



3-1-1960

Recent Decisions

John C. Hirschfeld

Thomas Kavadas

Thomas A. McNish

Joseph A. Marino

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

John C. Hirschfeld, Thomas Kavadas, Thomas A. McNish & Joseph A. Marino, *Recent Decisions*, 35 Notre Dame L. Rev. 265 (1960).
Available at: <http://scholarship.law.nd.edu/ndlr/vol35/iss2/9>

This Commentary is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

RECENT DECISIONS

ANTITRUST — SECTION 7 OF CLAYTON ACT — EQUITABLE REMEDIES AVAILABLE TO COURT IN ALLEVIATING RESULTS OF ILLEGAL STOCK ACQUISITION. — E. I. duPont de Nemours & Company had acquired approximately 63,000,000 shares of common stock of General Motors Corporation. A prior determination by the United States District Court for the Northern District of Illinois¹ that such acquisition did not violate section 7 of the Clayton Act² was reversed by the United States Supreme Court.³ The case was then remanded to the instant court “for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute.”⁴ Held, violation of section 7 of the Clayton Act does not make a divestiture of stockholdings mandatory, and the court has power to grant such equitable relief as might be necessary and appropriate. *United States v. E.I. duPont de Nemours & Co.*, 177 F. Supp. 1 (N.D. Ill. 1959).

To facilitate an understanding of the position adopted by the Supreme Court, and the final judgment rendered by the District Court to effectuate this position, it is necessary to briefly delve into the history of the legislative and judicial policy underlying antitrust law. Generally, it may be said that antitrust enforcement aims at two principal goals — the free access of potential competitors into an industry, and the prevention of administered rather than competitive prices.⁵ But the concepts of elimination of competition⁶ and monopoly⁷ are anything but static, and the two terms are not always synonymous.⁸

The first major effort to prevent monopolies and restraints of trade came with the Sherman Act of 1890.⁹ To enable the courts to draw the often fine lines between those transactions thought to be economically deleterious, and those considered to be legitimate, a “rule of reason” was adopted.¹⁰ But this rule was often applied arbitrarily. To counteract this fact, the Supreme Court recognized that some concentrations of economic power were so serious a danger to free competition as to be “unreasonable per se.”¹¹ Furthermore, the act was invoked even to restrain those

1 *United States v. E. I. duPont de Nemours & Co.*, 126 F. Supp. 235 (N.D. Ill. 1954).

2 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952).

3 *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

4 38 Stat. 736 (1914), 15 U.S.C. § 25 (1952).

5 See Timberg, *Equitable Relief under the Sherman Act*, 1950 U. ILL. L.F. 629, 636-37 (1950).

6 “Workable competition is considered to require, principally, a fairly large number of sellers and buyers, no one of whom occupies a large share of the market, the absence of collusion among either group, and the possibility of market entry by new firms.” Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1268 (1949).

7 Monopoly has dimensions other than the exclusion of competitors from a market. Monopolistic behavior may appear in an industry while there are still competitors and while business rivalries are still vigorous. . . . Symptoms of monopoly can be recognized whenever a competitor, or a few competitors, achieve a market position wherein the competitor may choose his competitive strategy. . . . [This marks] . . . the demise, first of price competition, and then of other forms of competition in many industries.

Barnes, *Competitive Mores and Legal Tests in Merger Cases: The DuPont-General Motors Decision*, 46 Geo. L.J. 564, 592-93 (1958).

8 *Ibid.*

9 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1952).

10 *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60, 61-64 (1911).

11 See, e.g., *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries*, 273 U.S. 392 (1926).

monopolies resulting solely from internal growth.¹² But the Supreme Court's inability to arrive at an adequate criterion of illegality in the long series of antitrust cases which have come before it has continued to leave the scope and extent of the Sherman Act in some doubt.¹³ Because this was evident even at the time the instant case was litigated, a skeptic could easily conclude that, generally speaking, the only questions which have been definitively decided concern (1) the application of the statute of limitations, estoppel and laches to the Government,¹⁴ and (2) the resolution of doubtful points in favor of the Government.¹⁵

To implement the provisions of the Sherman Act, Congress passed the Clayton Act¹⁶ in 1914. For the purposes of this discussion, the appropriate section is section 7.¹⁷ This was the section held applicable to the present case,¹⁸ which is significant for several reasons: (1) since section 7 is phrased in the *disjunctive*, proof of either a probable substantial lessening of competition or of a tendency toward monopoly will suffice to show a violation of the statute;¹⁹ (2) less is required to prove illegality under section 7 of the Clayton Act than is required under section 2 of the Sherman Act;²⁰ (3) specifically, section 7 requires only a finding of *reasonable* probability of lessening competition or of tending toward a monopoly;²¹ and (4) the section was applied to a vertical integration for the first time in the instant case, despite the fact that the Government believed otherwise.²² It is also noteworthy that the in-

12 See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416, 431 (2d Cir. 1945); *accord*, *American Tobacco Co. v. United States*, 328 U.S. 781, 814 (1946).

13 For a penetrating analysis of this problem, see Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COLUM. L. REV. 179 (1932).

14 These defenses are not available against the Government under the Sherman Act. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 623-24 (1953); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Southern Pacific Co.*, 259 U.S. 214, 220 (1922); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917); and the same would appear to hold true under the Clayton Act: "Suits brought under the Clayton Act are not subject to any statute of limitations, and it is doubtful whether the doctrine of laches applies as against the Government," *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 622 (1957) (dissenting opinion of Burton, J.).

15 Past cases point out that the judiciary fully realizes that it is often impossible for the Government to establish, with certainty, the economic effect a given course of action will have in the future. As a result, doubts regarding remedies are usually resolved in favor of the Government and against the monopolist. See, e.g., *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1944); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 726 (1944). And the same approach has been taken as to the scope of relief recommended. See, e.g., *Local 167, Int'l Bhd. of Teamsters v. United States*, 291 U.S. 293, 299 (1934). *But see* the instant case, *United States v. E. I. duPont de Nemours & Co.*, 177 F. Supp. 1 (1959) for a contrary holding.

16 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1952). See also, SEN. REP. No. 698, 63d Cong., 2d Sess. 13 (1914); H.R. REP. No. 627, 63d Cong., 2d Sess. 17 (1914).

17 As originally enacted, section 7 provided that:

. . . no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. 38 Stat. 731 (1914), 15 U.S.C. § 18 (1952).

18 *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 588, n.4 (1957). The Court here points out that the case was decided under the original section 7, and not the 1950 amendment thereto, since the amendment was *prospective* in effect and therefore not applicable to earlier acquisitions.

19 *Aluminum Co. of America v. FTC*, 284 Fed. 401, 407 (3d Cir. 1922); *accord*, *Swift & Co. v. FTC*, 8 F.2d 595, 597 (7th Cir. 1925).

20 *United States v. Standard Oil of California*, 78 F. Supp. 850, 866-67 (S.D. Cal. 1948), *aff'd*, 337 U.S. 293 (1949).

21 *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 356-57 (1922).

22 For data illustrating the Government's approach to section 7 and vertical integration, see FEDERAL TRADE COMMISSION, REPORT ON CORPORATE MERGERS AND ACQUISITIONS 168 (1955).

vestment exemption,²³ vigorously relied upon by duPont and upheld at the District Court level,²⁴ was found inapplicable by the Supreme Court.²⁵

"[T]o limit further growth of monopoly and thereby aid in preserving small business as an important competitive factor in the American economy,"²⁶ Congress passed an amendment to section 7 in 1950, which amendment, though not retroactive in effect,²⁷ was intended to encompass an acquisition of assets which had not been covered by the original act.²⁸ There appears to be no agreement as to the test to be applied in determining whether or not a transaction falls within the phrase "substantially to lessen competition in any line of commerce."²⁹ But it seems fair to say that

the Court [in the *duPont* case], by its repeated emphasis on the necessity of a market analysis in determining a violation, makes it clear that substantiality does not mean mere dollar-size, independent of any inquiry regarding market, but rather refers only to the relative size of the portion of the relevant market affected.³⁰

Since the objective of the Clayton Act is to "nip monopoly in the bud,"³¹ the question as to "time of suit" is also important.³² By permitting the Government to

23 "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. . . ." 38 Stat. 732 (1914), as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1952).

24 *United States v. E. I. duPont de Nemours & Co.*, 126 F. Supp. 235, 242 (N.D. Ill. 1954).

25 *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 601-06 (1957). The view taken by the Supreme Court seems to more closely parallel the economic consideration in the instant case for

Industrial and Commercial firms exist to carry on industrial and trading operations, they are not investment companies as such. If such companies accumulate liquid funds, such funds may require *temporary investment*, presumably in readily liquidated assets such as treasury notes or government bonds. There is, therefore, a presumption that a stock acquisition by an industrial or commercial firm in another company is not "solely for investment," but . . . has been made for some other business reason. . . . Barnes, *supra* note 7, at 601. (Emphasis added.)

26 S. REP. No. 1775, 81st Cong., 2d Sess. 3 (1950); see also H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

27 See Handler, *Annual Review of Recent Antitrust Developments*, 12 THE RECORD 411, 425 (1957).

28 See H.R. REP. No. 1191, 81st Cong., 1st Sess. 8-9 (1949).

29 See Sheehy, *The Test of Illegality under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 491 (1958).

30 46 CALIF. L. REV. 266, 271 (1958). Since the "Quantitative Substantiality Test" deals with mere size and dollar-volume, see LEVI, *The Antitrust Laws and Monopoly*, 14 U. CHI L. REV. 153 (1947), it is obvious that the court in the instant case has continued to reject that test in favor of one of "Qualitative Substantiality." See *Transamerica Corporation v. Board of Governors*, 206 F.2d 163, 170 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953). This latter test includes such factors as presently existing competition, the relative size of the acquiring company, the amount of its participation in the present competitive market, and the strength of the remaining competition. See H.R. REP. No. 1191, 81st Cong., 1st Sess. 8 (1949).

Therefore, to determine whether . . . section [7] has been violated the Court must determine (1) the line of commerce, (2) the section of the country, and (3) whether, in the light of all the competitive factors in that line of commerce in that section of the country, the particular acquisition of stock may have the effect of materially lessening competition or tending to create a monopoly.

. . . the statute obviously envisioned a situation where *less than control* of a competing corporation might be sufficient to be a violation of this section. *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 152 F. Supp. 387, 395 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958). (Emphasis added.)

31 *Transamerica Corporation v. Board of Governors*, 206 F.2d 163 (3d Cir. 1953), *cert. denied*, 346 U.S. 901 (1953).

32 The Supreme Court's new approach to the concept of "time of suit" has been severely criticized. See, e.g., Manne, *The Perplexing DuPont Case: Additional Confusion in*

bring suit at any time (as was done in the instant case) it seems clear that a court may force a corporation to abandon even that stock initially purchased for investment purposes³³ whenever the court finds it reasonably probable that such earlier acquisition may now result in the creation of a monopoly in any line of commerce, or in restraint of commerce.³⁴

To understand the alleged "innovations" taken by the Supreme Court in the *duPont* case, one must appreciate the several types of merger which are possible in our economic climate. There are primarily three types: (1) horizontal mergers, which involve two firms engaged in similar enterprises; (2) vertical mergers, which involve a supplier acquiring the supplied corporation or *vice versa*; and (3) conglomerate mergers, in which there is no apparent relationship between the businesses of the acquired and acquiring corporations.³⁵ The instant case involved a vertical integration.³⁶ And, although it has been strenuously argued that such a form of merger is "by no means incompatible with vigorous competition" and is more efficient,³⁷ statistics apparently prove the contrary.³⁸

The early cases of "vertical forestalling" of competition were brought under the Sherman Act and a violation was found in a few instances.³⁹ But, because of the "intent" test set down in the *Paramount Pictures* case,⁴⁰ many vertical integrations were found not to be violative of antitrust principles. This apparent failure of the Sherman Act caused the Government to seize upon section 7 of the Clayton Act as a remedy.⁴¹ But one wonders why it was not invoked before, since the obvious purpose

the Law of Mergers, 106 U. PA. L. REV. 385, 411 (1957); Rogers, *United States v. DuPont — A Judicial Revision of Section 7*, 2 ANTITRUST BULL. 577, 581 (1957). The real importance of the court's approach seems to center around the standards of proof which will be utilized. "The significance of the new time dimensions for section 7 is not that earlier acquisitions may be questioned, for that could have been done at any time under the Sherman Act. What is important is that in testing earlier acquisitions, *Clayton Act standards* rather than Sherman Act standards shall apply. Barnes, *supra* note 7, at 577. (Emphasis added.)

33 See authorities cited notes 23, 24, 25, *supra*.

34 For an explanation of a possible way to eliminate "the danger of a later surprising suit subjecting [a company] to the full force and effect of the *duPont* decision," see Manne, *supra* note 32, at 411. See also S. REP. No. 198, 85th Cong., 1st Sess. (1957); H.R. REP. No. 7698, 85th Cong., 1st Sess. (1957).

35 . . . there are two clear zones of merger which do not seem to run contrary to either the letter or spirit of the Sherman Act. These zones would seem to be (a) where horizontal coagulations are putting together bits that are non-contiguous, area-wise or product-wise and (b) where vertical coagulations are putting together higher and lower levels of processing that do not relate to each other as customers-suppliers.

Smith, *Precedent, Public Policy and Predictability*. 46 GEO. L.J. 633, 644 (1958). It would appear that the same rules are applicable under the Clayton Act.

36 For a history of vertical integration, see Frank, *The Significance of Industrial Integration*, 33 J. POL. ECON. 179 (1925). Note especially that prior to 1940 there were only three cases heard by the Supreme Court of the United States involving a direct attack on vertical integration: *United States v. Lehigh Valley R.R. Co.*, 254 U.S. 255 (1920); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Reading Co.*, 226 U.S. 324 (1912), *modified*, 228 U.S. 158 (1913). See also, Comment, 19 U. CHI. L. REV. 583, 584 (1952).

37 Hale, *Vertical Integration: Impact of the Antitrust Laws upon Combinations of Successive States of Production & Distribution*, 49 COLUM. L. REV. 921, 937-46 (1949).

38 See Dewing, *The Financial Policy of Corporations* 778, at 787 (3d ed. 1934); Smith, *supra* note 35, at 643. But see Hale, *supra* note 37, at 951-52, for a persuasive argument to the effect that vertical integration will substantially lessen competition only when there is an imperfection in the market resulting from horizontal mergers.

39 See, e.g., *United States v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *United States v. General Motors Corporation*, 121 F.2d 376, 404 (7th Cir. 1941).

40 "The legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 174 (1948); *accord*, *United States v. Columbia Steel Co.*, 334 U.S. 495, 524-27 (1948).

41 "Vertical forestalling is clearly illegal when combined with unlawful monopoly power. Some of the 'loose' forms of vertical control are apparently illegal per se, and others

of the act was to *prevent* what the Sherman Act was unable to *cure*. And, despite earlier cases to the contrary,⁴² the Committee Reports published prior to the passage of the 1950 amendment to section 7 make it unmistakably clear that section 7 was to apply to vertical as well as horizontal acquisitions.⁴³ Analogous legislative precedent was thereby established for the *duPont* case.

One final point is relevant to the historical background underlying the *duPont* decision — namely, the methods of determining a “relevant market.” It now seems to be generally accepted that if there is no market of substantial size, the public interest will not be affected regardless of what the consequences of an acquisition might be.⁴⁴ But this still leaves undetermined the troublesome problem of actually defining such a market.⁴⁵ Generally speaking, a determination of what constitutes a market is a question of fact,⁴⁶ governed by the exigencies of the situation,⁴⁷ rather than by fixed standards.⁴⁸ This becomes even more evident when “substitute products” play a role in determining the relevant market.⁴⁹

In the instant case we have a question of the scope of the equitable remedies invoked by the District Court, and the court's right to administer them. Although

may be illegal *even though connected with monopoly power not unlawful under the antitrust laws as now interpreted.*” Comment, 19 U. CHI. L. REV. 583, 610 (1952). (Emphasis added.)

42 See, e.g., *United States v. Republic Steel Corporation*, 11 F. Supp. 117 (N.D. Ohio 1935).

43 See H.R. REP. NO. 1191, 81st Cong., 1st Sess. 11 (1949). See also Dirlam & Stelzer, *The DuPont-General Motors Decision: In the Antitrust Grain*, 58 COLUM. L. REV. 24, 27-28, 29 (1958).

44 See *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

45 The necessity of such a determination is aptly pointed out in *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948).

46 “It is the geographic or economic area in which a monopoly makes its impact felt that is the geographic or economic area of the market subject to the control of the monopoly.” Oppenheim, Timberg & Van Cise, *Divestiture As A Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 120, 138 (1950). See also *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *United States v. Standard Oil of California*, 337 U.S. 293, 299 (1949); *Maple Flooring Manufacturer's Ass'n v. United States*, 268 U.S. 563 (1925); Hansen, *The Antitrust Laws in a Changing Economy*, 6 U.C.L.A.L. REV. 183, 199 (1950).

