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**XXIV**
TAX PROBLEMS IN OWNERSHIP OF LIFE INSURANCE CONTRACTS BY PERSONS OTHER THAN THE INSURED

WILLIAM J. BOWE*

Noting the tax significance of a recent trend among persons other than insureds to assume ownership of life insurance contracts, Professor Bowe offers a tripartite analysis of the likely ramifications of this movement and suggests a number of ways to avoid the manifold pitfalls awaiting those who enter the transaction unsuspectingly.

Many life insurance contracts are owned today by persons other than the individuals whose lives are insured. The 1954 Code provisions eliminating the estate tax premium-payment test caused many insureds to assign their policies to their wives or to other family members. Much insurance is now owned by family trusts. Corporations and partnerships frequently own policies designed for keyman protection or earmarked for stock redemption or partnership liquidation purposes. Divorce settlements frequently provide for the transfer and maintenance of policies on the lives of husbands for the benefit of their former spouses. Charitable institutions solicit gifts of policies on the lives of donors who are unable to make large capital donations. Thus in a variety of ways and for a variety of reasons persons other than insureds own insurance contracts. Sometimes a policy is acquired by assignment from the insured; in other instances the non-insured person, where he has an insurable interest, will make the original application to the company for the issuance of the policy. There are tax pitfalls in this type of ownership that may justify a discussion of these problems as a separate topic apart from a general discussion of the taxation of life insurance.

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Gift Taxes

1. Transfer of Policies.

Value. The irrevocable assignment of an existing policy may constitute a taxable transfer. For gift tax purposes the value of a single-premium contract or of a fully paid-up policy is its replacement cost on the date of the transfer. In Guggenheim v. Rasquin1 $1,000,000 of policies were purchased for a single premium of $852,438. Their cash-surrender values immediately after they were issued were $717,344. The policies at substantially the same time as originally acquired were irrevocably assigned to the three children of the insured. The taxpayer argued that the gift tax value should be determined by the cash-surrender value of the policies since that was all the donees could obtain for them on the date of the transfer. But the Supreme Court held replacement cost was the measure of their true worth. “[T]he owner of a fully paid life insurance policy has more than the mere right to surrender it; he has the right to retain it for its investment virtues and to receive the face amount of the policy upon the insured’s death.”2 In a companion case decided the same day,3 single-premium policies had been purchased in 1928 and 1929. They were given away irrevocably in 1934. The Court said:

We think that such cost of replacement ... is the best available criterion of the value .... The elapse of time between issuance and assignment of the policies does not justify the substitution of cash-surrender value for replacement cost .... Here, as in the case where the issuance of the policies and their assignment as gifts are simultaneous, cash-surrender value reflects only part of the value of the contracts. The cost of duplicating the policies at the dates of the gifts is, in absence of more cogent evidence, the one criterion which reflects both their insurance and investment value to the owner at that time.4

The same test determines the value of a newly issued annual-premium policy. However, with respect to annual-premium policies that have been in existence for some years, no replacement-cost figure is available. Here the Regulations provide that the policies shall be valued at their interpolated terminal reserve value (generally an amount slightly in excess of cash-surrender value), since no more accurate measure is readily available. The Regulations5 give the following example:

A gift is made four months after the last premium due date of an ordinary life insurance policy issued nine years and four months prior to the gift thereof.

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1 312 U.S. 254 (1941).
2 Id. at 237. The rule of the Guggenheim cases applies also in the case of fully paid-up policies. Houston v. Commissioner, 124 F.2d 518 (3d Cir. 1941).
4 Id. at 261.
by the insured, who was 35 years of age at the date of issue. The gross annual
premium is $2,811. The computation follows:

<table>
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<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
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<tr>
<td>Terminal reserve at end of tenth year</td>
<td>$14,601.00</td>
</tr>
<tr>
<td>Terminal reserve at end of ninth year</td>
<td>$12,965.00</td>
</tr>
<tr>
<td>Increase</td>
<td>$1,636.00</td>
</tr>
<tr>
<td>One-third of such increase (the gift having been made four months following the last preceding premium due date), is</td>
<td>$545.33</td>
</tr>
<tr>
<td>Terminal reserve at end of ninth year</td>
<td>$12,965.00</td>
</tr>
<tr>
<td>Interpolated terminal reserve at date of gift</td>
<td>$13,510.33</td>
</tr>
<tr>
<td>Two-thirds of gross premium ($2,811)</td>
<td>$1,874.00</td>
</tr>
<tr>
<td>Value of the gift</td>
<td>$15,384.33</td>
</tr>
</tbody>
</table>

Query how an annual-premium policy in existence for a two-year period should be valued. It seems absurd to value it at less than its value on the date of its issuance but this would seem to be the effect of the application of the above rules. Assume that the annual premium is $2,000. It may have no cash value during the first year and a value of less than $1,500 after the payment of the second annual premium. This would mean that if the policy is transferred immediately after it is issued, the gift tax value would be $2,000. If, however, the donor retains the policy until the second year and gives it away after he has invested $4,000 in it, the gift tax value would be less than $1,500!

Where the donor after an irrevocable assignment of the contract continues to pay the premiums, each premium payment constitutes a gift in the amount of the net premium paid.  

**Exemption.** Any transfer of a life insurance contract or any payment of a premium on a policy owned by another qualifies for the $30,000 gift tax lifetime exemption.

**Exclusion.** Whether such a transfer or premium payment qualifies for the $3,000 annual per donee gift tax exclusion will depend on the title vested in the donee. To obtain the exclusion the gift must be of a present rather than a future interest. Normally if the donee’s ownership is outright, the donor will be entitled to the exclusion. However, for a transfer to constitute a gift of a present interest the donee must have the right immediately to possess and enjoy the property. In *Nashville Trust Co.* policies were assigned to A, B, and C jointly. No one of the three could exercise rights in the policy without the consent of the

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6 Roberts v. Commissioner, 143 F.2d 657 (5th Cir. 1944).
other two. The court held that no present interests were created since no donee could immediately possess and enjoy the property. His rights were dependent on the consent of the others. Here the exclusion could have been obtained if the policies were split so that each owned, as sole owner, separate policies having one-third of the face value of the total of the original policies.

Gifts in trust frequently result in a loss of the exclusion. Transfers in trust generally involve transfers of both present and future interests. Thus if $3000 is placed in trust with income to A until 40 at which time the principal is to be paid to him, A has both a present interest (the right to the income) and a future interest (the delayed right to the principal). The only method of making the full amount a present interest would be to give A an immediate, full and absolute power of withdrawal. If he is given the power to invade the corpus in whole or in part, at any time and for any reason, he will have a present interest in the principal since he would then have the immediate right to possess and enjoy it. Generally, where insurance policies are transferred to irrevocable trusts, no present interests are created. This is always true of the unfunded trust and will be true in the case of funded trusts where the income is to be used to pay the annual premiums, except in the very rare cases where the anticipated income so far exceeds the amount that may be applied to premium payments that the donee is assured of some current income. Here again the exclusion will be lost unless the trustee is directed to pay the excess income to the donee and the amount of the excess is readily determinable. There must be no discretionary power to accumulate or to invest in additional policies. Any insurance trust may be qualified for the exclusion by giving the donee the absolute withdrawal power, but such a power frequently will defeat the very objective of the trust.

Transfers to corporations are necessarily gifts of future interests. The individual stockholders are the donees in these cases, and as to each of these, the transfer is a future interest since no stockholder has any present right to possess and enjoy the donated property.

Gift Splitting. The donor of a policy or of a premium payment may split the gift with his spouse if she files the requisite consent. No techni-
cal rules apply to gift splitting other than the requirement that the gift be for the exclusive benefit of third persons. However, the privilege may be lost if the wife is given any rights in the policy, however remote or contingent. This sometimes happens where a trust for the benefit of the children, for example, contains a provision that in the event they and their issue predecease the termination date, the spouse of the grantor will receive the corpus. This pitfall can be avoided by vesting the right to distribution on termination in the estate of the last dying child or last dying issue of deceased children.

Marital Deduction. An assignment of the policy to a spouse qualifies the gift for the gift tax marital deduction. Where the assignment is in trust for the benefit of the spouse, the technical requirements of the statute with respect to power-of-appointment trusts may make it impossible to obtain the deduction. The deduction is available only if the spouse is given the right to all of the income from the trust or from a specific portion thereof and is given the requisite general power of appointment. The Regulations require that the trust be income producing. In Estate of Smith the entire corpus of an inter vivos trust consisted of life insurance policies. The trust was created in 1934. After the 1948 Code amendments authorizing the marital deduction, the taxpayer paid $5000 for premiums on certain of the policies held in the trust and claimed a marital deduction. By the express terms of the trust the trustee was directed to hold the principal and "pay the net income therefrom to my wife... for her life." The court denied the deduction since the taxpayer obviously intended that the trust would not provide any economic benefits for his wife until after his death. The wife had no power to compel the trustee to convert the policies and make the trust income-producing. Hence it failed to meet the income requirement of the Regulations. In the later case of Harbeck Halsted the facts were much the same except that the wife had an unlimited power of invasion. She could withdraw the corpus in whole or in part at any time. The issues involved were whether the grantor was entitled, as to premium payments, to the annual exclusion and the gift tax marital deduction. The court held the grantor was entitled to the annual ex-

16 The deduction may be obtained through the use of an "estate trust," i.e., a trust for the benefit of the wife during her life, remainder to her estate.
18 23 T.C. 367 (1954).
19 Id. at 369.
20 28 T.C. 1069 (1957).
clusion since his donee by virtue of her withdrawal privilege had the right to immediate possession and enjoyment of the principal. However, the gift tax marital deduction was denied for the reason that the trust was not designed to be immediately income-producing. It seems wrong to deny the deduction in these cases, even though the income of a trust is to be applied to the payment of premiums or even if there is no trust income, since a wife, through her withdrawal privilege, has the absolute right to make the property income-producing any time she wants. In fact, she has the equivalent of outright ownership. But in view of this decision it may not be possible to qualify a power-of-appointment insurance trust for the gift tax marital deduction.

Charitable Deductions. The irrevocable assignment of a policy to a charity is deductible under the gift tax statute. Subsequent premium payments are also deductible. Under the income tax law, subject to the statutory limitations, gifts of policies and premium payments on policies owned by charities entitle donors to income tax deductions. The amount of any deduction is measured by the rule discussed above under the heading Value.

Sales of Policies. Sometimes donors prefer to sell rather than give their policies to family members. Such a sale may involve gift taxes where the sale is for less than a full and adequate consideration. In any sale of a policy there is an income tax pitfall because of the transfer-for-value rule, to be discussed at a later point, that makes such sales undesirable from a tax standpoint.

2. Payment of Proceeds.

The payment of proceeds on the death of an insured may have unanticipated gift or income tax consequences to an owner other than the insured. Thus assume Father is the insured, Mother the owner and Son the beneficiary. Since Mother is the owner, she has the power to change the beneficiary designation. Under these circumstances, on the death of Father and the payment of the proceeds to Son, Mother has been held to have made a taxable gift to Son in the face amount of the policy. Father’s death in such a case brings about a shift in wealth from Mother to Son. As a result of Mother’s earlier direction, the valuable contract rights owned by Mother up to the moment of Father’s death irrevocably vest in Son on the happening of that event. The claim

21 Ernst Behrend, 23 B.T.A. 1037 (1931).
22 Ibid.
23 Goodman v. Commissioner, 156 F.2d 218 (2d Cir. 1946).
against the company was actually given to Son at the time of his designation as beneficiary, but no gift tax consequences attached at that time since Mother retained the power to revoke the gift, and it is well settled that a revocable transfer will not attract gift taxes. In the case of revocable transfers, the gift occurs upon the lapse or release of the power to revoke. In the case of the life insurance contract, this occurs at the moment of Father's death.

The value of the gift was held to be the face amount of the policy, rather than its cash-surrender value. It is a good general rule that where the owner is a person other than the insured he should name himself beneficiary. Failure to do this will result in either gift taxes to the policy owner or, as will appear later, income taxes to the beneficiary.

**Income Taxes**

*In General.* In general the proceeds of life insurance received by reason of death are exempt from income tax. Proceeds in excess of cost, where received other than by reason of death, as on the maturity of an endowment contract, are taxable as other gains or profits under the Code. The same rules apply with few exceptions whether the policy is owned by the insured or by a person other than the insured. Pre-

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26 The following quotation from the author's text, State Farm Life Insurance Co., Advanced Life Underwriting and Tax Planning 82-87 (1956), discusses the general income tax rules relating to the receipt of insurance proceeds:

**Received by Reason of Death:**

(a) **Lump sum.** ... Both with respect to persons dying prior to and after August 16, 1954, gross income does not include any portion of the amount received in a lump sum under a life insurance contract paid by reason of the death of an insured. It is immaterial whether the payee is an individual, trust, partnership or corporation.

(b) **Interest Option.** Where the entire proceeds are held by the insurer under an agreement to pay interest thereon the interest payments must be included in the taxable income of the recipient. Thus if the widow is to receive the interest on the proceeds for her life and the face amount of the policy is to be paid to the children upon her death, the interest payments received by the widow are taxable to her but the payments received by the children on her death are exempt from tax.

