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Recent Decisions

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RECENT DECISIONS

ANTITRUST LAW — PRICES — GEOGRAPHICAL PRICE CUT HELD GROUNDS FOR TREBLE-DAMAGE SUIT UNDER SECTION 2(a) OF ROBINSON-PATMAN ACT. — Appellant, Atlas Building Products Company of El Paso, Texas, a manufacturer of cinder-concrete building blocks, maintained a virtual monopoly in the El Paso area. Appellant's El Paso price during the period in question was 23.1 cents per standard block, delivered. Appellant also sold blocks in the Las Cruces, New Mexico area. The delivered price in this area was 20 cents per block to principle building contractors, which amounted to 75% of total area sales. The remaining 25% was sold to Atlas dealers who sold retail at from 24 to 27 cents per block. Appellee, Diamond Block and Gravel Company of Las Cruces, New Mexico, sold the same type product in the Las Cruces area. Appellee's original delivery price was 22.2 cents per block, with discounts to 21.74 cents on certain large contracts. Appellee was approached by its purchasers as to whether it could meet a 20 cent delivered price. It gave this price to one builder for two or three houses, but was forced to discontinue, and thereafter its price was 23.1 cents per block. Diamond's contractors thereafter purchased all their blocks from appellant. In an appeal from a judgment for treble damages in a private antitrust suit under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[1] *held:* affirmed. Prohibitions of section 2(a) are applicable to price discriminations between different, but noncompeting purchasers of products of like grade and quality. *Atlas Building Products Co. v. Diamond Block and Gravel Co.*, 28 U.S.L. Week 2107 (U.S. Aug. 1959), *petition for cert. filed, supra* at 3131.

The issue of whether geographical price cutting was violative of the Robinson-Patman Act was before the Seventh Circuit in *Anheuser-Busch, Inc. v. FTC.*[2] Anheuser-Busch, a national brewer, reduced prices on its beer in the St. Louis area to practically equal prices charged for local beer while maintaining its premium price in other areas. There was no discrimination among the St. Louis purchasers. In an appeal from an FTC cease and desist order, the order was set aside because there was no discrimination among local competitors. Anheuser-Busch's affirmative "good faith" defense under section 2(b)[3] of the Clayton Act was not entered into because there was no violation of section 2(a). The instant case specifically rejected the Anheuser-Busch restriction upon section 2(a). Such splits and divergence of opinion among the circuits are not rare in the twenty-three year history of Robinson-Patman litigation.

To truly appreciate the act, it must be viewed in its proper framework, namely, the federal antitrust laws. Antitrust legislation is based on the policy that it is in

1 Section 2 (a) of the Act provides:
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . . 49 Stat. 1526 (1936), 15 U.S.C. § 13 (a) (1952).

2 Anheuser-Busch, Inc. v. FTC 265 F.2d 677 (7th Cir. 1959), *cert. granted,* 28 U.S.L. WEEK 3147 (U.S. Nov. 10, 1959).

3 Section 2 (b) contains the following proviso:
> Provided, however, that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. . . . 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952).

the public interest to preserve hard competition which will result in lower prices to the consumer.[4] It was to carry out this policy that both the Sheman Act[5] and the Clayton Act[6] were passed. The Robinson-Patman amendment shifted emphasis to the competitor, and the hard competition theory was mitigated. Section 2 of the Clayton Act prohibited price differentials "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce." This section was aimed at large concerns, such as Standard Oil, which employed less-than-cost spot price reductions as a means to eliminate local competition. The Robinson-Patman Act, moreover, condemns any attempt "to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them . . . ." The latter provision is phrased in terms of competitor injury rather than injury to competition.

The other section of the act pertinent here is section 2(b).[7] This section states that the showing of discrimination shall establish a prima facie case, but provides that the case thus established may be rebutted by showing that the lower price was made in good faith to meet an equally low price of a competitor.

This is the statutory material upon which price discrimination cases must be decided — no easy task when the courts are confronted with conflicting economic theories and perhaps purposely ambiguous statutory language.[8] There have been three basic stages in court reaction to the Robinson-Patman Act: 1) conservative enforcement of early years, 2) radical expansion of the 1940's, and 3) vacillation of the 1950's with a tendency to retreat, the extent and direction of which is as yet uncertain.

The first stage was evidenced by many dismissals for the primary reasons of slight detriment to competition and *de minimis* effect of price differentials. The second stage, that of expansion, is heralded by cases such as *Corn Products Co. v. Federal Trade Commission*[10] which found competition among distant purchasers and declared that it was sufficient that the practice[11] *may* have the proscribed effect. In *Samuel H. Moss, Inc. v. FTC*[12] the court over-ruled precedent to shift to the defendant the burden of showing an absence of injury to competition.

In *FTC v. Morton Salt Co.*[13] the Supreme Court held that it was merely necessary to show a reasonable possbility of injury to competition rather than probability, and that Congress considered discounts to purchasing powers to be an evil unless justified by cost reduction or a good faith meeting of competition. The Commission, in *Minneapolis-Honeywell Regulator Co. v. FTC*[14] reached a high point in the equating of price differentials with price discrimination by holding that insofar as business is held or increased by a price differential there has been an adverse effect on competition. However, this commission order was set aside

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4 Morton & Cotton, *Robinson-Patman Act — Anti-trust or Anti-consumer,* 37 MINN. L. REV. 227, 229 (1953).

5 26 Stat. 209-10 (1890), 15 U.S.C. §§ 1-7 (1952).

6 38 Stat. 730 (1914), 15 U.S.C. §§ 12-13, 14-21, 22-27, 44 (1952).

7 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1952).

8 Morton & Cotton, *supra* note 4, at 227, 229.

9 Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective,* 57 COLUM. L. REV. 1059, 1074-85 (1957).

10 324 U.S. 726 (1945). The distant purchasers referred to were in such widely separated areas as Kansas City and Chicago.

11 The practice referred to is the use of the base point system of pricing, in which the price is computed by adding freight rates from some base point regardless of actual freight costs. This was extended to multiple base points in *FTC v. Cement Institute,* 333 U.S. 683 (1948).

12 148 F.2d 378 (2d Cir. 1945), *repudiated in* General Foods, Inc. v. FTC, 3 CCH TRADE REG. REP. ¶ 11, 697 (1954).

13 334 U.S. 37 (1948).

14 44 FTC 351 (1948), *set aside,* 191 F.2d 786 (7th Cir. 1951).

on the grounds that the Commission had failed to show that the price differential in regard to component parts hurt competition in regard to the finished product.[15]

FTC v. Standard Oil[16] initiated the retreat from the extreme position of injury to competitors back to the theory of injury to competition. This seems to be the present judicial inclination.[17] In the *Standard Oil* case the Supreme Court recognized that price rigidity brought about as a result of strict enforcement of the Robinson-Patman Act is inconsistent with the antitrust laws of which it forms a part. The Attorney General's Report[18] commended the Supreme Court on this decision and stated that it went far toward putting the Robinson-Patman Act in its proper antitrust perspective and was consistent with national policy and practical business methods of competition in which the consumer benefits from a flexible pricing system. Further, the report declared: "The essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public."[19] As a result of this report and the *Standard Oil* decision, there has been increased agitation by small business groups toward strengthening the act. This pressure has caused some congressional activity in this regard.[20]

The strong dissent in *Standard Oil* sums up the position of those who oppose a relaxation in the enforcement of the act. As stated above, these opponents look to competitor injury as indicative of injury to competition and emphasize the importance of curtailing monopolies in their inception.[21]

In the instant case, the Tenth Circuit indicated its basic approach to the problem by stating:

> Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.[22]

It went on to state that the jury below had been correctly instructed that in determining the "reasonable possibility" of injury to competition as a result of appellant's actions consideration could be given to the price differential between El Paso and Las Cruces, and that consideration could also be given to the appellant's size and economic domination in its area of operation. However, the jury was cautioned that only price differentials having the proscribed harmful effects on competition were actionable.

This approach is in contrast to that utilized by the Seventh Circuit in *Anheuser-Busch,* a contrast which is apparent from the following portion of that decision.

> It is not every price difference that amounts to a discrimination in price under the act. Price discrimination means more than a mere difference in price. There must be some relationship between the different purchasers which entitles them to comparable treatment.[23]

Representative Utterback, a manager of the conference bill, referred to this relationship and gave as examples of it: 1) competition in the resale of goods, and 2) prices so low as to sacrifice some part of the seller's necessary costs and profit — inevitably leaving the deficit to be made up in higher prices to other customers.[24]

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15 *Id.* at 792.
16 340 U.S. 231 (1951), *sequel,* 355 U.S. 396 (1958).
17 *A Symposium on the Robinson-Patman Act,* 49 NW. U. L. REV. 196 (1954).
18 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 180 (1955).
19 *Id.* at 164-65.
20 Rowe, *supra* note 9.
21 For further discussions of the Robinson-Patman Act and its judicial implications, see: Note, 67 YALE L. J. 1073 (1958) and Note, 67 YALE L. J. 1246 (1958); see also, Note, 66 YALE L. J. 935 (1957); 71 HARV. L. REV. 1367 (1958).
22 Reasonable possibility, as opposed to probability was held to be the test in FTC v. Morton Salt Co., 334 U.S. 37, 47 (1948).
23 Anheuser-Busch v. FTC, 265 F.2d 677 (7th Cir. 1959), *cert. granted,* 28 U.S.L. WEEK 3147 (U.S. Nov. 10, 1959).
24 80 CONG. REC. 9416 (1936).

He declared, "But where goods are sold in different markets and local conditions set different price levels, sale at those different prices would not constitute a discrimination under the bill."[25] Since discrimination had not been shown in the St. Louis area, the court held there was not a sufficient relationship between competitors of Anheuser-Busch in the St. Louis area and those in other areas of the country.

The Tenth Circuit relied heavily on *Moore v. Mead's Fine Bread Co.*[26] and *Maryland Baking Co. v. FTC*[27] in holding that geographical price discrimination between non-competing purchasers is actionable under section 2(a). It also stated that such discriminations were actionable prior to the enactment of the Robinson-Patman bill.[28] In contrast, the Seventh Circuit did not even discuss these cases. It would appear that they are rightly ignored because in each case the price reduction in question was so drastic as to be prohibited under section 2 of the original Clayton Act.[29] (The Tenth Circuit recognized this fact when it cited *Puerto Rican American Tobacco Co. v. American Tobacco Co.*)[30] Thus, it would seem that the reductions in the instant case and especially in the *Anheuser-Busch* case (where the reduction was only to existing competitive prices) are readily distinguishable from the above cited cases.

In the light of the *Standard Oil* decisions of 1951 and 1958, the affirmative defense raised in the *Anheuser-Busch* case under section 2(b) appears judicially and logically sound. Although the Seventh Circuit did not find it necessary to discuss section 2(b), it is a defense of great potential. In the *Standard Oil* case the Supreme Court held that a good faith reduction in price to meet a competitor's price is a complete defense even though there may be a possibility of injury to competitors. A proposed limitation upon this stand is the view that premium priced products may not meet non-premium prices of competitors but must maintain the premium differential.[31] Since this point was not at issue in the compared cases it is beyond the scope of detailed analysis. However, in view of the reversal of the FTC in the *Minneapolis-Honeywell* decision, the premium product argument is weakened considerably. The reversal was on the grounds that the component price differences did not substantially injure competition between finished product competitors. Although the premium product charges of the Commission were mentioned, no discussion was given them.

In summary, the position of the Seventh Circuit in *Anheuser-Busch* is more in line with current judicial interpretation of the Robinson-Patman Act than is the position of the instant case. At one time, protection of each competitor was the best means to stop the growth of monopolistic corporations. Today, however, a return toward hard competition with its resulting price flexibility will result in consumer and public benefit as price stratification is broken by the competitive process.

What direction the present trend, characterized as it is by vacillation, will take may well be indicated by the decision of the Supreme Court in the *Anheuser-Busch* case presently on appeal.[32] The division between the Seventh and Tenth Circuits will be decided there.

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25 *Ibid.*
26 248 U.S. 115 (1954).
27 243 F.2d 716 (4th Cir. 1957).
28 See Puerto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929).
29 In the *Moore* case, the price reduction was from 14 to 7 cents for a pound loaf of bread and from 21 to 11 cents for a pound and a half loaf. Similarly, the cut in the *Maryland Baking* case was approximately 25%. Also, in the *American Tobacco* case, the loss to defendant as a result of his reduction amounted to $175,000 annually.
30 30 F.2d 234 (2d Cir. 1929).
31 For a contrast in the approaches to the *Anheuser-Busch* case compare 26 GEO. WASH. L. REV. 769 (1958) and 58 COLUM. L. REV. 567 (1958).
32 *Cert. granted,* 28 U.S.L. WEEK 3147 (U.S. Nov. 10, 1959).

CONSTITUTIONAL LAW — FEDERAL JURISDICTION — FEDERAL COURT DENIED JURISDICTION TO INVALIDATE STATE STATUTE FAIR ON ITS FACE. — The Alabama State Legislature, by statutory enactment, altered the boundaries of the City of Tuskegee, Alabama. Prior to 1957, the boundaries formed a square, and of the 5,397 negro population, approximately 400 were qualified voters. As newly defined, the city is so irregularly shaped that all but four or five of the negro voters and most of the total negro population have been excluded from the city, without a similar effect on any of the 1,310 white persons residing there. Appellants, former negro residents of Tuskegee, brought a class action seeking a declaratory judgment to render the act invalid, contending that it effected an unconstitutional disenfranchisement and deprivation of benefits of residence in the city without due process and constituted a denial of equal protection. The district court held that it lacked authority and jurisdiction "to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body."[1] On appeal, *held*, affirmed. Since there was no violation of appellants' fourteenth and fifteenth amendment rights on the face of the statute a federal court has no authority to interfere with the enforcement of the state's legislative act. *Gomillion v. Lightfoot*, 28 U.S.L. WEEK 2115 (5th Cir. Sep. 22, 1959).

On its face the act in question did not indicate racial or class discrimination.[2]

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1 Gomillion v. Lightfoot, 167 F. Supp. 405 (M.D. Ala. 1958).

2 *Act No. 140.*

AN ACT

To alter, re-arrange, and re-define the boundaries of the City of Tuskegee in Macon County.