47 As to the particular utility of this approach in the *duPont* case, see Barnes, *supra* note 7, at 602, 603; Howrey, *Advising Clients in the Light of the duPont (General Motors) Decision*, 3 ANTITRUST BULL. 13, 19 (1958); Manne, *supra* note 32, at 395, 397, 410 (1957). But for an analysis of the manner in which the definition of “relevant market” in this very case could become a “two-edged sword,” see Markham, *The DuPont-General Motors Decision*, 43 VA. L. REV. 881, 887, 888 (1957). For a comparative list of varying concepts of the term “relevant market,” see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934); *Appalachian Coal, Inc. v. United States*, 288 U.S. 344 (1933); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. Corn Products Refining Co.*, 234 Fed. 964 (S.D.N.Y. 1916).

48 See Hansen, *supra* note 46, at 204. For an argument as to the futility of attempting to seek fixed standards, see S. REP. NO. 1775, 81st Cong., 2d Sess. 5 (1950); see also *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-94 (1957), where it was held that the product market was the equivalent of those products that “have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other[s] . . . to make them a ‘line of commerce.’ . . .” But for arguments favoring the adoption of a strict market definition, see Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956); Note, 54 COLUM. L. REV. 580, 603 (1954).

49 In determining the relevant market, the courts usually will not consider substitutes other than those that are substantially fungible with the monopolized product and which sell at substantially the same price. See, e.g., *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). Although the opinion in *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956) was apparently *contra* to this practice, since the court described the relevant market as the extent of interchangeability of flexible packaging materials regardless of fungibility or price, that case appears anomalous in light of the most recent *duPont* decision. In the latter case the principle of the *Times-Picayune* case was reaffirmed.

the Supreme Court remanded the case to the District Court "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute,"⁵⁰ the District Court obtained its power, not from the Supreme Court's decision, but from section 15 of the Clayton Act.⁵¹

The courts have outlined four main objectives that an antitrust equity judgment must serve — it must prohibit past illegalities; prevent future violations; restore competitive conditions; and make restitution for unjustifiable competitive advantages. . . . [The] restorative function of the antitrust judgment is a direct corollary of its preventive function.⁵²

Aside from the oft-used injunction, a court enforcing the antitrust laws may invoke one of the three remedies of dissolution, divestiture or divorcement.⁵³ Further, as was pointed out by Justice Jackson,⁵⁴ the court has a right to expand the remedy beyond the actual violation.

In the instant case, the District Court allowed duPont to keep its legal title to the General Motors stock, but divested duPont of its right to vote any of those shares, granting this right to duPont's stockholders.⁵⁵ In analyzing the court's approach, several factors must be considered. To begin with, the court, by founding its remedy, to a large degree, on the basis of economic facts presented during the hearing,⁵⁶ demonstrated both erudition and practicality in approaching an extremely complex problem. This is particularly important in antitrust cases because of the wide discretion resting in the court. For, although "penalties which are not authorized by law may not be inflicted by judicial authority,"⁵⁷ the court need not avoid inflicting hardship on the defendant if this is the only method of achieving effective relief.⁵⁸ It is to the present court's credit that it appears to have obtained effective relief without resorting either to hardship or penalty.

50 *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586, 607 (1957).

51 38 Stat. 736 (1914), 15 U.S.C. § 25 (1952). It is this section of the Clayton Act which gives the District Court in the instant case all the powers of a court of equity.

52 Timberg, *supra* note 5, at 631, 633.

53 . . . "dissolution" refers to an antitrust judgment which dissolves or terminates an illegal combination or association. . . . "Divestiture" is used to refer to situations where the defendants are required to . . . dispossess themselves of specified property in physical facilities, securities, or other assets. "Divorcement" is commonly used to indicate the effect or result of a judgment wherein certain types of divestiture are ordered. . . .

Oppenheim, Timberg & Van Cise, *supra* note 46, at 120-21. See also Howrey, *supra* note 48, at 19.

54 When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

International Salt Co. v. United States, 332 U.S. 392, 400 (1947).

55 Three exceptions were made to this remedy, however: (1) Christiana and Delaware, though stockholders of duPont, were not allowed to vote the portion allocable to them; (2) the General Motors stock which Christiana held in its own name was also sterilized; and (3) no officers or directors of duPont, Christiana or Delaware were to be allowed to vote any General Motors stock. *United States v. E. I. duPont de Nemours & Co.*, 177 F. Supp. 1, 52 (N.D. Ill. 1959).

56 This is in sharp contrast with the position generally taken by the judiciary in the past — *i.e.*, an almost blanket refusal to delve into economics in detail in antitrust cases. See, *e.g.*, Oppenheim, Timberg & Van Cise, *supra* note 46, at 129; Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 35 (1951); Barnes, *supra* note 7, at 588, 589. For a discussion of the problems necessitating the adoption of an economic approach, see Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L.J. 1019 (1949).

57 *Standard Oil Co. v. United States*, 221 U.S. 1, 77 (1910); *accord*, *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 604 (1950) (concurring opinion); *United States v. National Lead Co.*, 332 U.S. 319, 338, 348 (1946); *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1944).

58 See *United States v. Union Pacific R.R.*, 226 U.S. 470, 477 (1913); *accord*, *United States v. Crescent Amusement Co.*, 323 U.S. 173, 189 (1944).

There is no question but, had the court so decided, it could have ordered duPont to effect a complete divestiture of its General Motors stock.⁵⁹ Equity, however, particularly as applied to the stockholders,⁶⁰ prevented such a remedy. And dissolution, although within the power of the court, appeared to be too harsh a remedy.⁶¹ This is especially true since the stock transaction certainly appeared legal at the time it was executed. In fact, it seems almost undeniable that its illegality arose only because of the tremendous growth of General Motors and duPont. The latter company thereby achieved the power to control some of the former's business policies⁶² — an illegal result even if intent were lacking.⁶³

In exercising its equity powers the court also ordered that "no officer or director of duPont, Christiana and Delaware will be permitted to serve as an officer or director of General Motors, and General Motors will be prohibited from having as an employee any employee of duPont, Christiana or Delaware."⁶⁴ There is no question but that this remedy was within the equity powers of the court,⁶⁵ and that it was absolutely necessary to effectively eliminate the conditions found by the Supreme Court to be existing.⁶⁶ The failure of the Government to obtain more stringent remedies very possibly resulted from its own inability to convince the court

⁵⁹ See *United States v. Southern Pacific Co.*, 250 U.S. 214 (1922); *United States v. Reading Co.*, 253 U.S. 26 (1920).

⁶⁰ Under no theory can these stockholders be said to have participated in any violation or engaged in any improper conduct. Moreover, the Government itself cannot escape responsibility for the plight of these stockholders. At the time of acquisition there existed a very small fraction of the present number of stockholders of the corporations involved. It waited some thirty years after the acquisition occurred before bringing this action. It should, therefore, recognize that stockholders who purchased duPont in those intervening years had every reason to believe that duPont's holding of General Motors was entirely proper and legal.

United States v. E. I. duPont de Nemours & Co., 177 F. Supp. 1, 13 (1959). The tax consequences were also so overwhelming that the court could not, in all fairness, require a complete divestiture of the General Motors stock. And this is in keeping with the historical policy adopted by Congress of avoiding the imposition of a tax burden on stock transactions required by law. See, e.g., INT. REV. CODE OF 1954, §§ 1071, 1081, 1101; *United States v. Minnesota Mining and Mfg. Co.*, 96 F. Supp. 356, 358, (D. Mass. 1951). Finally, the court had generous precedent to invoke in order to substantiate its order divesting duPont only of its right to vote the General Motors stock. See, e.g., *American Crystal Sugar Co., v. Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953); *Union Bag & Paper Corp.*, 52 F.T.C. 1278 (1956).

⁶¹ The Government may bring suit to dissolve an unlawful combination, *United States v. Trans-Missouri Freight Assoc.*, 166 U.S. 290 (1897); and the court has the right to decree dissolution of such an unlawful combination, *United States v. Reading Co.*, 253 U.S. 26 (1920); but this right rests in the discretion of the court, *United States v. American Can Co.*, 234 Fed. 1019 (1916); and will or will not be exercised depending on the facts of each case, *United States v. Pacific R.R. Co.*, 226 U.S. 470 (1913). The courts generally refuse the Government's request for dissolution if it will not serve the public interest, *United States v. Borax Consol.*, 62 F. Supp. 220 (1945); or "if the industry will not need it for its protection," *United States v. Aluminum Co. of America*, 148 F.2d 416, 446 (2d Cir. 1945); or if the less severe remedy of injunction is adequate, *United States v. Great Lakes Towing Co.*, 217 Fed. 656 (1914). But for a denunciation of the equitable approaches taken in similar antitrust cases, see Adams, *supra* note 56, at 32: "The courts . . . have generally refrained from breaking asunder what man has illegally joined together."

⁶² DuPont and its affiliates owned 23% of the common stock of General Motors, a holding which most assuredly gave it the power of control even if such power was never exercised. See, e.g., *Morgan Stanley & Co. v. SEC*, 126 F.2d 325, 328 (2d Cir. 1942), a case in which ownership of only 19.6% of the voting stock of a company was held sufficient to maintain control.

⁶³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

⁶⁴ *United States v. E. I. duPont de Nemours & Co.*, 177 F. Supp. 1, 52 (1959).

⁶⁵ See *International Salt Co. v. United States*, 332 U.S. 392 (1947).

⁶⁶ For an excellent discussion of the vast role duPont has continued to play in the development of General Motors and the direction of many facets of General Motors' business policies, see Dirlam & Stelzer, *supra* note 43. It is obvious that duPont was able to place its officers and directors on the Board of General Motors only because of the large per-

of the "disastrous" results of the existing oligopolistic structure in the "lines of commerce" in which General Motors and duPont carried on their activities.⁶⁷

Another essential feature of the final judgment of the District Court upon remand was the following:

All preferential trade arrangements or understandings between duPont and General Motors will be cancelled, and they will be prohibited from entering into any such arrangements or embarking on joint commercial ventures so long as duPont owns General Motors stock. Any existing requirements contracts between the two companies will be cancelled and they will not be permitted to enter into any such contract for a period of three years following entry of the final judgment herein, after which period requirements contracts of not more than one year's duration will not be prohibited.⁶⁸

Although the facts allegedly showing duPont's ability to influence the creation of preferential trade arrangements were disputed at the hearing, this does not deprive the court of the right to make the above order.⁶⁹ Furthermore, even if such arrangements had not been made in the past, it is entirely reasonable to hold that duPont had the power to inaugurate them.⁷⁰ There seems to be no question, therefore, but that the court was correct in prohibiting preferential trade agreements.

Nor should the cancellation of existing requirements contracts be considered an inequitable or harsh remedy. "It is axiomatic that contracts, agreements and arrangements containing illegal features be terminated. Here, . . . the better practice is *outright cancellation* rather than mere reformation of existing instruments."⁷¹ With this in mind, the wisdom underlying the restriction of such contracts in the future to periods of one year's duration appears obvious.⁷² It should also be kept in mind that the court made a special provision "for a review and reconsideration of . . . the final judgment [if] the provisions thereof should prove in the future to

centage of common stock which it controlled. Since the court allows the legal ownership of these shares to remain with duPont and its affiliates, the elimination of the interlocking directorate was vital if the harmful results of the vertical integration were to be prevented. See Barnes, *supra* note 7, at 598-99: "It would always appear to be a *reasonable probability*, approaching a *per se* test, that any *significant* stock relation between two companies would influence competition between them." (Emphasis added.)

67 See Adams, *supra* note 56, at 24, 31, 34, 36.

68 United States v. E. I. duPont de Nemours & Co., 177 F. Supp. 1, 52 (N.D. Ill. 1959).

69 See International Salt Co. v. United States, 332 U.S. 392 (1947).

70 DuPont's power rested on three factors: (1) it owned such a large block of stock that it could not be challenged, since the larger the corporation the smaller the percentage of voting stock needed for effective control. See BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); (2) directly connected with the ownership of stock was the concept of vertical integration, for "one likely effect of acquiring a customer corporation is to reduce a competitor's choice of customers even though the industry may remain unquestionably competitive." Manne, *supra* note 32, at 406; and (3) both duPont and General Motors fall within that classification of concerns known as "oligopolies" — industries where a relatively small number of large firms account for the major portion of the total production and sales. Oppenheim, Timberg & Van Cise, *supra* note 46, at 125.

71 Timberg, *supra* note 5, at 652. (Emphasis added.) See also United States v. Standard Oil of California, 78 F. Supp. 850, 867 (S.D. Cal. 1948), *aff'd*, 337 U.S. 293 (1949), where the court elaborated on this problem in some detail. For an economic argument in favor of such contracts, see Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N.Y.U.L.Q. 412 (1948). Restrictions contracts are certainly analogous to "exclusive dealing" contracts, which have generally been held violative of the principles of the antitrust acts where they have an appreciable impact on the competitive market. See, e.g., FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953); Standard Oil of California v. United States, 337 U.S. 293 (1949); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Griffith, 334 U.S. 100 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); Associated Press v. United States, 326 U.S. 1 (1945); International Business Machines Corp. v. United States, 298 U.S. 131 (1936).

72 "A purchase control plan merely does directly what divestiture is designed to do indirectly, *viz.*, create equal opportunity for Dupont's competitors." 12 Sw.L.J. 128, 132 (1958). But query, (1) whether General Motors will be able to purchase the same high quality goods as were provided by duPont, and (2) whether a provision allowing requirements con-

be inadequate to curb the violation, and in the event of [a] . . . change in tax policy."⁷³

The equitable remedies contained in the final judgment of the District Court seem eminently practical even though not so extensive as the Government requested. But the real problem arises when one considers the extent to which the *duPont* decision might be applied in subsequent antitrust litigation. It could either be confined to its peculiar facts, or extended to cover numerous corporate mergers.⁷⁴ And the possible scope of the decision will certainly depend on whether it is expanded to include cases of internal growth.⁷⁵ Nevertheless, the better approach would seem to be to limit the case to its peculiar facts. It seems highly unlikely that the Government, not being faced with a situation involving two oligopolies of the size of General Motors and *duPont*, with their interlocking directorates, their percentage of stock holdings, extensive requirements contracts, and alleged preferential trade arrangements, would invoke an antitrust action. Consequently, the worst that can be said of the Supreme Court's interpretation of *duPont*'s stock acquisition is that the Court twisted the fibers of section 7 in order to find illegitimacy in the face of an apparently legal birth certificate. The best that can be said is that the Supreme Court found that *duPont* had engaged in a speculative venture that had had enormous success; but that it must now discontinue reaping many of its financial rewards because its continued interest in General Motors constitutes a probable harmful effect on the relevant market. Since the truth probably lies somewhere in between, it must be said of the District Court that it demonstrated erudition and judicial restraint in exercising its discretionary equity power in so efficacious a manner. As a result, neither the Government, *duPont*, nor the latter's stockholders should be heard to complain.

John C. Hirschfeld

tracts for one year periods is not a continuation of the same evil found to exist, since General Motors can still purchase the greater percentage of its requirements from *duPont*, even though this be limited to a year-by-year basis?

73 *United States v. E. I. duPont de Nemours & Co.*, 177 F. Supp. 1, 52 (N.D. Ill. 1959). As to the rationale for this approach, see Timberg, *supra* note 5, at 656-57:

Although the practice has been to respect the finality of judgments, it is arguable that the reserved jurisdiction of the court may be resorted to by the Government any time that the basic purposes of a judgment are being frustrated. . . . Frequently, . . . the defendants present an economic justification for less far-reaching relief than the Department may have asked for . . . — a justification which the Government is willing to test (without acquiescence) in the light of operations under the judgment.

74 Prior to the amendment to section 7 in 1950, a corporation could avoid that section by acquiring the assets of a company after purchasing its stock. *Thatcher Manufacturing Co. v. FTC*, 272 U.S. 554, 561 (1926). Nor would section 7 apply even if the assets were purchased after the Government brought action on the illegal stock transaction. *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U.S. 587 (1934). This was remedied by the 1950 amendment to section 7. Yet, because acquisitions of assets prior to the 1950 amendment are not subject to it (since it is not retroactive in effect), and because many stock acquisitions were immediately followed by asset acquisitions to take advantage of the above two decisions, many corporations appear to be safe from the *duPont* decision. If the courts continue to oppose monopolistic tendencies, however, it would be possible for the Government, by a judicial reinterpretation of the *Thatcher* and *Arrow-Hart* decisions, to reach those acquisitions that fell within the rules of these two cases. The fact that the decisions in both cases were 5 to 4 renders this approach very probable. Cf., Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 176, 177 (1955).

75 For an argument that the *duPont* decision should be limited solely to cases of external growth, see Baldrige, *The Present Status of Large Corporations under Section 7 of the Clayton Act*, 3 ANTITRUST BULL. 25, 30 (1958).