(c) **Instalments.** Under the 1939 Code, the entire amount received and to be received in the future under an annuity or life income option, with or without refund, or in annual instalments over a fixed number of years is excluded from gross income. This is true whether the option was selected by the insured or by the beneficiary. Obviously a portion of each year's payment under any of these options includes interest earned on the part of the principal retained by the company. The 1954 Congress regarded this as unduly favorable treatment since if a beneficiary had received the lump sum and invested it himself he would have had to pay tax on the interest or dividends received by him. It nevertheless felt that in the case of a widow the tax advantage might properly be retained, at least partially, in order to encourage her to take the proceeds in instalments so as not to waste the principal. While it is not clear that widowers need the same incentive the new Code [I.R.C., Sec. 101(d)] provides that
mium payments as such are never deductible. Occasionally a deduction will be obtained because the payment may be classified under one of

with respect to insureds dying after August 16, 1954, the interest element in all installment payments shall be included in income except in the case of a surviving spouse who is given a special $1,000 interest-element exclusion.

Assume a beneficiary, other than a spouse, who under the terms of a $50,000 policy (maturing by reason of death after August 16, 1954) is entitled to annual installments of $5,600 for ten years. The portion to be excluded from gross income each year is $5,000 ($50,000 divided by 10). Any amount received in any year in excess of $5,000 is taxable. Thus the taxable portion would be $600 plus any dividends paid over the guaranteed amount.

If payments for life had been provided under the above supposition, the $50,000 face amount would be divided by the beneficiary's present life expectancy. Assume this to be 20 years. Here $2,500 of each payment would be excluded and the excess subject to tax. This yearly exclusion of $2,500 will continue even though the beneficiary outlives his expectancy and thus has received tax free the full capital sum.

Where the mode of settlement contains a refund feature, as is usual, the yearly exclusion is to be computed after deducting from the face amount the actuarial value of such feature, under regulations . . . issued by the Commissioner. . . .

This change in the method of taxing insurance proceeds paid by reason of death but spread over the years has removed the tax advantage that formerly obtained through selecting either one of the annuity or installment options. However, because of the special exception in favor of a surviving spouse, a distinct tax advantage may still be realized through use of one of these optional settlements where a widow or widower is the beneficiary. Assume that an insured dies leaving a $100,000 policy payable in ten installments of $11,200 each. Here the annual taxable amount will only be $200, the portion excludible under the general rule being $10,000 plus the special interest element exclusion of $1,000.

. . .

Received Other than by Reason of Death:

(a) Tax Considerations in General. 1954 I.R.C., Sec. 72, in substance provides that amounts received under a life insurance or an endowment contract, other than by reason of death, shall be included in income to the extent that such amounts exceed the investment in the contract. Such amounts may be received upon maturity, surrender or sale of the contract, or through the receipt of dividends. Assume, for example, that A, upon his 30th birthday, purchases a $10,000 twenty-year endowment policy. Should he die prior to maturity, $10,000 will be paid to his beneficiary. Because the policy becomes payable by reason of death the proceeds will be exempt from income tax. On the other hand, if the policy matures while A is still alive any profit will be taxable under 1954 I.R.C., Sec. 72. This gain is ordinarily the difference between the net premiums paid and the face amount of the policy. The “dividends” distributed to policyholders prior to maturity are treated as adjustments of cost rather than as distribution of earnings. This is true whether the dividends are applied to reduce premiums or received in cash.

(b) Payment in Lump Sum. If A, in the case suggested, had paid gross premiums of $9,000 but had received dividends of $500 during the same period, his investment in the contract would be $8,500 and his profit on maturity would be $1,500. . . . Under the 1939 Code the entire amount of the gain was taxable in the year of receipt. This is still true but under the new Code [I.R.C., Sec. 72(e)(3)] the tax attributable to this inclusion may not be greater than the taxes which would have been payable if the amount had been received ratably over the actual year of receipt and the two prior years. In other words, A is permitted to spread his gain over a three year period. He computes his tax for the year of receipt as though he had only received $500. He then computes his taxes for the prior two years as though he had received an additional $500 in each year. The increase in tax for the two prior years plus the current year's tax based on the inclusion of only $500 will represent his total tax. This privilege of spreading the gain over three years and consequently having it taxed at lower brackets will frequently make the choice to receive the proceeds in a lump sum much more attractive than heretofore.
the standard deduction items. Thus a premium payment may in fact represent alimony, additional compensation or a charitable contribution. In these cases the amount of the premium payment is deductible within

(c) Constructive Receipt of Lump Sum Payment. Endowment policies usually provide for the payment of the face amount at maturity unless the insured has elected one of the standard options. He may elect (1) to leave the proceeds at interest or (2) to receive a life income, usually with a minimum number of payments guaranteed, or (3) to receive instalments for a fixed number of years. Under the 1939 Code and the court decisions interpreting it, if he elected, after maturity, to receive the proceeds under one of these options, he was nevertheless immediately taxable upon any profit since he was treated as having constructively received the proceeds and as having deposited them with the company. But if, even a few days before maturity, he had made an irrevocable election, no immediate gain was recognized since the principal was never unconditionally available to him. This obviously was a pitfall to the uninformed since frequently it was only at maturity that they would first give serious consideration to the choices available. Congress has happily modified this rule to provide for a 60 day additional grace period, at least where the option selected is of the annuity type [I.R.C., Sec. 72(h)]. Thus a lump sum may no longer be considered as constructively received upon the maturity date of the contract if the insured elects within 60 days to receive the proceeds in instalments or for life.

(d) Principal Sum Left at Interest. If the insured elects the interest option, all interest payments will be subject to tax, just as the interest on any other deposit. If he retains the right to withdraw the principal at his pleasure, any gain will be immediately taxable under the constructive receipt doctrine, discussed in (c) above. It is only when he irrevocably surrenders his immediate right to obtain the principal that he will delay the tax on the gain.

(e) Life Income and Instalment Options Beginning In or After 1954. Under the 1939 Code a distinct advantage obtained through the selection of the instalment option for a fixed number of years over the life income option since the taxpayer was much more likely to recover his capital tax free. Assume that A in the example above, whose investment in the $10,000 matured endowment contract was $8,500, was entitled to annual payments of $632 for 20 years. Under prior law he was permitted to recover his entire cost before including any part of any instalment in income. Thus it would take him slightly more than 13 years before any instalments were subject to income tax. On the other hand if he elected the life income option he became subject to the old 3% rule; that is, the portion of each payment equal to 3% of his cost was taxed as income each year and the balance was treated as return of capital. Assume he was to receive $540 per year for life. His cost being $8,500, 3% of this or $255 was taxed as income each year. The excess was regarded as return of capital. Here he would have to live 30 years to get his capital back.

The old instalment rule may have been unduly favorable to taxpayers but the annuity rule was both unrealistic and unfair in that annuitants rarely live long enough to recover their capital investment.

Under the 1954 Code both instalments for a specified number of years and those guaranteed for life are classified as annuities and taxed in much the same way. Part of each payment is reportable as income and part is regarded as return of capital but in the life income cases the actual life expectancy of the beneficiary is used to determine the percentage rather than the arbitrary and unreasonably high 3% figure.

There are three basic rules for determining what is called the “exclusion ratio.”

(1) The life expectancy rule is used for the life income option. Here the ratio of investment to expected recovery based on the beneficiary’s actual expectancy is determined and that percentage of each payment is excluded from income. (2) The instalment annuity rule applies where the payments are for a definite number of years. Here again the ratio of investment to expected recovery over the period of fixed years is determined and that percentage of each payment is excluded from income. (3) The “cost recovery rule” applies for miscellaneous payments such as dividends, receipts on surrender, etc.

Let us stay with our example of A who purchased the 20 year $10,000 endowment contract. Assume he elects instalments for 20 years. It will be remembered that his
the limits and subject to the general rules applicable to the pertinent Code sections.

**Transfer-for-Value Rule.** The statute specifically exempts the pro-

net cost or investment was $8,500 and the guaranteed yearly payments were $632. His expected return under the contract is $12,640 ($632 multiplied by 20). Here 67.25% ($8,500 $12,640) of each payment, or $425 represents recovery of cost and the balance is taxable income. In most cases this exclusion ratio may be found by simply dividing the cost by the number of payments: \( \frac{($8,500)}{20} \).

Now assume A elects the life income option and that his life expectancy is 20 years. Here he may be assumed to be entitled to receive $540 per year as long as he lives. His expected recovery is $11,800 [$10,800] ($540 multiplied by 20). The ratio of investment to expected recovery is 72.4% [78.7%]: \( \frac{($8,500)}{($11,800)} \left[ \frac{(\$8,500)}{($10,800)} \right] \). Here he would exclude 72.4% [78.7%] of each payment as return of capital. Once the ratio is determined for a particular contract it remains fixed despite the fact that the particular annuitant may outlive his expectancy. Thus it is possible that more than the original investment may be received tax free.

In most life options there are refund features in the event of the early death of the beneficiary. Thus the contract may guarantee a minimum number of payments certain or may provide that should the primary beneficiary die before the instalments received equal the face amount of the policy, any unpaid difference will be paid to a secondary beneficiary. The new rules require that the actual investment in the contract be reduced by the value of any refund feature before determining the exclusion ratio. This adjustment is necessary to avoid a double exclusion since under the new Code a refund payment to a refund beneficiary is generally exempt from tax.

The Senate Finance Committee report explains how the amount of this reduction is to be determined and gives the illustration appearing below.

"The determination of the value of the refund feature is to be without discount for interest and is the net actuarial value at rate of interest zero of the refund payment or payments certain as of the annuity starting date. It will be obtained by entering actuarial tables to be provided by the Commissioner with the whole number of years nearest to the quotient of the guaranteed amount divided by the payments per year and with the age of the annuitant at the annuity starting date. The tables will yield a figure (to be applied without regard to whether the annuity is payable annually or at more frequent intervals) for each $1 per year of annuity payment. This figure will then be multiplied by the rate of annual payment provided in the contract, the result being the value of the refund for such contract, which will be subtracted from the investment in the contract otherwise determined." The example below illustrates the tax treatment for refund annuities according to the Senate Committee Report:

"**Example:** On January 1, 1954, A purchased for $17,836 an instalment refund annuity of $1,000 per year. He is 63 years old on the annuity starting date. The guaranteed amount of $17,836 divided by the annual payment of $1,000 gives 17.836 years as the minimum period of time from the annuity starting date for which $1,000 per year will be paid. To determine the value of the refund, A will enter the actuarial tables with his age, 63, and the nearest whole number of years to 17.836. Assuming that the factor he thus finds is 5.170, he multiplies his annual payment of $1,000 by this figure to determine the value of the refund, namely, $5,170. This latter figure is then subtracted from the tentative investment in the contract of $17,836 to obtain the adjusted investment in the contract of $12,666. This adjusted figure is to be used in determining the proportionate part of each annuity payment to be excluded from the gross income. The effect of this computation is to include in the gross income of the annuitant the interest which it is anticipated will accrue from the reserve for the death benefit."
ceeds of a life insurance contract from income tax except where the policy had been transferred for a valuable consideration. Congress apparently felt that to the extent taxpayers speculated in life insurance contracts any gains should be fully taxable. The rule would make more sense if it were limited to cases where policies were acquired by persons without an insurable interest. Something of this idea was suggested by the Tax Court in Francis H. W. Ducros where that court (later reversed) held the proceeds of certain policies taxable on the ground that the acquisition of the policies represented "a wagering contract." The court thought no insurable interest was present.

The transfer-for-value rule does not apply to newly issued policies. Thus Father may apply for a policy on Son's life without fear of adverse tax consequences. It does not apply where an existing policy is transferred by gift. Son may gratuitously transfer an existing policy on his life to Father. But Father may not purchase an existing policy from Son without subjecting the proceeds, insofar as they represent gain, to income tax. This can be an unhappy pitfall since in many family situations policies will be sold rather than given, even though the predominate motivation be love and affection.

The author has suggested elsewhere typical cases where the rule operates with extreme unfairness. Son-in-law borrows $5,000 from Father for a business venture, assigning his policies as collateral. The venture fails and Father takes over ownership of the policies in satisfaction of the

(f) Life Income and Instalment Options Beginning Before 1954. The treatment provided by the Code for the annuity options described in (e) above (the immediately preceding subsection) also applies to taxpayers who have been receiving such annuities prior to 1954. All payments received in 1954 must be reported under the new life expectancy and instalment annuity rules. A taxpayer who has been receiving a life income annuity must reduce his investment in his contract before determining his exclusion ratio by the amounts he has received tax free under the cost recovery rule of the 1939 Code. Thus if he purchased his contract for $20,000 and under the 3% rule had recovered $5,000 tax free prior to 1954, his investment in the contract for the purposes of the new rule will be $15,000. It will be remembered that if instalments for a definite number of years were elected, the 1939 Code permitted recovery of the full purchase price before any amount was to be included in income. Such an annuitant must now reduce his investment by these tax free recoveries. Assume that A's investment in a contract which guarantees him $5,000 a year for 20 years is $65,000. Further assume that he had received ten instalments prior to 1954. His unrecovered cost and his investment as of 1954 is $15,000. His expected recovery is $50,000. Since his exclusion ratio is 30% he may exclude only $1,500 from each $5,000 payment received in 1954 and subsequent years. [Footnotes omitted.]

29 1 Bowe, Estate Planning and Taxation 440 (1957).
debt and continues the premium payments thereafter. Has Father made an investment? Should he be taxed on the profit when he would not be if he had taken out a new policy on Son-in-law’s life?

Son has a $20,000 policy on which he has paid ten annual premiums. He needs funds to complete the home he is building. Father takes over the policy in exchange for $3,000, its cash value, and thereafter pays the premiums. Should this situation be treated differently from that in which Son, about to surrender the policy because of the premium burden, instead, at Father’s suggestion, gratuitously assigns the policy to Father who thereafter pays the premiums? In each case, Father’s motivation is the same, that is, the moral responsibility he feels for Son’s dependents.