Be It Enacted by the Legislature of Alabama:

Section 1. The boundaries of the City of Tuskegee in Macon County are hereby altered, re-arranged and re-defined so as to include within the corporate limits of said municipality all of the territory lying within the following described boundaries, and to exclude all territory lying outside such boundaries:

Beginning at the Northwest Corner of Section 30, Township 17-N, Range 24-E in Macon County, Alabama; thence South 89 degrees 53 minutes East, 1160.3 feet; thence South 37 degrees 34 minutes East, 211.6 feet; thence South 53 degrees 57 minutes West, 545.4 feet; thence South 36 degrees 03 minutes East, 1190.0 feet; thence South 53 degrees 57 minutes West, 675.2 feet; thence South 36 degrees 19 minutes East, 743.4 feet; thence South 33 degrees 50 minutes East, 1597.4 feet; thence North 61 degrees 26 minutes East, 1122.8 feet; thence North 28 degrees 34 minutes West, 50.0 feet; thence North 59 degrees 11 minutes East, 1049.3 feet; thence South 30 degrees 48 minutes East, 50.0 feet; thence North 50 degrees 08 minutes East, 341.1 feet; thence North 47 degrees 08 minutes East, 1239.4 feet; thence South 42 degrees 51 minutes East, 300.0 feet; thence South 47 degrees 00 minutes West, 1199.5 feet; thence South 64 degrees 09 minutes East, 1422.0 feet; thence South 24 degrees 13 minutes East 488.7 feet; thence South 73 degrees 25 minutes West (370.8 feet; thence North 79 degrees 25 minutes West, 2285.3 feet; thence South 61 degrees 26 minutes West, 1232.6 feet; thence South 41 degrees 03 minutes East, 792.3 feet; thence South 12 degrees 03 minutes East, 842.2 feet; thence North 88 degrees 09 minutes East, 4403.6 feet; thence South 0 degrees 15 minutes West, 6008.2 feet; thence North 89 degrees 59 minutes West, 4140.2 feet; thence North 34 degrees 46 minutes West, 6668.7 feet; thence North 35 degrees 00 minutes West, 380.4 feet; thence North 16 degrees 55 minutes West, 377.2 feet; thence North 54 degrees 29 minutes East, 497.8 feet; thence North 35 degrees 02 minutes West, 717.5 feet; thence South 54 degrees 03 minutes West, 1241.9 feet; thence North 36 degrees 09 minutes West, 858.4 feet; thence North 44 degrees 28 minutes East 452.2 feet; thence North 22 degrees 33 minutes East, 4305.9 feet; thence North 86 degrees 43 minutes East, 236.3 feet to the point of beginning.

Section 2. All laws or parts of laws which conflict with this Act are repealed.

Section 3. This Act shall become effective immediately upon its passage

It was simply a legislative decree which changed the municipal boundaries. The Alabama Constitution[3] provides that the legislature may pass acts altering or rearranging the boundaries of a city, town or village. The validity of acts passed pursuant to this provision has been upheld in cases before the Alabama Supreme Court.[4] In the light of these facts, both the district court and the court of appeals decided the case on two main grounds.

The first of these grounds was that the federal courts have traditionally regarded boundaries as a political matter to be determined by the legislature. The question of municipal boundary changes has confronted the federal courts on several occasions. In Laramie County Comm'rs v. Albany County,[5] the Supreme Court laid down the general rule that counties, cities and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the legislature, except where provided otherwise by the state constitution.[6] The *Laramie* court went on to note:

> Unless the constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its actions whenever it is deemed unwise, impolitic or unjust, and even abolish the municipality altogether, in the legislative discretion.[7]

Such power is to be exercised in a reasonable and equitable manner.[8] Subsequently, in *Mt. Pleasant v. Beckwith*[9] and *Hunter v. Pittsburgh*,[10] the *Laramie* decision controlled the boundary problems which confronted the Court. These same principles are confirmed by the legal encyclopedias[11] and supported by the cases cited.

The second basis of the decision was that, since the state had the power to change the boundary, the judiciary may not inquire into the motives which prompted the legislature to act. The court relied on *Doyle v. Continental Ins.*[12] where it was observed that, if the act done by the legislature is not in violation of the Constitution or the laws of the United States, the court has no power to inquire into the legislature's intent.[13] Similarly in *Hunter* the Court denied itself authority to review or criticize the policy, wisdom, justice or fairness of the act under consideration.[14]

The instant court did not deny that certain statutes fixing boundaries may exceed constitutional limits, but it refused to search beyond the face of a statute for any such violation. Apparently the court felt that such inquiry would overstep the limits of the judiciary and be objectionable as a search for motive. Thus the court concluded that since no racial or class discrimination appeared on the face of the statute, it lacked jurisdiction to invalidate the act despite plaintiffs' allegation of unconstitutionality.[15] But, as the dissenting opinion points out,[16] to apply these general principles, without more, is to beg the essential question raised by the appellants.

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and approval by the Governor, or upon its otherwise becoming a law.
This bill became an Act on *July 15, 1957* without approval by the Governor.

3 ALA. CONST. § 104 (18) (1901).
4 State *ex rel* Brooks v. Gullatt, 210 Ala. 452, 98 So. 373 (1923); City of Ensley v. Simpson, 166 Ala. 366, 52 So. 61 (1909).
5 92 U.S. 307 (1875).
6 *Id.* at 308.
7 *Id.* at 308.
8 *Id.* at 312.
9 100 U.S. 514 (1879).
10 207 U.S. 161 (1907).
11 See 16 C.J.S. *Const. Law* § 145 (1956); 37 AM. JUR., *Municipal Corp.* § 35 (1941).
12 94 U.S. 535 (1876).
13 *Id.* at 541.
14 Hunter v. Pittsburgh, 207 U.S. 161 (1907).
15 270 F.2d——(5th cir. 1959).
16 *Id.* at ——.

That question was whether the state actually has the power to make this change. The appellants challenged such power on the grounds that this particular change of boundary was discriminatory and violated due process and equal protection of the laws. Since no state has the power to pass a law abrogating a constitutional right, appellants contended that Alabama was powerless to pass this particular act. Referring, then, to the instant decision, it should be noted that in two of the cases which were cited as controlling, *Laramie*[17] and *Mt. Pleasant*,[18] no constitutional question was raised. And the constitutional question presented in *Hunter*[19] differed from that which was raised here. There the attack on the statute authorizing annexation was based on an alleged impairment of a contract between a city and its citizens, and on an alleged deprivation of property without due process based on the increased taxation caused by the annexation. Neither claim presented a substantial constitutional question.[20] The instant court indicated that an act fair on its face is not the proper subject of judicial inquiry. The court may be unduly restricting itself. It is true that a court may not inquire into the *motive* — the subjective intention — of the legislature, but motive must be distinguished from purpose. It is well settled that the *purpose* of a legislative decree can and ought to be inquired into by the courts.[21] That the total effect of a statute is to be considered in the determination of its purpose was long ago indicated by the Supreme Court.[22] Indeed, *Doyle v. Continental Ins.*,[23] the very case cited by the district court for the proposition that motives are not justiciable demonstrates that courts do look to effect. The effect of the contested statute in that case was to give insurance companies a choice to stay out of federal courts or lose their licenses. The difference between that legislative act and the instant one is that Wisconsin had every right to refuse to grant, or to revoke, a license to do business. Hence, the Wisconsin statute violated no rights of appellants. The total effect of the present statute, on the other hand, was to exclude a body of Negroes from membership in a municipal community, thereby denying them their constitutional right to equal protection of the laws.

By looking beyond the face of a statute to the facts and the effects, the Supreme Court has in other situations resisted attempts at racial and class discrimination. In this way the practice of excluding Negroes from juries has been stopped,[24] and laws permitting commissioners arbitrarily to exclude Orientals from a town or state have been overturned.[25] But, of course, these cases might be distinguished from the instant case. Some were declared unconstitutional for lack of standards, while others were simply discriminatory applications of otherwise valid laws. The act in question here required no standards and it applied equally to all within the class. Yet a brief consideration of the facts is sufficient to demonstrate that this act was so drawn as to insure that the class to be affected was composed entirely of Negroes. Even this is not without precedent, however.

A similar problem was presented in *Miller v. Milwaukee*[26] where the State of Wisconsin attempted to indirectly discriminate against holders of United States

17 Laramie County Comm'rs v. Albany County, 92 U.S. 307 (1875).
18 Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879).
19 Hunter v. Pittsburgh, 207 U.S. 161 (1907).
20 As to the argument that a contract existed between the city and its citizens by virtue of the relationship between the parties the Court observed: "It is difficult to deal with a proposition like this except by saying that it is not true." *Id.* at 177. Hence, there could be no unconstitutional impairment of contract. The argument that an increase in taxation resulting from annexation deprived a person of property without due process had been denied by the Court in *Kelly v. Pittsburgh*, 104 U.S. 78 (1881).
21 Henderson v. Mayor of New York, 92 U.S. 259 (1875).
22 *Id.* at 268.
23 94 U.S. 535 (1876).
24 See Patton v. Mississippi, 332 U.S. 463 (1947); Smith v. Texas, 311 U.S. 128 (1940); Norris v. Alabama, 294 U.S. 857 (1934).
25 Yick Wo v. Hopkins, 118 U.S. 356 (1885); See Soon Hing v. Crowley, 113 U.S. 703 (1884).
26 272 U.S. 713 (1926).

bonds. The bonds were owned by the corporation and interest from the bonds was included with other corporate income and distributed to the stockholders in the form of dividends. But the income from the bonds was not, under the prevailing law, taxable by the state. Wisconsin circumvented this by a new tax law. Stockholders paid no tax upon dividends of corporations the income of which was assessed; but if only a part of the corporation's income was assessed, only a corresponding part of the dividends could be deducted by stockholders from their gross income. The Supreme Court struck down this statute because it discriminated against United States bonds. In his opinion, Justice Holmes thus stated the law:

> It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of a scheme to reach a prohibited result. If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. Under the law of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. . . . A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts.[27]

It remains only to find the "prohibited result" in this case, and that must be segregation. Recent cases in the civil rights area seem to have expanded the meaning of equal protection. They suggest, if they do not say, that state enforced segregation, in any manner, is contrary to the demands of equal protection.[28] Segregation denotes inequality, and when state enforced violates the Constitution. Surely this is the meaning of *Brown v. Board of Education,*[29] above and beyond its holding in regard to public education. For the court speaks of the effects of segregation, the feeling of inferiority which it engenders and the psychological harms which it works.[30] This discussion of the inherent inequality denoted by segregation was quoted with approval in *Dawson v. Mayor and City Council of Baltimore City*[31] in which a statute authorizing segregation on public beaches was struck down. The same condemnation of segregation as violative of the equal protection clause is found in recent cases involving restaurants,[32] public golf courses,[33] and public transportation.[34] It seems fairly clear, then, that the mere fact of segregation or discrimination, when it is caused or upheld by a state statute is sufficient to invalidate that statute.

Having announced the requirements of equal protection, the courts appear determined to prevent evasions. To this end they have probed beneath the face of many state statutes, notably the "massive resistance laws" which followed upon the decision in *Brown.*[35] And in the Texas primary cases[36] the courts sought the purpose of the various state enactments by a consideration of the results.

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27 *Id.* at 715.
28 Cahn, *Jurisprudence,* 30 N.Y.U.L. REV. 150 (1955).
29 347 U.S. 483 (1954).
30 *Id.* at 493-95.
31 220 F.2d 386 (4th Cir. 1955), *aff'd per. curiam,* 350 U.S. 877 (1956).
32 Derrington v. Plummer, 240 F.2d 922 (5th Cir.), *cert. denied,* Casey v. Plummer, 353 U.S. 924 (1956).
33 Holmes v. City of Atlanta, 350 U.S. 879 (1955), *reversing* 223 F.2d 93 (5th Cir. 1955).
34 Browder v. Gayle, 142 F. Supp. 707 (M.D. Ala. 1956).
35 See Orleans Parish School Board v. Bush, 242 F.2d 156 (5th Cir. 1957); School Board of City of Charlottesville, Va. v. Allen, 240 F.2d 59 (4th Cir. 1956), *cert. denied,* 353 U.S. 911 (1957); James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959); James v. Duckworth, 170 F. Supp. 342 (E.D. Va. 1959).

The application of these principles to the instant case should be readily apparent. The court ought not restrict itself to the face of the statute but should consider the total effect. If, as it seems, the purpose and effect is to exclude Negroes from the city the disposition of the case is clear. On the basis of *Miller v. Milwaukee*[37] a state may not achieve indirectly what it may not accomplish directly. This "back-door" method of segregation by changing the boundaries is as violative of equal protection as a frontal assault.

It may be that the problem bothering the instant court, perhaps controlling its decision, is the problem of remedies. This difficulty was suggested some years ago in *Colegrove v. Green*,[38] cited in both the majority and concurring opinions. But the difficulty in Illinois as presented by that case is clearly distinguishable from the situation in Alabama. The complainants in *Colegrove* desired a redistricting which would have called for positive action. It would have been virtually impossible for the court to undertake such a reapportionment and to enforce its decree. This type of action had to be left to the legislature. Appellants in the instant case seek only a return to the status quo. That can be achieved by simply declaring this particular act unconstitutional. If the legislature still wishes to alter the boundaries it may try again, but this time on a non-discriminatory basis.

John J. Coffey

CRIMINAL LAW — GRAND JURY — COURT HAS JURISDICTION TO ORDER INSPECTION OF TRANSCRIPT OF DEFENDANT'S TESTIMONY BEFORE GRAND JURY. — Accused was indicted for soliciting a bribe, and for perjuring himself during the grand jury hearing on the matter. Accused filed for inspection of the grand jury minutes before respondent, Honorable John R. James of the Sixteenth Judicial Circuit of Missouri. The motion was based on allegations (1) that inspection would obviate the necessity of taking depositions, (2) that there were unauthorized persons present while the grand jury deliberated, and (3) that the evidence before the grand jury was insufficient and illegal. Respondent granted the motion, and ordered the minutes turned over to the accused. The State petitioned the Supreme Court of Missouri for a writ of prohibition to stay the respondent's order, contending that respondent had exceeded his jurisdiction. *Held:* Affirmed in part. The court has jurisdiction to order inspection of the transcript of defendant's testimony before the grand jury and the testimony of those witnesses who endorsed indictments. *State v. James*, 327 S.W.2d 278 (Mo. 1959).