ATTORNEYS GENERAL — DISCIPLINARY POWERS OF THE COURT — ATTORNEY GENERAL SUBJECT TO DISCIPLINARY POWERS OF COURT — The Supreme Court of Minnesota issued a temporary writ directing certain counties to refrain from adopting any order or resolution establishing daylight saving time or putting into effect any such order or resolution already adopted. Shortly after the writ was issued, the state Attorney General, who was assisting the attorneys for the counties involved, appeared on radio and television and stated that the court had no right to issue such an order, and that the counties concerned could legally establish daylight saving time. The Supreme Court issued a citation to the Attorney General directing him to appear before the court and explain or deny the statements. Acting upon the advice of the Governor, the Attorney General declined to appear. The court then instituted an original proceeding to investigate his professional conduct. *Held, per curiam*: censure ordered. When the Attorney General appears before the court in a legal matter, he is an officer of the court and as such subject to its disciplinary powers. *In re Lord*, 97 N.W.2d 287 (Minn. 1959).

Historically the courts have had the power to summarily punish attorneys for acts of professional misconduct.¹ The basis of this summary jurisdiction is said to be found in the fact that an attorney is an officer of the court and as such is subject to the inherent power of the courts to discipline its officers.² Formerly, the sanction imposed under this general power included disbarment by pitching the offender over an iron bar fortified with spikes.³ Today, however, the generally imposed sanctions are limited to censure, suspension, and a more restrained type of disbarment.

It is important to distinguish the court's summary jurisdiction over an attorney for professional misbehavior from its jurisdiction to punish summarily for contempt. The two are distinct and "proceed upon very different grounds."⁴ A contempt proceeding is essentially criminal in nature while a disciplinary proceeding is not regarded as being a criminal inquiry.⁵ The latter addresses itself solely to the attorney's continued fitness to practice law.⁶ It is often said that the function of a disciplinary proceeding is to preserve the courts "from the officious ministrations of persons unfit to practice in them."⁷

There is little doubt that a state supreme court has the power, in the exercise of its supervisory jurisdiction over the legal profession, to discipline an attorney who advises a client to disregard a temporary order of the court. The very least that could be said about such conduct is that it is a breach of professional ethics⁸ and impairs the due and orderly administration of justice. Presumably the Attorney General, as the attorney of the body politic, is bound by the same standards of ethical conduct prescribed for other attorneys.⁹ However, it does not necessarily follow that the Attorney General is subject to the disciplinary powers of the court, as is a private attorney, when he misbehaves professionally.

Indeed the only question really presented by the instant case is whether the court has jurisdiction over the professional conduct of the Attorney General. This is a point which apparently has never been decided by any American court prior to the instant decision.

1 *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928).

2 See *Ex parte* Garland *supra* note 1; see generally 2 THORNTON, ATTORNEYS AT LAW §§ 756-72 (1914).

3 ORKIN, LEGAL ETHICS 195 (1957).

4 *Ex parte* Robinson, 86 U.S. (19 Wall.) 505, 520 (1873).

5 *E.g.*, *In re* Rieg, 131 N.J.L. 559, 37 A.2d 417 (1944). *But see* *Buhler v. Frick*, 195 Ind. 190, 144 N.E. 840 (1924) where it was held that disbarment actions are penal in nature.

6 *E.g.*, *Bar Association of City of Boston v. Casey*, 211 Mass. 187, 97 N.E. 751 (1912).

7 *Ex parte* Wall, 107 U.S. 265, 288 (1882).

8 See DRINKER, LEGAL ETHICS 152 (1953); NEW YORK COUNTY LAWYERS' ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, Opinion 262 (1928).

9 *Cf.* ABA, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES, Opinion 199 (1957).

Two factors complicate the issue. First, in nearly all states the Attorney General is an elected official. Is it within the purview of courts or is it for the electorate to determine the fitness of the Attorney General to discharge the duties of his office? Secondly, in all states the Attorney General is a key part of the executive branch of government.¹⁰ Does a court, by exercising jurisdiction over his professional conduct, subvert the separation of powers?

The instant court did not consider the first point. It did, however, deal with the separation of powers question. In fact, the court, with some ingenuity, used the doctrine to justify its exercise of jurisdiction over the Attorney General.

The court maintained that, although the Attorney General is a member of the executive branch, as an attorney he is also an officer of the court. When he appears before the court in a legal matter he appears as an attorney and in no other capacity. The court contended that to hold that the Attorney General, when he appears before it, is not subject to the same ethical standards prescribed for other attorneys and that the court is without power to discipline him for misconduct would "reduce the court to a tool of the executive." The court further contended that to permit the governor to interfere with the disciplinary power of the court over the Attorney General when he appears in court would destroy the separation of powers.

It is interesting to note that the Attorney General used the same separation of powers doctrine to deny that the court had jurisdiction over him. In a letter to the governor¹¹ he stated that for him to submit to the courts' compulsory process would seriously impair the independence of the executive branch. He maintained that to "consent to the courts' jurisdiction in this matter would be to deny that we are a government of separate, co-equal and independent branches."

Putting aside the separation of powers doctrine and turning to the court's contention that the Attorney General is an officer of the court, we find that this claim is without historical support. The office of Attorney General, as well as the concept that the attorney is an officer of the court, has its origin in English history. The Attorney General emerged in seventeenth-century England as the chief law officer of the Crown.¹² He appeared for the Crown in all courts in any matter, civil or criminal, in which the Crown had an interest.¹³ Because it was his duty to speak for the rights, interests and prerogatives of the Crown, he enjoyed certain powers and privileges which the ordinary attorney did not possess.¹⁴ Chroust states:

[U]nlike the common attorney, he was not really an officer of the court since he was not admitted to practice by the court. . . . Neither was he under the disciplinary supervision of the court. The gradual development of the special powers and prerogatives of the King's attorney progressively distinguished him from the ordinary attorney to the extent that by the seventeenth century his office had a unique character hardly reminiscent of the old *attornatus*.¹⁵

From the outset, the American colonies adopted the office of Attorney General as it existed in England.¹⁶ Today it is well established that the state attorneys general have all of the duties, powers and prerogatives of their English predeces-

10 MINN. CONST. art. V, § 1: "The executive department shall consist of . . . an attorney general, who shall be chosen by the electors of the state."

11 Letter from Miles Lord to Orville L. Freeman, May 26, 1959.

12 For authoritative historical studies of the office of Attorney General see: PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 228-230 (5th ed. 1956); POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 111-18 (1953); Bellot, *Origin of the Attorney General*, 25 L.Q. REV. 400 (1909); Cooley, *Predecessors of the Federal Attorney General In England and the American Colonies*, 2 AM J. LEGAL HIST. 304 (1958); Holdsworth, *The Early History of the Attorney and Solicitor General*, 13 ILL. L. REV. 602 (1919).

13 See material cited *supra* note 12.

14 See generally 6 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 458-81 (2d ed. 1937).

15 Chroust, *The Ranks of the Legal Profession In England*. To appear in 11 W. RES. L. REV. (Spring 1960); accord, 6 HOLDSWORTH, *supra* note 12, at 613.

16 See generally Cooley, *supra* note 12.

sors.¹⁷ However, as previously mentioned, only the instant court has passed on the question whether they have inherited their predecessors' immunity from the disciplinary powers of the court.

The instant court stated that in order to prevent repetitions of the condemned conduct, it will retain jurisdiction over the matter for three years. By retaining jurisdiction the court suggests that its jurisdiction extends to more than a censure. This raises an interesting question. Assuming that a state supreme court does have jurisdiction over the Attorney General's professional conduct, how far can it go in disciplining him? Could it suspend or disbar him?

The answer to this question would probably depend on whether the Attorney General is required to be a licensed attorney.¹⁸ If the state constitution requires him to be a licensed attorney,¹⁹ then disbarment or suspension would appear to disqualify him from office.²⁰ This might be challenged as unconstitutional,²¹ since, removal of the Attorney General from office is provided for by the constitution in most if not all states.²² Possibly a court in such a state could disbar him but recognize his capacity to perform any administrative functions incident to his office.²³ Further, could a court, after disbarring the Attorney General, rightfully refuse to hear him if he appears before it as the legal representative of the state? At best, this appears questionable, since the Attorney General's warrant to represent the sovereign in its courts is conferred by virtue of his office rather than by license from the court.

The position taken by the Attorney General and the one taken by the court represent two extreme views. Neither seems very realistic. To say that the courts have no control over the Attorney General's conduct when he appears before them would expose the courts to public ridicule and subject them to the danger of becoming a tool of the executive. On the other hand, to have an Attorney General who is subservient to the courts would not be in the public interest. An acceptable solution would be to give the court a limited jurisdiction for the purpose of censuring an Attorney General whose conduct before the court is unethical or extremely indiscreet. No real disruption of the separation of powers would result and the court would maintain its judicial dignity. Without special constitutional provision, any further disciplinary powers affecting the conduct of an executive office would be an usurpation of a right reserved to the people.

Thomas Kavadas, Jr.

17 *E.g.*, *Darling Apartment Co. v. Springer*, 25 Del. Ch. 420, 22 A.2d 397 (1941); *Kennington-Saenger Theatres v. State*, 196 Miss. 841, 18 So.2d 483 (1944).

18 There is no requirement in the Minnesota Constitution that the Attorney General be an attorney or licensed to practice law. *But see* *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1925) where it was held that a prosecuting attorney must be licensed to practice law although the constitution did not require it.

19 COLO. CONST. art. IV, § 4: "No person shall be eligible to the office of . . . attorney-general unless he . . . be a licensed attorney of the supreme court of the state." LA. CONST. art. 7, § 56: "The Attorney General . . . shall be learned in the law." See *Danford v. Egan*, 23 S.D. 43, 119 N.W. 1021 (1909) where a similar provision precluded a disbarred attorney from holding the office of prosecuting attorney.

20 *Cf. State ex. rel. Saxbe v. Franko*, 168 Ohio St. 338, 154 N.E. 751 (1958) where a statute requiring that a municipal judge "shall have been admitted to the practice of law in this state" was interpreted to require a maintenance of his privilege to practice law. This is distinguishable, however, since the judge's duties are wholly judicial as compared with the primarily administrative duties of the Attorney General.

21 This contention was rejected when made by a prosecuting attorney in *Commonwealth ex. rel. Pike County Bar Ass'n. v. Stump*, 247 Ky. 587, 57 S.W.2d 524 (1924).

22 See, *e.g.*, MO. CONST. art. 7, § 1: "All elective executive officials of the state, . . . shall be liable to impeachment for crimes, misconduct, drunkenness, . . . corruption in office, incompetency . . .;" art. 2 "The house of representatives shall have the sole power of impeachment."

23 An attorney who had been suspended for one year was specifically allowed to serve as a prosecuting attorney after being elected to the office in *McGehee v. State*, 182 Ark. 1024, 33 S.W.2d 368 (1930).

CHARITABLE TRUSTS — CY PRES — DOCTRINE HELD INAPPLICABLE TO BEQUEST TO MUNICIPALITY FOR RACIALLY RESTRICTED PLAYFIELD — Decedent made a testamentary bequest of the residue of her estate to the city of Detroit for the establishment of a playground for white children. The will stipulated that its provisions were "to be carried out to the letter." No provision was made for gift over in the event of the failure of the condition. The lower court held the bequest invalid as violative of the fourteenth amendment. On appeal, *held*, affirmed by an evenly divided court. The affirming opinion held that the requirement in the will that its provisions were "to be carried out to the letter" precluded application of the cy pres doctrine. The remainder of the court voted to permit the city to accept the gift by construing the bequest, cy pres, for the benefit of all the children of Detroit. *LaFond v. City of Detroit*, 98 N.W.2d 530 (Mich. 1959).

The American Law Institute has expressed what is generally conceded to be a fair working definition of the cy pres doctrine:¹

If property is given in trust to be applied to a particular charitable purpose, and if it is or becomes impossible or impractical or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.²

The history of the cy pres doctrine has been checkered with extremes of judicial favor. Though perhaps its origin can be traced to early Roman times,³ it received its English birth under the medieval ecclesiastical chancellors. The theory was that, since it was the donor's intent to receive higher approval in the hereafter, this desire should not be frustrated by taking the property from charitable uses. To preserve these expiatory bequests, the doctrine developed a double character, judicial and prerogative cy pres. The former is merely a construction of the testator's intent "as near as possible" (from Norman French, *cy pres comme possible*), while the latter, exercised *parens patriae*, often flew in the face of the testator's express intention. The blurring of the two forms caused even the judicial form of the doctrine to be rejected in early American jurisprudence. However, by statute and decision it gradually returned to favor.⁴

Traditionally there have been three prerequisites to the sustaining of a charitable bequest by the application of cy pres, namely, a charitable trust, a general charitable intent, and impossibility, impracticability or illegality of carrying out the terms of the donor's specific purpose.⁵ Although there has been a general liberalization of these requirements, they still must be present to warrant invocation of the cy pres doctrine.⁶

The courts have generally experienced little difficulty in finding a charitable trust. It would seem that any gift to a charitable organization is given subject to a trust, or "a gift in trust will be implied."⁷

1 See, e.g., *Estate of Clippinger*, 75 Cal. App. 2d 426, 171 P.2d 567 (2d Dist. Ct. App. 1946); *First Nat'l Bank v. Elliot*, 406 Ill. 44, 92 N.E.2d 446 (1950); *Petition of Rochester Trust Co.*, 94 N.H. 207, 49 A.2d 922 (1946).

2 RESTATEMENT (SECOND), TRUSTS § 399 (1959). The wording is identical to the original version of 1935 which received such wide judicial approval.

3 *Church of Latter Day Saints v. United States*, 136 U.S. 1 (1890).

4 FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 2-124 (1950).

5 FISCH, *Id.* at 128.

6 FISCH, *Changing Concepts and Cy Pres*, 44 CORNELL L. Q. 382 (1959).

7 *In re Walter's Estate*, 269 N.Y.S. 402, 405 (Surr. Ct. 1934); *accord*, *Estate of Clippinger*, 75 Cal. App. 2d 426, 171 P.2d 567, 572 (2d Dist. Ct. App. 1946), wherein the Court said "a devise to a society organized for charitable purposes without a declaration of the use to which the gift is to be put is given in trust to carry out the objects for which the organization was created." *But see In re Lowe's Estate* 117 Ind. App. 554, 70 N.E.2d 187 (1946), wherein there is broad language to the effect that a gift to a charitable institution with no terms of trust is an outright gift to which cy pres is not applicable.

The requirement of a general charitable intent is the problem with which the courts most frequently have to wrestle. In *O'Hara v. Grand Lodge I.O.G.T.* can be found expression of the sentiments of many courts on this prerequisite: "In determining whether there has been expressed a general charitable intent, the trust instrument is always construed most strongly against the trustor, for the reason that the courts favor charities."⁸ Factors usually considered to find a general charitable intent are a provision for distribution of the entire residue of the estate to various charities, and the absence of a provision for gift over in the event of the failure of the condition.⁹ The fact that the donor requires a memorial to himself or another does not usually indicate a lack of charitable intent.¹⁰

In order for cy pres to be applicable, there must be a failure only of the particular means for effectuating the testator's more general intent."¹¹ Related to this is the question of whether the purpose specified admits of a more general intention. In *Hampton v. O'Rear* the court determined that the settlor had "intended to part with title to the property devised in the event only that such property should be used for a particular purpose and in a particular manner by a particular person."¹² This conclusion was reached by reading the entire will which contained such phrases as "strict adherence to and compliance with these provisions . . . and not otherwise."

However, although the specified purpose may be quite limited it may be sufficiently general to satisfy this requirement. In *Fay v. Hunster*¹³ the settlor left money insufficient to establish a home for aged colored people which was to be under the direction of the pastor of a named church. The court held that there was evidenced a charitable intent to aid aged colored people and the establishment of the home was only the way to effect this. Therefore, the trust should be applied cy pres to other such institutions.

The third requirement is that of impossibility, impracticality or illegality of the donor's method of carrying out his general intent.¹⁴ The situations this encompasses are legion: the trustee may refuse the gift;¹⁵ the named institution may no longer be or never have been in existence;¹⁶ the trust may be insufficient for the plan proposed;¹⁷ changed condition may make it impractical to carry out the plan.¹⁸ In all of the above instances the court distributed the trust cy pres to effectuate the

8 213 Cal. 131, 141, 2 P.2d 21, 25 (1931); *accord*, *Union Methodist Episcopal Church v. Equitable Trust Co.*, 32 Del. Ch. 197, 83 A.2d 111, 114 (1951); 31 *ST. JOHN'S L. REV.* 271 (1957).

9 *Town of Brookline v. Barnes*, 324 Mass. 632, 87 N.E.2d 843 (1949).

10 *Noel v. Olds*, 138 F.2d 581, 584 (D.C. Cir. 1943); *In re Loring's Estate*, 29 Cal.2d 423, 175 P.2d 524 (1946).

11 *FISCH*, *supra* note 4 at 128.

12 309 Ky. 1, 215 S.W.2d 539, 543 (1948); *accord*, *Defenders of Furbearers v. First Nat'l Bank & Trust Co.*, 306 S.W.2d 100 (Ky. 1957); *Banker's Trust Co. v. New York Women's League for Animals*, 23 N.J. Super. 170, 92 A.2d 820 (1952).