In a case where an individual assigned his policies to his children in consideration of their cash-surrender values, the children were taxed on the part of the proceeds in excess of their cost even though a portion of the proceeds were included in the father’s estate as a transfer for less than a full and adequate consideration made in contemplation of death.\textsuperscript{30} Prior to 1954 the transfer-for-value rule caused considerable difficulty in the area of buy-and-sell and stock-redemption agreements funded with life insurance. If we assume a partnership consisting of A, B, and C and a typical cross-purchase agreement, A would own policies on the lives of B and C, B on the lives of A and C, C on the lives of A and B. On the death of any one partner, assume A for example, B and C would receive the proceeds necessary to buy up A’s stock from his estate. But A’s estate would still own the policies on the lives of B and C. In order to continue the arrangement B would have liked to buy from A’s estate the policy on C’s life. But the transfer-for-value rule was a powerful deterrent. Similar problems existed with respect to the transfer of corporate owned policies in connection with corporate reorganizations. Under the 1954 Code Congress has greatly, though not wholly, relieved this situation by providing that the rule shall not apply where the transfer is to an insured, a partner of the insured, a partnership of which the insured is a member, or a corporation of which the insured is a stockholder or an officer.\textsuperscript{31} It also excepts from the rule transfers in connection with tax exempt reorganizations.\textsuperscript{32}

In partnership cases, such as the one suggested above, B may now buy the policy on C’s life from A’s estate without fear of the rule. Fur-

\textsuperscript{30} Bourne Bean, 14 CCH Tax Ct. Mem. 786 (1955).
\textsuperscript{31} § 101(a)(2).
\textsuperscript{32} § 101(a)(2)(A).
thermore, on the inception of such plans, partners may sell existing policies on their lives to other partners or, if the entity method is used,\textsuperscript{33} to the partnership itself. But note that the pre-1954 difficulty still exists where a business is conducted in corporate form. Thus if \( A, B, \) and \( C \) are stockholders instead of partners, and \( A \) dies, \( B \) may not buy the policy on \( C \)'s life from \( A \)'s estate under the exception. Only the corporation may buy it. The effect of this is to force closely held corporations to use the stock-redemption method rather than the cross-purchase arrangement.

The transfer-for-value rule also causes problems where policies are transferred in connection with the settlement of marital rights. These problems are treated later in the separate section on \textit{Alimony}.

It should also be noted that the exception does not apply to transfers to trusts. Generally these will be gift transfers but occasionally a beneficiary may be tempted to sell his policy to a family trust so that the premium payments thereafter made from trust income will be taxable to the trust.\textsuperscript{34}

\textit{Alimony}. Not infrequently a life insurance policy is assigned by a husband to his former spouse in connection with the settlement of their property interests upon divorce, the husband agreeing to maintain the policy in force. Where all of the incidents of ownership are irrevocably transferred to the wife the income tax rules as to future premium payments are clear.\textsuperscript{35} Premium payments made by the husband are treated as additional alimony deductible by him\textsuperscript{36} and includible as alimony income by the wife. Upon the husband's death and receipt of the proceeds by the wife, the proceeds do not constitute alimony income since they are the proceeds of a capital investment owned by her. However, she would seem to be a purchaser of the contract for a valuable consideration.\textsuperscript{37} This would appear to subject her to the transfer-for-value rule. Hence her profit (the excess of the proceeds over the value of the contract on the date of transfer plus all premiums paid thereafter) would be taxable as ordinary income.

\textsuperscript{33} Under the entity method the partnership will own the insurance on the lives of all the partners, and upon the death of any one of them will receive the proceeds of the policy on his life and liquidate his interest.

\textsuperscript{34} He must, of course, not be the grantor of the trust. Int. Rev. Code of 1954, § 677(a)(3).

\textsuperscript{35} The transfer of the policy itself would seem to be a lump sum payment and hence neither deductible by the husband nor taxable to the wife.

\textsuperscript{36} Estate of Boies Hart, 11 T.C. 16 (1948).

\textsuperscript{37} The transfer of the policy was not a gift but in partial settlement of her marital rights.
Where, as is frequently the case, the policy is transferred as collateral
only, to secure the post-death payments which the husband may have
agreed to make, then the premium payments do not constitute alimony
to the wife and no deduction is allowed the husband.\textsuperscript{38} The husband in
this case is making the payment solely for his own benefit. He remains
the owner of the policy subject to the security interest of his former wife.
If the proceeds are paid to the wife after his death they are taxable as
alimony income to her when and as received.\textsuperscript{39} The husband’s estate does
not become entitled to any income tax deduction, but there should be an
estate tax deduction for the computed value of the post death payments
as a debt of the estate, provided the payments are required to be made
pursuant to court decree.\textsuperscript{40}

The pitfalls in this area arise where the transfer to the wife is less
than complete. Thus in many cases the assignment to the wife will con-
tain a provision that ownership shall re vest in the husband if the wife
predeceases him. Here the deduction for alimony has generally been
denied the husband as the premium payments are not exclusively for the
benefit of the wife.\textsuperscript{41} Correspondingly the premium payments should not
at that time be income to the wife. But on the death of the husband
and the irrevocable vesting of full ownership in the wife, she may con-
ceivably be held to be in receipt of alimony income in the full amount
of the proceeds. Query if any income or estate tax deductions are avail-
able in this situation. Because of these uncertainties this type of de-
feasible transfer should not generally be recommended.

\textit{Proceeds or Premium Payments as Compensation or Dividend Income.}
Questions arise, depending on ownership, where an employer pays pre-
miums on life insurance on the lives of employees\textsuperscript{42} or stockholders, or
where the proceeds are payable to beneficiaries of either of these two
groups. The Regulations have long provided that premiums paid by an
employer on group-life policies covering the lives of employees are not
income to the employees. These are considered a type of fringe benefit
“not paid as compensation to the employee but rather as an investment
in increased efficiency.”\textsuperscript{43} The ruling, however, does not apply to group-

\textsuperscript{38} William J. Gardner, 14 T.C. 1445 (1950).
\textsuperscript{39} Int. Rev. Code of 1954, § 71.
\textsuperscript{40} Cf. Laughlin’s Estate v. Commissioner, 167 F.2d 828 (9th Cir. 1948). The proceeds, of
course, would be included in the husband’s estate.
\textsuperscript{41} Smith’s Estate v. Commissioner, 208 F.2d 349 (3d Cir. 1953).
\textsuperscript{42} Premiums paid on policies under qualified pension and profit sharing plans are not
discussed.
\textsuperscript{43} O. 1014, 2 Cum. Bull. 89 (1920).
permanent policies since any form of permanent insurance affords present substantial economic benefits to the employees.44

With respect to other than group policies, it is well settled that if an employer pays premiums on a policy owned by an employee, the employee is charged with income in the net amount of the premiums so paid.45 This is simply an application of the general rule that income may be in forms other than the receipt of cash. If, however, the employer owns the contract at the time when a premium is paid and is the direct beneficiary, the payment is neither income to the employee nor deductible by the employer.46 Frequently, deferred compensation contracts provide that the employer will insure the life of the employee for $X dollars; that when the employee attains age 65 the contract will be transferred to him; that if the proceeds become payable prior to that date by reason of his death the proceeds will be paid to his designee. In these cases ownership in the first instance vests in the employer. It is clear that when the policy is later transferred to the employee at age 65, he will be in receipt of compensation income in its then value.47 If the proceeds are paid as a result of his earlier death, his designated beneficiary will have taxable income subject to the $5,000 tax exempt exclusion under section 101(b) for post-death payments made by reason of the death of an employee.48

In this area the litigation has been over who really owns the policies. Thus in Rhodes v. Gray49 an employment contract required the employer to pay premiums on the life of an employee and to pay the proceeds to his son. The policy was applied for by the employee. The employer was named owner and beneficiary. The employer paid the premiums, deducting the amounts so paid each year as additional compensation. On the death of the employee the proceeds were paid over by the employer to the deceased’s son under the employment contract. He claimed the proceeds were exempt from income tax as an amount received under an insurance contract. The Commissioner argued they were paid as a death benefit and that only the first $5,000 was excludable. A district court found on these facts that the employee was the equitable owner of the insurance, the finding being based largely on the fact that the premium payments had been treated as additional compensation by

45 Canaday v. Guitteau, 86 F.2d 303 (6th Cir. 1936).
48 The split-dollar plan is not discussed since this contemplates a policy owned by an insured employee with premiums paid in part with the tax-free loans made by the employer.
the employer. The record title does not necessarily control. The conduct of the parties may be inconsistent with the paper title. Most of these cases in the income tax area have involved the question of dividend income rather than compensation. The problem is identical. If the corporation owns the policy, a premium payment is obviously for its own benefit. If, however, a stockholder owns the policy, then a premium payment (assuming sufficient earnings and profits) constitutes dividend income to the stockholder. In *Prunier v. Commissioner*50 two brothers owned all the stock of a corporation. Each held the record ownership of policies on the life of the other and each was beneficiary of the policies so owned. The corporation paid premiums on these policies and the Tax Court held that such payments were taxable to the brothers since nothing in the policies showed the corporation as owner. On appeal, the decision was reversed. There had been an agreement entered on the corporate minutes that the proceeds on the death of either stockholder would be paid over to the corporation and used by it to redeem the stock of the deceased. Because of this enforceable contract the appellate court held that the corporation was the beneficial owner, that the premiums were paid for its benefit, and hence the stockholders were not in receipt of income.

Occasionally the corporation as owner of the policy will cause stockholders to be named as beneficiaries. This fact situation is similar to the gift-of-the-proceeds pitfall discussed earlier. It will be remembered that where Mother owned a policy on Father's life and named Son as beneficiary, Mother was treated as having made a taxable gift in the face amount of the policy to Son on Father's death. Where a corporation owns a policy on the life of a stockholder and the proceeds are paid on his death to the surviving stockholders, there is a similar transfer of property from owner to beneficiary, and wherever corporate-owned assets are shifted to stockholders, dividend income results.51 As noted earlier, wherever a policy is owned by one other than the insured, the owner should be the beneficiary if gift or income tax consequences are to be avoided.

*Gain on Sale of Policy.* The gain on the maturity of an endowment contract will be taxed as ordinary income, whether the contract is owned by the insured or by another. The capital gain provisions of the Code

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50 248 F.2d 818 (1st Cir. 1957). See also Casale v. Commissioner, 247 F.2d 440 (2d Cir. 1957).

51 Golden v. Commissioner, 113 F.2d 590 (3d Cir. 1940); see Doran v. Commissioner, 246 F.2d 934 (9th Cir. 1957). Ducros v. Commissioner, 272 F.2d 49 (6th Cir. 1959), holding on these facts no dividend income, seems clearly wrong in principle.
are not available since the gain is not the result of a sale or exchange.\textsuperscript{52} Thus if A paid $15,000 of premiums and received $20,000 on his sixty-fifth birthday, he is held to have $5,000 of ordinary income. Since the contract was regarded as a capital asset, it was generally thought that a sale of the policy prior to maturity would result in capital gain. This led to some absurd results. In \textit{Commissioner v. Phillips}\textsuperscript{53} the endowment contract was sold 12 days before maturity for $26,750, only $250 less than its face amount of $27,000. The seller’s cost was $21,360. Had he waited until maturity, his profit of $5,640, assuming he was in a 50% bracket, would have netted him $2,820. Should a sale 12 days before maturity net him $4,040? The Tax Court thought so but the appellate court reversed, holding that a sale may not be used as a device to convert ordinary income into capital gain where the consideration received is essentially a substitute for what would have been received as ordinary income at a future date.

\textbf{Estate Taxes}

\textit{Tests of inclusion}. Section 2042 of the Internal Revenue Code requires the inclusion in the estate of a decedent of all insurance on his life if (1) at the time of his death he owned any incidents in the policy, or (2) if the proceeds of any insurance on his life were payable to his executor or administrator. Prior to 1954 there was a third alternative test under which the portion of any insurance paid for by the insured was taxed as part of his estate, even though he had irrevocably assigned, or in fact never owned, the policy. This test was happily discarded by the 1954 Revenue Act. Since that date, efforts to restore the test have failed, but recently the Supreme Court in a case\textsuperscript{54} arising under the 1939 Code, sustained the constitutionality of the premium-payment test as a basis of inclusion. Whether this decision will prompt a reconsideration by Congress to broaden again the basis of inclusion of insurance proceeds is something only the future will tell.

\textit{Ownership Test}. Since 1954 it has been possible for an insured to remove the proceeds of insurance from the federal estate tax on death by the simple expedient of making an absolute assignment of all his right, title and interest in the policy to a family member. Gifts of life insurance policies have many attractions to those whose wealth puts them in the higher estate tax brackets. A gift of a policy generally attracts little,

\begin{footnotesize}
\textsuperscript{52} Avery v. Commissioner, 111 F.2d 19 (9th Cir. 1940).
\textsuperscript{53} 275 F.2d 33 (4th Cir. 1960).
\end{footnotesize}
if any, gift tax since cash-surrender value or replacement cost determine its gift tax value. Yet the effect of an assignment is to remove the face amount of the insurance from the gross taxable estate. Further it is a type of property with which donors willingly part since its value springs up largely with death. In the usual case the donor feels no poorer after such a gift; his donees feel no richer.

But here, as elsewhere in the law, a gift requires something more than compliance with the formal acts of transfer specified by local law. There must be an intent to transfer ownership, otherwise the transaction may be characterized as sham.55 It is not enough to pretend to give; one must intend to give, and evidence of later conduct will more strongly show who really owns than the words of the instrument or gift. The family partnership cases56 and the transfer-of-property cases where the evidence indicates a private understanding that the donors are to retain the life use of the property are instructive in this area.57 It may be important after the gift that the donee have possession of the policy, that the beneficiary designation be a natural object of his bounty, and that the donee pay the premiums even though the funds are furnished by the donor. In short, that the donee behave like an owner.