The history of the grand jury in Anglo-American law dates from the year 1166.[1] Since that time, a policy of strict secrecy has prevailed under the common law with regard to the proceedings of, and testimony before, the grand jury. The reasons for grand jury secrecy today have been well summarized:

> 1. To prevent the accused from escaping before he is indicted and arrested or from tampering with the witnesses against him.
> 2. To prevent disclosure of derogatory information presented to the grand jury against an accused who has not been indicted.
> 3. To encourage complainants and witnesses to come before the grand jury and speak freely without fear that their testimony will be made public thereby subjecting them to possible discomfort or retaliation.
> 4. To encourage the grand jurors to engage in uninhibited investigation and deliberation by barring disclosure of their votes and comments during the proceedings.[2]

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36 Terry v. Adams, 345 U.S. 461 (1952); Smith v. Allwright, 321 U.S. 649 (1943); Nixon v. Condon, 286 U.S. 73 (1931); Herndon v. Nixon, 273 U.S. 536 (1926).
37 272 U.S. 713 (1926).
38 328 U.S. 549 (1946), *rehearing den.*, 329 U.S. 825 (1947).

1 ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 137 (1947).
2 Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 405 (1959) (Brennan, J., dissenting).

Nevertheless, as these reasons have been obviated, or overcome by overriding policy considerations, the veil of secrecy has been lifted. The criteria supporting a relaxation in secrecy can be stated as follows:

1. In cases where a request for inspection has been made, the accused has already been arrested. Further, since the names of the witnesses are on the indictment,[3] and the defense has the right to take depositions prior to trial,[4] release of the minutes will have little effect on the security of witnesses.

2. The accused will have been indicted before requesting inspection of the minutes. Information pertaining to third parties involved probably will become public on trial, if pertinent.

3. Witnesses with particularly damaging information will have signed the indictment, and will be subject to questioning by the defense before and during trial. Secrecy with respect to their remarks before the grand jury, therefore, will not shield them from exposure.

4. The vote and other proceedings of the grand jurors can be kept secret by exhibiting only the transcript of the testimony of witnesses.

These criteria are usually accompanied by such language as "truth has nothing to fear from light." [5]

While some jurisdictions hold to the strict common law rule of total secrecy in all grand jury proceedings,[6] most allow relaxation, some by statute, others by judicial construction. Of those jurisdictions in which secrecy is lifted by statute, some provide for disclosure of the grand jury minutes, or transcripts of the witnesses' testimony.[7] Such disclosures are usually within the discretionary power of the trial judge. In a few jurisdictions disclosure is a right of the defendant.[8] In other jurisdictions using statutes, the release of transcripts is obtained through interpretation of the statutory oaths of witnesses, jurors, and reporters. These oaths usually require strict secrecy regarding the proceedings "unless lawfully required to testify in relation thereto." [9] This phrase is so interpreted as to give the trial judge discretionary power to make the transcript of the witnesses' testimony available to the defendant. [10]

These methods of achieving a relaxation in the secrecy of grand jury proceedings are most commonly used in those cases in which inspection is requested to impeach witnesses, or in which the accused is charged with perjury before the grand jury. In cases involving the impeachment of witnesses, some showing of facts to indicate inconsistency is required.[11] In cases of indictment for perjury before the grand jury, the accused is usually granted access to the transcript of his own testimony.[12]

Motions to review the evidence acted upon by the grand jury are generally appraised critically.[13] The courts have been reluctant to pass judgment on the sufficiency of evidence before the grand jury.[14] Such a procedure would be, in effect, to indict and try the accused before the same tribunal.[15] To do so would be to de-

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3 See 23 C.J.S. *Criminal Law* § 948 (a) (1940).

4 See *Ex parte* Welborn, 237 Mo. 297, 141 S.W. 31 (1911); 23 C.J.S. *Criminal Law* § 958 (1940).

5 *Ex parte* Welborn, *supra* note 4, at 34.

6 See, *e.g.*, Lawder v. State, 154 N.E.2d 507 (Ind. 1958).

7 See, *e.g.*, FED. R. CRIM. P. 6(e); FLA. STAT. § 905.27 (Supp. 1958) (*semble*), as interpreted in Gordon v. State, 104 So. 2d 524 (Fla. 1958); KY. CRIM. CODE §§ 110, 113 (Baldwin 1959).

8 KY. CRIM. CODE §§ 110, 113 (Baldwin 1959).

9 See MO. ANN. STAT. § 540.110 (1953).

10 State v. Pierson, 343 Mo. 841, 123 S.W.2d 149 (1938); State v. Goyet, 119 Vt. 167, 122 A.2d 862 (1956). See State v. Lack, 118 Utah 128, 221 P.2d 852 (1950).

11 Minton v. State, 113 So. 2d 361, 365 (Fla. 1959); See People v. McCann, 166 Misc. 269, 2 N.Y.S.2d 216 (Ct. of Gen. Sessions 1938).

12 United States v. Remington, 191 F.2d 246, 250 (2d Cir. 1951); Minton v. State, 113 So. 2d 361 (Fla. 1959).

13 People v. Liso, 186 N.Y.S.2d 332 (Queens County Ct. 1959).

14 *Ibid.*

15 State v. Shawley, 334 Mo. 352, 67 S.W.2d 74, 82 (1933).

stroy the reason underlying the existence of the grand jury.[16] Yet, upon a proper showing of facts indicating that there may have been no legal evidence before the grand jury, most courts have the power to grant an inspection of the transcripts of the testimony in order to substantiate the charge.[17] In other jurisdictions, however, such inspection is flatly denied.[18]

In the instant case the court decided that the accused could inspect the transcripts of the testimony but not the minutes of the proceedings, since they had been made secret expressly by statute.[19]

This relaxation of secrecy was further qualified by the statement that inspection could not be allowed on an allegation that there was *insufficient* evidence before the grand jury, but could be allowed on the allegation that there was *no* legal evidence before the grand jury. Up to this point, the court was in accord with the recognized exceptions set out above.[20] In the instant case, however, there was no record of any showing of facts substantiating this allegation. The court apparently overlooked this fact, thereby, in the absence of statutory provision, making this an unprecedented decision.[21] By contrast, a 1956 decision of the same court placed the burden of proof on the accused to show good cause and evidence for the granting of a motion for a pretrial inspection of documents.[22] It would therefore seem inconsistent that these decisions should stand side by side. Hence, it might be concluded that the principal case overruled the earlier position, and a trial judge in Missouri can now entertain any motion for the inspection of grand jury minutes up to the point prohibited by statute.[23]

This result, however, could be avoided by interpreting the decision more narrowly. The state contested the respondent's jurisdiction to order this exposure of the minutes. There is language in the opinion which suggests that an approach may have been adopted which raised the narrow question of whether or not the power lay with the respondent to order exposure in such cases. In this regard the court reasoned as follows: since the court could not hold that the respondent never had discretion to order disclosure in any case, it could not deny the jurisdiction of the respondent to so order in the present case. But if this is the only point decided in the principal case, it is unfortunate. The state hardly intended to raise such a narrow question, since it was already well settled in this jurisdiction.[24] In the absence of a recent similar case in this jurisdiction, this case afforded an excellent opportunity for the court to spell out clearly a sound guide for trial judges in handling these requests for disclosure. As asserted by the dissent, this the majority opinion failed to do satisfactorily.*

Richard M. Bies

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16 See Note, 45 Ky. L.J. 151 (1956).

17 *E.g.*, United States v. White, 104 F. Supp. 120 (D.N.J. 1952); People v. Joslin, 129 Misc. 790, 223 N.Y. Supp. 59 (Sup. Ct. 1927).

18 *Cf.* State v. Garrison, 130 N.J.L. 350, 33 A.2d 113 (Sup. Ct. 1943).

19 Mo. Ann. Stat. § 56.190 (1951), § 56.560 (Supp. 1958), § 540.10 (1953).

20 United States v. White, 104 F. Supp. 120 (D.N.J. 1952); People v. Joslin, 129 Misc. 790, 223 N.Y. Supp. 59 (Sup. Ct. 1927).

21 No case cited in the opinion allowed inspection on a charge that there was no legal evidence before the grand jury without a showing of facts to this effect, and further research has not disclosed such a case in any other jurisdiction.

22 State v. McQueen, 296 S.W.2d 85 (Mo. 1956). Which documents are in question is not clear in the case. The language would include grand jury minutes, and if any documents are to be so protected, the grand jury minutes must be within this class, as they enjoy the highest degree of secrecy.

23 Mo. Ann. Stat. § 56.190 (1951), § 56.560 (Supp. 1958), § 540.110 (1953).

24 State v. Pierson, 343 Mo. 841, 123 S.W.2d 149 (1938).

* Subsequent to the completion of this writing, in a per curiam opinion denying a motion for rehearing, the Missouri Supreme Court interpreted their opinion in the instant case as limiting inspection to such parts of the transcript of the testimony as would be relevant and material at the trial. State v. James, 327 S.W.2d 278, 289 (Mo. 1959).

FEDERAL RULES OF CIVIL PROCEDURE — EXTRATERRITORIAL PERSONAL SERVICE OF PROCESS — RULE 4(f) DOES NOT PROHIBIT STATE-AUTHORIZED PERSONAL EXTRATERRITORIAL SERVICE OF PROCESS MADE PURSUANT TO RULE 4(d)(7). Plaintiff instituted an action in the United States District Court for the Eastern District of Wisconsin against several defendants, alleging, among other things, breach of contract. One of the defendants was a foreign corporation, the Western Hills Oil Company of Tulsa, Oklahoma. A Wisconsin statute[1] authorized personal service of process outside the state on a foreign corporation if the cause of action arose out of the corporation's doing business in Wisconsin. Pursuant to this statute and Rule 4(d)(7) of the Federal Rules of Civil Procedure, service was made on the corporation's executive vice president in Tulsa by a U. S. Marshall.

The corporate defendant moved to dismiss the action for lack of jurisdiction on the ground that Rule 4(f) restricts service of process to the territorial limits of the state in which the district court sits. *Held,* service was sufficient. Rule 4(f) should not be interpreted as restricting state authorized personal extraterritorial service made pursuant to Federal Rule 4(d)(7). *Kappus v. Western Hills Oil Company Inc.,* 24 F.R.D. 123 (E.D. Wis. 1959).

Until recently it was held that due process requires service within the territorial limits of the state of forum unless the defendant consents to jurisdiction.[2] But it is now well established that due process imposes only two restraints on the exercise of jurisdiction over a defendant who cannot be found within the state of forum. First, the defendant must have certain minimum contacts with the state so that the exercise of jurisdiction does not offend "traditional notions of fair play and substantial justice."[3] Second, the method of service must be reasonably calculated to give the defendant actual notice of the action pending against him.[4]

It would follow that, under Rule 4(d)(7), a federal district court may, in a diversity action, constitutionally use a state statute permitting personal extraterritorial service if the above two requirements are met. Rule 4(d)(7) provides that service of process is sufficient "if made in the manner prescribed by the law of the state in which the service is made." However, Federal Rule 4(f) states that process "may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state." Hence we arrive at the issue presented in the instant case: Does Rule 4(f) prevent the use of such a state statute?

The first judicial discussion of this question is found in the concurring opinion in *McCoy v. Siler,*[5] decided by the Court of Appeals for the Third Circuit in 1953. In that opinion, Judge Maris maintained that Rule 4(f) was a limitation on Rule 4(d)(7) insofar as extraterritorial service is concerned. He contended that, where there is no federal statute to the contrary, Rule 4(f) confines service of process to the territorial limits of the state in which the district court is sitting.

This view was rejected three years later by the same court in *Griffin v. Ensign.*[6] This case, as did the *McCoy* case, involved service pursuant to the Pennsylvania nonresident motorist statute.[7] It should be noted that nonresident motorist statutes do not present the problem raised in the instant case. These statutes utilize the popular device of appointing a state official as agent to receive service for any suit arising out of the defendant's use of the state's highways.[8] Since service is technically effected within the state, possible conflict with the territorial limitations

1 WISC. STAT. ANN. §262.09(4) (1957).

2 This belief grew out of the confusion caused by Pennoyer v. Neff, 95 U.S. 714 (1877). For an exhaustive treatment of problems and trends in jurisdictional doctrines see *Symposium —Jurisdiction: Current Problems and Legislative Trends,* 44 IOWA L. REV. 244 (1959).

3 International Shoe Co. v. Washington, 326 U.S. 310 (1945).

4 Milliken v. Meyer, 311 U.S. 457 (1940).

5 205 F.2d 498, 501 (3d Cir. 1953).

6 234 F.2d 307 (3d Cir. 1956).

7 PA. STAT. ANN. tit. 75, § 1201.

8 For a current compilation of state nonresident motorist statutes see *Nonresident Motorist*

contained in Rule 4(f) is avoided.[9] But the *Griffin* court did not base its decision on such a distinction. The court was clearly of the opinion that Rule 4 (f) was not intended as a limitation on Rule 4(d)(7). It held that Rule 4(f) does not address itself to or cover nonresident procedures authorized by state law which is the subject of Rule 4(d)(7).

This view received the endorsement of the Court of Appeals for the Second Circuit.[10] That court held that the territorial limitations found in Rule 4(f) relate to service of "federal process" only. Additional support of the *Griffin* decision is found in Professor Moore's statement that "clause (f) evidently refers to ordinary original service and was not intended to restrict the effectiveness of state substituted service when federal process is served in that manner." [11]

In 1957 a district court in Illinois heard the first diversity action in which Rule 4(d)(7) was used to effect actual personal extraterritorial service.[12] Summons in this case was personally served on the defendant, an Indiana resident, in Indiana, pursuant to sections 16 and 17 of the Illinois Civil Practice Act.[13] This statute was the first legislation to abolish the subterfuge of appointing a state official as agent to receive service of process for nonresident individuals and foreign corporations. The statute permits personal extraterritorial service whenever a defendant does any one of several specified acts within the state which constitute submission to the jurisdiction of the courts of Illinois. The service was upheld on the familiar ground that the language of Rule 4(d)(7) indicates no intention to restrict service to the territorial limits of the state; if the state statute providing the service is valid, the service is valid.