13 181 F.2d 289 (D.C. Cir. 1950). *Accord*, *Olds v. Rollins College*, 173 F.2d 639 (D.C. Cir. 1949) (a gift of an art museum was refused by Duke University. *Held*, testator had general intent to promote culture in the South; the establishment at Duke was only specific interest). See *Stead v. American Security & Trust Co.*, 173 F.2d 650 (D.C. Cir. 1949) (*per curiam*); *Petition of Rochester Trust Co.*, 94 N.H. 207, 49 A.2d 922 (1946).

14 *First Nat'l Bank v. Elliot*, 406 Ill. 44, 92 N.E.2d 446 (1950).

15 *In re Faulkner's Estate*, 128 Cal. App. 2d 575, 275 P.2d 818 (1st Dist. Ct. App. 1954) (a gift to A.A. was refused as a matter of policy. Gift indicated a general intent to help alcoholics so court will name new trustee). *Olds v. Rollins College*, 173 F.2d 639 (D.C. Cir. 1949).

16 *Petition of Rochester Trust Co.*, 94 N.H. 207, 49 A.2d 922 (1946). (There was no specifically Protestant charitable institution in named town); *In re Clark's Will*, 150 N.Y.S.2d 65 (Surr. Ct. 1956) (Named church had ceased to exist as a separate entity but had merged with another).

17 *Fay v. Hunster*, 181 F.2d 289 (D.C. Cir. 1950) (not sufficient money to establish a home for aged).

18 *Stead v. American Security & Trust Co.*, 173 F.2d 650 (D.C. Cir. 1949) (*per curiam*); *Shoemaker v. American Security Charity & Trust Co.*, 163 F.2d 585 (D.C. Cir. 1947).

settlor's dominant intention. One situation where cy pres has no application is that in which the testator provided for failure of his original plan by gift over.¹⁹ The expressed intent of the donor in regard to the alternative beneficiary obviates the need for the use of cy pres.²⁰

The instant case provided only two of the three prerequisites for the proper application of cy pres. Both opinions assumed without discussion that the bequest was a charitable trust. Neither opinion denied that a strict adherence to the specific condition would have been improper state action in contravention to the fourteenth amendment. Apparently there was no attempt to avoid the illegality of the condition as was done in *In re Girard College Trusteeship*,²¹ by use of cy pres to replace the municipal trustee with a private trustee. Neither opinion considered this approach, possibly because the bequest had already been declared invalid by a lower court.²² It has been suggested that such action on the part of a court would of itself constitute improper state action.²³

It was the general charitable intent that was found lacking in the instant case. Usually implicit in these cases, but at times explicit, is the realization that in the exercise of judicial cy pres the courts are to carry out the intention of the settlor. As a rule of judicial construction, cy pres "is an aid to fulfill a testator's design as nearly as possible."²⁴ Therefore,

A court of equity is not warranted in substituting a different plan for that which the testatrix primarily prescribed in the instrument creating this charitable trust, merely because a coldly wise intelligence, impervious to the special predilections which inspired her liberality, and indifferent to her final word as to the disposition of her property, would have dictated a different use of her money.²⁵

Those who sought to overturn the lower court decision by the use of cy pres would seem to overlook this canon of equity jurisprudence. The testatrix intended to aid only children of the white race. Any other "construction" is merely substituting the "constructor's" desires for those of the donor whose property and generosity are involved. The result reached by a literal interpretation of the donor's command that the provisions were "to be carried out to the letter" does less violence to the donor's intention than would an enlarged class of beneficiaries. Though the guarantee of civil rights to all citizens is a most important function of the courts, this policy should not permit a court to override the intention of the testator in the disposition of his property. The approach favored by the dissent would result in the predilections of the judge prevailing over the generous intent of the testator and the introduction into our jurisprudence of the detested prerogative cy pres which has been rightly left to the British Crown.²⁶

Thomas A. McNish

19 *First Nat'l Bank v. American Bd. of Comm'rs for Foreign Missions*, 328 Ill. App. 481, 66 N.E.2d 446 (1946); *City of Belfast v. Goodwill Farms*, 103 A.2d 517 (Me. 1954).

20 *Camden Trust Co. v. Christ's Home*, 28 N.J. Super. 446, 101 A.2d 84 (1953); *In re Shapiro*, 112 N.Y.S.2d 46 (Surr. Ct. 1952).

21 *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, cert. denied, 357 U.S. 570 (1958).

22 28 U.S.L. WEEK 1061 (Nov. 3, 1959). Also, it is questionable whether it would be practicable to appoint a private trustee to administer a playfield.

23 *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, 854 (1958) (dissenting opinion); 33 *Notre Dame Law*. 495 (1958).

24 *In re Clark's Will*, 150 N.Y.S.2d 65, 68 (Surr. Ct. 1956); accord, *Residents & Fellows of Harvard College v. Jewett*, 11 F.2d 119, 122 (6th Cir. 1925).

25 *In re Price's Will*, 35 N.Y.S.2d 111, 117 (Sup. Ct. 3d Dept. App. Div. 1942), aff'd per curiam 289 N.Y. 751, 46 N.E.2d 354 (1943); accord, *Union Methodist Episcopal Church v. Equitable Trust Co.*, 32 Del. Ch. 197, 83 A.2d 111, 114 (1951); *In re Women's Homoeopathic Hospital*, 393 Pa. 313, 142 A.2d 292, 294 (1958).

26 4 SCOTT, TRUSTS § 399.1 (1956).

CONSTITUTIONAL LAW — COURTS-MARTIAL — CIVILIAN DEPENDENTS AND EMPLOYEES NOT SUBJECT TO MILITARY JURISDICTION. — On January 18, 1960 the United States Supreme Court decided four cases which gave a final and authoritative answer to the question, may civilians be court-martialed in peacetime? In 1957, it was decided in *Reid v. Covert*¹ that servicemen's wives could not be court-martialed for capital offenses committed abroad. One of the cases concerned a serviceman's wife who was court-martialed for a noncapital offense committed while accompanying her husband overseas. Three other cases involved capital and noncapital offenses committed by civilian employees of the armed forces while overseas. *Held*, the necessary and proper clause cannot expand the power given Congress to regulate the land and naval forces so as to include civilian dependents who have committed noncapital crimes, *Kinsella v. Singleton*, 80 Sup. Ct. 297 (1960), or civilian employees who have committed capital crimes, *Grisham v. Hagan*, 80 Sup. Ct. 310 (1960), or noncapital crimes in peacetime while abroad with the armed forces, *McElroy v. Guagliardo*, 80 Sup. Ct. 305 (1960).

Congress, in May of 1950, enacted the Uniform Code of Military Justice² (UCMJ), accomplishing a badly needed reform.³ Especially significant among the many changes was the establishment of the Court of Military Appeals composed of three civilian judges.⁴ While most would agree with Mr. Justice Black that trial by court-martial lacks the advantages of trial by jury,⁵ the same cannot be said about the procedural safeguards insured by the Code. The pre-trial investigatory proceedings are noteworthy.⁶ It might even be argued that military appellate review possesses many advantages which are lacking in the civil system. Among its more desirable features are automatic review at no cost to the accused,⁷ competent counsel furnished without charge,⁸ the possibility of defendant procuring his own civilian counsel,⁹ and an extensive review of court-martial findings and sentences.¹⁰

But Americans are distrustful, if not fearful, of military authority and have therefore turned to the federal civil courts when faced with the exercise of military jurisdiction.¹¹ Past history has demonstrated that petitions for writs of habeas corpus have given rise to most of the important cases concerning military jurisdiction.¹² Because a court-martial is not a part of the federal judiciary the federal courts can-

1 354 U.S. 1 (1957).

2 10 U.S.C. §§ 801-76 (1959). Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

3 "Probably no one will deny that the court-martial law under which appellant was convicted needed reformation; indeed this has already been accomplished [by UCMJ]." *White v. Humphrey*, 212 F.2d 503, 507-8 (3d Cir. 1954); *Burns v. Wilson*, 346 U.S. 137, 140-41 (1953). Snedeker, *The Uniform Code of Military Justice*, 38 GEO. L.J. 521, 524-56 (1950), contains an analysis of the "ailments of military justice" prior to the Code.

4 Uniform Code of Military Justice art. 67(a), 10 U.S.C. § 867(a) (1959); *Shaw v. United States*, 209 F.2d 811 (D.C. Cir. 1954).

5 *Toth v. Quarles*, 350 U.S. 11, 17-19 (1955); *Reid v. Covert*, 354 U.S. 1, 36-39 (1957); *Lee v. Madigan*, 358 U.S. 228, 234 (1959).

6 Uniform Code of Military Justice arts. 30-35, 10 U.S.C. §§ 830-5 (1959).

7 EVERETT, MILITARY JUSTICE 306 (1956).

8 Uniform Code of Military Justice art. 70(c), 10 U.S.C. § 870(c) (1959).

9 Uniform Code of Military Justice art. 70(d), 10 U.S.C. § 870(d) (1959).

10 Uniform Code of Military Justice arts. 59-76, 10 U.S.C. § 859-76 (1959).

11 *Ex parte Merryman*, 17 Fed. Cas. 144 (No. 9487) (C.C.D. Md. 1861) (a courageous stand taken by Chief Justice Taney against the exercise of military jurisdiction); *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866) (a "state paper" in this field holding that if a civil court is "open," a civilian citizen cannot be made subject to military jurisdiction). *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Toth v. Quarles*, 350 U.S. 11 (1955); *Reid v. Covert*, 354 U.S. 1 (1957); *Lee v. Madigan*, 358 U.S. 228 (1959).

12 *Ibid.*

13 *Jackson v. Taylor*, 353 U.S. 509 (1957); *Fowler v. Wilkinson*, 353 U.S. 583 (1957); *Burns v. Wilson*, 346 U.S. 137 (1953); WINTHROP, MILITARY LAW AND PRECEDENTS 30.2 (2d Ed. 1920). ". . . neither mandamus, certiorari, nor a writ of prohibition is available." Snedeker, *The Uniform Code of Military Justice*, 38 GEO. L.J. 521, 532 (1950).

not directly review its actions.¹³ But a collateral attack may be allowed, especially when military jurisdiction is challenged.¹⁴

Articles (2) and (3) of the UCMJ classify the persons subject to the Code.¹⁵ If the exercise of jurisdiction is justified by the statute the more difficult question of constitutional power is reached.¹⁶

When does a civilian become a member of the armed forces? Under existing law, induction causes the crucial transformation. Although the Supreme Court had indicated¹⁷ that if an individual failed to report for induction he could be court-martialed, Congress in article 2(1) of the UCMJ established "actual induction" as the changing point.¹⁸ Volunteers, however, are transformed at the time of their "muster or acceptance" into the armed forces.¹⁹

But the termination of military status, or the point when a soldier again returns to civilian status, has caused more difficulty. One of the prisoners of war of the Korean conflict who at first refused repatriation was court-martialed when he finally returned to the United States. He challenged the exercise of military jurisdiction, claiming he should have been discharged from the armed forces before his court-martial. His claim was rejected by two federal courts which pointed out that the Code in unambiguous terms reaches "those who are awaiting discharge after expiration of enlistment."²⁰ Actual discharge, then, would seem to be the act that transforms a soldier into a civilian.

But Congress did not stop at this point in granting military jurisdiction. Article 3(a) of the UCMJ provides that anyone accused of having committed a serious offense while subject to the UCMJ remains triable by court-martial after the termination of that status, but only if he could not be tried in a civil court.²¹ In 1955

14 WINTHROP, *op. cit.* at 49-50. For the beginning of the evolution of a new method of challenging military authority see *Girard v. Wilson*, 152 F. Supp. 21 (D.D.C.), *reversed on other grounds*, 354 U.S. 524 (1957); *Jackson v. Mc Elroy*, 163 F. Supp. 257, 259 (D.D.C. 1958) where it is stated: "It will be assumed not only that the question of jurisdiction may be inquired into but that it should be done in this declaratory judgement proceeding." For the old view see: *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958).

15 10 U.S.C. §§ 802-03 (1959).

16 In addition to Congress' power "to make rules for the government and regulation of the land and naval forces" U.S. CONST. art. I, § 8, cl. 14, clauses 10, 11 and 12 are also cited to justify congressional action.

17 *Billings v. Truesdell*, 321 U.S. 542, 556, (1944).

18 The Court of Military Appeals had held that a person must take an oath before jurisdiction attaches. *United States v. Ornelas*, 2 USCMA 96, 6 CMR 96 (1952).

19 Uniform Code of Military Justice art. 2(1), 10 U.S.C. § 802(1) (1959).

20 *Dickenson v. Davis*, 143 F. Supp. 421 (D. Kans.), *affirmed*, 245 F.2d 317, (10th Cir.), *cert. denied*, 355 U.S. 918 (1958). But dictum indicated that "unreasonable delay in granting the discharge could, in all probability be made the basis for appropriate court action." 143 F. Supp. at 425.

21 One author has effectively summarized the legislative history of Art. 3(a) Uniform Code of Military Justice, 10 U.S.C. § 803 (a) in the following passage:

Hirshberg v. Cooke, 336 U.S. 210 (1949) was the case Congress seems to have had particularly in mind when it enacted Art. 3(a) of the Uniform Code. Hirshberg, a Navy enlisted man, had been a Japanese prisoner of war during World War II. After his liberation his normal term of enlistment expired and he re-enlisted the next day. Later he was court-martialed for maltreatment of other prisoners of war. After habeas corpus proceedings had been instituted to test military jurisdiction, the Supreme Court held that under the applicable statutes the discharge made Hirshberg immune from court-martial for crimes committed during his first enlistment. See House Report No. 491, 81st Congress, 1st Session, Hearings before the House Committee on Armed Forces, HR 4080, p. 5. In the same context the Report refers to the larceny by American personnel of the crown jewels of Hesse. One of the participants was a WAC Captain who was apprehended while in terminal leave status. A Federal court decided that while in this status she remained subject to military jurisdiction. *Hironimus v. Durant*, 168 F.2d 388 (4th Cir.), *cert. denied* 335 U.S. 818 (1948).

EVERETT, MILITARY JUSTICE 35 n. 51 (1956).

this article came under the fire of the federal judiciary in *Toth v. Quarles*.²²

Toth, a discharged airman, had been arrested in Pittsburgh, transported to Korea, and charged with a murder allegedly committed while he was a member of the armed forces. A discharged serviceman, said the Supreme Court, was a civilian, and therefore entitled to trial by jury in an article III constitutional court, with the full protection of the fifth and sixth amendments. Congress had acted outside of its constitutional power in exercising military jurisdiction over a person in Toth's position.²³

Closely related to the regular component of our armed forces are the reserves of the various services. Under article 2(1,3) of the UCMJ only those reserves on active duty, or those in training who voluntarily accept orders specifying that they are subject to the Code are amenable to military jurisdiction. Under certain limited circumstances reservists can be ordered to active duty and would then become subject to military law. For example, it has been held that a Marine reservist ordered to active duty after failing to fulfill his reserve obligation could be taken into custody by military authorities.²⁴

Article 2(11) contains what has proven to be the most controversial exercise of military jurisdiction.²⁵ It provides that any person "serving with, accompanying, or employed by" the armed forces outside the United States, is amenable to military jurisdiction. This article has also been challenged in the federal courts. When a case concerning the "accompanying" provision first reached the Court of Appeals for the District of Columbia it finessed the problem by sending the case back for the compilation of a more comprehensive record.²⁶ But in a case involving a serviceman's wife who had been court-martialed for the alleged murder of her husband while in England, Judge Tamm faced the issue squarely with the resounding observation that "a civilian is entitled to a civilian trial."²⁷ A different district court disagreed and the two cases reached the Supreme Court.²⁸ At first, the exercise of military jurisdiction was approved on the strength of previous opinions which seemed to indicate that the Constitution was not applicable outside the jurisdiction of the United States,²⁹ but a rehearing was later ordered. The previous opinions were withdrawn and the petitioners were ordered released.³⁰ Mr. Justice Black, in a forceful opinion for four Justices,³¹ rejected the notion that the protection of the Constitution did not apply outside the territorial limits of the United States.³² The claim that the exercise of military jurisdiction was necessary and proper to carry

22 350 U.S. 11 (1955).

23 But Art. 3(a) still seems to have some life. An airman released from active duty and transferred to a reserve status for completion of his military obligation was found subject to military jurisdiction. In *Wheeler v. Reynolds*, 164 F. Supp. 951, 955 (N.D. Fla. 1958) the court felt that, unlike *Toth*, petitioner "was not a full-fledge civilian, nor in the same status as a discharged veteran." A soldier who was discharged and immediately re-enlisted the next day was found amenable to military jurisdiction for an offense committed prior to the discharge. *United States v. Kish*, 176 F. Supp. 820 (M.D. Pa. 1959). The Court of Military Appeals has taken similar positions in several cases. See *United States v. Wheeler*, 10 USCMA 646, 28 CMR 212 (1959) and cases cited therein.