As in the dividend cases, ownership will frequently be a question of fact. Thus in Estate of Doerken58 the decedent was the record owner of the policy. The corporation of which he was president was the designated beneficiary. It had paid all the premiums. It carried the policy as an asset on its books. The court held the corporation to be the real owner on these facts and excluded the proceeds from Doerken's estate. In the recent case of Hall v. Wheeler59 the court on substantially identical facts held the proceeds includible in the estate of the insured on the theory that the outside evidence (payment of premiums, possession of policy, beneficiary designation, corporate books showing it a corporate asset) were insufficient to rebut the paper title. The court further held that in any event since the decedent was the record owner, the incidents of ownership were exercisable by him "alone or in conjunction with any other person."60 The case seems wrong on both grounds.

55 McNichol v. Commissioner, 265 F.2d 667 (3d Cir. 1959); Estate of Albert Rand, 28 T.C. 1002 (1957).
57 Cases cited note 55 supra.
58 46 B.T.A. 809 (1942).
As to ownership, *Doerken* is consistent with the cases under the other inclusionary provisions of the Code. 61 The sounder approach is illustrated by *National Metropolitan Bank v. United States.* 62 There the decedent’s son caused policies to be taken out on the decedent’s life. The son paid the premiums, was named beneficiary, had possession of the policy and it was intended that he should be the owner. The agent, however, filled in the application form which directed that ownership vest in the decedent. The court held the proceeds were not includible in the estate of the insured since the son was the real owner of the policy. On the second point, the *Hall* result is also out of line with well recognized principles. Thus in the community-property cases, the Regulations recognize that even though the insured has control over the full policy, “the power of surrender possessed by the decedent as agent for his wife … is not … ‘an incident of ownership’ . . . .”63 Further, the phrase exercisable “alone or in conjunction with any person” contemplates, in the author’s opinion, a power which the decedent may legally exercise.

*Transfers in Trust.* Where policies are irrevocably transferred to a trust, the insured transferor may not be the sole trustee nor one of the trustees. As trustee or co-trustee he would possess the incidents of ownership in the policy “alone or in conjunction with any other person” that the statute makes fatal. Even if the decedent is not a trustee he may not retain any power to alter, amend, revoke or terminate the trust. 64 The only safe course for him to follow is to wholly remove himself from any control over the trust or its administration. 65

*Possibility of Reverter.* Any transfer, whether outright or in trust, should eliminate the possibility of the ownership reverting to the insured upon the death of his donee. The 1954 Code made the five-percent reversionary rule applicable to life insurance. 66 This means that if under the instrument of transfer there is, as of the date of the insured’s death, a better than one chance in twenty, based upon actuarial principles, that the ownership of the policy could revert to him, the proceeds will be taxed as part of his estate. Possibilities of reverter may be readily eliminated by a provision that the policy shall become the property of the donee, “his heirs and assigns,” or if the ownership interest is to shift upon the death of the primary owner, it shall vest in the estate of the

61 See 1 Bowe, Estate Planning and Taxation 28 (1957).
65 State St. Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959).
last dying contingent owner. Thus: “to my wife but if she fails to survive me, to my children, the survivor or survivors of them, and if all fail to survive me to the estate of the last dying child.”

It is now well settled that the possibility that the insured may inherit the policy from his donee does not constitute a possibility of reverter. The Regulations specifically state, “The term reversionary interest . . . does not include the possibility that the decedent might receive a policy or its proceeds by inheritance through the estate of another person, or as a surviving spouse under a statutory right of election or a similar right.”

Gifts in Contemplation of Death. Any gift of a policy may run afool of the contemplation-of-death section of the Code. Under this section any transfer made within three years of the date of the transferor’s death, if made in contemplation of death and for less than a full and adequate consideration, may, in effect, be disregarded. Where an insured dies within three years of the date of the transfer of a policy, his executor may find it difficult to persuade the Commissioner that the gift was not prompted by thoughts of death. Insurance has been said to be inherently testamentary in character. It is frequently difficult to ascribe lifetime reasons for such a transfer. In the last analysis each case presents a question of fact and there have been cases where the estate prevailed even though the insured died within the three year period. If the insured lives beyond three years, then the gift is not subject to attack by the Commissioner as a contemplation-of-death transfer. However, it must be remembered that if the insured donor continues to pay the premiums, each premium payment is itself a gift and the last three premium payments may be vulnerable. The law is not clear as to what should be included in the estate of a donor under these circumstances. Suppose ten premiums in all were paid on the policy. Three years after it was issued, the insured transferred it to his wife. Thereafter he paid seven of the assumed premiums. Since the transfer and the subsequent payments (other than the last three) are protected by the statute, question arises as to how much of the face amount should be included if the last three premiums are found to have been made in contemplation of death. Arguably it should only be the amount of money so paid. But it seems likely the courts will follow the reasoning of Liebmann v. Hasseit. In that case a policy was found to have been transferred in con-

70 148 F.2d 247 (1st Cir. 1945).
templation of death, but for the two years the insured survived the transfer, the premiums were paid by his donee. The court held the proportionate part of the insurance purchased by the last two premiums should be excluded from the gross estate, and this amount was determined by taking the proportion of the proceeds which the last two premiums bore to the total premiums paid. It would seem to follow that if the total of all premiums paid were ten and if the last three were in contemplation of death, then only three-tenths of the proceeds should be included.

**Payable-to-the-Estate Test.** It is generally unwise to name the estate of the insured as beneficiary. This subjects the proceeds to state death taxes in many jurisdictions which exempt only insurance paid to named beneficiaries. It will make the proceeds, in many states, available for the claims of creditors of the estate, and may substantially increase executor fees and other administration expenses. In some states, even though the estate is specifically named as beneficiary, the proceeds are payable by statute to the widow and children.\(^{71}\) Such insurance, in those jurisdictions, escapes inclusion under this test. On the other hand, if the proceeds are paid to designated beneficiaries but are to be used for the benefit of the estate, they may be caught by this test. The proceeds are receivable for the benefit of the estate wherever there is an obligation legally binding on the recipients to use such proceeds for the payment of taxes, debts or charges which are enforceable against the estate.\(^{72}\)

The test is significant only where one other than the insured owns the policy. Where the insured himself owns the contract, the incidents-of-ownership test will cause inclusion of the proceeds in all cases where the payable-to-the-estate test would apply. Where the test is the sole basis for inclusion it may result in double succession taxes at the same moment on the same transfer. Assume Father owns a policy on Son's life with Son's wife as beneficiary and "if she predeceases the insured, the proceeds are to be paid to the executor or administrator of the insured." Further assume Son's wife predeceases Son. On these facts the proceeds will be paid to the estate of Son and pass under his will. The test requires that the proceeds be taxed as part of his estate. Has not Father at the same moment made a gift of the proceeds? The valuable contract rights have shifted from Father to Son's estate on his son's death. Father has depleted his estate by the amount of the proceeds,

\(^{71}\) See Lowdnes & Kramer, Federal Estate and Gift Taxes 294 (1957).

the appropriate occasion for the imposition of a gift tax; substantial property is transmitted by Son at his death, the appropriate occasion for the imposition of an estate tax. Because of this likely double succession tax, the beneficiary designation by an owner, other than the insured, should avoid any contingency under which the proceeds may become payable to the estate of the insured.
THE NEW INTERNATIONAL DEVELOPMENT ASSOCIATION

STANLEY D. METZGER*

The International Development Association is a multigovernmental effort to foster world peace and prosperity by providing finance to less economically strong countries. In a provocative analysis and appraisal of the newly ordained IDA, Professor Metzger observes that IDA's current resources are inadequate, and suggests that a solution to United States domestic problems will in turn ultimately answer the Association's financial needs. The author further submits that subsequent replenishment of organization funds, and permitting them to be granted as well as loaned, would evince a realistic and genuine concern for the betterment of underdeveloped countries.

INTRODUCTION

On January 26, 1960, the Executive Directors of the International Bank for Reconstruction and Development¹ submitted to the governments of the sixty-eight member countries the Articles of Agreement of a new International Development Association (IDA) upon which they had been negotiating for four months.² On February 18, 1960, the President of the United States submitted to the Congress these Articles of Agreement and recommended legislation authorizing United States membership in the Association as well as payment of the subscription obligations prescribed in the Articles.³ On June 30, 1960, this legislation was enacted into law,⁴ and by September 1960 more than the number of countries necessary to bring IDA into being had become members of the new Association.⁵

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¹ Hereinafter referred to as the World Bank.


⁵ The IDA Agreement provided that it enter into force "when it has been signed on behalf of governments whose subscriptions comprise not less than sixty-five percent of the total subscriptions." IDA Articles of Agreement, art. XI, § 1. At the time of signature each government must deposit an instrument stating that it has accepted the Agreement in accordance with its law and has taken all steps necessary to enable it to carry out its obligations thereunder. IDA Articles of Agreement, art. XI, § 2(a). The Agreement remains open for signature until the close of December 31, 1960. If insufficient signatures
Ordinarily, it makes sense to withhold judgment upon a new international institution until it has had a period of years in which to demonstrate its effectiveness or lack of it—years in which the adequacies or inadequacies of its basic charter or its underlying conception have been tested against the needs which it was designed to fulfill. The great importance of the economic development of the underdeveloped countries of the world to the welfare and security of the economically more fortunate peoples, however, more than justifies an appraisal at the outset of the new IDA and the contribution it is likely to make to economic development. Moreover, it is not as if IDA represents a completely new response to a new need. Rather, it is an additional effort to answer a need which has been felt acutely at least since the mid-1930's, a need which has called into being several international and a number of domestic institutions. The "strategy" of growth of underdeveloped societies has called forth a veritable library of economic and political writing to enable us better to appreciate the dimensions of the effort required to ensure its success. Consequently, there is a considerable background of effort and thought against which to appraise IDA with a degree of perspective which is not usual in dealing with new institutions. This article will attempt to assess the institution—its purpose, capital structure, organization, and functions—in terms of its likely contribution to the furtherance of economic development, and in the process suggest some ways for improving IDA's long-term role in fostering the development of its member countries.

**Purposes**

The premises upon which IDA is based are set forth in a succinct statement at the outset of the Articles. Cooperation for "constructive economic purposes," development of the "world economy" and "bal-

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6 There are no generally accepted and definitive criteria for determining whether a country is "underdeveloped," a word which has come to supplant "backward" because of the supposed sensibilities of such countries. Such a characterization is usually made if a country has a relatively low per capita annual income, relatively less industrialization than others, and in other respects is relatively "poor."

7 These include the International Bank for Reconstruction and Development, the Export-Import Bank of Washington, the United States Development Loan Fund, the International Finance Corporation, and the Inter-American Development Bank. For a survey of the functions of these institutions, see Private Foreign Investment, 19 Fed. B.J. 308 (1959).

anced growth of international trade” are conducive to peace and prosperity; acceleration of economic development which will promote higher standards of living and economic progress in the less-developed countries “is desirable not only in the interests of those countries but also in the interests of the international community as a whole”; and “achievement of these objectives” would be facilitated by an “increase in the international flow of capital, public and private, to assist in the development of the resources of the less-developed countries.”

This rationale for a cooperative effort to accelerate economic development of underdeveloped countries is not new. It underlies both the bilateral efforts of the United States through the Export-Import Bank and the Development Loan Fund (DLF), and multilateral mechanisms such as the International Bank for Reconstruction and Development, the Inter-American Development Bank, and the United Nations Special Fund. But nowhere has it been formulated with the clarity and precision of the IDA “preamble,” and with less self-consciousness on the part of the developed countries which bear the cost. The fact that sixty-eight countries will have subscribed to such a clear and uncompromised conception of their mutual interests is a more than hopeful augury. That nations are prepared to acknowledge this interest is easily the most significant new element in the foreign relations of the last fifteen years.

The immediate purpose of IDA, the role assigned to it, is to promote economic development, increase productivity and thus raise standards of living in the less-developed areas of the world included in its membership, by providing finance to meet their important developmental requirements on terms which are more flexible and bear less heavily on the balance of payments than those of conventional loans, thereby furthering the develop-

12 The Articles of Agreement and Resolutions establishing these institutions may be found conveniently in “Legislation on Foreign Relations,” printed for the use of Committees on Foreign Relations and Foreign Affairs of the Senate and House of Representatives. Staff of Senate Foreign Relations Committee, House Foreign Relations Committee, 86th Cong., 1st Sess., Legislation On Foreign Relations (Comm. Print 1959).
13 Sixty-eight countries are now members of the World Bank, membership in which is prerequisite to becoming a member country of IDA. IDA Articles of Agreement, art. II, § 1. While the Netherlands and Belgium expressed the feeling during negotiations that their “quotas” were set too high and they might not become members, Hearings on S. 3074 Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 23 (1960), it is expected that all others will in fact become members and that the Netherlands and Belgium will in the last analysis likewise decide to join.
mental objectives of the IBRD [World Bank] ... and supplementing its activities.\textsuperscript{14}

Whether this purpose, which is not more confining than the preambular conception, can be met must be determined from the remainder of the agreement—from the amount of capital which IDA will have available and the limitations, if any, upon the manner in which it may infuse this capital into the less-developed areas.

**Capital Structure**

The capital structure of IDA consists of three elements: “initial subscriptions,” “additional subscriptions,” and “supplementary resources provided by a member in the currency of another member.”