It would be safe to assume that in the future more states will take advantage of current liberalized concepts of jurisdiction by enacting statutes providing for personal extraterritorial service of process.[14] The Illinois-type procedure eliminates the use of unnecessary fictions and more effectively meets the constitutional "fair notice" requirement by giving the defendant actual notice of the pending suit. An increase in the number of states adopting legislation of this type would, without a doubt, bring before an increasing number of federal courts the question whether Rule 4(f) restricts Rule 4(d)(7).

Since the United States Supreme Court and nine circuits have yet to decide the question, it would seem that its final answer also lies somewhere in the future. Meanwhile, a plaintiff relying on state-authorized extraterritorial service risks having the federal court dismiss his action for lack of jurisdiction over the defendant.

When the Federal Rules were adopted in 1938 the belief was still current that a valid in personam judgment required that the defendant either be served within the state or that he consent to the state's exercise of jurisdiction over him. Statutes imposing jurisdiction over persons not found within the state paid lip service to this doctrine by adopting such devices as appointing statutory agents to receive service of process. It appears that the rule makers, not anticipating another decade's procedural problems, drafted Rule 4 to conform to such practices. The obvious solution would appear to be an amendment to Rule 4.[15]

Thomas Kavadas, Jr.

Statutes—Their Current Scope, 44 IOWA L. REV. 384 (1959).

9 Holbrook v. Cafiero, 18 F.R.D. 218 (D. Md. 1955).

10 Service by mail pursuant to a New York statute was upheld in Farr & Co. v. CIA. International De Navegacion De Cuba, S.A., 243 F.2d 342. (2d Cir. 1957).

11 2 MOORE, FEDERAL PRACTICE ¶ 419 (2d ed. 1947).

12 Starr v. Rogalny, 162 F. Supp. 181 (E.D. Ill. 1957).

13 ILL. ANN. STAT. ch. 110, §§ 16-17 (Smith-Hurd 1956).

14 Wash. Session Laws 1959, ch. 131; see *Report of the Joint Committee on Michigan Procedural Revision*, 38 MICH. STATE B.J., No. 1, p. 34 (proposed rule 10.5.9).

15 In 1954 a suggestion was made to amend Rule 4(f) to permit service of process outside the state at any point within 100 miles of the courthouse where the district court sits. However no action was taken. See: ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 1 (1954).

IMPEACHMENT OF WITNESSES — JENCKS STATUTE — REQUEST FOR PRODUCTION OF NOTES USED BY POLICE-OFFICER WITNESS TO REFRESH HIS MEMORY PRIOR TO TESTIFYING DENIED. — Appellant was convicted of robbery and assault with a dangerous weapon. During the trial, appellant's counsel requested that the court order a vital prosecution witness, a police officer, to produce notes which he had taken during interviews with other witnesses, and which he had used to refresh his memory prior to taking the stand. The trial court refused this motion, apparently treating it as a request to see memory-refreshing materials. *Held,* affirmed. The "Jencks" statute[1] governs, and the notes requested were not required to be produced under the terms of that statute. *McGill v. United States,* 270 F.2d 329 (D.C. Cir. 1959).

The decision of the Supreme Court in *Jencks v. United States,*[2] holding that "the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford [government agents] in its possession, written and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial," gave rise to a great deal of controversy in the name of national security. There also arose the problem of protecting government witnesses from possible impeachment on the basis of statements which could not fairly be said to be their own rather than the selections, interpretations, or impressions of the investigator.[3]

Because of the confusion evolving from interpretations of that decision by other federal courts as to the limitations to be placed upon defense counsel's demands for any government material obtained from witnesses,[4] Congress attempted to define the principle announced in the *Jencks* case by enacting into law the "Jencks" statute. Its stated objectives in so doing were:

> . . . to preserve the rights of any defendant under due process of law. . . . It is the intent of the bill to provide for the production only of written statements previously made by a government witness . . . and any transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter to which the witness had testified. . . . The proposed legislation is not designed to nullify, to curb, or to limit the decision of the Supreme Court insofar as due process is concerned.[5]

But even though the statute does serve to define the *Jencks* decision, questions pertaining to the scope and interpretation of this legislation have arisen. Whether section 3500 alone is to govern every request for production of government records in federal criminal cases has not been determined. The Supreme Court recently intimated, by way of dicta, that such should be the construction given the statute.[6] Other federal courts, however, when faced directly with this question, have refused to construe the statute so broadly.[7] And even in those cases where there is no question whether section 3500 applies, it must still be determined whether the materials requested have to be produced under the restrictive qualifications of the statute.[8] Thus, in each case where section 3500 is put in issue, the court must determine first that the statute does apply, and if so, then whether the materials requested meet the qualifications of the statute.

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1 18 U.S.C. § 3500 (Supp. V, 1958).
2 353 U.S. 657, 668 (1957).
3 See 103 CONG. REC. 16116, 16739 (1957); H.R. REP. No. 700, 85th Cong., 1st Sess. (1957); S. REP. No. 569, 85th Cong., 1st Sess. (1957).
4 S. REP. No. 981, 85th Cong., 1st Sess. (1957).
5 *Ibid.*
6 Palermo v. United States, 360 U.S. 343 (1959).
7 See Needleman v. United States, 261 F.2d 802 (5th Cir. 1959); United States v. David, 168 F. Supp. 269 (N.D. Ohio 1958).
8 See United States v. Papworth, 256 F.2d 125 (5th Cir. 1958); United States v. Angelet, 255 F.2d 383 (2d Cir. 1958); Lohman v. United States, 251 F.2d 951 (6th Cir. 1958); United States v. Grunewald, 162 F. Supp. 621 (S.D.N.Y. 1958); United States v. Waldman, 159 F. Supp. 747 (D.N.J. 1958); 18 U.S.C. § 3500(e)2 (Supp. V, 1958).

In the instant case the court of appeals affirmed the trial court's refusal to grant defense counsel's request for the materials on finding that the "Jencks" statute governed. But if the inference from another passage of this opinion is correct,[9] the trial judge did not even consider the applicability of the statute, and appears to have refused the request on the basis of the reasons enunciated in *Goldman v. United States*.[10]

A reading of the statute, however, would seem to indicate that the case at hand does not fit the letter of the legislation.[11] The request here was not made for production of a statement that the police officer testifying had made, but rather was for production of notes which he had taken in his capacity as a government agent during interviews with other witnesses. Moreover, the request, at least apparently, was made for the purpose of impeaching either the officer or those other witnesses, but by means of statements made by those other witnesses, not by the officer himself.

That a real question does exist as to the applicability of the statute to this particular situation is illustrated by a decision of the Fifth Circuit, affirming a trial court's refusal of a request by the defense for similar material. The court held that such notes or memoranda could not be introduced for impeachment purposes under the statute, and reasserted the rule set forth in *Goldman*,[12] saying: "The case of *Goldman v. United States* holding that it is discretionary with the trial court to require or not to require a witness to produce memoranda or notes from which he had refreshed his recollection before taking the stand was not overruled by *Jencks*."[13] In *United States v. David*, the court held that "The statute . . . requires only the production of the statement of a witness of the Government who has completed his direct examination. It does not require production of the statement of any other person. The court would have no right to extend the operation of the statute beyond what its plain language requires."[14]

The instant court makes only the general statement that the "Jencks" statute does govern, citing *Palermo v. United States*.[15] There, affirming a refusal to produce certain government materials, Justice Frankfurter wrote that "The purpose of

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9 McGill v. United States, 270 F.2d 329, 331 (D.C. Cir. 1959). Demand being made for the production of the notes, the court held that if the officer had referred to the notes on the witness stand for the purpose of refreshing his recollection while testifying, then counsel, upon request, was entitled to look at those notes; but that if the witness had used these notes simply to refresh his memory before coming to court, counsel would not be entitled to require their production.

10 Goldman v. United States, 316 U.S. 129, 132 (1942). Where a witness does not use his notes or memoranda on the stand, the defense has no absolute right to their production. A large discretion is to be left to the trial judge.

11 See 18 U.S.C. § 3500 (Supp. V, 1958).

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

12 Goldman v. United States, 316 U.S. 129 (1942).

13 Needleman v. United States, 261 F.2d 802, 806 (5th Cir. 1959), *cert. granted*, 28 U.S.L. WEEK 3108 (U.S. Oct. 13, 1959).

14 United States v. David, 168 F. Supp. 269, 271 (N.D. Ohio 1958).

15 360 U.S. 343 (1959).

the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all."[16] It should be noted, however, that this statement was severely criticized by Justice Brennan in his concurring opinion as

> . . . ranging far afield from the necessities of the case in an opinion essaying *obiter* a general interpretation of the [statute]. . . . I see no necessity in the circumstances of this case which calls for a decision whether § 3500 is the sole vehicle whereby production of prior statements of government witnesses to government agents may be made to the defense.[17]

Since the case at hand does not meet the requirements of the terminology of the statute — the materials requested were not a statement of the witness — it must be inferred that, by applying the statute, the instant court is relying upon legislative intent — to preserve the rights of any defendant under due process — to support this extension of the statute beyond its terms. The court, however, cites no authority and makes no effort to justify or elucidate its reasons for so doing. Because the *Goldman* rule was apparently applied by the lower court, has governed in a similar case,[18] and evidently is applicable to the case at hand, the question arises whether this court is holding that, in criminal cases where a federal agent is the witness, section 3500 should be extended to the exclusion of the *Goldman* rule.

But given the assumption that legislative intent — to protect the defendant and, at the same time, to prevent "fishing expeditions" into government records[19] — will support an extension of the statute to cover this situation, questions bearing directly upon *why* the material requested here was not required to be produced under terms of the Act, also go unanswered. Did the other government witnesses, whose statements were the subject of the officer's notes, testify prior to the time defendant's request was made? Section (b) of the statute would support a refusal to grant such a request if they had not;[20] but if they had so testified, as must be inferred from the fact that the court cites *Palermo,* then a valid refusal under the terms of the statute could only have been premised upon one factor — namely, the nature of the notes themselves. Because the term *statement* is defined restrictively in the statute,[21] it is of fundamental importance that the nature of the notes be evaluated in the terms of this definition. An F.B.I. agent's notebook, in which he had recorded substantially verbatim statements of a government witness during an interview, has been held to be within the terms of the statute.[22] If, however, the Government's material consists partly of an agent's own impressions and comments, and partly of a substantially verbatim report of the witness' own words, the defense is entitled only to that part of those materials which purports to be the words of the witness.[23] And if the material requested is primarily analytical or interpretive, and does not contain a verbatim account of the witness' own words, or is not adopted by him, then such material does not fall within the scope of the act.[24]

The court in the instant opinion remains mute, however, on all of this, relying,

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16 *Id.* at 351.
17 *Id.* at 360-61.
18 Needleman v. United States, 261 F.2d 802 (5th Cir. 1959), *cert. granted,* 28 U.S.L. WEEK 3108 (U.S. Oct. 13, 1959).
19 S. REP. No. 981, 85th Cong., 1st Sess. (1957).
20 18 U.S.C. § 3500 (b) (Supp. V, 1958).
21 18 U.S.C. § 3500(e)2 (Supp. V, 1958).
> a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

22 United States v. Waldman, 159 F. Supp. 747 (D.N.J. 1958).
23 United States v. Papworth, 256 F.2d 125 (5th Cir. 1958).
24 United States v. Grunewald, 162 F. Supp. 621 (S.D.N.Y. 1958).

it appears, solely on the statement of Justice Frankfurter in the *Palermo* opinion quoted above.[25] However, the Supreme Court was careful in *Palermo* to state why the materials in that case could not be produced under the statute, saying:

> We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, are not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions.[26]

Whether or not *Palermo* does govern the case at hand poses a question the answer to which can only be inferred. Was production of the officer's notes not required because they were not approved by the witnesses themselves? Because they were essentially the words of the agent and not of the witness? Because, in short, they were not of that nature envisioned by Congress as necessary, in the interests of due process, to the defendant's case? To all of this the instant court remains silent.

But if inference can grant license to generalize, then the case at hand holds that the legislative intent will allow an extension of the "Jencks" statute to cover the type of situation present here. Notes taken by a federal officer during his interviews with witnesses must meet the restrictive qualifications of the statute, as construed in the *Palermo* case, regardless of whether the agent is himself a government witness and only uses the notes to refresh his memory before testifying; finally, the "Jencks" statute, so construed, does take precedence over the *Goldman* rule, at least where questions of federal criminal procedure such as those present here are raised.

It is regrettable, indeed, that this court did not set forth its reasoning, clearly and definitively, both for extending the statute and determining that production of the materials requested here could not be required. Since this particular situation would seem to be one that will arise in the future not infrequently, a careful and considered discussion of the problems and questions raised would have been of real value. In an area of federal criminal law already beset by so much controversy and misinterpretation, authority by inference seems somewhat tenuous and unreliable, and, it might be added, of little assistance to other federal courts in establishing and asserting a clear and definitive way out of the *Jencks* morass.

J. Michael Guenther

INCOME TAX — FEDERAL — DEDUCTIONS FOR INTEREST ON ANNUITY CONTRACT LOANS DISALLOWED. — On December 20, 1951, petitioner paid the first of forty-one premiums on an annuity contract purchased from an Indiana insurance company. The next day petitioner, pledging the annuity as collateral, borrowed from a bank an amount sufficient to prepay all forty-one premiums. The amount borrowed was credited to the insurance company as a single premium payment for the entire annuity. On December 24, 1951, petitioner prepaid interest on an anticipated policy loan against the cash loan value of the policy. On December 27, 1951, petitioner received the full loan value at 4% interest and thereupon repaid the bank loan with the proceeds. In 1952 petitioner again prepaid interest on a policy loan, immediately borrowing the increased cash loan value of the policy. Petitioner deducted the two interest payments as an interest expense on his 1951 and 1952

25 360 U.S. at 351.
26 *Id.* at 352-53.

income tax returns in the respective years.[1] In 1954 the Commissioner retroactively disallowed both deductions. The full Tax Court reviewed the Commissioner's decision and affirmed the disallowance.[2] On appeal to the United States Court of Appeals for the Third Circuit, *held:* affirmed. The transaction lacked substance and was contrived for the sole purpose of avoiding income taxes. *Weller v. Commissioner,* 270 F.2d 294 (3d Cir. 1959).[3]

The primary issue faced by the court was: did the 4% interest paid on the policy loans constitute "interest" on indebtedness as conceived in § 23(b) of the Internal Revenue Code of 1939?[4]

With the drafting of the Internal Revenue Code of 1954, this issue was legislatively resolved for the future by the disallowance of interest paid on annuity contracts as deductions from gross income.[5] However, petitioner's annuity contract was purchased in 1951 and the deductions were taken in 1951 and 1952. Thus, the instant court was compelled to review the interest deductions under the provisions of the 1939 Code.