24 *In re La Plata*, 174 F. Supp. 884 (E.D. Mich. 1959). A National Guardsman who consented to go on active duty with the army, received the approval of the state governor, and accepted orders, was found amenable to court-martial jurisdiction for an offense committed while on active duty. *In re Taylor*, 160 F. Supp. 932 (W.D. Mo. 1958). And a retired Admiral could be court-martialed for what also appeared to be a civilian offense: sodomy. *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958).

25 Uniform Code of Military Justice art. 2(11), 10 USC § 802(11) (1959).

26 *Rubenstein v. Wilson*, 212 F.2d 631 (D.C. Cir. 1954).

27 *Covert v. Reid*, D.D.C., Nov. 22, 1955 cited in *In re Varney*, 141 F. Supp. 190, 203 (S.D. Cal. 1956).

28 *Krueger v. Kinsella*, 137 F. Supp. 806 (S.D.W. Va. 1956).

29 *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956).

30 *Reid v. Covert*, 354 U.S. 1 (1957).

31 *Id.* at 3-41.

32 *Id.* at 5-6.

out our executive agreements with England and Japan was also rejected.³³ The question of congressional power was then reached: did the power to "make rules for the government of the land and naval forces" supplemented by the necessary and proper clause permit the exercise of military jurisdiction over civilians? The nub of the opinion is contained in the following portion:³⁴

Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and other treasured constitutional protections. Having run up against the steadfast bulwark of the Bill of Rights, the Necessary and Proper Clause cannot extend the Scope of Clause 14.

Justices Frankfurter and Harlan limited their concurrences to the proposition that in *capital* cases during peacetime the exercise of court-martial jurisdiction could not be justified by congressional power, when considered in connection with the specific protections of article III, and the fifth and sixth amendments.³⁵ Their opinions seemed to indicate a broader possible sweep for the necessary and proper clause and an indication that the question was akin to a due process determination calling for a balancing of many factors. For the second time, however, a portion of the UCMJ had been declared unconstitutional.

The "employed by" portion of article 2(11) has generated even more controversy. Since *Covert* the federal courts have had to decide several cases challenging the exercise of military jurisdiction over military employees charged with capital and noncapital offenses allegedly committed in foreign countries. In the *Guagliardo* case,³⁶ after summarizing the previous holdings of the Supreme Court,³⁷ Judge Holtzoff decided that an electrician employed by the Air Force in Morocco could be court-martialed for a noncapital offense. A different district court in the *Grisham* case, following this lead, held that an employee could be court-martialed even when a *capital* offense was involved.³⁸

In the Court of Appeals for the District of Columbia the *Guagliardo* decision was reversed.³⁹ The court held that while some persons employed by the armed forces could be made subject to military law, the blanket provision "employed by" would violate the constitutional rights discussed in *Covert*. But the court avoided a constitutional decision by holding that article 2(11) was not severable. The Third Circuit in *Grisham*⁴⁰ held that it was severable, and that even though a *capital* offense was involved, it had no constitutional doubts about the exercise of military jurisdiction. Several district courts also sustained the exercise of military jurisdiction.⁴¹ Finally the four cases under discussion reached the Supreme Court.⁴²

33 *Id.* at 16.

34 *Id.* at 21.

35 *Id.* at 41-64, and 64-70.

36 *Guagliardo v. McElroy*, 158 F. Supp. 171 (D.D.C. 1958).

37 A former member of the armed forces, who had been discharged is no longer within the control of the military, is not subject to trial by court-martial for an offense committed during his term of service.

A wife, a child, or other dependent of a member of the armed forces is not subject to trial by court-martial in a capital case.

The Supreme Court has not determined whether a dependent accompanying a serviceman is subject to trial by court-martial in a case other than capital.

Similarly, the Supreme Court has never had the occasion to decide whether a civilian employee attached to the armed forces in a foreign country is subject to trial by court-martial.

158 F. Supp. at 175.

38 *Grisham v. Taylor*, 167 F. Supp. 112 (M.D. Pa. 1958).

39 *Guagliardo v. McElroy*, 259 F.2d 927 (D.C. Cir. 1958).

40 *Grisham v. Taylor*, 261 F.2d 204 (3d Cir. 1958).

41 *In re Yokoyama*, 170 F. Supp. 467 (S.D. Cal. 1959); *Wilson v. Bohlender*, 167 F. Supp. 791 (D. Colo. 1958); *In re Varney*, 141 F. Supp. 190 (S.D. Cal. 1956). Of all the district courts who considered this question only one, in an unreported case, denied the exercise of jurisdiction by the military. *Hurlahe v. Wilson*, D.D.C., Jan. 4, 1956, cited in *In re Varney*, 141 F. Supp. 190, 204 (S.D. Cal. 1956).

The Government, in its argument, did not attack the *Covert* decision. While accepting it, they argued that it should not be extended.⁴³ The contention was again advanced that civilians "closely connected" with the armed forces have "consistently been subject to military jurisdiction."⁴⁴ Historical data was marshalled to support this contention, but it was unconvincing.⁴⁵ A second approach seemed more effective. It attempted to justify the exercise of military jurisdiction as necessary and proper for the regulation of the armed forces overseas.

Approximately 25,000 employees and 455,000 dependents are abroad in 105 foreign places with various services.⁴⁶ These civilians are considered members of the armed forces by foreigners, and create disciplinary problems.⁴⁷ Their offenses affect our relations with these nations. Criminal jurisdiction is necessary, but the various alternatives to trial by court-martial are inadequate. First,⁴⁸ trial by foreign court is undesirable because violations of our security regulations, and offenses against American citizens might not be prosecuted. In addition, military commanders should not be forced to rely on foreign courts for aid in maintaining discipline. It is also possible that the criminal procedure of the foreign country might not coincide with our notions of due process. Second,⁴⁹ trial in an American civil court in the United States is not practical. New diplomatic agreements would have to be negotiated with foreign nations. The problems of securing foreign witnesses, ex-

42 *Kinsella v. Singleton*, 359 U.S. 903 (1959); *McElroy v. Guagliardo*, 359 U.S. 904 (1959); *Wilson v. Bohlender*, 359 U.S. 906 (1959); *Grisham v. Taylor*, 359 U.S. 978 (1959).

43 Brief for the Petitioners, pp. 27-28, *McElroy v. Guagliardo*, 80 Sup. Ct. 305 (1960); Brief for the Appellant, pp. 11-15 *Kinsella v. Singleton*, 80 Sup. Ct. 297 (1960); Brief for Respondent, pp. 23-26, *Grisham v. Hagan*, 80 Sup. Ct. 310 (1960).

44 Brief for Petitioners, pp. 28-71, *supra* note 43.

45 Brief for Petitioners, pp. 28-71, *supra* note 43; Brief for Appellant, pp. 15-30, *supra* note 43; Brief for Respondent, pp. 15-23, *supra* note 43.

46 Brief for Petitioners, pp. 110-1, *supra* note 43.

47 Brief for Petitioners, p. 75, *supra* note 43 contains the following graph which demonstrates the number of offenses committed abroad:

Type of offense (period 1 Dec. '54 to 30 Nov. '58)	Subject to foreign jurisdiction		Waiver of foreign jurisdiction obtained	
	Employees	Dependents	Employees	Dependents
Murder.....	1	2	0	1
Rape.....	3	1	3	1
Manslaughter (including negligent homicide).....	32	16	10	3
Arson.....	0	6	0	5
Robbery, larceny and related offenses.....	7	36	5	25
Aggravated assault.....	8	8	4	4
Simple assault.....	50	21	41	16
Offenses against economic control laws.....	231	54	36	41
Traffic offenses incl. drunken and reckless driv. and fleeing scene of accident.....	2,566	1,791	2,187	1,587
Disorderly conduct, drunkenness, breach of peace, etc.....	28	41	19	34
Other.....	36	88	14	15
Totals.....	2,962	2,064	2,319	1,732
Combined Totals.....	5,026		4,051	

But referring to this graph Mr. Justice Clark in *Kinsella v. Singleton*, 80 Sup. Ct. 297, 302 n. 9 pointed out that:

Aside from traffic violations, there were only 273 cases (both capital and noncapital) involving dependents subject to foreign jurisdiction, during the period between December 1, 1954 and November 30, 1958. This number includes 54 "Offenses against economic control laws" and 88 offenses denominated as "other."

This was not enough to convince the Court that a discipline problem existed.

48 *Id.* at 83-90.

49 *Id.* at 90-5.

cessive delays, and great expense would also arise. Third,⁵⁰ trial by an American civil court in a foreign nation is not feasible. Assuming that the host nation would consent to this exercise of extraterritorial jurisdiction where would the grand juries, petit juries, and competent counsel come from? Finally,⁵¹ to forbid all civilians from accompanying the armed forces would deprive them of needed skilled personnel and create dangerous morale problems. Given these conditions the exercise of military jurisdiction over dependents in noncapital cases, and employees in all cases is necessary and proper.

Mr. Justice Clark, in a surprising switch,⁵² announced the opinions of the Court.⁵³ Referring to the *Toth* and *Covert* cases he indicated that: "The test for jurisdiction, it follows, is one of *status*, namely whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'"⁵⁴ Since the Court had already decided that civilian dependents in capital cases did not fall within this power and the Government had been unable to justify making a distinction between capital and noncapital cases,⁵⁵ *Covert* would control. Necessity, even if it be a relevant factor, had not been clearly demonstrated,⁵⁶ and the due process-like balancing suggested by the concurring Justices in *Covert* was not justified by history.⁵⁷ "If the exercise of power [by Congress] is valid it is because it is granted in clause 14, not because of the necessary and proper clause."⁵⁸

The question, may a civilian employee be tried by court-martial for a capital offense committed abroad while employed by the armed forces, was also answered in the negative. The constitutional rights discussed in *Covert* were held to protect a civilian employee in a capital case. "The awesomeness of the death penalty has no less impact when applied to civilian employees."⁵⁹ In the noncapital employee cases the severability solution was rejected. But since *Singleton*, *Grisham*, *Covert* and *Toth* controlled, the exercise of jurisdiction was held to be unconstitutional.⁶⁰

For the third time the Court declared part of the Uniform Code of Military Justice unconstitutional. No one will deny that the UCMJ is an enlightened criminal code.⁶¹ Nevertheless, in balancing the individual's constitutional rights against the power of Congress to regulate the land and naval forces the Court decided in favor of civil rights. This decision should not have been a surprise.⁶² Military

50 *Id.* at 95-100.

51 *Id.* at 100-1.

52 He had written the dissent in *Reid v. Covert*, 354 U.S. 1 (1957), and the majority opinions before the rehearing.

53 Justices Harlan and Frankfurter dissented in the noncapital cases but concurred in the capital case. Justices Whittaker and Stewart agreed that civilian dependents could not be court-martialed for a noncapital offense, but felt that the civilian employees could be made subject to military jurisdiction.

54 *Kinsella v. Singleton*, 80 Sup. Ct. 297, 300-01 (1960).

55 *Id.* at 301-02.

56 *Id.* at 302.

57 *Id.* at 304.

58 *Id.* at 304.

59 *Grisham v. Hagan*, 80 Sup. Ct. 310, 311 (1960).

60 *McElroy v. Guagliardo*, 80 Sup. Ct. 305 (1960).

61 Even Mr. Frederick Bernays Wiener who argued some of the instant cases, and *Covert* had written:

The only substantive rights available to civilians but still unavailable to those in uniform are indictment by grand jury and trial by petty jury (the former guarantee being of doubtful value); the right to confrontation; and the right to bail. Wiener, *Courts Martial and the Bill of Rights*, (pts. 1-2), 72 HARV. L. REV. 1, 266, 296 (1958).

62 At last year's term of the Court it had been pointed out that:

We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals—our reluctance to give them authority to try people for nonmilitary offenses — has a long history. *Lee v. Madigan*, 358 U.S. 228, 232 (1959).

jurisdiction over civilians has usually been restricted.⁶³ But while the present decisions were soothing to those who instinctively distrust military authority, the Government is left with half a million civilians overseas who, at the present time, are not subject to our criminal jurisdiction.

Congress, however, does have the power to provide for a trial in a federal court on the return of the accused to the United States.⁶⁴ Since sovereign foreign nations have jurisdiction to try offenses committed in their territory, this might be another solution.⁶⁵ Experience has demonstrated that most of these nations are humane in their treatment of criminals.⁶⁶ It is also possible that most of the work performed by civilian employees can be done by men in the service, and the Court indicated that the needed skilled personnel could be drafted if needed.⁶⁷ Other procedures⁶⁸ could be used to make them a part of the "land and naval forces." It is true that these decisions will cause much discomfort. New laws will have to be enacted, new treaties will have to be negotiated, and numerous expenses will have to be incurred. But, as Mr. Justice Clark has indicated, this is the price we pay for constitutional rights,⁶⁹ although not a cure for the cold war, the decisions are at least a "palliative to a troubled world."⁷⁰

Joseph A. Marino

COPYRIGHT — LITERARY PROPERTY IN GOVERNMENT OFFICIALS — WRITINGS OF A GOVERNMENT OFFICIAL NOT PART OF HIS OFFICIAL DUTIES ARE NOT IN THE PUBLIC DOMAIN ALTHOUGH THEY RELATE TO OR ARISE OUT OF HIS OFFICIAL DUTIES — Plaintiff publishing house sought in a declaratory judgment action to have certain speeches of defendant, a Vice Admiral of the United States Navy, declared to be in the public domain. Defendant had delivered twenty-three speeches on various topics before numerous organizations and groups. Mimeographed copies of each of the speeches were usually distributed at or about the time of the speech to interested persons, but only subsequent to December 1, 1958, did the defendant place a copyright notice on these mimeographed copies and adopt the practice of obtaining a copyright on each of his addresses at the time of delivery. *Held*, literary products of a Government official that have some bearing on, or arise out of his official actions are not in the public domain, but remain the property of the author if their writing and delivery is not part of his official duties. *Public Affairs Press v. Rickover*, 177 F. Supp. 601 (D.D.C. 1959).

Protection for their literary productions is provided to authors both by the common law¹ and by statute.² A recognition of these two distinct rights is essential to a proper understanding of the instant case. Reference is made to the common law protection as the right of first publication.³ The rights secured by statute are

63 See the cases cited in note 11 *supra*.

64 U. S. CONST. art. IV, § 2.

65 In *Wilson v. Girard*, 354 U.S. 524 (1957) the Court said that a sovereign nation had exclusive jurisdiction to punish offenses committed against its laws. It is interesting to note that in one of the instant cases the petitioner had been arrested and charged with murder by the French government, before he was court-martialed by the military authorities of the United States. Brief for Respondent, pp. 4-5, *Grisham v. Hagan*, 80 Sup. Ct. 310 (1960).

66 The *Girard* incident is a good example.

67 *McElroy v. Guagliardo*, 80 Sup. Ct. 305, 309 (1960).

68 It was suggested that procedures like those followed in *Johnson v. Sayre*, 158 U.S. 109 (1895) and *Ex parte Reed*, 100 U.S. 13 (1879) would permit the exercise of military jurisdiction. *McElroy v. Guagliardo*, 80 Sup. Ct. 305, 308 (1960).

69 *McElroy v. Guagliardo*, 80 Sup. Ct. 305, 309 (1960).

70 *Kinsella v. Singleton*, 80 Sup. Ct. 297, 305 (1960).

1 *White v. Kimmel*, 94 F. Supp. 502 (S.D. Cal. 1950). See generally HOWELL, *THE COPYRIGHT LAW* 1-10 (1952).

2 17 U.S.C. (1958).

3 *E.g.*, *Pushman v. N.Y. Graphic Society, Inc.*, 287 N.Y. 302, 39 N.E.2d 249 (1942).

properly referred to as copyrights.⁴ This terminology avoids the confusion that results from the use of the word copyright to designate both rights.⁵

The right of first publication is that of an author to publish or refrain from publishing his production. It enables an author to permit the use of his work by some to the exclusion of others and to give a copy of his manuscript to another person without parting with his property right in it.⁶ This right exists until an author permits a general publication of his work.⁷ To constitute a general publication there must be "a dissemination of the work of art itself among the public as to justify the belief that it took place with the intention of rendering such work common property."⁸ A limited publication communicates the contents of a manuscript to a definite group and for a limited purpose not including the right of diffusion, reproduction or sale, and does not result in the loss of the right of first publication,⁹ which then must mean the right of first general publication.

Upon general publication the only rights which an author has are those secured by compliance with the Federal Copyright Act.¹⁰ It also appears at present that the right of first publication is lost by registering the work with the copyright office, whether or not there is a general publication.¹¹ In any event, it is clear that a copyright and the right of first publication cannot co-exist.¹²

Plaintiff's claim of public ownership is thus reducible to two propositions: First, it was maintained that the speeches delivered after December 1, 1958, were in the public domain because, having been registered with the copyright office, and mimeographed copies having been distributed with the copyright notice, the only rights that remained were those secured by the Federal Copyright Act. Plaintiff maintained that the act afforded no protection since the speeches were government publications within that section of the act which provides that no copyright shall subsist in any government publication.¹³ Second, plaintiff contended that no matter who was deemed to be the proprietor of the speeches given before December 1, 1958, they were in the public domain because there had been a general publication of them without even an attempt to comply with the copyright act.