*Initial Subscriptions*

The total initial subscription to IDA is $1 billion. Of this amount, $763 million is to be subscribed in five annual installments by 17 more developed countries (Part I countries) in gold or freely convertible currency.\textsuperscript{15} The United States subscription is $320.29 million, and that of the other 16 totals $442.78. In addition to this 763 million in “dollars,” IDA will receive $236.93 million in subscriptions from the 51 less-developed (Part II) countries. However, only 10% of these subscriptions is payable in “dollars,” the rest being payable in the local currencies of these less-developed countries, which cannot be converted or otherwise used outside the territory of the particular country unless the country agrees.\textsuperscript{16} Consequently, only 10% of the $236.93 million subscribed by the less-developed countries will be “dollars” payable over a five-year period, or $23.69 million. Thus, the total “dollar” resources of IDA over the five-year period 1961-1965 which will be available for the acceleration of the economic development of 51 member underdeveloped countries will be approximately $787 million.

The local currency contribution by the 51 underdeveloped countries will be usable, to be sure, “in payment for goods and services produced in the territories of such member and required for projects financed”

\textsuperscript{14} IDA Articles of Agreement, art. I.

\textsuperscript{15} IDA Articles of Agreement, art. II, § 2. There was no agreed-upon formula for determining whether a country fell into Part I or Part II. A good many, such as the United States, United Kingdom, and Germany, were obviously Part I countries. The management of the World Bank was invited to present a list of countries for Parts I and II, did so, and it was accepted by the Executive Directors. Hearings on S. 3074 Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 22-23 (1960).

\textsuperscript{16} IDA Articles of Agreement, art. IV, § 1(a).
by IDA and located therein, insofar as such use is "consistent with sound monetary policies."17 But it must be recognized that this contribution represents a mobilization of internal resources and their focusing upon particular projects, and not an infusion of new resources of capital (goods or services) from outside the country's economy. There is, of course, the hope of the Executive Directors who negotiated the Articles that "the more developed of these countries, upon accepting membership in the Association or reasonably soon thereafter, will be in a position to release at least some part of the 90% portion of their subscriptions."18

This would permit some of their local currency to be used on a freely convertible basis or to finance exports from one to another of the 51 underdeveloped members. But the reality of the needs of these countries—the very fact that they are underdeveloped and are seeking to become less so—indicates that this is a very long-range hope indeed.

For example, in March 1960, the Finance Minister of Pakistan told a National Press Club audience that Pakistan's five-year plan will cost about $4 billion; that Pakistan hopes to raise about 60 percent of this herself; and the rest ($1,680 million) must come from foreign sources.19 If successful, the plan might enable Pakistan to raise its per capita income from $50 a year to $55 a year by the end of 1965. The Finance Minister emphasized, however, that even this "modest" plan will be difficult for a nation of 86 million people crowded into an area one-eighth the size of the United States. "We do not want simply to keep our heads above water," he said. "We are pleading for that decisive boost which will enable us to gain dry land and to stand in time on our own feet."20 If anything is clear, it is that (1) a per capita annual income of $55 in 1965 can in no sense be deemed to be "dry land" in view of the needs and aspirations of Pakistanis; (2) Pakistan will not be able, by 1965 or for decades thereafter, to permit an export of her resources, which is the meaning of the "hope" of the Executive Directors; and (3) since India,21 Indonesia and many others in the group of 51 countries have needs approximating those of Pakistan for the infusion of capital goods, the capital resources available to IDA from its initial subscriptions for the purpose of accelerating economic develop-

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17 Ibid.
20 Ibid.
21 India's third five-year plan which is to begin in April 1961 will require external assistance representing the foreign-exchange component of the plan and totalling $4,620 million. N.Y. Times, July 6, 1960, p. 1, col. 2.
ment by adding to the capital resources of underdeveloped countries are pitifully small.

Fortunately, this fact has been recognized by almost everyone. Senator Monroney, who introduced the Senate resolution which sparked the negotiations productive of IDA, was surely right when he stated during the debate upon the bill authorizing United States membership:

There is no question that the size of the fund proposed is completely inadequate in terms of the needs of the underdeveloped countries for additional capital from abroad to supplement their own meager resources. I had hoped that agreement could be reached for a greater amount of capital and for its payment into the Association much more quickly. However, those who have handled the long and difficult negotiations tell me that this was simply impossible to achieve because of the limited resources of many of the nations whose participation was far more important for the principle it established than because of the amount of their contribution. Senator Javits echoed the sentiments of his colleagues as to the inadequacy of IDA's resources from initial subscriptions, and there is no known dissent.

While it seems clear that much more by way of resources is necessary for economic development than those provided to IDA, estimates vary as to just how much additional will be needed. In 1951 a group of United Nations experts estimated that an annual capital import of more than $10 billion is needed in underdeveloped countries for investment in industry and agriculture alone. This estimate has been criticized, however, and a wise observer has simply characterized all such estimates as "dubious." Without any estimate of over-all needs, an articulate and competent British development administrator is of the view that the original capital needed for a Development Authority is "in the neighborhood of twenty-five billion dollars," to be "used gradually over the years" and to be replenished annually by as much as $5 billion. The most recent of these estimates is that of Paul G. Hoffman, former Marshall Plan Administrator and now advisor on economic

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24 Id. at 10845.
29 Hoffman, One Hundred Countries, One and One Quarter Billion People (1960).
development to the Secretary General of the United Nations. He has stated that if the underdeveloped countries are to increase their per capita rate of economic growth from one to two percent, their total merchandise import requirements during the decade 1961-1970 would be about $40 billion. Approximately $70 billion in investment capital will be needed, he believes, or $7 billion a year. This is $3 billion more than flowed to less-developed areas in 1957-1958. To meet this additional $3 billion a year need, “increased private investment and bankable loans might account for about $1 billion a year”—a high estimate, it would appear—while the “remaining $2 billion a year,” or $20 billion over the decade, “would have to be raised through other means.” Mr. Hoffman’s definition of these other means is instructive for the purpose of assessing IDA’s impact upon economic growth:

This $20 billion in new money is needed, for the most part, not for revenue-producing activities (which can readily be financed through public and private “bankable” loans) but for public facilities and services which can pay back their investment only through the generally increased output of the entire economy. Such facilities and services include roads, communications, education and training, health improvement and administration. The repayment of loans for such purposes should not over-burden those struggling economies, and therefore the loans should be long-term, at low rates of interest, and probably with the beginning dates of repayment deferred. In banking parlance, they may be “soft” loans—although from the point of view of economic growth they are the most important investments of all.

The new money should be administered for the most part through international or multi-national organizations. I would hope that at least half of the $20 billion needed over the coming decade would be channeled through the proposed International Development Association. This new institution, with its emphasis on loans with longer terms of repayment and lower interest rates than are now available, provides the very kind of instrument needed for carrying out this type of international investment. It will not be dominated by the same need to hedge against all the short-term risks, which at present limits the scope of the World Bank. It will be able to make loans for social projects like training programs and schools, which pay off heavily, but only in the long run. However, IDA as presently conceived has a major defect: its resources are too small. To do its job, it may need a billion dollars a year—not that amount spread over five years, which is the capitalization currently proposed. Under the IDA Articles of Agreement, the United States is committed to provide 32 percent of the total. If the IDA’s sights were raised to $1 billion a year, the United States would be investing through it $320 million a year.30

These figures will undoubtedly appear to many to be unduly high, but they surely indicate the limited contribution which IDA can be

30 Id. at 12-13.
expected to make with a total of less than $800 million available over a five-year period for the economic development of 51 countries.

"Additional Subscriptions"

The fact that the Executive Directors recognized the inadequacy of the initial capital subscription to IDA is evidenced by the provision that:

The Association shall at such time as it deems appropriate in the light of the schedule for completion of payments on initial subscriptions of original members, and at intervals of approximately five years thereafter, review the adequacy of its resources and, if it deems desirable, shall authorize a general increase in subscriptions.\(^{31}\)

The Executive Directors stated that in formulating this provision they considered that, as in the case of initial subscriptions, "any general increases in subscriptions should normally be designed to provide the Association with funds for a five-year period."\(^{32}\)

It is under this provision that the Board of Governors of IDA, by a two-thirds majority of the total voting power, may authorize a general increase in subscriptions. Accordingly, IDA has the power to transform itself into a development institution which could come closer to meeting development needs than its initial resources permit. However, to say that IDA has this power is to be delusively accurate. Since a favorable vote comprising two-thirds of the total voting power is a prerequisite to such action, it is clear that the major developed countries (United States, United Kingdom, Germany and France) will need to make national decisions to augment IDA's resources before such a vote can be mustered.\(^{33}\) In practice this will mean that the United States, which will have contributed $320 of the $763 million provided by Part I countries, will have to take the lead. Without United States willingness, nothing will be done. Since under the legislation authorizing United States membership any augmentation of IDA's resources will require fresh congressional approval,\(^{34}\) it can readily be seen that public opinion in the United States will be determinative.

Thus far, a combination of factors has made public opinion in the

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31 IDA Articles of Agreement, art. III, § 1.
33 The United States alone will have 27.6 percent of the total votes, and the other developed countries together will have 41.3 percent if all sixty-eight countries become members. Hearings on S. 3074 Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 81 (1960).
United States favorable to economic development of underdeveloped countries: the desire to contain international Communism, recognition that the continued wide and growing disparity between developed and underdeveloped countries’ living levels will otherwise make for an unhealthy and unstable world, a desire to increase raw materials supplies for, and markets for the products of, an expanding industry in developed countries, and altruistic motives. In recent years, however, the unfavorable American balance of payments, a growth rate in our domestic economy widely believed to be inadequate, a disturbingly steady and high unemployment rate in a time of general prosperity, a substantial number of “depressed areas” in the United States, and an Administration which has been less than eager to tackle these problems with vigor, has led to something of an erosion in popular opinion favorable to continued and expanded American assistance to foreign economic development.

The recent debates in the House of Representatives on the bill authorizing United States membership in IDA\textsuperscript{35} and the surprisingly large negative vote (the vote was 249 for, 158 against) reflect this erosion. Of more than passing significance was the opposition of Congressman Wright Patman, a long-time supporter of foreign aid measures, and others who joined him, on the ground that there had been successive vetoes of legislative measures to aid domestic “depressed areas” by appropriations of funds considerably less in amount than the United States subscription to IDA. Supporters of the bill did not contest his plea for such domestic measures, but urged that “two wrongs don’t make a right,” and that he should nevertheless support IDA.\textsuperscript{36}

It seems clear that future support for substantial additional funds for IDA will be contingent not only upon a continuation of a generally prosperous domestic economy, but also upon a much more vigorous attack on unemployment, lagging growth rates in the American economy, and greater expenditures for roads, schools, urban redevelopment, natural resources, and the rest of the social overhead of the United States, than the present Administration has been prepared to contemplate. The limits within which a foreign policy can depart from domestic policies are narrow, and would appear to have been pushed close to their outermost point. Long-term foreign aid, and particularly foreign economic-development assistance, is dependent upon a continually expanding domestic economy in both public and private sectors. A policy which fails to realize this, or forgets it, is in serious jeopardy.


Apart from the review at five-year intervals of the adequacy of IDA's resources, the Articles authorize a general or individual increase at any time, though individual increases may be considered only at the request of the member involved.\textsuperscript{37} It is highly improbable that the power to authorize individual increases will have more than marginal impact. No individual country is likely to contribute additional resources of any magnitude without assurances that others will share the burden. So far as general increases are concerned, since legislatures have been led to believe by the Executive Directors' report\textsuperscript{38} and otherwise\textsuperscript{39} that the first five years' appropriations of initial subscriptions are all that will be asked during that period, it will be difficult though not impossible to accelerate replenishment. If there are further upheavals in underdeveloped countries, such assurances will be overborne. As United States plans for a large new Latin-American program of aid came forth after stresses consequent upon Cuban developments, so can IDA's plans for replenishment at only five-year intervals be knocked awry by similar occurrences elsewhere.

"Supplementary Resources Provided by a Member in the Currency of Another Member"

Probably no subject in the current field of international finance is as much misunderstood as that of the uses and limitations of "local currencies" of one country which are owned by another. It is not a new problem, but in recent years it has assumed large and seemingly intractable proportions.

It should be clear at the outset that if Country A or its resident owns currency of Country B, what it owns is a claim on the resources of Country B. If the claim is to be satisfied, real resources in the nature of goods or services will sooner or later be withdrawn from Country B to Country A.\textsuperscript{40} If Country B's currency is not "convertible," this means that the claim upon its resources cannot be immediately satisfied—goods and services for export to Country A cannot be bought with its currency. The fact that Country B's currency is not convertible now does not necessarily mean that it may not become so in the future. Its international balance of payments may improve because the input of Country A's resources, for example, may increase the production of

\textsuperscript{37} IDA Articles of Agreement, art. III, § 1(a).
\textsuperscript{40} See Metzger, Exchange Controls and International Law, 1959 Ill. L.F. 311 (1959).
exports from $B$ so as to earn enough foreign exchange to bring about an equilibrium. Hence $B$ may be able to restore or create a convertible currency and permit its resources to flow out of the country.

In the past, the currencies of relatively developed countries like the United Kingdom have been inconvertible from time to time, and large amounts of their currencies have accumulated in the hands of other countries. In such cases, however, there was a quite reasonable expectation that such countries would recover a balance-of-payments equilibrium. "The great classic instance was Britain during the war; if the countries supplying Britain refused payment in non-negotiable sterling for their exports to her, where else would they find alternative markets for them? And in this case the sweetening hope was decidedly present that, after victory, the negotiability of sterling would be restored."\(^{41}\)

The situation is quite different where underdeveloped countries are concerned. As the Department of State stated to a Senate subcommittee in 1958:

The usefulness of a less developed country's local currency is determined by the economic position of that country. For the currency of any country is simply a claim against that country's existing economic resources. It is to a nation's economy what a checkbook is to a checking account. Expenditure of its own currency by a less developed country does not make more resources available to it, any more than writing checks increases a bank balance.