The tax codes of this country have long been a fertile field for disputes between the letter and the spirit of the law. The allowance of certain deductions from gross income in the calculation of taxable income have given rise to innumerable ingenious plans whereby the taxpayer could "create" tax deductions with very little expense or risk to himself.[6] In examining these deductions, two general principles of tax-statute interpretation have troubled the courts: (1) the common usage of the words found in the tax statute will be the interpretation given them by the courts,[7]

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1 The petitioner in effect purchased an income tax deduction at less than half price. The structure of the transaction was as follows:

Expenditures			Income Tax Deductions
Initial Premium	$ 2,500.00		
Total Premiums (Bank Loan)	59,213.75		
1951 Prepaid Interest	13,627.30		$13,627.30
1952 Prepaid Interest	9,699.64		9,699.64
Gross Expenditures		$85,040.69	
Less:			
Receipts From Annuity Loans			
1951 Annuity Loan	$ 68,374.00		
1952 Annuity Loan	5,364.00		
Total Loans		73,728.00	
Net Expenditures		$11,312.69	
Total Claimed Deduction			$23,326.94

2 Carl Weller, 31 T.C. No. 5 (Oct. 10, 1958).

3 The facts recited are the facts of W. Stuart Emmons, 31 T.C. No. 4 (Oct. 10, 1958) which is the companion case to the instant case and identical as to the facts.

4 Int. Rev. Code of 1939, ch. 1, § 23 (b), 53 Stat. 1 (now INT. REV. CODE OF 1954 §§ 163 (a), 265 (2)):

> Deductions from gross income. . . . (b) In computing net income there shall be allowed as deductions: . . . . (b) Interest. All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after Sept. 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from the taxes imposed by this Chapter.

5 INT. REV. CODE OF 1954 § 264 (a) (2):

> Certain amounts paid in connection with insurance contracts. (a) General Rule — No deduction shall be allowed for — Any amount paid or accrued on indebtedness incurred or continued to purchase or carry a single premium life insurance, endowment, or annuity contract.
> Paragraph (2) shall apply in respect of annuity contracts only as to contracts purchased after March 1, 1954.

6 An interesting example of the intricate plans devised to create tax savings is found in Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959).

7 Old Colony R.R. v. Commissioner, 284 U.S. 552 (1932).

and (2) no consideration will be given to the motive of the taxpayer in making the transaction.[8]

The "common usage" principle may be found in a landmark case of tax law. In *Old Colony R.R. v. Commissioner*,[9] the court disallowed the tax deduction of interest even though sound financial theory indicated that the "interest" expense claimed was part return of premium and part "effective" interest.[10] The court, averse to investigating the subtleties involved in the nature of interest, accepted the common definition of "money paid for the use of borrowed money" with a construction most favorable to the taxpayer. Further reflection, as will be seen later, has caused the courts to reconsider the nature of "interest."

In *Gregory v. Helvering*[11] the court restated the principle that the motive of the taxpayer should not be considered but qualified it by concluding that regardless of the motivation of tax saving underlying the transaction, the purpose of the statute should not be avoided. The transaction must be in accord with substantial economic reality and must change the flow of economic benefits.[12] The *Gregory* doctrine has become the rule,[13] although the rule finds its best expression in Judge Learned Hand's dissent in *Gilbert v. Commissioner*.[14]

In the area of disallowance of interest deductions, the *Gregory* doctrine has been used in an inquiry as to "indebtedness" on which interest was being paid. Nevertheless, in pursuing this inquiry, the court in the instant case was persuaded to affirm disallowance of the deduction on the ground that the "entire transaction lacks substance"[15] with only a casual reference to the lack of genuine indebtedness. Other cases have delved more deeply into the subject and seemingly have evolved two rules to be applied in determining whether there is genuine indebtedness. If the repayment of the debt is so uncertain as to maturity,[16] or is so risky that it is more venture capital than loan,[17] then the courts hold that there is no debt. Likewise, if the transaction imposes no real liability on anyone,[18] the courts will refuse to view the transaction as creating a debt.

Either the rule of uncertainty as to maturity or lack of genuine liability might be applied to the instant case. The annuity loan given by the insurance company was secured by the cash value of the annuity. That cash value had been created by a single premium payment which itself had been paid for with a bank loan. The bank loan was satisfied with the proceeds from the annuity loan. The petitioner was in reality borrowing what he himself had created at no substantial expense to himself and without liability to anyone. There was no risk to the petitioner and

8 Gregory v. Helvering, 293 U.S. 465 (1935).

9 284 U.S. 552 (1932).

10 The taxpayer had sold bonds at a premium prior to March 1, 1913 (effective date of the income tax statutes) and was amortizing the premium over the life of the bonds. Strict accounting theory would hold that the premium is only a loan by the buyer of the bonds. This is partially returned in each interest payment and thus all interest payments are part "effective interest" and part premium return. The Tax Court contended that either part of the interest should be disallowed as a deduction or the premium considered as income. The court ruled that all the interest should be allowed. See generally KARRENBROCK AND SIMONS, INTERMEDIATE ACCOUNTING 395-400 (3d ed. 1958).

11 293 U.S. 465 (1935).

12 Higgins v. Smith, 308 U.S. 473 (1940); Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957).

13 Higgins v. Smith, 308 U.S. 473 (1940); Minnesota v. Helvering, 302 U.S. 609 (1938); Commissioner v. Transport Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949).

14 "If however, the taxpayer enters into a transaction that does not appreciably affect his beneficial interest except to reduce his tax, the law will disregard it; for we cannot suppose that it was part of the purpose of the act to provide an escape from the liabilities it sought to impose." Gilbert v. Commissioner, 248 F.2d 399, 411 (2d Cir. 1957).

15 Weller v. Commissioner, 270 F.2d 294 (3d Cir. 1959).

16 United States v. Virgin, 230 F.2d 880 (5th Cir. 1956).

17 Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957).

18 Deputy v. du Pont, 308 U.S. 488 (1940); Haffenreffer Brewing Co. v. Commissioner, 116 F.2d 465 (1st Cir. 1940).

no set maturity date for the principal of the loan. Heedful of the Tax Court's inability to find any independent economic purpose in the transaction, the instant court appears to develop the rule that, to comply with the statutory intent, the reduction in tax must be a secondary result of a transaction entered into with economic change as its end. The court was unimpressed with the way the transaction was dealt with on an accounting basis by the insurance company. Thus, refusal to accept accounting theories, which had worked to the taxpayer's advantage in the *Old Colony Railroad* case, was invoked to the taxpayer's detriment in the instant case.

The only other court to face the precise problem presented in *Weller* held differently. The taxpayer in *United States v. Bond*[19] had entered into a transaction identical in every respect to the *Weller* case except that in *Bond* the taxpayer paid the first annuity premium and then immediately borrowed against the cash loan value in order to finance the full payment of all future premiums. The annuity contract expressly disclaimed any personal liability upon the annuitant (taxpayer) and limited any recourse to the cash loan value. The court in *Bond* held that interest paid on the annuity loan was deductible for income tax purposes.

It is doubtful whether the *Bond* decision can be used as precedent for any other proposition than that interest on annuity contract loans was deductible for income tax purposes prior to 1954. This can likewise be deduced by comparing the 1939 Code with the 1954 Code. It is submitted, as similarly recited in Judge John Wisdom's dissent, that the majority did not meet the issue. The question was not whether interest on annuity contract loans was deductible before 1954 but rather, was the deduction claimed in the *Bond* case "interest" as conceived in the 1939 Code.

The majority in *Bond* took judicial notice of the fact that there was no personal liability upon the taxpayer under the annuity loan contract. It concluded that this was immaterial insofar as the question of indebtedness was concerned. This was so because if it were otherwise then the interest on annuity loan contracts and interest paid by a mortgagor's assignee who assumes payment of mortgage interest without liability for the mortgage would not be deductible for income tax purposes.[20] The court's first proposition is of course the point at issue and thus begs the question. In support of the second proposition the court cites section 26.03 of Mertens' *Law of Federal Income Taxation.* An examination of this source indicates that the reason the assignee may deduct the interest although he does not assume the mortgage is that the assignee has an "equitable interest" in the indebtedness and receives economic benefit from it. The taxpayer in *Bond* paid interest on a loan the sole benefit to him being the creation of a tax deduction which, as was indicated above, was insufficient grounds for a tax deduction. In essence then it would seem that the majority in *Bond* overlooked the necessity of some personal liability, direct or indirect, upon the taxpayer. It strains the "ordinary use of words" doctrine stated by the Supreme Court in *Old Colony Railroad* to imagine a personal indebtedness without personal liability, or at least the beneficial interest proposed by Mertens.

Secondly, the court in *Bond* ignored the fact that there was no fixed or certain time when the principal of the debt came due. The loan was to come due only when there was a default on the premium payments or when the total amount of loans exceeded the cash value. Since the total premiums were prepaid the loan would never come due under the first method. The taxpayer could continually borrow up to within $1.00 of the cash loan value and thus be in complete control of the loan's maturity. Nevertheless the majority held that the annuity loans were indebtedness under section 23(b) of the Internal Revenue Code of 1939.

Four months before the *Bond* decision the Fifth Circuit made an exhaustive

19 258 F.2d 577 (5th Cir. 1958).
20 United States v. Bond 258 F.2d 577, 580 (5th Cir. 1958).

analysis of the deductibility of interest on indebtedness in *Guardian Investment Corp. v. Phinney*.[21] The case involved deduction of accrued interest on certain second mortgages. The court disallowed the interest deductions on the ground that the "indebtedness" lacked a determinable maturity date and genuine liability on the part of the taxpayer, thus not representing genuine indebtedness.[22] For the purposes of an income tax expense deduction, very little difference can be found between accrued interest on indebtedness and prepaid interest on indebtedness other than the actual date of the money payment. It is difficult to reconcile the approach of the *Bond* decision with the principles of genuine indebtedness set down by the same court in the *Guardian Trust* case.

The court in *Bond* was not able to fully ignore the long line of decisions repeating the *Gregory* doctrine and felt constrained to show some economic purpose or change in the transaction. This the court did by an elaborate chart showing that the insurance company received returns over and above the amount of the interest payments of the taxpayer by reinvesting these interest payments and thereby making a profit. This point is of no consequence because it is not the insurance company which is claiming the deduction. The rule has been repeatedly recited that the transaction must have been entered into by the taxpayer for some independent economic reason.[23] The court in *Weller* relied on this general rule as the basis for its decision. The transaction indulged in by the petitioner was "without substance."

In summary, the errors made in the *Bond* case serve to indicate that the *Weller* rule probably will prevail in any further litigation of the issue. Furthermore, the misconceptions concerning lack of personal liability, definite date of maturity, and substantial economic purpose serve to illuminate the nature of the theories underlying the *Weller* limitation on deductibility of annuity loan interest under the 1939 Code. Viewing the instant case in the light of the majority of the decisions in the area of interest deductions, the result is simply the application of well-accepted principles to a new set of facts. The absence of deep investigation into the bases underlying the decision may be attributed to the easily applied standards that have developed in prior cases. Where the tests for indebtedness prove overly complicated the court can usually apply the "economic purpose" test without undue confusion.

John R. Martzell

INSTRUCTIONS TO JURIES — PRIMA FACIE EVIDENCE — USE OF TERM PRIMA FACIE EVIDENCE IN INSTRUCTION TO COURT-MARTIAL HELD ERRONEOUS. — Accused were convicted by general court-martial of various offenses in violation of the Uniform Code of Military Justice.[1] The defense presented no evidence at the trial. During the law officer's instructions he gave the following charge:

> Prima facie proof of an essential element of an offense does not preclude the existence of a reasonable doubt with respect to that element. The court may decide, for instance, that the prima facie evidence presented does not outweigh the presumption of innocence. In law, prima facie evidence of a fact is sufficient to establish the fact, unless it is rebutted.

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21 253 F.2d 326 (5th Cir. 1958).

22 The taxpayer in *Guardian* gave its holding company a second mortgage on several houses, payment of which was contingent on the payment of first mortgages to a bank from the proceeds of selling the same houses. Taxpayer claimed a deduction for accrued interest on the second mortgage. The court disallowed the deduction. Guardian Investment Corp. v. Phinney, 253 F.2d 326 (5th Cir. 1958).

23 Gregory v. Helvering, 293 U.S. 465 (1935); Gilbert v. Commissioner, 248 F.2d 399 (2d Cir. 1957); Commissioner v. Transport Trading & Terminal Corp., 176 F.2d 570 (2d Cir. 1949), *cert. denied*, 338 U.S. 955 (1950).

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1 Uniform Code of Military Justice, 10 U.S.C. §§ 985, 921, 930 (Supp. V, 1958). The offenses are escape from confinement, various larcenies, and housebreaking.

On appeal accused contended that the instruction shifted to them the burden of proof, suggested a presumption of guilt, and did not require the government to meet the standard of proof required by the law.[2] *Held,* the use of the instruction was erroneous but not prejudicial when all the instructions and the evidence were considered. *United States v. Simpson,* 10 U.S.C.M.A. 543, 28 C.M.R. 109 (1959).

The "burden of proof" placed upon the prosecution to prove the guilt of the accused beyond reasonable doubt, is not without ambiguity. In the above context "burden of proof" has reference to the burden of persuasion, or as Wigmore terms it, "the risk of non-persuasion."[3] "The burden of persuasion simply does not come into play until the end of the proofs, when the judge charges the jury. . . ."[4] For this reason the instructions must not effect, in the mind of the jury, a shifting of the burden of proof to the accused. However, "burden of proof" has a second meaning — necessity of producing evidence of a particular fact in issue[5] — more properly referred to as the burden of producing evidence. This burden can be said to shift to the accused the duty of going forward with the evidence.[6] Presumably, then, a point in the trial can be reached where, if the defendant fails to meet his duty of going forward with the evidence, a prima facie case is established upon which a jury may find a verdict of guilty.[7] The question is thus raised as to what effect a prima facie case has on the presumption of innocence afforded to an accused, and on the requirement of proof of guilt beyond a reasonable doubt.