The court disposed of this second contention by finding that the facts showed no general publication. This holding is in accord with the current trend of judicial thought which fully recognizes the benefit that accrues to society in permitting more comprehensive disclosures to be included within the concept of limited publication¹⁴ when there has been no attempt to secure a copyright.

The speeches delivered after December 1, 1958 presented a more difficult problem. As the court viewed it, publications by government officers and employees could be divided into three categories. The first consists of publications which the employee was hired to produce.¹⁵ The second consists of publications completely unrelated to his job. And the third, lying between the other two, consists of those publications having some bearing on, or that arise out of his official actions, although the writing of books or delivering of addresses was not part of his official duties.

4 *Krafft v. Cohen*, 117 F.2d 579 (3d Cir. 1941).

5 *Stanley v. Columbia Broadcasting System*, 35 Cal. App. 2d 653, 221 P.2d 73 (1950).

6 *Frohman v. Ferris*, 238 Ill. 430, 87 N.E. 327 (1912), *aff'd*, 223 U.S. 424 (1912).

7 *White v. Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950).

8 *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 299-300 (1907).

9 *White v. Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950).

10 17 U.S.C. (1958); *White v. Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950).

11 *Brown v. Select Theatres Corp.*, 56 F. Supp. 438 (D. Mass. 1944).

12 The difference in protection given by these two rights is not discussed. The case was heard upon an agreed statement of facts. The question was whether the defendant had any property rights in his speeches. If he had either right it was apparently admitted in the instant case that the use which the plaintiff sought to make of the speeches would be unlawful.

13 17 U.S.C. § 2 (1958).

14 *White v. Kimmell*, 94 F. Supp. 502 (S.D. Cal. 1950); Young, *Plagiarism, Piracy, and the Common Law Copyright*, 5 ASCAP COPYRIGHT LAW SYMPOSIUM 205-29 (1954).

15 *Heine v. Appleton*, 11 Fed. Cas. 1031 (No. 6324) (C.C.S.D. N.Y. 1857).

The court, finding that the speeches in question were in the third category, was faced with an issue never decided on the appellate level.¹⁶

The question was whether or not literary productions in the third category were, like those in the first, government publications not capable of being copyrighted,¹⁷ or, like those in the second category, the property of their author and capable of being copyrighted.

The court held that such publications were not government publications. It agreed with trial court¹⁸ decision in *Sherrill v. Grieves*¹⁹ that the literary products in the third category were not in the public domain, but remained the property of their author to the extent that the common law and the law of copyright otherwise protected him. In the instant case the defendant, having fully complied with the statutory requisites for the granting of a copyright, obtained full protection.

It is submitted that the court ruled correctly on this issue. Plaintiff sought to do violence to our traditional notions of property in the area of government employment. Plaintiff, upon the policy considerations that the creator of a literary production is employed by the public, has gotten the germ of his creation from his public calling and has used public facilities to put it into concrete form, sought to make the creation public. It is submitted that our political and economic system is based upon the contrary proposition that satisfying the desire of the individual to acquire and enjoy property is the safest and most promising basis for society.²⁰

Rocco L. Puntureri

EXECUTORS AND ADMINISTRATORS — PROBATE JURISDICTION — AUTOMOBILE LIABILITY INSURANCE CONTRACT HELD ASSET WARRANTING ANCILLARY LETTERS. — Decedent, Robert A. Riggle, an Illinois resident, was insured under a contract of liability insurance issued in Nassau County, New York, by an insurer authorized to do business in New York. Pursuant to this contract the insurance company defended Riggle in a suit resulting from an automobile accident in the State of Wyoming. Jurisdiction in this suit was obtained by personal service on the defendant within the State of New York. While the suit was pending, Robert Riggle died, still a resident of Illinois, and a motion was filed in the Surrogate's court, Nassau County, for the issuance of ancillary letters of administration so that the suit could continue in New York. The executrix of Riggle's estate, appointed in Illinois, protested, claiming that the decedent was a resident of Illinois and had no property in New York upon which the court could issue the letters. *Held*, the automobile liability insurance policy is a sufficient asset to give the Surrogate's court for the county in which the policy was written jurisdiction to grant ancillary letters of administration. *In re Riggle's Will*, 188 N.Y.S.2d 622 (1959).

When one dies testate, his will is administered by an executor who derives his authority from that instrument.¹ When one dies intestate the law appoints an administrator for the deceased's estate.² In either case, the court will issue letters testamentary or letters of administration, which serve as credentials for the representative. It is the court decree or records which confer the right to act,³ but it is

16 The court stated that the question does not appear to have been raised in any reported case decided by any appellate court. *Sherrill v. Grieves*, 57 WASH. L. REP. 286 (1929), cited by the court as having the same issue, was decided by a trial court.

17 17 U.S.C. § 2 (1958).

18 This decision was rendered by the predecessor of the United States District Court for the District of Columbia.

19 57 WASH. L. REP. 286 (1929).

20 Mr. Justice Brandeis' dissent in *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

1 *In re Kermody's Estate*, 266 N.Y. Supp. 883 (1933).

2 *In re Thompson's Estate*, 339 Mo. 410, 97 S.W.2d 93 (1936).

3 *Wirt v. Pintard*, 40 La. Ann. 233, 4 So. 14 (1888).

the issued letters in the hands of the representative which evidences this right to those concerned with the estate. These letters are either domiciliary or ancillary. They are domiciliary if issued in the jurisdiction of decedent's domicile, and ancillary if issued anywhere else. Hence, ancillary letters are issued by a foreign jurisdiction in order to aid in the general administration of the estate. Some res located in the foreign jurisdiction is a requisite for issuance of letters in that jurisdiction,⁴ and the authority of the representative appointed will extend only to that res which is located therein.⁵

The issue in the instant case was whether a policy of automobile liability insurance written in the county of jurisdiction was sufficient in itself to warrant the issuance of ancillary letters by the Surrogate's Court. Two questions are involved: 1) Can the insurance be considered an asset? and, 2) If it is an asset, can it be said to be located within the issuing jurisdiction? Both conditions must be present in order to give the court jurisdiction to issue ancillary letters.

The authorities are divided on the question of whether an insurance policy constitutes an asset of the non-resident insured's estate which will empower a court to issue ancillary letters. For the purpose of brevity those decisions holding that it is not an asset shall be called the Kansas rule.⁶ Those holding that it is an asset which will warrant the issuance of ancillary letters shall be referred to as the New Hampshire rule.⁷

The Kansas court in the leading case of *In re Roger's Estate*⁸ reasoned that the insurer is merely an indemnitor and there can be no debt until liability of the insured is established. Therefore the insurance policy could not be considered an asset of decedent's estate since his liability had not been settled. The court betrayed some uncertainty as to this reasoning by basing its decision on the fact that even if the policy were an asset, it was not located in Kansas.⁹ Personal property was held to be transitory prior to death, but on death the situs becomes fixed at the place of domicile.¹⁰ Michigan¹¹ held that since the deceased himself could not have maintained an action against insurer in the county before his death, the county could not grant letters permitting insurer to be sued by another. A federal district court

4 *In re Roger's Will*, 232 N.Y. Supp. 609 (1929).

5 *Id.* at 613.

6 The instant court lists, with supporting case citations, the states of Colorado, Idaho, Kansas, Michigan and Oklahoma as following the Kansas rule. Further research discloses that Ohio also follows this rule. See *In re Wilcox's Estate*, 60 Ohio Ops. 232, 137 N.E.2d 301 (1955). See also *In re Klipple's Estate*, 101 So.2d 924 (Fla. App. 1958); *In re Roche's Estate*, 16 N.J. 579, 109 A.2d 655 (1954). These two cases are often cited as holding that an insurance policy is not an asset but in each case there was a finding that the insurer was not a resident of the state and therefore the requirement of situs was not met.

7 The instant court lists, with supporting authorities, as following the New Hampshire rule, the states of Georgia, Illinois, Iowa, Massachusetts, New Hampshire, Oregon and Texas. In addition to these, four other states have been found to follow this rule. See *In re Kresovich's Estate*, 168 Neb. 673, 97 N.W.2d 239 (1959); *Kimbell v. Smith*, 64 N.M. 374, 328 P.2d 942 (1958); *In re Leigh's Estate*, 6 Utah 299, 313 P.2d 455 (1957); *In re Breese's Estate*, 51 Wash. 2d 302, 317 P.2d 1055 (1957). Iowa, alone, legislatively provides that an insurance policy is an asset having situs in Iowa in any civil action arising from a motor vehicle accident. Iowa CODE § 321.512 (1958). But see *In re Fagin's Estate*, 246 Iowa 496, 66 N.W.2d 920 (1954), where the court read into this statute a requirement that the insurance company be licensed to transact business in Iowa.

8 164 Kan. 492, 190 P.2d 857 (1948).

9 *Accord*, *Wheat v. Fidelity & Casualty Co. of N.Y.*, 128 Colo. 236, 261 P.2d 493 (1953).

10 *In re De Land's Estate*, 181 Kan. 729, 315 P.2d 611 (1957) casts doubt on whether or not the Kansas court would still follow the *Rogers* holding today. In that case, a Kansas domiciliary died leaving intangible property in Missouri. The Kansas court ruled that the situs of the personal property was in Missouri and not Kansas.

11 *Olson v. Preferred Auto Ins. Co.*, 259 Mich. 612, 244 N.W. 178 (1932). Here a local statute stipulated that an insurance company could be sued only in the county of its home office and therefore, if decedent were alive he could not have maintained an action in any other county. On this basis, the Michigan case is distinguished in *Liberty v. Kinney*, 242 Iowa 656, 47 N.W.2d 835 (1951).

sitting in Idaho maintained that only the county in which the accident occurred could be said to have jurisdiction.¹²

Holding to the contrary, the New Hampshire court, in *Robinson v. Dana's Estate*,¹³ found that the insurance policy was a sufficient asset to warrant letters and that it was located within the court's jurisdiction. The appointment was held not to depend on the probable merits of the claim since to deny letters on this ground would be to take jurisdiction away from the proper state courts. The representative is appointed so that a suit can be instituted to determine the merits of the claim in the proper courts. "The event had taken place on account of which he was entitled to protection if certain things were done."¹⁴ Thus, the policy, once taken out, and once an accident occurs, is no different from an unmaturred note. When a creditor presents a claim for an appointment of a representative, he need not show the validity of the claim — that is left to other courts. The question of the situs of the debt presented no problem. The creditor's domicile is generally considered the fictional residence of the debt, but the enforcement can be had only where the debtor is found or served. Hence, the debt can be said to be located in either or both parties' domicile.

The Massachusetts court¹⁵ agreed with the *Robinson* case by holding that a creditor can be one holding a tort claim as well as a contract claim. Here a statute permitting a creditor to request ancillary appointment was construed.

Paraphrased, the position of the courts following the New Hampshire rule is that the ownership of an insurance policy can be said to be a property right in that it at least contingently protects the holder against loss. Under this theory, the insurer is a debtor of its insured and if the insurer is licensed to do business in a state he becomes a resident of that state. Since, under the New Hampshire rule, the situs of a debt is at the residence of the debtor, it logically follows that the court in that situs would have jurisdiction. Generally speaking, the situs of specialty debts shall be where the instrument happens to be, and of choses in action where the debtor resides.¹⁶

The Nebraska court analogized from the wrongful death statutes where the cause of action is said to be sufficient asset and asked the question: "How can the claimed liability be treated as an asset, while the insurance by which the liability is transferred is not?"¹⁷

The Utah court¹⁸ extended the New Hampshire rule to cases where the insurer is not a resident in the state of administration. The reason given was that it is not a question of jurisdiction with the issuing court, but a question of propriety, *i.e.*, if the court thinks ancillary letters are necessary and proper, it may grant them.

The instant court adopted the New Hampshire rule because it felt that rights under an insurance contract have a very real commercial value. It characterized as technical, artificial, and unrealistic the Kansas rule that exoneration and liability under an insurance contract is not an asset. To illustrate this contention the court pointed out that the insurance company received an annual premium of \$62.35 for this obligation of exoneration and liability. The court went on to say that to hold "such rights are insufficient to give the court jurisdiction, but that a five dollar watch found in the state would confer such jurisdiction appears to put theory in place of facts."¹⁹

An examination of the reasoning applied on both sides of the question reveals

12 *Feil v. Dice*, 135 F. Supp. 851 (S.D. Idaho 1955). The court noted the fact that there had been no determination of this question by an Idaho court.

13 87 N.H. 114, 174 Atl. 772 (1934).

14 *Id.* at 117, 174 Atl. at 775.

15 *Gordon v. Shea*, 300 Mass. 95, 14 N.E.2d 105 (1938).

16 19 CHI-KENT L. REV. 293 (1941).

17 *In re Kresovich's Estate*, 168 Neb. 673, 97 N.W.2d 239, 244 (1959).

18 *In re Leigh's Estate*, 6 Utah 299, 313 P.2d 455 (1957).

19 *In re Riggle's Will*, 188 N.Y.S.2d 622 (1959).

the difficulty courts have in finding a rationale for their decisions. For example, it is incongruous to speak of the situs of an intangible. As may be expected then, the real basis for decision is the underlying policy of the state courts. The primary conflicting policy consideration is whether the advantage of a single administration with its reduced costs, taxes, and red tape outweighs the desire of the state to protect its local claimants against non-resident tortfeasors. The following should also be considered in granting letters ancillary: (1) it does not impose an undue burden upon the insurer to defend since he must be doing business in the state for letters to issue,²⁰ (2) it may be easier to get witnesses in the state in which the accident occurred, and (3) the judgment will not affect the domiciliary administrator.²¹ In regard to (2) above, in every case except the instant case, the accident had occurred in the state in which letters were requested. Although here the accident had not occurred in New York, still it would be more convenient for the plaintiff to keep the suit in the state in which it was started, while it would cause no hardship to the defendant.

The New Hampshire rule is in keeping with the current trend in procedure which provides for easier suits by plaintiffs, especially in cases involving non-resident motorists. With an influential jurisdiction such as New York joining the New Hampshire ranks, a greater acceptance of this rationale may be expected as the question arises in uncommitted states.

Edward M. O'Toole

INCOME TAX — MULTI-CORPORATE ORGANIZATIONS — SECTION 129(a)
INTERNAL REVENUE CODE OF 1939 EXTENDED TO DISALLOW AN ACQUIRED CORPORATION ITS TAX CREDITS AND EXEMPTIONS. — Taxpayer, James Realty Co., was a corporation formed by Adolph Fine, an individual, for the avowed purpose of real estate development. Its initial assets consisted of undeveloped tracts of land, contributed by Mr. Fine in exchange for sufficient stock to secure control of the newly formed corporation. Adolph Fine, the individual, also controlled Adolph Fine, Inc., a construction company, Fine Realty, Inc., a real estate sales organization, and other real estate development companies. The Commissioner disallowed taxpayer's surtax exemption and excess profits credit under section 129(a)¹ and 15(c)² of the Internal Revenue Code of 1939. *Held*, affirmed. Section 129(a) may be extended to disallow an acquired corporation its tax credits and exemptions when it is formed for tax evasion or avoidance. *James Realty Company v. United States*, 176 F. Supp. 306 (D. Minn. 1959).

The basic question was the applicability of section 129(a) of the 1939 Code to the formation of separate corporations that operate various phases of one business, when these corporations are not formed by splitting the existing corporation, but are created out of the personal assets of an individual.

Three sections of the 1939 Code disallowed tax advantages accruing to corporations by manipulation of the corporate entity. Section 45³ authorized the Commissioner to "distribute, apportion or allocate gross income, deductions, credits or allowances" among business organizations owned or controlled by the same interest when the Commissioner determined that such allocation was necessary to

²⁰ That the insurer must be doing business within the state is a requisite for the issuance of ancillary letters in states following the New Hampshire rule. See, *e.g.*, *Furst v. Brady*, 375 Ill. 425, 31 N.E.2d 606 (1940). Utah, however, has granted letters when the insurer was not doing business in the state. See *In re Leigh's Estate*, 6 Utah 299, 313 P.2d 455 (1957).

²¹ *First Nat'l Bank v. Blessing*, 231 Mo. App. 288, 98 S.W.2d 149 (1936).

¹ Added by ch. 63, § 128(a), 58 Stat. 21 (1944) (now INT. REV. CODE of 1954, § 269(a)).

² Added by ch. 521, § 121(f), 65 Stat. 468 (1951) (now INT. REV. CODE of 1954, § 1551).