The less developed countries face a deficit rather than a surplus of useful resources. They need all the resources that they have in order to meet their own essential needs; and, in addition, they need more resources, which they do not now have, in order to carry forward economic development. The fact that these countries have a shortage of resources for development is the reason why they are considered as "less developed" countries.

It is clear, therefore, that unless they receive at least equivalent resources in return the less developed countries cannot provide resources to other countries without a setback to their own economic growth. If the United States were to use a less developed country's local currency to remove resources from it for use by other countries we would cause such a setback.

Eventually, we believe that it will be possible to use some of these local currencies to remove resources from some presently underdeveloped countries for United States or other uses. As these countries' development and production increases, it should be increasingly possible to do this without economic damage to the country concerned. This is not expected to be the case for a considerable period, however. Premature use of these local currencies to remove resources from less developed countries would only set back their development and increase their needs for other types of assistance from the United States.

To sum up, the limitations on the usefulness of our local currency holdings result from the economic condition of the countries in question and not from the fact of United States ownership. The utility of these local currencies of less developed countries as an instrument of multilateral economic development will remain very limited until their economic growth reaches the point where they begin to pass out of the category of less developed countries and develop a capacity to contribute to the development of the countries that have not yet made the transition.\textsuperscript{42}

In the case of Pakistan and India, for example, it is clear that if there is a serious interest in their progressive economic development, local currency accumulations by outside countries will not be able to be requited for many decades, perhaps centuries.

These considerations are peculiarly relevant to the provision in IDA's Articles which authorizes IDA to "enter into arrangements," on agreed-upon conditions, "to receive from any member . . . supplementary resources in the currency of another member," if "the member whose currency is involved agrees to the use of such currency as supplementary resources and to the terms and conditions governing such use."\textsuperscript{43} The relevance is peculiar because of the circumstances surrounding the genesis of IDA and what has occurred in its evolution.

When in 1958 Senator Monroney introduced the Senate resolution which launched the consideration, both national and international, of IDA in its present form, it contained two ideas, both given equal billing: there should be an International Development Association which would (1) provide long-term loans available at a low rate of interest and repayable in local currencies to supplement World Bank loans and thereby permit the prompt completion of worthwhile development projects which could not otherwise go forward, and (2) permit maximum use of foreign currencies available to the United States from the sale of agricultural surpluses and through other programs by devoting a portion of these currencies to such loans.\textsuperscript{44} In the hearings upon the resolution, much misunderstanding was displayed concerning the utility for development purposes of the very large accumulations of local currency which the United States had acquired, particularly as a consequence of sales of surplus agricultural commodities for local currencies.\textsuperscript{45} At the time, the United States owned about $1.8 billion worth of such currency, of which

\textsuperscript{43} IDA Articles of Agreement, art. III, § 2(a).
\textsuperscript{44} Hearings on S. Res. 264, supra note 42, at 1.
\textsuperscript{45} See id. at 10, 15, 55, 80.
some $1.6 billion represented the currency of less-developed countries. \(^\text{46}\)

As a result in substantial part of the efforts of the Department of State, above described, to disabuse some Senators of their exaggerated notions concerning the utility of local currencies for development purposes, the language of the resolution as adopted was softened in regard to local currency uses: the study of an International Development Association should include consideration of the objective of "facilitating, in connection with such loans [long-term loans repayable wholly or in part in local currencies] the use of local and other foreign currencies, including those available to the United States through the sale of agricultural surpluses and through other programs."\(^\text{47}\)

As a consequence, the United States proposal to the Governors of the World Bank concerning IDA, consisting of "guide lines which it hopes will form the basic framework of the proposed organization," suggested that "arrangements should be made to permit IDA to receive from one member the currency of another member."\(^\text{48}\) And, despite the misgivings of the Executive Directors of the World Bank who negotiated the Agreement establishing IDA, the Articles incorporated the idea of receiving such local currencies as supplementary resources.

The irony of the "supplementary" local currency episode was fully disclosed in the legislative process through Congress of the bill authorizing United States membership in IDA. There was a lively debate in the Senate as to whether the Executive should be able to "grant" such currencies to IDA as supplementary resources for development purposes, as it now can do directly to countries whose currencies the United States acquires through P.L. 480 sales\(^\text{49}\) of agricultural commodities. The bill before the Senate authorizing United States membership would have permitted such grants.\(^\text{50}\) An amendment by Senator Williams was adopted which restricted such transfers to what the Senator termed "loans," but permitted such "loans" where the United States would have a reversionary interest only in the event that IDA was liquidated or the United States withdrew from the organization.\(^\text{51}\) This arrangement was actually the one contemplated by the IDA Articles\(^\text{52}\) and by the United States as a condition to the transfer of local currencies,

\(^{46}\) Id. at 63.


\(^{48}\) S. Doc. No. 45, 86th Cong., 1st Sess. 5-6 (1959).


\(^{50}\) S. 3074, 86th Cong., 2d Sess. § 5 (1960).


\(^{52}\) IDA Articles of Agreement, art. III, § 2.

\(^{52}\) Art. III, § 2.
without characterizing such a transfer as a grant or a loan. When the companion clean bill—without the "Williams amendment" language—reached the House floor, however, the Parliamentarian ruled that the provision in the bill authorizing such transfers without express approval of Congress was out of order as an "appropriation." The bill as enacted does not permit the Executive to transfer to IDA United States owned local currencies either as a loan or a grant. As a result, despite the prominence of the vast accumulation of local currencies by the United States in the original Monroney motivation for IDA, this country is now at the point (a) where the Executive cannot transfer local currencies to IDA as supplementary resources without specific approval by Congress; (b) where IDA is certainly not unhappy that the provision in its Articles which was inserted at the strong urging of the United States will not be availed of, at least immediately; and (c) where the Executive itself is probably breathing easier in the realization that while its efforts to bring home the limitations of local currency uses were not necessarily reflected in the debates of Congress, at least it can continue to confine discussion of this subject to the domestic arena, and not continue to have to exhaust itself in trying to dispose of the accumulation to would-be recipients who do not want it because they know it for what it is.

There has been a recent development in discussions of local currency uses, however, which bodes well. On June 15, 1960, Senator Fulbright inserted into the Congressional Record an article by Professor Edward S. Mason of Harvard, which appeared in the May 1960 issue of the Atlantic Monthly, entitled "Foreign Money We Can't Spend." The Senator, pointing out that this subject is one of the most abstruse and difficult with which the Senate has to deal and that there "is much misunderstanding of this subject," urged his colleagues to read the article, which "is the best I have seen on the subject." Professor Mason's article, which develops the above-quoted arguments used by the Department of State in 1958, is perfectly sound. His conclusion particularly, it is hoped, will be taken to heart by his senatorial readers:

All things considered, the best disposition of the vast bulk of local currency accumulations would be for us to grant them back for debt retirement or any other purpose deemed proper by the receiving country. Alternatively, we could

53 Hearings on S. 3074 Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess. 74-75 (1960).
56 Ibid.
burn them, though this would involve the country in the additional expense of printing new currency notes.\textsuperscript{57}

**Organization**

The IDA will be administered by the Governors, Board of Directors, and staff of the World Bank, augmented by such additional personnel as prove to be necessary.\textsuperscript{58} The fact that an institution which enjoys wide confidence for its "sound" management will dispense IDA's funds is of substantial importance not only in securing approval of IDA by the legislatures of developed countries, but also in securing additional funds for replenishment five years from now or earlier.\textsuperscript{59}

The soundness of the World Bank's management has not enjoyed universal approval from underdeveloped countries. Many have felt that desirable projects have failed because of the conservatism of the management, and have consequently sought in the negotiations to increase the role of the Executive Directors in the lending procedures of the Bank at the expense of the President and his staff. This effort does not appear to have succeeded. The Articles specifically state:

The Association shall not provide financing except upon the recommendation of a competent committee, made after a careful study of the merits of the proposal. Each such committee shall be appointed by the Association and shall include a nominee of the Governor or Governors representing the member or members in whose territories the project under consideration is located and one or more members of the technical staff of the Association.\textsuperscript{60}

It is thus clear that no financing can occur without the approval of the Bank's professional management, thus severely limiting the area of "back-scratching" by Executive Directors in favor of each other's pet projects. This must be contrasted with the possibilities for such activities included in the Articles of the Inter-American Development Bank. While requiring that financing must be preceded by a report of the Bank's staff "recommending the proposal after a study of its merits," the Articles of the latter institution provide that "In special circumstances, the Board of Executive Directors, by a majority of the total voting power of the member countries, may require that a proposal be submitted to the Board for decision in the absence of such a report."\textsuperscript{61}

\textsuperscript{57} Id. at 11711.
\textsuperscript{58} H.R. Doc. No. 345, 86th Cong., 2d Sess. 6 (1960).
\textsuperscript{59} See 106 Cong. Rec. 13723 (daily ed. June 28, 1960). This is a statement by Congressman Barr highly laudatory of President Black of the World Bank and his staff.
\textsuperscript{60} IDA Articles of Agreement, art. V, \$ 1(d).
Both institutions, like the World Bank itself, will make all decisions by weighted voting, the votes of each member depending in greatest part upon their respective financial contributions to IDA. This system of equating power with responsibility has rightly become customary in all post-war organizations entrusted with decision-making power over large amounts of money or material which have been consigned to their discretionary use or over whose disposition they have substantial influence.62

While there have been voices in recent years urging that unconventional financing should not be done by conventional bankers, it is doubtful whether such a sentiment is appropriate when applied to the World Bank. For all its banking trappings and flotations of securities, the World Bank depends for its financing upon government contributions and guarantees, and cannot survive unless it continues to pour out concessional financing to projects which could not otherwise secure the necessary money. It is thus highly probable that the World Bank will utilize IDA’s funds with all deliberate speed, if for no other reason than that the needs of underdeveloped countries are so great and so pressing that they will see to it that some other and new institution will be assigned the task if the World Bank handles it half-heartedly.

FUNCTIONS

As indicated earlier, IDA’s purpose is to promote economic development by affording financing on terms which are more flexible and bear less heavily on the balance of payments than those of conventional loans. It may do so on such terms as it may deem appropriate, “having regard to the economic position and prospects of the area or areas concerned and to the nature and requirements of the project.”63 The project should be “of high developmental priority in the light of the needs of the area or areas concerned and, except in special circumstances,” shall be for what is called a “specific project.”64 However, the limitations which might be connoted by some of this language tend to look less limiting when the report of the Executive Directors is read. A project may be of high developmental priority whether or not it is revenue-producing or directly productive. Thus projects such as water supply, sanitation, pilot housing and the like are eligible, although the Directors expect that

63 IDA Articles of Agreement, art. V, § 2(b).
64 IDA Articles of Agreement, art. V, § 1(b).
the major part of the financing will be for projects of the kind financed by the World Bank. And what is termed a specific project is intended to include, as in the World Bank's practice, "such proposals as a railway program, an agricultural program, or a group of related projects forming part of a development program." This is all apart from the ability to finance other than specific projects in special circumstances.

But what kind of financing is IDA permitted to perform for this wide and unconstrained area of economic development? There are two limitations: one firm and imposed by the Articles, and the other not so firm and self-imposed.

The imposed limitation is contained in Article V, Section 2 of IDA's Articles, which provides that financing from initial subscriptions "shall take the form of loans." While subsequent replenishing funds may be transferred in the form of grants "if the authorization for such subscriptions expressly provides for such financing," a number of the developed countries which are furnishing the hard currency of IDA insisted that no grants be made from IDA's initial resources. Since, as noted above, the large countries with very serious and indefinite development problems, such as India and Pakistan, will not be able to repay loans in convertible currency, i.e., in goods and services, without to that extent curtailing the very development which hard-currency contributors profess to desire, such a provision, as it affects such countries, appears to mean either of two things: (a) the developed countries are prepared to see development slowed in the interest of the "character-building" qualities thought to reside in loans, but not in grants; or (b) they do not expect repayment in real terms from such countries, but wish different people at different times to make continued deferments or to forgive the obligations to repay. Neither seems particularly sensible or courageous.

It seems to have been forgotten that this issue was faced squarely and honestly in 1947 in the formulation of the European Recovery Program. The Department of State, on December 19, 1947, spoke in support of its bill (involving grants) and in opposition to the then extant Herter Bill (which excluded grants) as follows:

The question of grants as against loans should be realistically approached. It must be recognized, for example, that where the past and present situation of a country or its future prospects give little chance of repayment it would be both misleading and unwise to furnish aid on a loan basis. To furnish assistance by way of loans when there is substantial doubt that the recipient country will

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be able to repay the loan and with the idea that at the proper time the obligation to repay may be modified or forgiven, would only be the source of difficulties and perhaps bitterness in the future.  

This was said with respect to the so-called "hard" type of "soft" loans, loans repayable in convertible currency but on long-term and low-interest rates. With respect to the "soft" type of "soft" loans, loans repayable in inconvertible currency, the following colloquy which took place during the 1957 Hearings on the Mutual Security Program makes the point:

Senator Kennedy: I am just trying to find out how you feel that it would be any more possible, if this money is put in the form of a loan program, for Vietnam and Korea to pay us back in the next 3 or 4 years than it has been in the last 3 or 4 years.