The better view appears to be that the presumption of innocence is not "evidence,"[8] and prima facie evidence, therefore, effectively rebuts it. Perhaps the most widely used definition of prima facie evidence, and the one from which most of the others appear to be derived, is that given by Mr. Justice Story in *Kelly v. Jackson:*[9] "such as, in judgment of law is sufficient to establish the fact; and if not rebutted, remains sufficient for the purpose." He further stated that it would be error for the jury to disregard it and, if not discredited, it should operate on the minds of the jurors as decisive to found their verdict as to the fact.[10]

When speaking in terms of prima facie evidence a distinction must be made between the legal effect and the practical effect of such evidence. Legally, prima facie evidence is sufficient to support a verdict of guilty if not rebutted.[11] An instruction that so stated the legal effect of prima facie evidence would not seem to be erroneous. Yet if a jury were told that such was the legal effect, the practical effect may be that in the minds of the jurors, the burden of persuasion has been shifted, or that the presumption of innocence may have been replaced by a presumption of guilt. Anything which in practical effect minimized the burden of persuasion placed on the prosecution would tend to lessen the burden of proof beyond reasonable doubt and would appear to be prejudicial to the defendant.

Although the Uniform Code of Military Justice does not deal specifically with prima facie evidence, the problem of prima facie evidence and the shifting of the burden of proof in instructions has come before the courts-martial before. In *United States v. Miller*[12] the law officer instructed the court that in his opinion the prosecution had presented a prima facie case which was sufficient to counterbalance the

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2 10 U.S.C.M.A. 543, 545, 28 C.M.R. 109, 111 (1959). The dissent accepted this contention and asserted that the error was uncured.
3 9 WIGMORE, EVIDENCE § 2485 (3d ed. 1940).
4 MCCORMICK, EVIDENCE § 307 at 639 (1954).
5 *Id.,* § 306 at 636.
6 *Id.* at 637.
7 Bailey v. Alabama, 219 U.S. 219, 234 (1911).
8 Holt v. United States, 218 U.S. 245, 253 (1910); Agnew v. United States, 165 U.S. 36, 51 (1897).
9 Kelly v. Jackson, 31 U.S. (6 Pet.) 622, 632 (1832).
10 *Ibid.*
11 Bailey v. Alabama, 219 U.S. 219, 234 (1911).
12 6 U.S.C.M.A. 495, 20 C.M.R. 211 (1955).

general presumption of innocence and warrant a conviction if not controlled by evidence tending to contradict it or render it improbable. The Court of Military Appeals held that while the words were in some degree inartful and ill-chosen, and came dangerously near shifting the burden of proof, they were not prejudicial when considered with other instructions.[13] It has also been held that when a prima facie case has been made out a conviction follows unless it can be rebutted and the necessity of adducing evidence to rebut it devolves on the accused.[14]

In *Agnew v. United States*[15] the jury was instructed that "such an inference or presumption throws the burden of proof upon the defendant, and the evidence upon him in rebuttal to do away with that presumption of guilty intent must be sufficiently strong to satisfy the jury beyond a reasonable doubt that there was no such guilty intent. . . ." The Supreme Court held that although the instruction was open to objection for want of accuracy, it was not prejudicial when the charge was considered as a whole.

The prima facie evidence presented by the government in the instant case would seem to put the burden on the accused, not of proving their innocence, but of raising a reasonable doubt as to the efficacy of such prima facie evidence.[16] Such burden would be merely the burden of evidence rather than the burden of persuasion which never shifts.[17] In *United States v. Mullaly*[18] it was held that the burden of going forward with the evidence shifted to the accused when the government established a prima facie case. The Supreme Court has taken a similar position.[19] If this position were followed, the instruction in the present case would not require the accused to prove their innocence, but would require them to raise some doubt as to the prima facie evidence lest it be conclusive against them. Such a rule would not take away their traditional right of not having the burden of proof, as they would only have to introduce enough evidence to create a reasonable doubt and would not have to prove that there is reasonable doubt.[20]

Here, however, the accused presented no evidence. Regardless of the position taken, they would be seriously affected by an instruction which put the burden of proof or burden of evidence upon them. For if they can be said to have the burden of producing evidence to rebut a prima facie case, the effect of telling this to a jury after the accused have presented no evidence will be disastrous. To avoid the confusion of thought engendered in the minds of the jurors by the use of such terms, it is submitted that their use should be avoided in jury instructions. Any necessity for additional instructions to correct or clarify instructions previously given will likewise be avoided and possibility of prejudice to the accused is minimized.

William J. Luff, Jr.

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13 *Ibid.*

14 United States v. Dowling, 18 C.M.R. 670 (1954), *pet. for review granted,* 18 C.M.R. 832, *motion for petition to withdraw granted,* 18 C.M.R. 833 (1955); United States v. Hansen, 8 C.M.R. 231 (1952).

15 165 U.S. 36, 49-50 (1897).

16 See the instruction held valid in Fout v. Commonwealth, 199 Va. 184, 98 S.E.2d 817, 824 (1957). *But see,* Chaffee & Co. v. United States, 85 U.S. (18 Wall.) 516 (1873).

17 For the distinction between burden of proof and burden of evidence see 9 WIGMORE, EVIDENCE, §§ 2485, 2487, 2494 (3d ed. 1940); Note, *Constitutionality of Rebuttable Statutory Presumptions,* 55 COLUM. L. REV. 527-549 (1955).

18 9 C.M.R. 150, 154 (1952).

19 Agnew v. United States, 165 U.S. 36, 50 (1897).

20 United States v. Miller, 6 U.S.C.M.A. 495, 499, 20 C.M.R. 211 (1955): ". . . the onus placed on an accused person by the law properly requires that he do no more than induce reasonable doubt in the minds of the members of the court-martial. . . ." *But see,* Arthur v. State, 227 Ind. 493, 86 N.E.2d 698, 700 (1949): "Any instruction by the court which . . . would in any manner place the burden upon the appellant to prove his innocence, or force him to introduce evidence to create a reasonable doubt in the minds of the jurors, is erroneous." See also the clarification of the term prima facie evidence suggested in Barton v. Camden, 147 Va. 402, 137 S.E. 465, 468 (1927).

MAILS — INTERIM IMPOUNDING ORDER — POST OFFICE DEPARTMENT DENIED AUTHORITY TO DETAIN MAIL PRIOR TO TERMINATION OF FRAUD ORDER PROCEEDINGS. — Petitioner sent advertisements through the mails soliciting money for the purchase of Tigron tablets, which would allegedly reactivate sexual potency and lost sex energy. Relying on a report from the Department of Health, Education and Welfare, which disclaimed the alleged efficacy of the tablets, the Post Office Department docketed a complaint against Tigron, recommending that a fraud order be issued pursuant to 39 U.S.C. §§ 259,[1] 732.[2] Petitioner's mail was then impounded pending determination of proceedings instituted by the Post Office Department for identification of Tigron, in accordance with 39 U.S.C. § 255[3] and for a fraud order pursuant to 39 U.S.C. § 259.[4] After the petitioner had complied with the identification requirement, but prior to the fraud hearing, the interim mail impounding order was extended by order of the Post Office Department. Petitioner then filed a complaint in a New Jersey federal district court seeking a preliminary and permanent injunction restraining the enforcement of the extended interim impounding order. *Held:* preliminary injunction granted. Until the administrative proceedings have terminated in a fraud order, 39 U.S.C. § 259[5] vests no authority in the Postmaster General to issue interim impounding orders. Greene v. Kern, 174 F. Supp. 480 (D.N.J.), *aff'd per curiam*, 269 F.2d 344 (3d Cir. 1959).

The Constitution granted Congress the power to establish a postal system,[6] and the power to regulate the mails was subsequently found to be implicit in this original grant.[7] As early as 1872 Congress authorized the Postmaster General to deny payment of money orders and delivery of registered letters to anyone he found to be using the mails to obtain money by false pretenses.[8] Further, at this time placing materials in the mail in furtherance of a fraudulent scheme was made a crime.[9]

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1 This section provides:

> The Postmaster General may, upon evidence satisfactory to him that any person . . . is . . . conducting any . . . scheme . . . for obtaining money . . . through the mails by means of false or fraudulent . . . representations, or promises, instruct postmasters at any post office at which registered . . . or any other letters or mail matter arrive directed to any such person . . . to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Fraudulent" plainly . . . stamped upon the outside thereof; and all such mail matter so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. Nothing contained in this section shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself. . . .

2 This section provides:

> The Postmaster General may, upon evidence satisfactory to him that any person . . . is conducting any . . . scheme for obtaining money . . . through the mails by means of false or fraudulent . . . representations, or promises, forbid the payment by any postmaster to said person . . . of any postal money orders drawn to his . . . order . . . any may provide by regulation for the return to the remitters of the sums named in such money orders. . . .

3 This section provides:

> The Postmaster General may, upon evidence satisfactory to him, that any person is using any fictitious, false, or assumed name, . . . or address in conducting . . . by means of the Post Office Establishment of the United States, any business scheme for fraudulent purposes instruct any postmaster at any post office at which such letters . . . addressed to such fictitious, false, or assumed name or address arrive to notify the party claiming or receiving such letters, . . . to appear at the post office and be identified; . . .

4 17 Stat. 323 (1872), 39 U.S.C. § 259 (1952).

5 17 Stat. 323 (1872), 39 U.S.C. § 259 (1952).

6 U.S. CONST. art. I, § 8.

7 Public Clearing House v. Coyne, 194 U.S. 497 (1904) (constitutionality of postal fraud statutes upheld).

8 17 Stat. 323, as amended 26 Stat. 466, 39 U.S.C. § 732 (1952).

9 17 Stat. 323 (1872), as amended 66 Stat. 722 (1952), 18 U.S.C. § 1341 (1952).

Letters and other materials sent by mail for fraudulent purposes have been declared non-mailable,[10] and the Postmaster General's power to issue fraud orders was extended in 1895 to include all fraudulent material sent by mail.[11] Other statutes have also been passed by Congress seeking to protect the public against the fraudulent use of the mails.[12]

Post Office Department practices in fraud order cases are covered by regulations promulgated by the Department[13] in conformity with the Administrative Procedure Act.[14] Although these regulations do not mention interim impounding orders, such orders have been used by the Post Office Department.[15] They are issued at the time a formal complaint is docketed against a supposed fraudulent use of the mails.[16] Once the impounding order is issued, all mail addressed to the suspect is detained at his local post office pending final termination of fraud order hearings. There is no administrative remedy available in an interim impounding situation;[17] hence, injunctive relief must be sought from the courts.[18]

Such relief was obtained in an early case, *Donnell Mfg. Co. v. Wyman*,[19] against the temporary impounding order on the ground that no explicit statutory authority existed for the order. In addition, petitioner's mail had been detained for six weeks, and the court considered this an unreasonable amount of time. The court, however, said:

> This court does not now hold that the Postmaster General cannot make all needful orders pending the hearing and in furtherance of the hearing. . . . It may be . . . that the Postmaster General can make proper orders to protect the public from schemes of swindlers.[20]

A recent decision, *Williams v. Petty*,[21] on the other hand, denied injunctive relief to a petitioner who had extended the length of time his mail was detained by requesting a delay in the fraud order hearing. In dismissing petitioner's contention that no statutory authority existed for the temporary impounding of mail prior to a fraud hearing the court stated: "[I]t is my judgment that the authority to impound mail pending a hearing is *implicit* in the authority of the Postmaster General to direct that the mail be returned to the original sender after a fraud order is issued." (Emphasis added.)[22] An indication was also given that as long as there was no unreasonable delay in the administrative proceedings, no relief from an interim impounding order would be granted.[23] In a later case, *Barel v. Fiske*,[24] a petitioner, before the company involved had been adequately identified as required by statute in postal fraud order cases, sought injunctive relief. Because of this non-compliance the court upheld the summary impounding order, but indicated that even had petitioner satisfactorily identified the company, "the Postmaster General has the authority to impound

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10 25 Stat. 824 (1889), 39 U.S.C. § 256 (1952).
11 26 Stat. 466 (1890), as amended, 28 Stat. 964 (1895), 39 U.S.C. § 259 (1952).
12 Securities and Exchange Act, 48 Stat. 77, 906, 15 U.S.C. § 77e (2) (1952); Federal Trade Commission Act, 52 Stat. 114, 15 U.S.C. § 52 (1952).
13 39 C.F.R. § 201.1-34 (Supp. 1959).
14 60 Stat. 239 (1946), 5 U.S.C. § 1004 (1958).
15 See Hart, *The Postal Fraud Statutes: Their Use and Abuse*, 11 Food Drug Cosm L. J. 245 (1956).
16 Greene v. Kern, 174 F. Supp. 480, 482 (D.N.J.), *aff'd per curiam*, 269 F.2d 344 (3rd. Cir. 1959).
17 If respondent desires to cease his activities without having a final determination on the question of their illegality, he may file an affidavit to that effect in accordance with 39 C.F.R. § 201.11 (b) (Supp. 1959) and apparently the stop order will be lifted.
18 See Jaffe, *The Right to Judicial Review*, 71 Harv. L. Rev. 401 (1958) and Kramer, *The Place and Function of Judicial Review in the Administrative Process*, 28 Fordham L. Rev. 1 (1959) for a general discussion on the right to judicial review.
19 156 Fed. 415 (C.C.E.D. Mo. 1907).
20 *Id.* at 417.
21 136 F. Supp. 283 (E.D. Okla. 1953).
22 *Id.* at 285.
23 *Id.* at 286. *Cf.* Donnell Mfg. Co. v. Wyman, 156 Fed. 415 (C.C.E.D. Mo. 1907).
24 136 F. Supp. 751 (S.D.N.Y. 1954).

suspect mail matter pending decision of the question whether the mails are being used unlawfully."[25]

Strong disapproval of the issuance of interim impounding orders, however, has been voiced by Mr. Justice Douglas. In *Stanard v. Olesen*,[26] he stated: "I find no statutory authority of the Post Office Department to impound mail without a hearing and before there has been any final determination of illegal activity." However, injunctive relief was denied because petitioner's case was then pending in the court of appeals and a decision on the issue would render the case moot.