³ Ch. 289, § 45, 52 Stat. 474 (1938) (now INT. REV. CODE of 1954, § 482).

prevent tax evasion. Section 129(a) was aimed at the purchase of loss corporations by a taxpayer who wished to take advantage of such corporation's loss carryover and excess profits credit.⁴ The section stated:

a. Disallowance of deduction, credit, or allowance. If (1) any person or persons acquire . . . directly or indirectly, control of a corporation . . . and the principal purpose for which such acquisition was made is evasion or avoidance of Federal Income or Excess Profits Tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then such deduction, credit, or other allowance shall not be allowed.

The third section, 15(c),⁵ was aimed specifically at the splitting of an existing corporation for the purpose of obtaining an additional corporate surtax exemption.⁶ This latter section, although placed in issue in the instant case, was cursorily handled by the court since taxpayer's claim for relief was denied under section 129(a). An examination of these three sections, viewed in the light of the generally accepted tax law doctrine of *Gregory v. Helvering*,⁷ is essential to any consideration of the legislative purpose underlying each of them.⁸ The *Gregory* doctrine is essentially that although all formal requisites of a non-taxable transaction have been shown, tax benefits achieved thereby may be disallowed if there was no valid business purpose for the transaction.

Early cases indicated obiter that section 129(a) was to be interpreted as disallowing exemptions which an *acquiring* corporation had obtained from the *acquired* corporation, but that the restriction did not apply "to their use by the corporation whose control was acquired."⁹ For example, if corporation A, with high profits, were to acquire control of corporation B, with a loss carryover, corporation A's use of B's loss carryover would be precluded by section 129(a) if the acquisition were made for tax avoidance purposes; however, corporation B, being the acquired corporation in the transaction, would be permitted to continue the use of its loss carryover. Until *British Motor Car Distributors, Ltd.*,¹⁰ the application of section 129(a) was not strictly in issue since the court had found a valid business purpose as the basis of the acquisition in each of the cases. But in *British* there was no attempt by the

4 *Dilworth v. Henslee*, 98 F. Supp. 957 (D. Tenn. 1951); Rudick, *Acquisitions to Avoid Income or Excess Profits Tax: Section 129 of the Internal Revenue Code*, 58 HARV. L. REV. 196, 200-06 (1944).

5 Added by ch. 521, § 121(f), 65 Stat. 468 (1951) (now INT. REV. CODE of 1954, § 1551). It states:

Disallowance of surtax exemption and accumulated earnings credit: If any corporation transfers . . . all or part of its property . . . to another corporation which was created for the purpose of acquiring such property or which was not actively engaged in business at the time of such acquisition and if the transferor corporation or its stockholders control the transferee then the exemption or deduction will be disallowed unless such transferee corporation shall establish by the clear preponderance of the evidence that the securing of such exemption or credit was not a major purpose of such transfer.

6 Treas. Reg. 118, § 39.15 -2(b)1 (1939); 7 MERTENS, LAW OF FEDERAL INCOME TAXATION 164 (1956).

7 293 U.S. 465 (1935).

8 Treas. Reg. 118, § 39.15 -2(b)1 states:

It is not intended that section 15(c) be interpreted as delimiting or abrogating any principle of law established by judicial decision or any existing principle of the Internal Revenue Code such as section 45 and 129. . . . Such principles of law and such provisions of the Code, including section 15(c) are not mutually exclusive, and in appropriate cases they may operate together or they may operate separately.

9 *Alprosa Watch Corp.*, 11 T.C. 240 (1948) was the first such interpretation. The dicta there prompted similar dicta in subsequent cases. *Chelsea Products, Inc.*, 197 F.2d 620 (3d Cir. 1952); *TVD Co.* 27 T.C. 879 (1957); *WAGE, Inc.*, 19 T.C. 249 (1952); *Berland's Inc., of South Bend*, 16 T.C. 182 (1951); *A.B. and Container Corp.*, 14 T.C. 842 (1950). Only a very few cases have been decided under section 129(a).

10 31.44 PHTC (1958), *appeal authorized*, 56366 PH Fed. Tax. Curr. Dec. (1959). (Five judges dissenting.)

taxpayer to show a business purpose for the acquisition and what in previous cases had been mere dicta, was elevated to a holding. In *British*, taxpayer, a corporation, had been acquired by a partnership. The partnership assets were then transferred to taxpayer, leaving the taxpayer the sole extant business after the transaction. The taxpayer, claiming the status of an acquired corporation, relied on the *Alprosa Watch Corp.*^{10a} dicta and successfully contended that it could use its prior loss carryover. The result was that the Commissioner could not disallow credits of an acquired corporation, even when the maneuver was in effect a 129(a) situation, because of the artifice of the taxpayer in causing the acquiring partnership to lose its identity within the acquired corporation by a mere transfer of assets.

The court in the present case rejected *British Motor Car* as wrongly decided and relied upon two recent federal court decisions. The first of these, *Mill Ridge Coal Co. v. Patterson*,¹¹ does not appear to indicate that section 129(a) is applicable to an acquired corporation, but is rather an ordinary 129(a) case. The Fifth Circuit held that it was proper to disallow, under section 129(a), a loss carryover that a corporation had acquired by purchase of another company. The fact that the taxpayer corporation was newly formed seems to be the only direct parallel between that case and the instant one.

The second case relied on is a stronger support for the present case. In *Coastal Oil Storage v. Commissioner*,¹² there was an arrangement very similar to Adolph Fine's related businesses. Tax credits and the surtax exemption were denied to an "acquired corporation"¹³ born of a split-up of the original corporation, upon a finding that the split was not made for a valid business purpose.¹⁴ The Fourth Circuit interpreted section 129(a) as having a broad scope, citing the words of the House Report pertaining to it: "The scope of the terms used in this section is to be found in the objective of the section, namely, to prevent the tax liability from being reduced through the distortion or perversion effected through tax avoidance devices."¹⁵ But the facts of the *Coastal Oil* case were unique. There, an existing corporation set up a new corporation by transfer of assets. There was no evidence of an acceptable business purpose. The Commissioner concluded that the formation of the new corporation was effected to avoid surtax to the original corporation by splitting its income. Although this is exactly the type of situation that 15(c) was passed to foreclose, section 15(c) could not be applied to the entire period in issue because the recently formed corporation's taxable year had begun two months before the operative date of the newly passed section. The court had to turn to 129(a) to find a useful, if not readily adaptable, weapon to disallow the corporate surtax exemption for the first two months in question.¹⁶ Out of this situation grew the more extensive application of section 129(a) to an acquired corporation. However, section 129(a) came into play in *Coastal* only after a definite wrong on the part of the taxpayer had been ascertained under section 15(c). Thus there seems to be a compelling reason to invoke any section of the Code that would give effect to a section 15(c) misallocation of income in the interim between that section's

10a 11 T.C. 240 (1948).

11 264 F.2d 713 (5th Cir. 1959).

12 242 F.2d 396 (4th Cir. 1957).

13 "Acquired corporation" is used in the same sense as the court uses it in *James, i.e.*, to include a corporation formed by an existing corporation.

14 *Criticized*, 42 VA. L. Rev. 1134 (1957), on the basis that this was too great an extension of § 129(a), a section passed for the purpose of curtailing the market in loss corporations.

15 H.R. REP. No. 871, 78th Cong., 1st Sess. 49 (1939).

16 The Regulation illustration of a 129(a) violation seems to track the *Coastal Oil* case very closely. It stated:

... Among the transactions within clause 1 of section 129(a) are the following: . . .

(2) A corporation with large profits transfers the assets of each of its branches or departments to newly organized corporations in order to secure the benefit of the exemption provided in section 431.

Treas. Reg. 118 § 39.129 -3(b).

passage and its operative date. Also, in *Coastal*, one corporation split its income by formation of another corporation. In the *James* case, none of Adolph Fine's various corporations gave birth to James Realty; Adolph Fine the individual formed this corporation. How can it then be said that any corporation has been acquired by another corporation, when an individual who owns a group of companies forms another company and retains control thereof?

When an attempt is made to fit the factual situation of the instant case into either of the specific pigeonholes of section 129(a) or section 15(c), a court is immediately confronted with great difficulty. Section 129(a) proves difficult in view of the case law indications that an acquired corporation may not be deprived of its tax credits and exemptions, whatever the purpose of the acquisition, and section 15(c) begins, "if any corporation transfers. . ." and is aimed at corporate income splitting. In the instant case, Adolph Fine the individual formed James by transfer of his own property to it — not the property of any of his corporations. It would require a tenuous extension of the statutory language to determine that the statutory word "corporation" is meant to include individuals who control corporations. Even assuming that the income of James Realty Co. would have been made by the taxpayer's other corporations had not James been formed, it is difficult to find a splitting of their income by the creation of a corporation to handle the development of a new realty subdivision.

Although not placed in issue in the present case,¹⁷ the more general section 45 seems to be the most applicable here. It applies not merely to acquisitions and splits by corporations, but to control by the same interests of "two or more organizations, trades, or businesses" resulting in evasion of taxes or misstatement of income of any of the members of the business organization controlled. The Commissioner, at his discretion, could allocate the income among the various members of the Fine organization. There would be no need for an analysis of the acquired-acquiring corporation morass.

Assuming that the instant court was correct in determining that there was no valid business purpose for the formation of James, an examination of the effect of a contra holding will underscore the merits of the result reached. An individual who controls numerous corporations in a particular business could set up new entities to handle exactly the same business as the existing ones were chartered to transact and avoid surtax on the initial income in each case. Such a decision would be an obvious refusal to follow the well-established principle set down long ago in the *Gregory* decision.

However, the court's fact determination, that tax evasion or avoidance motivated the formation of James, is subject to criticism. The relatively few cases decided under section 129(a) seem to have given taxpayers the benefit of the doubt on this issue. Past decisions have found a valid business purpose in forming corporations to separate production from sales;¹⁸ to split along state lines in order to get the advantages of domestic incorporation;¹⁹ to reduce liability or risk on business leases;²⁰ and to limit tort liability risks and improve the credit position of the resulting corporations.²¹ The liberality of the courts in this area has prompted one writer to remark: "Section 129 has thus been rendered almost completely ineffective, and this fact contributed in a large part to the enactment of section 15(c)."²² The court in the instant case, however, is certainly not in accord with this liberality

17 The court considered cases decided under section 45 as an analogy supporting its conclusion. Since section 45 uses much broader language than section 129(a), it is doubtful that an extension of it to an acquired corporation would justify a similar extension of section 129(a).

18 *Chelsea Products, Inc.*, 16 T.C. 840 (1951).

19 *J. E. Dilworth v. Henslee*, 98 F. Supp. 957 (D. Tenn. 1951).

20 *Berland's Inc. of South Bend*, 16 T.C. 182 (1951).

21 *Alcorn Wholesale Co.*, 16 T.C. 75 (1951).

22 *Ekman, Warning Signals Under Sections 45 and 129*, N.Y.U. 12TH ANN. INST. ON FED. TAX. (1954) 693, 698.

in its interpretation. Plaintiff indicated in its brief, that the formation of James was motivated by a desire to protect Adolph Fine, Inc., and Fine Realty Corp. from the risks inherent in the actual development function.²³ Could it not be said a sound business purpose exists in the setting up of separate corporations to handle separate economic functions such as real estate acquisition, development, and sales, just as where one company will manufacture the product and another will be responsible for its distribution? This type of division is common to the business community.

The decision in the instant case places the future of a great number of multiple corporations in jeopardy, due to the difficulty they will have when called upon to prove that their formation was motivated primarily for business purposes.

Paul B. Coffey

LABOR LAW — HIRING HALL — CONTRACT PROVIDING FOR EXCLUSIVE HIRING HALL IS NOT ILLEGAL ABSENT PROOF OF ACTUAL DISCRIMINATION. — A hod-carrier with some twenty years experience filed charges with the National Labor Relations Board alleging that he had been consistently denied employment at a hiring hall operated by the union¹ pursuant to its contract with an employer's association.² He further alleged that the union attempted to coerce him into withdrawing these charges, and that, after having been dropped for non-payment of dues, his subsequent efforts to rejoin the union were frustrated. The Trial Examiner found³ that the union violated section 8(b)(1)(A) of the Taft-Hartley Act⁴ by its conduct, but refused to hold the employers and the union, in the absence of positive evidence, guilty of discrimination under sections 8(a)(3) and 8(b)(2) of the act.⁵ The Board affirmed the Examiner's first finding, but reversed the second determination, holding that the execution and maintenance of an exclusive hiring hall contract was in itself unlawful discrimination.⁶ On petition for enforcement, *held*, denied. Absent proof of actual discrimination, a hiring hall contract is not per se illegal. *NLRB v. Mountain Pacific Chapter*, 270 F.2d 425 (9th Cir. 1959).

Section 8(b)(2) of the Taft-Hartley Act makes it illegal for a union to cause or attempt to cause an employer to discriminate in regard to hire, tenure, terms or conditions of employment for the purpose of encouraging or discouraging membership in a union. In framing these provisions, Congress evidently did not intend to eliminate altogether the hiring hall arrangement.⁷ Only those practices under such an agreement which amount to the maintenance of a closed shop were prohibited.⁸ Accordingly, courts have indicated that "the factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer,"⁹ and that the hiring hall

23 Reply Brief for the Plaintiff, pp. 5,6.

1 International Hodcarriers, AFL-CIO.

2 The Associated General Contractors; Mountain Pacific, Seattle, and Tacoma Chapters.

3 *Mountain Pacific Chapter*, 119 N.L.R.B. 883, 910 (1957).

4 Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

5 Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 141, (1947), 29 U.S.C. § 158(a)(3) and 158(b)(2) (1952).

6 *Mountain Pacific Chapter*, 119 N.L.R.B. 883 (1957). The order issued by the Board provided that the respondents cease giving effect to the hiring hall provisions of the contract and reimburse the individual for any loss of pay he may have sustained as a result of the illegal conduct.

7 See S. REP. No. 1287, 81st Cong. 2d Sess. (Remarks of Senator Taft) (1950).

8 See, e.g., *NLRB v. National Maritime Union*, 175 F.2d 686 (2d Cir. 1949).

9 *NLRB v. Del E. Webb Constr. Co.*, 196 F.2d 841, 845 (8th Cir. 1952). See *Eichleay Corp. v. NLRB*, 206 F.2d 799 (3rd Cir. 1953); *NLRB v. F. H. McGraw & Co.*, 206 F.2d 635 (6th Cir. 1953).

system itself is proper if union and non-union men are referred to the company without discrimination.¹⁰ The Board itself originally enunciated this rule.¹¹

The action of the Board in the instant case, however, constituted a departure from this principle. To the Board the Mountain Pacific contract apparently effected a surrender of all hiring authority to the union. It was advance notice to the world that the union was the contractual hiring master.¹² The Board reasoned that this delegation was unlawful on its face because "from the standpoint of the working force generally . . . it is difficult to conceive of anything that would encourage their subservience to union activity more than this kind of hiring hall."¹³ Finding such, it cited *Radio Officers' Union v. NLRB*¹⁴ for the position that, unlawful conduct having been established, illegal encouragement may be inferred without additional positive evidence. The Board added, however, that it did not construe the act as prohibiting all hiring arrangements.¹⁵ In the future, such agreements would not be considered per se violations, if they contained certain safeguards which the Board felt would negate the unlawful encouragement inherent in the hiring hall arrangement.¹⁶

Relying upon its holding in *NLRB v. Swinerton*,¹⁷ however, the court in the instant case disagreed with the Board and reasserted the principle that "hiring of employees done only through a particular union's offices does not violate the Act absent evidence that the union unlawfully discriminated in supplying the company with personnel."¹⁸ The court noted that a contract lawful on its face could still serve to hide discriminatory practices despite an inclusion of the provisions promulgated by the Board. In the opinion of the court the provisions did not possess such preventive value to warrant a finding that their absence constituted a per se violation of the act. The court did add, however, that its holding would not preclude the Board in the future from finding "as a fact that the omission of the guaranties or prohibitory clauses from a contract was evidence of an intent upon the part of the signatories and their associates to violate the Act."¹⁹ Yet this rule of evidence would have to operate prospectively, since the burden of proving the absence of a possible violation would be shifted from the General Counsel to the charged parties.

10 *NLRB v. Swinerton*, 202 F.2d 511 (9th Cir. 1953), *cert. denied*, 346 U.S. 814 (1953). It should be noted that although the *Swinerton* case is invariably cited for this proposition, the decision in the case ultimately rested on a finding of actual discrimination.

11 *Hunkin-Conkey Constr. Co.*, 95 N.L.R.B. 433, 435 (1951).

12 *Mountain Pacific Chapter*, 119 N.L.R.B. 883, 894-95 (1957). The contract provided that: 1) the recruitment of employees shall be the responsibility of the union which shall maintain offices for this purpose for the convenience of the employers and the workmen, 2) employers shall call upon the local union in whose territory the work is to be done, 3) if the union cannot supply the workmen requested, the employer may procure them from another source.

13 *Id.* at 895.

14 347 U.S. 17, 45 (1954).

15 *Mountain Pacific Chapter*, 119 N.L.R.B. 883, 896 (1957).

