 Tex. 247 (1885).

16 Pierce v. Moremen, 84 Tex. 596, 20 S.W. 821 (1892); Stephens v. Motl, 82 Tex. 81, 18 S.W. 99 (1881).

17 1 GLENN, *op. cit. supra* note 1, § 14.1 at 71.

to have felt that a foreclosure suit is not analogous to a "private" rescission, and that the latter is absolute at the moment the vendor decides to rescind.

Great weight was given by the court to three cases concerning the notice question. In the first case, that of *Revard v. Wood*,[18] the court stated that the vendor, "was not required to make sub-vendees a party to this suit."[19] Nowhere in that opinion, however, is any mention made of whether notice to the sub-vendee was required; in fact, though it is not included in the statement of facts, one may infer from the language of the court that the sub-vendee had notice but had failed to do anything about it.

In *Williams v. Coleman-Fulton Pasture Co.*,[20] the court held that the sub-vendee was not a necessary party to the foreclosure, and since the sub-vendee had not acted for a period of 18 years, he was now barred by laches. But a very important distinction can be made between that case and the one now under discussion. In the *Williams* case the sub-vendee had not acted for 18 years, but it is conceded in the opinion that he had knowledge, or notice, of the foreclosure at the time that it took place. The court stated:

> The record shows conclusively that the appellant, Williams, obtained knowledge of the Coleman-Fulton foreclosure in cause No. 2694 shortly after its rendition, yet took no action in regard thereto until the filing of the present suit.[21]

The case of *Howell v. Townsend*[22] also held that a sub-vendee was not a necessary party to a lien foreclosure action, but in that case the contention of the sub-vendee was that the foreclosure was barred by a four year statute of limitations because he had not been a party to the extension of the purchase notes. No question of notice of either the extension or of the foreclosure was involved in the case.

In *Whiteside*, the court also cited several cases[23] in which it was said that a vendor may not rescind the sale without giving notice of his intention to his purchaser. But the court went on to distinguish these cases on the ground that they did not involve the rights of the sub-vendee to notice. As has been previously mentioned, however, it is well settled that a sub-vendee "steps into the shoes" of the vendee when dealing with the vendor. Under this rule, if the vendee were entitled to notice, the sub-vendee would also be entitled to notice.

There is another point which serves to justify Whiteside's lack of knowledge concerning the reconveyance. His interest went only to the mineral deposits in the land. The ownership of the surface was inconsequential to him. He would have no reason, therefore, to have any interest in the transfer of the surface rights to the acreage. Also, because of the several extensions granted by the vendor, Whiteside would have been quite reasonable to assume that the lien had been paid at least ten years prior to the reconveyance, and that he therefore had no reason to tender the unpaid amount to the vendor. It cannot be claimed that Whiteside had neglected his interest during the twenty-seven year period, as the court seems to imply, because during that time he paid the taxes on the property, both state and county, and his name was listed on the records of the tax commissioner.

Concerning the question of notice, the court in *Huffman v. Mulkey*[24] said:

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18 156 S.W.2d 561 (Tex. Civ. App. 1941).

19 *Id.* at 562.

20 157 S.W.2d 995 (Tex. Civ. App. 1941).

21 *Id.* at 997.

22 217 S.W. 975 (Tex. Civ. App. 1919). *But see*, Noble v. Kahn, 206 Okl. 13, 240 P.2d 757 (1952). In this case, where the owner of an undivided one-half interest in land was made a party to the foreclosure of a subsequent mortgage and suffered judgment by default, it was held that the owner of such mineral interest was entitled to attack the foreclosure in an action to quiet title brought by the grantees of the foreclosure sale purchaser, and that possession of the surface was not a bar to the mineral owner's claim.

23 Phillips v. Hernden, 78 Tex. 378, 14 S.W. 857 (1890); Heirs of Redden v. Smith, 65 Tex. 26 (1885).

24 78 Tex. 556, 14 S.W. 1029 (1890). See also, Skelly Oil Co. v. Johnson, 209 Ark. 1107, 194 S.W.2d 425 (1946), where M conveyed land to D by warranty deed reserving

> The right of a vendor, who has conveyed land through a deed on its face reserving a lien for purchase money, to rescind, is not an absolute right, even in cases in which the purchase money has become due and remained unpaid, as may be seen by an examination of the many cases decided by this court. The right of the vendor to rescind, in such cases, does not exist at all until the vendee has failed to pay the purchase price in accordance with the contract, and one to whom a vendee has conveyed *is entitled to all the rights of his vendor,* which cannot be affected by any transaction between the original vendor and his vendee after the latter has parted with his interest in the land.[25]

If the vendor was in fact not obliged to give notice of his intention to rescind, then the sub-vendee would be barred by laches from asserting his claim 27 years after the reconveyance. The logical effect of the rule in this case, that notice is not required to be given to the sub-vendee, is that land titles, where certainty of ownership is a prime policy consideration, may be determined by the application of the indefinite rules of laches. The court in this case held that 27 years was too long a period of inactivity on the part of the sub-vendee. But would a 20 year period have been too long? Or a 15 year period? If a sub-vendee of today were to desire to know how long he could refrain from tendering payment to the vendor, what would be the answer? This case stands for the anomalous proposition that a person, in this case the sub-vendee, who has a definite right, the right to tender payment, may discover that his right has been constantly decreasing over a period of 27 years, and that, at the end of this period it is finally eliminated once and for all, through the application of an "equitable" doctrine. At the same time, the interest of the vendor in the land is constantly gathering strength, until at the end of the same period his interest in the land is said to cancel out all other interests. The application of laches to a situation such as the one presented by this case frustrates the very purpose of title recordation. The minority opinion, (this was a 4-3 decision), stated that:

> Lands, and particularly mineral estates therein, are often held for long periods of time for investment and speculative purposes and I would be most hesitant to rely on the uncertain and often complicated doctrine of laches to effect the evaporation of a land title or interest in land which had vested in accordance with a duly recorded written interest.[26]

In any case involving a "private" rescission, the better rule would be to refuse to recognize the unilateral rescission by the vendor, or even a bilateral rescission by agreement between the vendor and vendee, unless notice was first given to any sub-vendee claiming an interest. This is not an unreasonable burden, because the vendor has only to take notice of any subsequent conveyances in the title record of his vendee, and then make a reasonable effort to contact these parties. This giving of notice would supply a definite time at which the sub-vendee must act or have his interest cut off by rescission. In addition, the question as to ownership of the various interests in the land would be settled at a much earlier date, and would not be uncertain for such a long period of time. Also, the doctrine of laches would not have to be relied upon to determine the proper ownership. It is submitted that the proper determination of this case would have been a finding for the petitioner, Whiteside.

Theodore A. Fitzgerald.

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vendor's lien to secure the payment of the unpaid purchase money, and D conveyed mineral interests to third persons by recorded deeds. It was held by the court that a foreclosure by M of the vendor's lien without making the mineral grantees parties did not foreclose the equities of redemption of such mineral grantees. In Deruy v. Noah, 199 Okl. 230, 185 P.2d 189 (1947), Noah acquired a separate estate in the minerals on or under a tract of land subject to a pre-existing mortgage, and in a subsequent foreclosure proceeding Noah was not made a party. It was held that the interest of Noah was not foreclosed and that Deruy claiming the entire title to the land as purchaser at the foreclosure sale, could not acquire title to the mineral interest merely by possession of the surface.

25 *Id.* at 1030. [Emphasis supplied]

26 347 S.W.2d 568, 574.