Petitioner in the instant case relied on *Stanard v. Olesen*[27] in seeking injunctive relief against the interim impounding order. The instant court granted the requested injunction, ignoring prior decisions upholding its use, in apparent reliance on the dicta from *Stanard v. Olesen*.[28] The court further found that the requirements of due process precluded the use of summary power by the Postmaster General in a fraud situation.[29]

In reaching its decision the court reasoned that section 259 of the code grants no express statutory authority to the Postmaster General to issue interim mail impounding orders. Thus, if the authorization did exist, it would have to be implicit; but to imply such authority would render section 259 unconstitutional as a taking without due process of law. Here the court noted that the petitioner would be deprived of the use of the remittances contained in the mail.[30] In keeping with the general policy of the constitutional interpretations of statutes,[31] the court was unwilling to find such an implication. As a further indication that such summary power was not implicit, the court pointed to section 259b,[32] which expressly provides for a twenty-day interim impounding of obscene material prior to an administrative hearing, and section 259c,[33] which exempts obscenity cases from Administrative Procedure Act requirements. It reasoned that, since Congress explicitly gave such summary power to the Post Office in dealing with the fly-by-night disseminator of obscene material, it was a reasonable inference that Congress would not implicitly grant such a far-reaching power in dealing with schemes to defraud, and it is not for the court to so extend the law.[34]

Here, however, the court tacitly admits the constitutionality of the power exercised in the interim impounding order in section 259b. But if the taking involved in the use of such orders is violative of due process, no statutory authorization by Congress could validate such procedure. Conversely, if Congress could authorize the impounding order, then the order is not unconstitutional. If the latter view is adopted, the instant court's asserted basis for disclaiming an implicit power in section 259 to grant interim impounding orders, is unsound. On the other hand, if the "taking" is unconstitutional, then the court cannot logically rely on the explicit granting of power found in section 259b as an alternative basis for its decision, since

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25 *Id.* at 752.

26 74 Sup. Ct. 768, 770 (Douglas, Circuit Justice 1954). See Schwartz, *Administrative Law*, 30 N.Y.U. L. REV. 85, 101-02 (1955) for a discussion of this case.

27 74 Sup. Ct. 768 (Douglas, Circuit Justice 1954).

28 *Ibid.*

29 174 F. Supp. at 484.

30 *Ibid.*

31 See Crowell v. Benson, 285 U.S. 22, 62 (1932).

32 70 Stat. 699, 39 U.S.C. § 259b (1955) provides:

> Whenever the Postmaster General shall determine during proceedings before him that in the administration of . . . this title, such action is necessary . . . he may enter an interim order directing that mail addressed to any person be held and detained by the postmaster at the post office of delivery for a period of twenty days from the effective date of such order. . . .

33 70 Stat. 699 (1955), 39 U.S.C. § 259c provides:

> Action by the Postmaster General in issuing the interim order . . . shall not be subject to the requirements of the Administrative Procedure Act. . . .

34 174 F. Supp. at 485.

the exercise of this power would also be an unconstitutional taking, unless a distinction can be made as to the taking involved. A distinction might possibly be drawn on the basis that obscene material is potentially more dangerous to public interests than is fraudulent advertising. Such a distinction would involve the recognition of a "constitutional" difference between the dissemination of obscene material and the perpetration of fraud. Under this theory protection of a paramount public interest would warrant the granting of summary, "emergency" power. Yet Congress has already indicated that the public is entitled to summary protection from fraudulent use of the mails. Both the Federal Trade Commission and the Securities Exchange Commission have limited jurisdiction of the mails in fraud cases.[35] If the interests of the public require it, these commissions are empowered to bring suit in a federal district court to enjoin alleged fraudulent use of the mails pending final administrative determination of actual fraud.[36]

In view of the possible far-reaching consequences of the instant decision, it cannot pass without criticism. A contradiction exists between the court's due process argument and its reasoning in denying that section 259 implicitly authorizes the issuance of interim impounding orders in fraud cases. Either the court did not see this contradiction or, in seeing it, made a distinction as to the taking involved in obscenity and fraud cases. If such a constitutional distinction exists, then the instant decision is sound. However, it is submitted that such a distinction is unwarranted. And, if this is so, then the constitutionality of section 259b has been placed in serious doubt. Congress should, therefore, act to expressly authorize the use of interim impounding orders by the Postmaster General in fraud order cases.

William R. Kennedy

NEWSPAPERS — CONTEMPT — IMPROPER COMMENTS ON PENDING JUDICIAL ACTION. — The Supreme Court of Colorado heard on appeal a tax dispute between the State Board of Equalization and Arapahoe County and, in announcing a decision in favor of the board, delayed publication of its formal written opinion for one week. At the time the decision was announced the opinion had been written, but had not been prepared for publication. Four days later respondent published an editorial in his newspaper attacking the decision,[1] suggesting that it was inspired by political rather than legal considerations,[2] and intimating that popular disapproval might result in a written opinion mitigating some of the decision's rigor.[3] Under Colorado procedure, the parties had time to file for rehearing. Two days after the editorial — six days after the decision — a thirty-two page opinion was printed. Two days after the publication the court, on its own motion, cited respondent for constructive criminal contempt. Respondent filed an answer to the citation and orally defended himself in an open hearing. *Held;* two of six participating justices dissenting: not guilty. *In Re Jameson,* 340 P.2d 423 (Colo. 1959).

Contempt by publication, the common law court's most effective cudgel in defending itself from journalists, has been curtailed, if not obliterated, by a solid phalanx of relatively recent United States Supreme Court decisions. Early opinions left de-

35 15 U.S.C. § 77e (2) (Supp. 1952) (SEC has jurisdiction of securities sent through the mails). 15 U.S.C. § 52 (1) (1952) (FTC).

36 15 U.S.C. § 77t (b) (Supp. 1952) (SEC). 15 U.S.C. § 53 (1952) (FTC).

1 "the court has chiseled away more of our vanishing local governmental rights." The Englewood Herald, Mar. 2, 1959; quoted in 340 P.2d 423, 424 (1959).

2 "Or could it be that the justices—they are elected state-wide, too — felt that the problem of getting politically powerful school teachers paid on time justifies the means used of issuing a quick ruling without legal opinion in its support?" *Ibid.*

3 "Could it have been that if the populace should rise up in wrath that the opinion could temper down the ruling, or, if it went almost unnoticed, the court could breathe easier and file an opinion backing up its ruling to the hilt?" *Ibid.*

termination of contempts largely up to state law,[4] holding that if the publication had "a reasonable tendency" to obstruct justice, freedom of speech and the press were not offended by summary punishment for contempt.[5] Since 1941, both federal[6] and state[7] courts have been limited in finding published contempt to those cases in which there is "a clear and present danger" to the administration of justice.

Using a test first applied in a World War I espionage case,[8] the court in *Nye v. United States*[9] denied to federal courts, and in *Bridges v. California*,[10] to state courts, the broad summary power traditionally exercised by English judges.

Solidifying its position in *Bridges*, the court in the last eighteen years has applied the "clear and present danger" test with an unanimous record of reversals of state convictions for contempt by publication.[11] Both courts and legal scholars now generally recognize the test as controlling.[12] State courts occasionally show a tendency to use other standards,[13] but the tightening of contempt power has been general, extending even to English-speaking courts outside the United States.[14]

The Supreme Court's use of the fourteenth amendment as a virtual roadblock to punishment for contempt by publication has escaped neither opposition nor ambiguity. None of the leading cases has been decided without dissent[15] and no dependable definition of the "clear and present danger" rule has emerged from the half dozen discussions of it since *Bridges*.[16] It remains to conjecture whether the court would be as rigorous in cases involving juries as it has been in appeals from cases tried solely to the court,[17] but there is apparently no permissable distinction to be drawn between elected and appointed judges.[18]

Constructive contempt is a criminal offense punishable summarily without a jury trial.[19] It is ordinarily instituted by the offended court on its own motion and is considered to be aimed at vindication of a public, as distinguished from a private, wrong.[20] Usual procedural safeguards are not required, as they are in civil contempt proceedings.[21] The offense is predicated on the act and the tendency of the act;

4 Patterson v. Colorado, 205 U.S. 454 (1907).
5 Toledo Newspaper Co. v. United States, 247 U.S. 403 (1918).
6 Nye v. United States, 313 U.S. 33 (1941).
7 Bridges v. California, 314 U.S. 252 (1941).
8 Schenck v. United States, 249 U.S. 47 (1919), construing the Espionage Act, 40 Stat. 217, 219 (1917).
9 313 U.S. 33 (1941).
10 314 U.S. 252 (1941).
11 Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946).
12 See People v. Goss, 10 Ill. 2d 533, 141 N.E.2d 385 (1957), and comment, 24 BROOKLYN L. REV. 123 (1957); Note, *The Contempt Power in Montana: A Cloud on Freedom of the Press,* 18 MONT. L. REV. 68 (1956). *But cf.* the test set forth in THAYER, LEGAL CONTROL OF THE PRESS 489, 505-07 (3d ed., 1956). Thayer regards the old *Toledo Newspaper* test of "reasonable tendency" and the *Bridges* test as alternatively valid.
13 The Florida court, possibly risking another *Pennekamp,* recently concentrated on a litigant's right to fair trial to the exclusion of the *Bridges* yardstick. Brumfield v. State, 108 So.2d 33 (Fla. 1959).
14 See, *e.g.,* John Fairfax & Sons Pty. Ltd. v. McRae, 93 Commw. L.R. 351 (Austl. 1955), and Consolidated Press Ltd. v. McRae, 93 Commw. L.R. 325 (Austl. 1955). *Cf.* Comment, 7 RES JUDICATAE 195 (1955).
15 "I shall remain unreconciled, as long as I live, to the notion that the right of talking takes precedence over the duty to conduct trials in the only way they can be conducted fairly." Frankfurter, J., commenting during oral argument in *In Re* Sawyer, 360 U.S. 622 (1957); see U.S.L. WEEK 3331, 3332 (1958).
16 Justice Reed used six definitions in Pennekamp v. Florida, 328 U.S. 331, 333 (1946). See Communications Assn. v. Douds, 339 U.S. 382, 398 (1950); Whitney v. California, 274 U.S. 357, 376 (1927).
17 No constructive criminal contempt by publication involving a jury case has been before the court since *Bridges.*
18 Craig v. Harney, 331 U.S. 367, 377 (1947).
19 Bullock v. United States, 265 F.2d 683 (6th Cir. 1959).
20 MacNeil v. United States, 236 F.2d 149 (1st Cir. 1956).
21 Quezada v. Superior Court, 340 P.2d 1018 (Cal. Dist. Ct. App., 2d Dist., 1959). See Green v. United States, 356 U.S. 165 (1958).

intention to obstruct justice is important, but not strictly necessary, and disclaimer of intent is probably not a valid defense.[22]

The case out of which the publication arises must be pending in a real, and not merely technical, sense;[23] but exact determination of the meaning of "pending" is still apparently a question of local law.[24] At least one state retains a statute punishing "contemptuous" statements concerning past judicial acts.[25] A state court has upheld the statute,[26] but its survival under the "clear and present danger" test before a federal court is at best dubious.

Power to punish for contempt is inherent in a court of law; statutes may modify it procedurally,[27] but every legislative attempt to take it away entirely has been jealously spurned.[28] It is usually said that the court must have had jurisdiction in the matter out of which the contempt arose.[29]

The modern decisions on the subject make it crystal clear that the essential purpose of contempt power is the assurance of a fair trial to litigants, rather than protection of judicial dignity.[30] As the Indiana court once colorfully put it, "whatever may bring the law into contempt is a public calamity which, if continued, will eventually lead to anarchy and Bolshevism." [31]

In any event, fair trial considerations must be viewed in the context of the "clear and present danger" test.[32] This often necessitates a continuance or new trial in cases where a litigant's rights are put in peril even though no contempt arises under the modern rationale.[33] To complicate the problem, defendants in criminal actions have a right to a public trial, which presumably includes some amount of publicity.[34]

A court hearing a constructive criminal contempt action which originated during previous litigation in the same forum faces the delicate choice of finding the publisher guilty, and thereby admitting that it was influenced by the offending words,[35] or vindicating its judicial impartiality and dismissing the citation. The

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22 State v. Schumaker, 200 Ind. 623, 163 N.E. 272 (1928); Ray v. State, 186 Ind. 396, 114 N.E. 866 (1917); Regina v. Odhams Press Ltd., 3 W.L.R. 796 (1956). For discussion of elements of the offense, see THAYER, *op. cit. supra,* note 12, at 498, and DANGEL, CONTEMPT 168, 169-70 (1939).

23 See concurring opinion, Frankfurter, J., in Pennekamp v. Florida, 328 U.S. 331, 369 (1946); Craig v. Hecht, 263 U.S. 255 (1923); Nixon v. State, 207 Ind. 426, 193 N.E. 591 (1935).

24 A determination not without its problems. See State v. District Court, 99 Mont. 33, 43 P.2d 249 (1935), *following* Grice v. District Court, 37 Mont. 590, 97 Pac. 1032 (1908).

25 VA. CODE ANN. § 18-255 (1950).

26 Weston v. Commonwealth, 195 Va. 175, 77 S.E.2d 405 (1953).

27 Wyatt v. People, 17 Colo. 261, 28 Pac. 961 (1892); *cf.* Commonwealth v. Hoffman, 152 A.2d 726 (Pa. 1959), construing PA. STAT. tit. 42, § 1080 (1936).

28 *Ex parte* Shuler, 210 Cal. 377, 292 Pac. 481 (1930); Telegram Newspaper Co. v. Commonwealth, 172 Mass. 294, 52 N.E. 445 (1899); *In Re* Assignment of Huff, 352 Mich. 402, 91 N.W.2d 613 (1958); State v. Goff, 288 S.C. 17, 88 S.E.2d 788 (1955).

29 Lane v. Bradley, 339 P.2d 583 (Cal. Dist. Ct. App., 1st Dist. 1959); Harvey v. Prall, 97 N.W.2d 306 (Iowa 1959); State v. Olsen, 340 P.2d 171 (Wash. 1959).