In other words, a great subsidy is going to have to be given to those countries in the future. Either the loan program is going to be synthetic and provide for payment back in local currencies which will pile up and then cannot be liquidated—and you gave us no assurances that they could be liquidated—or otherwise, you are going to have to put the programs of these countries into the defense program in order to permit you to give them grants.

... 

Mr. Hollister: Senator, our whole program is a program of different types of aid; some complete grants, some less so, some involving definite quid pro quos that we get from certain countries. So where we are able, we make dollar loans, sometimes we are only able to make local currency loans.

The whole program obviously is one of assistance. I believe it is one which we can justify because we get an adequate return or we should not be in it. I am not prepared to discuss how this would be worked out in each particular country in detail. ...

Senator Kennedy: As I understand it, the World Bank provides for repayment in the currency which is given to the country; is that right?

... 

Mr. Hollister: I think so, though I am not an authority on it.

Senator Kennedy: [Y]ou would accept repayment in local currencies. In the case of Vietnam how would they be able to liquidate that?

Mr. Hollister: Senator, I don't know. If you could tell me how we are going to liquidate a great many of the loans we have made, I am sure you would have to give me the same answer. I don't know the answer. I think you can have unlimited discussion of the advisability of a grant as against a soft loan which at the present time has no great prospect of repayment. ... If necessary, you can later forgive the loan, or if the conditions in the country improve, you have some chance of payment.  

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66 Department of State, 80th Cong., 1st Sess., Outline of European Recovery Program, Draft Legislation and Background Information 45 (Comm. Print 1947).

67 Hearings Before the Special Senate Committee to Study the Foreign Aid Program, 85th Cong., 1st Sess. 482-84 (1957).
It is high time for the plain-speaking of 1947 to be reiterated. Economic aid to the large and poverty-stricken countries where efforts to develop will be continuing for decades, if not centuries, is grant aid and should be so identified. The debates in the Congress in 1960, like the above-quoted colloquy in 1957, leave no doubt that the legislatures know that the development needs of the populous and backward nations do not permit of realistic repayment of money transferred to them for that purpose. Persistence in feeding the mythology that we are "lending" this money merely distracts from the sense of reality which must be achieved if we are to deal successfully with our complex and troubled foreign relations. It creates a welter of minor issues and debating points which clutter aid programs, domestic and multilateral, and will in the end only lead to charges of repudiation and worse. It is hoped that when the time for replenishment rolls around, the governors and the legislatures will expressly authorize grants from the fresh funds, as IDA's Articles sensibly permit, so IDA will be able to make grants or loans as its judgment indicates from case to case.

What kind of loans will IDA make from its initial resources? The Executive Directors, in their report, state that the terms will be "lenient." Such leniency may be expressed in "long maturities or long periods of grace or both," by "lending free of interest or at a low rate of interest, or by some combination of the foregoing." The Directors acknowledge that loans repayable wholly or partly in local currency also qualify as a lenient term or repayment, but they, like the present World Bank management, apparently frown upon extensive use of this kind of soft loan since they take care to submerge its mention.

Undoubtedly, the experience of the United States in accumulating mountainous quantities of local currency through P.L. 480 sales of agricultural commodities, and the accumulations yet to come from re-

69 The World War I loans to the Allied Powers have long been in default, except that of "little Finland." Charges of repudiation are still heard from time to time.
71 Ibid.
72 "Loans repayable wholly or partly in local currency" is the last method mentioned. H.R. Doc. No. 345, 86th Cong., 2d Sess. 20 (1960). See also 106 Cong. Rec. 13713 (daily ed. June 28, 1960) where Chairman Spence states with obvious foreknowledge:
I do not anticipate that when those loans are made for the economic growth and development of those countries, that we will be paid in soft currencies. I think this organization will follow a policy of requiring repayment in the currencies loaned; the special accommodation will come in the form of longer maturities, low interest rates, and other favorable terms rather than in permitting repayment in local currencies.
payment of DLF loans, have influenced the World Bank not to follow the same course and thereby create for itself the same problem—what to do with them. This is probably the major reason for this second, self-imposed limitation. In addition, any local currencies which will be needed for development purposes will be callable from the local currency contributions of the Part II countries in fairly significant quantities. This is true at least for the larger countries such as India where projects will be financed. But while the desire of the IDA management to avoid accumulations of local currency repayments is understandable, their choice of requiring repayment in hard currencies, the only other choice available for the present, involves precisely the dilemma outlined above. When repayments become due, development which will then be necessary will be slowed if repayments are required. If they are forgiven or continually deferred, the transparency of the loan technique, clearly discernible even now, will be used to discredit both aid donors and recipients. So long as the apparent decision of the IDA management to lend largely upon repayment in convertible currency does not lead to failure to lend at all because repayment prospects from Pakistan, for example, are dim, the choice is not catastrophic, given the Hobson's choice of techniques which is currently available. But if doubt as to repayment in convertible currency is to result in reluctance to "lend," it would be better for IDA to accept local currencies in repayment, with all of their problems. At least no one can claim that he expects that they will be convertible in such cases as far as the eye can see.

The assigned task of IDA—to promote economic development by lending funds—and its ability to use all techniques except grants in aiding projects and programs related to development, is a multilateral duplicate of the United States Development Loan Fund which has the same objectives and choice of means. In fact, another of the ironies of IDA's launching by Senator Monroney in 1958 was that it was put forward as a hoped-for substitute for the DLF, eventually if not immediately. The prospect that the DLF appropriation, which has been at a level of approximately $500 million a year, could be substantially reduced if not eliminated upon the establishment of IDA was dangled before the Congress as a form of bait for those who preferred to reduce foreign aid expenditures. Later, when IDA came before Congress in 1960, this aspect of IDA's attractiveness was muted in favor of the argument that IDA, by enlisting other countries in the role of aid-donor, might

74 See Hearings on S. 264, supra note 42, at 11, 16, 53.
eventually reduce the burden upon the United States. Substitution of the United States contribution to IDA of $320 million spread over five years for the annual appropriation of $500 million to DLF was no longer viewed as realistic.75 This marks progress in public awareness of the importance and need of economic development.

While there are many valid arguments for increasing the utilization of multilateral instrumentalities in dispensing aid,76 and a number for retaining domestic institutions such as DLF at the same time,77 the argument for using both that must weigh most heavily with those interested in development is that the substitution of one technique for another would probably result, as a consequence of political pullings and haulings, in a smaller amount being available. Since what is essential is—in the immortal word of Samuel Gompers when asked, “What does Labor really want?”—“more,” and since a proliferation of institutional techniques usually means that “more” money is made available, those who seek that objective will gladly take the risks of imperfect coordination, agency-shopping by would-be recipients, and other complications78 because their interest in results outweighs any puristic preferences concerning methods.

Conclusion

The new International Development Association has the valid and essential purpose of promoting economic development of underdeveloped countries by “unconventional” means of financing, a charter sufficiently flexible to permit it to promote this purpose in all respects but one, and an experienced and respected management. It has been provided insufficient resources at the outset, which can be supplemented at intervals which appear to be too lengthy, and has been denied during its first five years the option of granting funds where that method of financing may be most appropriate. Despite these deficiencies, which are remediable if there is a continuing appreciation of the need for development, it is a strong step forward by free peoples toward a healthier and more satisfying world.

76 Id. at 13725.
77 See generally Hearings on S. 3074, supra note 53, at 46.
78 See generally id. at 15, 20-21.
THE EVISCERATION OF SECTION 5 OF THE CLAYTON ACT

RUSSELL HARDY, Sr.*

Viewing with alarm the whittling away process experienced by section 5 of the Clayton Act at the hands of courts unwilling to give broad application to its use as an antitrust weapon, the author analyzes the cases which have fostered the narrow view, and decries the judicial interpretations which have either mistaken or misused the substantive evidentiary rule to be derived from section 5.

I

INTRODUCTION

Section 5 of the Clayton Act reads as follows:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.1

Section 5 was one of three statutory provisions enacted in 1914 to implement the antitrust laws by increasing the rights of private litigants. These provisions gave private parties (1) the right to use judgments procured by the Government in antitrust cases as prima facie evidence in their suits;2 (2) the right to enjoin threatened loss or damage;3 and (3) a suspension of statutes of limitations running against their suits pending government action relevant to their claims.4 As of June 30, 1960, there were 593 private antitrust suits pending in the federal courts, in which judgments procured by the Government may be used as evidence.5

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Section 5 of the Clayton Act

In the original enactment of the Sherman Act in 1890, victims of unlawful business restraints received the single but extraordinary right to sue for treble damages.6 Behind the treble-damage provision lay the theory that private litigants would implement the anti-monopoly policy if given sufficient incentive to attempt a recovery.7 Results in the private suits instituted prior to the Clayton Act, however, proved most disappointing. Of 42 reported decisions in such suits,8 the plaintiffs prevailed on the merits in only four.9

The small number and the general failure of private antitrust suits is not strange. Any action brought by a single individual or small group or company, against gigantic combinations like those which prior to 1914 had been challenged by the Government as contrary to law, was virtually doomed to failure even at an early stage of the contest. Primarily, the enormous disparity between the wealth and power of the two colliding parties promoted this failure. Few "had the resources or staying power to conduct a protracted and difficult antitrust case. And those who were able and willing to assume the staggering cost of litigation were frequently worn out by their opponents by sheer attrition."10 The dearth of private suits, in like manner, was not owing to the fact that only a few enterprises had been injured. Monopolies of that era, as perhaps in every era, were built on the ruins of small and independent businesses, and undoubtedly numerous claims existed for redress under the treble-damage provision. Gigantic combinations came to dominate businesses formerly the arenas of many small competitors, especially the meat packing business and the oil, tobacco, and harvesting-machinery industries. The large number of small owners who were prevented from entering or driven out of the oil business alone is suggested by the fact that in 1907 the then notorious Standard Oil trust had

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6 26 Stat. 210 (1890).
8 Exact figures in this area are not available owing to the lack of reported cases in the lower federal courts, inaccurate digesting and the great number of cases remanded for new trial which are either settled or unreported thereafter.
operating stations throughout the country, all in competition with small businesses. 11

Rice v. Standard Oil Co., 12 the only reported treble-damage suit brought against the oil trust, illustrates the enormous inequality which discouraged private parties from looking to the courts for restitution. Rice's resources were represented by one refinery located in Marietta, Ohio, doing a yearly business of $750,000 with an annual profit of $50,000. In contrast, the Standard Oil combination then consisted of more than 70 corporations, capitalized at more than $150 million and controlling seventy-five percent of the oil business in the country. 13 Rice quickly lost his treble-damage suit against the trust, the court summarily dismissing his complaint on the pleadings. Thereafter nothing further was heard of the Marietta refiner.

The original tobacco trust was similarly armored against private suits. At one time the combination consisted of 67 corporations, capitalized at $100 million and controlling up to eighty-six percent of the trade. Of seven reported actions against the combination, 14 the private plaintiffs recovered in a single case. 15

Prior to enactment of section 5 of the Clayton Act, experience had shown, therefore, that few private parties had prevailed in litigation against monopoly—wholly, or almost wholly—because of an enormous difference in resources. The stage was thus set for the further inroad 16 which the Clayton Act proposed to cut in the power of monopolies. With the passage of the act, judgments from government antitrust cases were made available for evidentiary use by private parties who wished to sue the combination which had defended in the government action. By relieving these parties of the necessity of again proving the facts in

13 Standard Oil Co. v. United States, 221 U.S. 1 (1911).
16 Prior to the passage of the Clayton Act, a judgment from the government action was not admissible in the private suit. See, e.g., Ware-Kramer Tobacco Co. v. American Tobacco Co., 178 Fed. 117 (E.D.N.C. 1910).
the government case, it was hoped to reduce the overwhelming handicap in favor of monopoly and thereby to achieve a more effective enforcement of the antitrust laws.\textsuperscript{17}

The purpose of this article is (1) to investigate the nature of the doctrine of estoppel by judgment, which section 5 invokes for determining which matters of fact involved in the government judgment are to be given prima facie effect as evidence in a subsequent private suit; (2) to survey the decisions in which courts have been confronted by a litigant's wish to employ a government judgment; and (3) to point up the unfortunate effect these cases have had in limiting section 5 as though it were merely an estoppel statute, thus reducing to almost nothing its usefulness as an implement of antitrust policy.

II

The Different Policies of Section 5 and Estoppel by Judgment

The controlling characteristic of section 5 of the Clayton Act is that, although it refers to estoppel by judgment, it is not an estoppel statute, but merely a rule of evidence.\textsuperscript{18} Nevertheless, contrary to its evidentiary import, it has been misapplied as an estoppel statute, and the rules of estoppel have been employed to deprive plaintiffs of the benefit of evidence intended by the statute. Confusion of the doctrine of estoppel by judgment with the rules of evidence has bred a chaos of uncertain and absurd decisions—uniform only in sterilizing the statute and defeating the private litigants who have invoked it.

The estoppel referred to in section 5—that a judgment shall be evidence as to all matters respecting which the judgment would be an estoppel—means simply that the facts proved in the government case are to be accepted as true for the private suit, subject to a right of rebuttal by the defendants. Court and jury in the private suit are to take the facts proved in the government case as ready-made prima facie evidence against the defendants along with such other evidence as may be presented by the plaintiff.