16 *Id.* at 897. The requisite safeguards provide:

- 1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
- 2) The employer retains the right to reject any applicant referred by the union.
- 3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring agreement, including the safeguards that we [the Board] deem essential to the legality of an exclusive hiring agreement.

17 202 F.2d 511 (9th Cir. 1953), *cert. denied*, 346 U.S. 814 (1953). See also *NLRB v. Del E. Webb Constr. Co.*, 196 F.2d 841 (8th Cir. 1953); *Eichleay Corp. v. NLRB*, 206 F.2d 799 (3rd Cir. 1953); *NLRB v. F. H. McGraw & Co.*, 206 F.2d 635 (6th Cir. 1953).

18 *NLRB v. Mountain Pacific Chapter*, 270 F.2d 425, 429-30 (9th Cir. 1959).

19 *Id.* at 428.

Because of the wide application which the Board has given its *Mountain Pacific* rule, the significance of the instant opinion should not be underestimated. Although hiring halls are most often associated with the maritime and construction industries, the Board has extended the rule to include contracts involving brewers,²⁰ truckers,²¹ manufacturers²² — in short, to all agreements where an employer confers exclusive hiring authority on a union.²³ The rule has also been applied where an employer's action of hiring through the union amounts only to a general practice,²⁴ and where an employer, although not a party to such a contract, nevertheless subscribes to its provisions.²⁵ Also, the contract or agreement must include all three of the requisite safeguards to be lawful and non-discriminatory.²⁶

The *Mountain Pacific* rule assumes even greater importance when the remedy for its violation is considered.²⁷ All money exacted from employees, *i.e.*, dues and assessments, during the six-month period preceding the filing of the charge must be reimbursed.²⁸ Initially this remedy was applied only where such payments were exacted pursuant to the illegal contract,²⁹ but the Board recently announced that the remedy would be asserted whenever a contract providing for exclusive hiring by a union did not meet the *Mountain Pacific* standards.³⁰

The status of the *Mountain Pacific* rule in the face of the instant case is now doubtful, at least in the Ninth Circuit. It remains to be seen how it will be treated elsewhere. The Board, however, is perhaps correct in observing that hiring halls do inherently encourage union membership. To this degree the wisdom of the rule is unquestionable. But Congress did not express a desire to prohibit such encouragement, only to prevent *practices* which amount to the maintenance of a closed shop and its attendant vices.³¹ It is also doubtful that the Board's requisite guaranties would prevent discrimination if the parties are so disposed, nor does it seem reasonable that such guaranties can effectively negate the encouragement inherent in the arrangement itself. Noting that neither Congress nor the courts have ever intimated that hiring halls are *per se* violative of the act, such a construction by the Board cannot be supported. Even granting that the reasoning of the Board is valid, the responsibility and authority for effecting such a change in policy — and this interpretation must be considered a clear policy change — can only rest with Congress. Further, the instant opinion, by approving the Board's determinations, even to the limited degree of noting the possible validity of the *Mountain Pacific* rule as a presumption of evidence, is equally unsupportable. It can only serve to confuse and complicate an already subtle area of the law.

J. Michael Guenther

20 See *E. & B. Brewing Co.*, 122 N.L.R.B. No. 50 (1958).

21 See *C. Rasmussen & Sons*, 122 N.L.R.B. No. 85 (1958).

22 See *Consolidated Western Steel Div.*, 122 N.L.R.B. No. 107 (1959).

23 See, *e.g.*, *Roy Price, Inc.*, 121 N.L.R.B. 508 (1958).

24 See *Armco Drainage & Metal Products, Inc.*, 123 N.L.R.B. No. 212 (1959).

25 See, *e.g.*, *Fluor Co., Ltd.*, 122 N.L.R.B. No. 154 (1958).

26 See *Anchor Welding & Manufacturing Co.*, 123 N.L.R.B. No. 220 (1959); *E. & B. Brewing Co.*, 122 N.L.R.B. No. 50 (1958); *K. M. & M. Constr. Co.*, 120 N.L.R.B. 1062 (1958).

27 See, *e.g.*, *J. S. Brown-E. F. Olds Plumbing & Heating Corp.*, 115 N.L.R.B. 594 (1956). See also letters of the General Counsel allowing moratoria of application of this remedy for the purpose of enabling parties affected by the *Mountain Pacific* rule to conform their contracts to the requisite standards. 5 CCH Lab. L. Rep. (4th ed.) No. 50060 (Feb. 7, 1958) and No. 50074 (April 23, 1958).

28 *Nassau and Suffolk Contractors' Ass'n.*, 123 N.L.R.B. No. 167 (1959).

29 See *Farsworth & Chambers, Inc.*, 122 N.L.R.B. No. 41 (1958).

30 *Nassau and Suffolk Contractors' Ass'n.*, 123 N.L.R.B. No. 167 (1959).

31 See S. REP. No. 1287, 81st Cong. 2d Sess. (Remarks of Senator Taft) (1950). *But see*, H. REP. No. 1147, 86th Cong. 1st Sess. (1959). Regarding proposed amendments to the Labor Management Relations Act, the REPORT states: "Nothing in such provisions is intended to restrict the applicability of the hiring hall provisions announced in the *Mountain Pacific* case"

PENOLOGY—APPELLATE REVIEW OF CRIMINAL SENTENCES—DEATH SENTENCE OF YOUTH REDUCED TO LIFE IMPRISONMENT.—Green, a fifteen year old boy, pleaded guilty to the shotgun murder of a seventy-five year old drug store owner. A three-judge court took testimony to determine the degree of guilt under Pennsylvania's statute and unanimously found Green and his two accomplices guilty of murder in the first degree. After hearing testimony on mitigating circumstances, the court sentenced Green to death by electrocution and his accomplices to life imprisonment. On appeal, *held*, sentence of death vacated and the record remanded with instructions that Green be sentenced to life imprisonment. *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1959).

The scope of appellate review of criminal sentences was limited early in the history of this country to those cases where the punishment exceeded that warranted by law. In *Shepherd v. Commonwealth*¹ the trial judge sentenced the defendant to a term in the house of correction in excess of that prescribed by statute, though not longer than the term allowed in the alternative to be served in the state prison. On appeal, the Massachusetts court adjudged itself powerless to send the case back for a new sentence or to pronounce a new one itself. Relying on two English cases, *King v. Ellis*² and *King v. Bourne*,³ the court reversed the trial judge and discharged the defendant. The only justification in limiting the alternatives open to the reviewing court to blanket approval or reversal is to be found in procedural hobbles. Appeal was had by writ of error. In effect the question posed was whether the trial court was wholly right or not.⁴

The procedural anomaly which required the Massachusetts court to free a convicted criminal has been corrected in virtually every jurisdiction by statutes permitting reduction of sentences by appellate courts.⁵ However the statutes are usually silent in cases where the sentence is within the limits prescribed by statute, but unusually harsh in the particular case. State courts have taken various approaches to the problem of reviewing a lower court's sentencing discretion.

In a few jurisdictions, the appellate courts are given express statutory authority to reduce legal but excessive sentences.⁶ Under most statutes, the appellate court is given power to "reverse, affirm or modify" the sentence of the trial judge, but the majority of jurisdictions do not construe this grant to include the power to reduce a legal sentence.⁷ In the minority, the appellate courts of Pennsylvania,⁸ Ari-

1 43 Mass (2 Meto.) 419 (1841).

2 5 Barn. & Cress. 395, 108 Eng. Rep. 147 (1826).

3 7 Adolph. & Ellis 58, 112 Eng. Rep. 393 (1837). Interestingly enough, the sentence here was transportation across the seas for seven years although the only prescribed penalty according to statute was death.

4 *But see* *People v. Farrell*, 146 Mich. 264, 109 N.W. 440 (1906), where this view was presented and rejected because of a belief that "a general superintending control over all inferior courts" authorized the supreme court to do more — in this case to remand to the trial court with directions.

5. See Annot., 29 ALR 313 (1924) and cases cited at 314-18; Supp. Annot., 89 ALR 295 (1934) and cases cited at 296-8.

6 The supreme court . . . may affirm, reverse, or modify the judgment, or render such judgment as the district court should have done, or order a new trial, or reduce the punishment, but cannot increase it. IOWA CODE ANN. § 793.18 (1946).

Similar provisions can be found in N.Y. CODE CRIM. PROC. § 543 (McKinney 1958) and NEB. REV. STAT. § 29-2308 (1956). In *Bates v. United States*, 10 FED. 92, (C.C.N.D. III. 1881), the circuit court held that it had power to reduce the sentence of the district court under 20 Stat. 826 (1891). The appellate jurisdiction of the circuit courts was transferred to the circuit courts of appeal by 26 Stat. 826 (1891). Since that time federal courts have denied the existence of that power, *United States v. Rosenberg*, 195 F.2d 583, 605 (2d Cir. 1952), although they almost certainly would have exercised it, had they believed in its existence. *Nash v. United States* 54 F.2d 1006, 1008 (2d Cir. 1932).

7 *Hall, Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521, 524 (1937). *Accord*, *People v. Odle*, 37 Cal. 2d 52, 230 P.2d 345 (1951), *Stanford v. State*, 110 So.2d 1 (Fla. 1959).

zona,⁹ Idaho,¹⁰ and Oklahoma¹¹ regularly reduce trial court sentences.

By statute in Pennsylvania, the penalty for murder in the first degree is either death or life imprisonment, at the discretion of the jury if the defendant pleads not guilty, or of the court in cases of pleas of guilty.¹² When the evidence warrants a verdict of first degree murder, the appellate court is justified in modifying the sentence for "a manifest abuse of discretion,"¹³ or where the trial court has "overlooked pertinent facts or has disregarded the force of evidence or erred in its law."¹⁴

The question is not whether the appellate court would have imposed the death penalty, but whether the discretion vested in the court below was judicially exercised.¹⁵ In inquiries of this sort, there is a strong presumption in favor of the correctness of the trial court sentence. Such is the import of the oft-voiced requirement of a "manifest abuse of discretion."¹⁶

In the instant opinion, the court expressly limited its scope of review to the question of whether there was an abuse of discretion by the lower court in imposing the death penalty. The defendant, at age 15, was prima facie capable of the commission of a capital crime under the common law rule which prevails in Pennsylvania. As the dissent pointed out, the majority proceeded upon the principle that "the imposition of the death penalty by a judicial tribunal should be made only when it is the sole penalty justified both by the criminal act and the criminal himself."¹⁷ Finding nothing in the record of the boy's background and character, the court found an abuse of discretion in the imposition of the death penalty because of a failure to consider exhaustively all the facts surrounding the criminal act and the criminal actor. The majority clearly required an unspecified minimum amount of research as a prerequisite to the death penalty.

The dissent took issue with the a priori statement that the death penalty may only be imposed in the absence of all mitigating factors. This rule would place upon the prosecution the burden of disproving any proffered mitigation, rather than requiring the defense to establish it.¹⁸ In support of this contention, the majority cited several cases as holding that a jury, in choosing the penalty for first degree murder, must consider all the evidence, including data on the defendant's character. The cited cases do not support the contention. On the contrary, in *Commonwealth v. Wooding*,¹⁹ the court said that no instruction as to factors affecting the propriety of a penalty need be given, even after evidence tending toward mitigation is introduced. The entire question may be left to the discretion of an uninstructed jury.²⁰

8 *Commonwealth v. Garramore*, 307 Pa. 507, 161 Atl. 733 (1932); *Commonwealth v. Ireland*, 341 Pa. 43, 17 A.2d 897 (1941).

9 *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959).

10 *State v. Linebarger*, 71 Idaho 255, 232 P.2d 669 (1951).

11 *Schoolcraft v. State*, 84 Okla. Crim. 20, 178 P.2d 641 (1947).

12 PA. STAT. ANN. tit. 18, § 4701(1945).

13 *Commonwealth v. Hough*, 358 Pa. 247, 56 A.2d 84 (1948); *Commonwealth v. Jones*, 355 Pa. 522, 50 A.2d 317 (1947).

14 *Commonwealth v. Sterling*, 314 Pa. 76, 170 Atl. 58 (1934); *Commonwealth v. Hawk*, 328 Pa. 417, 196 Atl. 5 (1938).

15 *Commonwealth v. Howell*, 338 Pa. 577, 13 A.2d 521, 522 (1940).

16 In *Commonwealth v. Taranow*, 359 Pa. 342, 59 A.2d 53 (1948), the court observed that there has been no instance where the penalty imposed by a jury in first degree murder cases has been modified on appeal, and only two instances where the courts' pronouncement was deemed to be an abuse of discretion. *Commonwealth v. Garramore*, 307 Pa. 507, 161 Atl. 733 (1932) and *Commonwealth v. Ireland*, 341 Pa. 43, 17 A.2d 897 (1941). Except for the instant case, this appears to be a correct statement of the record to date.

17 151 A.2d 241, 247.

18 "In legal contemplation, the one penalty is just as 'normal' as the other for murder in the first degree." There would be no error in imposing life imprisonment even where no mitigating factor was shown to exist. *Commonwealth v. Hough*, 258 Pa. 247, 56 A.2d 84 (1948).

19 355 Pa. 438, 50 A.2d 328 (1947).

20. *Id.*, at 330.

The dissent also took issue with the majority's final order, requiring a life imprisonment sentence and directing the trial court to impose it. This, according to the dissenter, was usurpation of the lower court's discretion. The lower court was given no opportunity to review its sentence²¹ in the light of this decision, but was relegated to carrying out the decision of the Supreme Court. However, the order in the instant case is identical to that in *Commonwealth v. Garramore*²² and *Commonwealth v. Irelan*.²³

The question of abuse of discretion revolves around appropriateness of penalty in view of the peculiar facts of the case. It is seemingly an insoluble dilemma without basic agreement upon a theory of penology. While a surface difference between the opinions might be found in their conclusions as to the defendant's ability and character, it is at least possible that a deeper disagreement separates majority and dissent here. This is no classic dichotomy between reformation and retribution. Both opinions speak of penalty; both sentences will restrain; neither proposes education for a return to society. The difference in deterrent effect would seem negligible,²⁴ although the dissent is apparently of the opposite opinion.

The difference is not so much what each opinion emphasizes — each goes to some length to justify the penalty according to the capabilities and character of the defendant — as what each deprecates. The majority criticized what it considered yielding to the public plaint and concentration upon the crime to the exclusion of consideration of the criminal. The dissent, with tongue in cheek, suggested that the holding of the majority is: "It shall be unlawful for a trial court to impose the death penalty on any murderer who is under ——— years of age."²⁵

It is undesirable, indeed impossible, to have a penal system reflecting only one basic theory of penology;²⁶ and it would seem at least difficult to have a judge so simply motivated. In the narrow choice between death and life imprisonment, what theories of punishment are to be given greater emphasis?

The course of the law thus far in Pennsylvania, if it does not establish the penalty according to the theory of retribution, at least indicates that personal culpability will set an outer limit upon the sentence.²⁷ It is in this spirit that the majority felt itself compelled to consider whether the responsibility of the defendant as a moral agent was proportionate to the sentence imposed. This concept of the criminal as moral agent requires much more than a showing of legal sanity. It includes, as the majority indicates, factors which will neither negate responsibility nor absolve its breach, but will tend to contract the area of free choice available to the defendant.²⁸

The dissent contented itself with a showing of legal sanity as contained in the psychiatrists' report and a past history of delinquent behavior, reflecting a traditional reluctance in judges to consider more than bare sanity, a refusal to delve into psychological responsibility and use a different standard to sentence than the jury uses to convict. From a footnote²⁹ it appears that the dissent had in mind the value of

21 In *Commonwealth v. Jones*, 355 Pa. 522, 50 A.2d 317 (1947), the court said:

It does not lie within our province, as an appellate court, to attempt a catalogue of relative grades or shades of brutality, viciousness or depravity as a fixed and immutable standard for juries or trial courts in appraising death in one instance and life imprisonment in the other as the appropriate penalty for murder.

22 *Commonwealth v. Garramore*, 307 Pa. 507, 161 Atl. 733 (1932).

23 *Commonwealth v. Irelan*, 341 Pa. 43, 17 A.2d 897 (1941).

24 See generally Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401 (1958).

25 151 A.2d 241, 251, n.4.

26 Hart, *supra* note 24, at 401.

27 *Commonwealth v. Garramore*, 307 Pa. 507, 161 Atl. 733 (1932); *Commonwealth v. Irelan*, 341 Pa. 43, 17 A.2d 897 (1941).

28 *Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241, 247 (1959).

29 *Id.* at 251, n.6.

the lower court's judgment as a deterrent to the mounting crime rate. It is this view which indicates that the philosophy of the dissenter is not narrowly retributive, but finds some value in the deterrent effects of punishment, a confidence he shares with the layman, although possibly not with the modern penologist.

It would appear that what is termed "a manifest abuse of discretion" meriting reversal, may in reality be only a difference in emphasis upon one of the various theories of penology by the judges participating in the instant case. So long as the controversy is unresolved and the courts refuse or are unable to establish universal standards for the imposition of sentence, the possibility of appellate modification of the death penalty is present in any capital case.

Gerald M. Gallivan