30 See, *e.g.,* Tribune Review Publishing Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957).

31 Coons v. State, 191 Ind. 580, 134 N.E. 194 (1922).

32 Baltimore Radio Show v. State, 193 Md. 300, 67 A.2d 497 (1949).

33 A continuance was granted in United States v. Dioguardi, 147 F. Supp. 421 (S.D.N.Y. 1956), but denied in United States v. Hoffa, 156 F. Supp. 495 (S.D.N.Y. 1957) and Irvin v. Dowd, 153 F. Supp. 531 (N.D. Ind. 1957). Whether or not a continuance is called for is a matter within the discretion of the trial court. Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951); Commonwealth v. Richardson, 392 Pa. 528, 140 A.2d 828 (1958); Commonwealth v. Harrison, 137 Pa. Super. 279, 8 A.2d 733 (1939). But interference with a fair trial by the press is a constitutional ground for reversal. Shepherd v. Florida, 341 U.S. 50 (1951).

34 People v. Jelke, 308 N.Y. 56, 123 N.E.2d 769 (1954).

35 This admission lies at the core of the dissent in the instant case. 340 P.2d 423, 438 (1959). It becomes no less delicate when an appellate court considers the contempt conviction: "To say that [the words] had the effect of intimidating, coercing or influencing the judge from

Colorado court, in other words, had either to admit that Jameson's editorial disturbed it enough to present an obstacle to justice or deny the effect of his words and release him. If the publisher has merely attempted to influence, but has not succeeded, he has, by the Colorado court's reasoning, not committed a contempt.[36]

Contempt, of course, is a weapon peculiar to the judicial arsenal which does not foreclose use of more common weapons. A judge may certainly resort to the courts for damages in cases involving libel; and the instant opinion implies that Jameson may be liable for both criminal and civil libel.[37] The court may give an offending publisher a severe tongue-lashing and release him without risking reversal on constitutional grounds.[38] Indicating the availability of extra-legal pressures, the instant court suggested that the newspapermen of Colorado should have been able to prevent Editor Jameson's irresponsible journalism.[39]

The Colorado court's decision is probably in accord with the judicial temperament since 1941. But future contempt cases, particularly those involving juries, may of necessity retreat from a situation in which "the power theoretically possessed by the State is largely paralyzed."[40]

Thomas L. Shaffer

PROCEDURE — TRIAL BY JURY — UNLESS INADEQUACY OF LEGAL REMEDIES CAN BE SHOWN LEGAL ISSUES MUST BE TRIED BY JURY PRIOR TO COURT TRIAL OF THE EQUITABLE ISSUES. — Plaintiff brought action to enjoin the defendant from instituting an antitrust suit against the plaintiff, requesting also a declaration that a grant of clearance, whereby plaintiff was allowed to show first-run movies before any other theater, was not in violation of the antitrust laws. The defendant counterclaimed for treble damages under the antitrust laws and requested a trial by jury. Upon affirmance by the court of appeals of the trial judge's decision to try the equitable issues to the court prior to jury determination of the antitrust violations charged in the counterclaim, and of his denial of defendant's demand for a jury

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his course of duty is to fail to accord him the strength of character and judicial fortitude . . . so vividly exemplified by the long record of his judicial acts." Smotherman v. United States, 186 F.2d 676 (10th Cir. 1950).

36 Contrast the instant decision, for instance, with the import of the following exchange at the hearing:

"MR. JUSTICE DAY: Didn't you in fact say that as a result of public clamor, including your own opinion, that this opinion might be withdrawn and otherwise be reversed on that particular ground? Would you say that, that you were part of the clamor?
"MR. JAMESON: If you please, I would rather not answer the clamor.
"MR. JUSTICE DAY: You used something about the public rising up.
"MR. JAMESON: Yes, there's a reference to that sort of thing.
"MR. JUSTICE DAY: And you were part of the rising up against us, were you not, the public rising up against us, and you inferred if it was loud enough, that the opinion would be either tempered down or withdrawn, and that if it went unnoticed, then the opinion would stand, that these were the things that determined it, isn't that what you said?
"MR. JAMESON: I will let the editorial speak for itself.
"MR. JUSTICE HALL: You chose your words advisedly?
"MR. JAMESON: Yes, sir, I did." COLORADO PRESS ASSOCIATION, SPECIAL LEGISLATIVE AND LEGAL BULLETIN, Mar. 20, 1959, p. 12.

37 Editorial referred to as "defamatory," 340 P.2d 423, 427, 428; liability for libel is discussed at 429.

38 This is an alternative not to be discounted. The instant court resorted to it, as the Colorado Press Association predicted it would. COLORADO PRESS ASSOCIATION, CONFIDENTIAL BULLETIN, March 26, 1959, p. 1. The procedure has been followed in earlier cases. People v. Stapleton, 18 Colo. 568, 33 Pac. 167 (1893); State v. Faulds, 17 Mont. 140, 42 Pac. 285 (1895); State v. Magee Pub. Co., 29 N.M. 455, 224 Pac. 1028 (1924).

39 340 P.2d 423, 429 (1959). Another instance: "The law-abiding, intelligent and patriotic people of this state will effectually settle the matter, if they are ever given an opportunity to deal with it." State v. Shepherd, 117 Mo. 205, 76 S.W. 79 (1903).

40 Frankfurter, J., concurring in Dennis v. United States, 341 U.S. 494, 532 (1951).

trial of the facts involved,[1] the Supreme Court granted certiorari. *Held,* reversed. Where equitable and legal claims are both present, the right to trial by jury of the legal claims takes precedence, unless inadequacy of legal remedies can be shown. *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959).

The seventh amendment preserves[2] the right to trial by jury in actions at common law, and the courts have endeavored to make certain that this right, as it existed at the time of the ratification of the Constitution, is in no way curtailed.[3] With the adoption of the Federal Rules of Civil Procedure the distinction between actions in equity and at law was abolished and it was made possible, and even necessary, that all actions be brought at the same time.[4] Thus, the problem has been raised with jury-trial implications as to which issue, legal or equitable, is to be tried first.[5]

In *North American Philips Co. v. Brownshield,*[6] where the plaintiff sought an injunction and the defendant presented a legal counterclaim, the court refused to permit a jury trial and held that equity would decide the issues common to both claims, any remnants then being decided at law by the jury. In a similar case[7] a jury trial demanded by the defendant was refused when his legal counterclaim was dismissed. *Union Cent. Life Ins. Co. v. Burger*[8] held that the equitable issues were to be determined first, even if such action would be dispositive of all the issues in the case. However, ordinarily where the result of such order of trial would be to completely deprive a party of his right to a jury trial, priority will be given to the jury trial of the legal issues. *Leimer v. Woods,*[9] however, makes it quite plain that the right to a trial by jury can be done away with in cases in which equitable and legal claims are mixed only if there are very special reasons for so doing. In one case, decided soon after the adoption of the Federal Rules, there is even a hint that all factual issues involved should be submitted to the jury.[10]

To determine which issue is to be tried first, Professor Moore[11] suggests that the court must look to the basic issues between the parties to see whether they are of a legal or equitable nature. Priority is then to be given to that issue more in accord with the nature of the basic claim. The courts have tended to follow this reasoning.[12] Thus in *Ryan Distrib. Corp. v. Caley,*[13] where the plaintiff sought an injunction and a declaration that a patent of the defendant was either invalid

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1 Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).

2 "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

3 In Dimick v. Schiedt, 293 U.S. 474, 486 (1935), as quoted on page 501 of *Beacon,* the court stated: "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

4 FED. R. CIV. P. 13 (a) (b).

5 See generally, ANNOT., 13 A.L.R.2d 777 (1950).

6 9 F.R.D. 132 (S.D.N.Y. 1949); *accord,* Bendix Aviation Corp. v. Glass, 81 F. Supp. 645 (E.D. Pa. 1948).

7 Beaunit Mills, Inc. v. Eday Fabric Sales Corp., 124 F.2d (2d Cir. 1942).

8 27 F. Supp. 554, 555 (S.D.N.Y. 1935); *accord,* United States Fid. & Guar. Co. v. Janich, 3 F.R.D. 16, 19 (S.D. Cal. 1943).

9 196 F.2d 828 (8th Cir. 1952).

10 "The entire case should have been submitted to a jury. The factual issues should not have been tried piecemeal." Pacific Indem. Co. v. McDonald, 107 F.2d 446, 449 (9th Cir. 1939).

11 5 MOORE, FEDERAL PRACTICE ¶38.14 at 147 (2d ed. 1951).

12 It seems equally clear that where the complaint contains matter which is equitable in character and the counterclaim is legal in character, the court must determine the nature of the basic issues and if these are legal in character a demand for a jury trial must be granted. General Motors Corp. v. California Research Corp., 9 F.R.D. 565, 568 (D. Del. 1949).

13 51 F. Supp. 377 (E.D. Pa. 1943).

or was not being infringed upon, the court granted a jury trial because of the damage issue as counterclaimed by the defendant, stating that the basic issues presented by both claims centered around the validity of a patent and its infringement, which are legal issues.

Generally, the application of the above standard is viewed as being within the discretion of the trial judge. *American Life Ins. Co. v. Steward*[14] held that, since a court has control over its own docket, it can decide which issue is to be given preference. A similar idea was also presented at a later date in *City of Morgantown v. Royal Inc. Co.*[15] where the plaintiff sued for reformation of a contract and was met with a counterclaim for recovery on the policy as well as a contest over the reformation. The court said:

> The latter [counterclaim] was a conventional action at law which, under the Constitution, entitled the defendant to a jury trial. The judge continued this action at law until the prior equitable proceeding could be concluded. . . . Here there was no intervention by a court of equity in proceedings at law, but "a mere stay of proceedings which a court of law, as well as a court of equity, may grant in a cause pending before it by virtue of its inherent power to control the progress of the case so as to maintain the orderly process of justice."[16]

In order to determine whether the basic nature of the claim is legal or equitable, the courts have looked to the days of English Chancery when the rules of equity were formulated.[17] In the legislation enabling the Supreme Court to establish court rules, Congress indicated its desire that these basic rules not be enlarged. They warned: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."[18] The same is true of the Declaratory Judgment Act.[19] It has been stated that this act, by itself, does not make the fact issues either legal or equitable;[20] the act is sui generis;[21] "the real nature of the issue whether equitable or legal in such a suit depends upon the nature of the case."[22] Until the present case, the courts have given effect to these declarations.[23]

Since there was to be no change wrought in the judicial system regarding the right to trial by jury with the enactment of the Declaratory Judgment Act and the Federal Rules, the rules to determine equity's jurisdiction existing prior to the adoption of the Federal Rules would appear to govern. Thus equity's jurisdiction would not be defeated unless the legal remedy is equally prompt and certain and in other ways efficient.[24] Nor is equitable jurisdiction existing at the filing of a bill destroyed because an adequate legal remedy may have become available thereafter.[25]

It appears that the instant Court relies chiefly upon the traditional equity jurisdictional requirements of irreparable harm and inadequacy of legal remedies

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14 300 U.S. 203, 215 (1937). *Contra,* Enelow v. New York Life Ins. Co., 293 U.S. 379 (1935).

15 337 U.S. 254 (1949).

16 *Id.* at 260. *But see,* Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942) which holds that the decision of a court to hear an equity claim prior to a legal claim is really an injunction against the legal claim.

17 "The equity jurisdiction conferred on inferior courts of the United States. . . is that of the English Court of Chancery at the time of the separation of the two countries." Matthews v. Rodgers, 284 U.S. 521, 529 (1932). See Pennsylvania v. Wheeling Bridge Co., 54 U.S. 556, 604 (1852).

18 28 U.S.C. § 2072 (1958).

19 28 U.S.C. §§ 2201-02 (1958).

20 Hargrove v. American Cent. Ins. Co., 125 F.2d 225, 228 (10th Cir. 1942).

21 Pacific Indem. Co. v. McDonald, 107 F.2d 446 (9th Cir. 1939).

22 Connecticut Gen. Life Ins. Co. v. Candimat Co., 83 F. Supp. 1, 2 (D. Md. 1949).

23 "However, it is not the purpose to expand the strict concept of a law action by rationalization beyond that covered by the constitutional guaranty." Schaefer v. Gunzburg, 246 F.2d 11, 15 (9th Cir.), *cert. denied,* 355 U.S. 831 (1957); Fitzpatrick v. Sun Life Assur. Co. of Canada, 1 F.R.D. 713, 715 (D.N.J. 1941).

24 American Life Ins. Co. v. Stewart, 300 U.S. 203, 214-15 (1937).

25 *Ibid.*

to support its holding. The Court reasons that since inadequacy of legal remedies and the threat of irreparable harm are traditional requirements for equitable jurisdiction, at least as much is required under the Federal Rules to allow equitable claims to be tried ahead of legal ones since, in effect, this is the same as enjoining the legal claim.[26] But the Court felt that whether or not these criteria exist is to be determined in the light of *modern* judicial procedures — namely, the Declaratory Judgment Act and the Federal Rules.[27] As pointed out by the dissent,[28] from this it must be supposed that the instant Court interprets these procedures as expanding traditional legal remedies, which would correspondingly narrow equity's jurisdiction. As a result, the area for the exercise of judicial discretion is likewise contracted to such an extent that the trial judge in this case is considered to have acted outside this area of discretion. Apparently, to the mind of the Court, a solution of the antitrust violation in issue provided adequate legal relief. If this issue were resolved in favor of the plaintiff below, then the Court could give any permanent injunctive relief to which the plaintiff might be entitled on the basis of the jury's verdict.

It is submitted that the practical effect of the Court's decision is to extensively curtail the area in which the trial court's discretion may be meaningfully exercised by means of an unprecedented interpretation of the Federal Rules and Declaratory Judgment Act. It is not doubted that the Court has the power to extend the right of trial by jury into the area in question here since there is no constitutional right to a trial by the court without a jury.[29] However, it is also true that no one has the right to a trial by jury in a suit in equity.[30] The practical effect of the instant Court's decision is to make irrelevant many of the historical distinctions between suits in equity and at law with regard to jury trials.[31]

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26 Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959).

27 *Id.* at 507:

> Inadequacy of remedy and irreparable harm are practical terms, however. As such their existence today must be determined, not by precedents decided under *discarded procedures*, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules. (Emphasis added.)

28 *Id.* at 518.

29 Hurwitz v. Hurwitz, 136 F.2d 796 (D.C. Cir. 1943).

30 United States v. Friedman, 89 F. Supp. 957, 961 (S.D. Iowa 1950).

31 Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 518 (1959) (Stewart, J., dissenting).