The major reasons justifying the use of judgments from government antitrust cases as evidence in private suits are that (1) the defendants have had their day in court; (2) there is the greatest certainty which can result from a judicial proceeding that the facts supporting the judgment are true; and (3) any subsequent effort to establish the same facts

\textsuperscript{17} Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 568 (1951); Twin Ports Oil Co. v. Pure Oil Co., 26 F. Supp. 366, 369 (D. Minn. 1939).

against the defendants will almost invariably fall short of doing so and will, at best, be merely repetitious. Of all litigation government antitrust cases are probably the most thoroughly contested by the defendants. While no litigant is more skillful than the Government in accumulating all effective evidence relevant to the charges, no matter how difficult the task, the defendants are in most cases equally capable of amassing an exhaustive defense. *United States v. Paramount Pictures, Inc.* is a classic example of the fact that the decisions in such suits represent the closest approximation to objective certainty possible in litigation. That suit was contested on the merits for thirteen years, and the several decisions on trial and appeal during that period put beyond doubt the strong probative value of the judgments.

In the congressional debates on the Clayton Act, the right given by the then pending legislation to use judgments as evidence was called a new and formidable weapon for enforcing the antitrust laws. But the use as evidence of former similar conduct, as well as of former adjudications between parties, was no legal novelty. Former similar *conduct* is used as evidence, but its admissibility is subject to the discretion of the trial judge; former *judgments* between the same parties are used for estoppel, are conclusive, and are not subject to such discretion. The new and distinguishing feature added by section 5 is that, while the admissibility of the judgment as evidence of former conduct is not subject to the discretion of the court, the evidence is given only prima facie effect.

The scope and rationale of estoppel by judgment differ radically from the scope and rationale of section 5. Estoppel by judgment is meant to

20 See the several decisions cited note 19 supra.
21 51 Cong. Rec. 9188 (1914).
22 In the celebrated case of Standard Oil Co. v. United States, 221 U.S. 1 (1910), years before section 5 was enacted, a judgment against defendants in antitrust litigation by the State of Ohio was referred to by the Supreme Court. Standard Oil Co. v. United States, supra at 38, 70, 74-76. The entire record in the Ohio case was received in evidence by the trial court. Record, vol. XXII, 55 Transcripts of Records and File Copies of Briefs, United States Supreme Court (Oct. Term 1910); Brief for the United States, vol. I, pp. 1, 54, 57 Transcripts of Records and File Copies of Briefs, United States Supreme Court (Oct. Term 1910); Stenographer's minutes of the oral argument of Frank B. Kellogg on behalf of the United States, pp. 2, 20, 57 Transcripts of Records and File Copies of Briefs, United States Supreme Court (Oct. Term 1910).
discourage repetitious litigation; section 5 on the other hand was intended to encourage litigation by making available to plaintiffs in one suit the benefit of previous similar litigation between other parties. The public policy that supports the estoppel rule of res judicata reflects the need for finality in litigation: "to secure the peace and repose of society by the settlement of matters capable of judicial determination," to prevent litigants from "agitating the matters in a second suit." The public policy served by the right given under the Clayton Act is the suppression of restraints and monopolies.

Estoppel by judgment is a matter of substantive law, a rule of law which gives conclusive and irrebuttable effect to a judgment. The estoppel of section 5 is in no way an estoppel but merely an index to the prima facie evidence which may be imported into the private suit, where it will be subject to rebuttal by the defendant.

The function of the court in estoppel by judgment differs fundamentally from its function under section 5. Conclusive estoppel is exclusively within the province of the court, whereas section 5 provides for evidence for consideration by the jury or the judge when acting as finder of fact. Duties under the statute are divided between court and jury. The court determines whether the judgment is admissible, of what facts it is evidence, and instructs the jury to that effect. The jury takes the facts as to which it is so instructed together with all other evidence in the case as the basis for its verdict.

In estoppel the defendant has already had his day in court and is denied a second day on the same issues; under section 5, he is permitted the second day. While the judgment may relieve the plaintiff of some part of his burden of proof, it does not deprive the defendant of the right and opportunity to rebut the evidence provided by the judgment.

The import of these differences between estoppel by judgment and the rule of evidence established in section 5 is that application of the section should be controlled, not by the principles and purpose of estoppel, but by the entirely different and, in important respects, directly opposite purpose of aiding private litigants and suppressing monopoly. At least the principles and purpose of estoppel should not be followed when to do so would limit or defeat the important public policy of section 5.

III
SIMILARITY OF APPROACH UNDER SECTION 5 AND ESTOPPEL
BY JUDGMENT

Since estoppel by judgment measures the evidence which the private litigant may derive under section 5, it is useful to recall briefly the general principles of estoppel and the manner in which they are applied. Against this background, a clearer insight may be gained both as to how it shall be determined what matters from the government judgment may be used as evidence and how this determination is complicated by the nature of judgments in antitrust litigation.

The classic statement of the doctrine of estoppel was made in Cromwell v. County of Sac:

In considering the operation of [a prior] . . . judgment, it should be borne in mind . . . that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand [direct estoppel] and its effect as an estoppel in another action between the same parties upon a different claim [collateral estoppel] . . . . In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose . . . . The language . . . that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy . . . .

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered . . . . [I]n a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.28

The provision that "every ground which might have been presented" is concluded by judgment is an indispensable part of direct estoppel. Its special function is to bar piecemeal litigation of a claim. To that end it requires that all arguments and evidence which a party may have in support of his claim or defense must be presented in one action. All matters which are not actually presented are concluded by the judgment. But where the suits are based on different claims, the estoppel is partial.

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or incomplete. Only matters which were actually in issue and upon which the verdict was rendered are foreclosed for the second suit. Depending on whether such matters are controlling in the second suit, the effect may or may not be to terminate the litigation. In so far as they are consistent with the remedial purpose of the statute, these principles of estoppel, less their conclusive effect, are incorporated into section 5 for the purpose of determining what facts have been proven by the judgment. "The evidentiary use which may be made of section 5 . . . is thus to be determined by reference to the general doctrine of estoppel."29 The private litigant is given as large an advantage as estoppel provides.30 Judgments in civil cases seldom indicate by their text the facts on which they are founded. The complexity of government antitrust cases makes this equally true of judgments issuing from them. Because in most instances such judgments are based on voluminous and complicated facts, difficult to recite in the judgments, little if anything more than the terms of the remedy is given. In criminal antitrust cases, the judgment is merely a short statement that upon the verdict of a jury, the defendants have been convicted of a violation of the antitrust laws.31 For this reason, in most cases of estoppel by judgment, the matters determined by a prior judgment are to be ascertained by an examination of the record and other materials constituting the source of the judgment. This method of proceeding has been coexistent with the doctrine of estoppel and is applicable in ascertaining what matters in the government suit are to be received as evidence under section 5. In Eastman Kodak Co. v. Southern Photo Materials Co.,32 the first suit in which section 5 was invoked, the problem of determining what facts the government judgments proved was solved as if it were entirely an estoppel situation. Accordingly, the trial court received in evidence not only two judgments from the government case,33 but also the petition, the answer of the defendant, exhibits in evidence, and the findings and written opinion of the trial court.34

30 Ibid.
31 For example, the government judgment against General Motors merely "recited a finding of guilt of the offense charged in the indictment, '. . . to wit: . . . Violation of Sherman Anti-Trust Law.'" Emich Motors Corp. v. General Motors Corp., 181 F.2d 70, 77 (7th Cir. 1950).
32 295 Fed. 98 (5th Cir. 1923), aff'd, 273 U.S. 359 (1927).
34 The court of appeals held that it was harmless error to admit the opinion of the trial court. 295 Fed. at 101-02.
Whenever former judgments are pleaded in bar, the problem of discovering what matters have been already determined is invariably solved by as comprehensive an examination of the former suit as may be necessary. There is little if any limit to the material used. No reason exists for a less favorable privilege or different method under section 5. In *Emich Motors Corp. v. General Motors Corp.*, the Supreme Court held that the trial judge "is not precluded from resorting to such portions of the record, including the pleadings and judgment, in the antecedent case as he may find necessary or appropriate" to discover what issues were determined in the government case. Accordingly, where it is not apparent from the face of the judgment what matters have been determined, all of the record, proceedings and evidence in the case may be utilized, as well as extrinsic evidence and other material found needful and appropriate for the purpose. The cases of estoppel by judgment specifically resort not only to the pleadings, testimony, and documents of the prior decision, but also to the contentions of the parties, opinion of the court, the charge to the jury, the findings of the court, the verdict, and even the testimony of judge and jurors.

![Image of text](https://example.com/image.jpg)

In the *Emich* case, the trial court had received in evidence the judgment of conviction and the indictment of the government case. The record of the testimony and of the exhibits at trial, with certain exceptions, was excluded. The court of appeals approved the admission of the judgment, but held that admission of the indictment was "serious error." This decision was in turn reversed by the Supreme Court on the ground that the court of appeals "was in error when it held that the

36 Id. at 571-72.
37 Oklahoma v. Texas, 256 U.S. 70 (1921) (record); Radford v. Meyers, 231 U.S. 725 (1914) (opinion); Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683 (1895) (findings and conclusion); Hornbuckle v. Stafford, 111 U.S. 389 (1884) (pleadings); Russell v. Place, 94 U.S. 606 (1876) (extrinsic evidence); Washington, A. & G. Steam Packet Co. v. Sickles, 72 U.S. (5 Wall.) 580 (1866) (testimony of jurors).
38 Russell v. Place, supra note 37, at 608.
39 United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941).
40 181 F.2d 70, 76 (7th Cir. 1950).
judgment was prima facie evidence only of a conspiracy by the respondents.”41 The Court significantly stated that it is for the trial judge to determine what was decided in the government case.42 This rule follows the procedure in estoppel by judgment where matters relative to the judgment are exclusively for the trial judge; their consideration by the jury is unnecessary. Under section 5, however, the purpose of the requirement that the trial judge determine what was proved in the government case is primarily to enable him to inform the jury of such matters so that the jury in turn may exercise its conventional function upon such evidence.

What issues were decided by the former government litigation is, of course, a question of law as to which the court must instruct the jury. It is the task of the trial judge to make clear to the jury the issues that were determined against the defendant in the prior suit, and to limit to those issues the effect of that judgment as evidence in the present action.43

Thus, as a general rule, the methods used in estoppel by judgment to determine the matters foreclosed by the earlier judgment are not different from those to be employed under section 5.

IV

THE HISTORY OF SECTION 5 IN THE COURTS

The extent to which private antitrust litigants may use government judgments as evidence is dependent, of course, upon the efficiency and success of the Department of Justice in administering the antitrust laws. Without successfully contested antitrust litigation by the Government, section 5 remains dormant.

Since the enactment of the Clayton Act in 1914, very few judgments have qualified for use in private suits. During the forty-five years from that time to June 30, 1959, only 136 contested judgments have been procured in government cases or an average of about three a year. During the last ten years of this period, the rate has been approximately 5.2 a year.44 During the entire period, only six of these 136 judgments have been used in private suits, at least as far as the reported cases

41 340 U.S. at 571.
42 Id. at 569.
43 Id. at 571.
show.45 The six judgments were invoked in 24 private cases.46 From 1914 to 1949, the statute was used in only one reported case.47 The remaining 23 cases occurred after 1949, nineteen of them being an outgrowth of United States v. Paramount Pictures, Inc.48

About 80 percent of the case law on the use of section 5 is therefore related to the judgments in one case. This common origin of subject matter naturally lends itself to an exhaustive study of section 5, but it also precludes, for lack of material, any contrast in the application of the same rules of law to a variety of judgments and factual situations.

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45 A more definitive figure would involve an expensive and laborious examination of the court files for the individual cases. The six judgments used in private suits were derived from: Besser Mfg. Co. v. United States, 343 U.S. 444 (1952); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. General Motors Corp., 121 F.2d 376 (7th Cir.), cert. denied, 314 U.S. 618 (1941); United States v. Eastman Kodak Co., 230 Fed. 522 (W.D.N.Y. 1916), appeal dismissed, 255 U.S. 578 (1921).


48 334 U.S. 131 (1948).
The lack of a sufficiently large number of government judgments is not the sole limitation on the private litigant's use of section 5, however, nor does this lack of judgments pose the greatest threat to its continued use as a weapon against monopoly. As the cases to be discussed in this section will show, a number of rules have been evolved in the application of section 5 which make it virtually impossible to invoke the statute as a means of introducing evidence, except in rare situations. The origin of these rules must be traced to the significant role played by the trial judge in the private suit. As noted earlier, it is the trial judge who examines the record of the antecedent government case to determine the issues decided by the judgment.\(^49\) He also acquaints the jury with those issues, explaining the scope and effect of the former judgment on the case at trial.\(^50\) It is to be expected, therefore, that the efficacy of section 5 will depend to a large extent upon the weight and considerations which the judges themselves—guided by law, personal views, and otherwise—attach to the judgments from the government litigation. The history of section 5 in the courts bears out this conclusion.

Judgments in a government antitrust case were completely excluded from evidence in *Park Neponset Corp. v. Smith*,\(^51\) apparently on the theory that the alleged violations of the antitrust laws were not coincident in time. The wrongful activity attacked in the government litigation antedated 1946, but final judgments for the Government were not entered until November 1948, March 1949, February 1950, January 1951 and June 1951.\(^52\) Compliance with the requirements of these judgments was deferred for one, two and three years thereafter. The period under consideration in the private suit was May 1947 to October 1952.\(^53\) The ground of exclusion does not appear in the opinion of the court of appeals, and no opinion was written by the district court. In affirming the exclusion, the court of appeals stated merely that the district judge was "apparently" of the belief that the judgment had little "relevancy."\(^54\)

The brief for the appellant states, however, that the judgments were excluded apparently because the bases of the government and the private suit were not coincident in time.\(^55\) A necessary support for placing the

\(^{49}\) Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 572 (1951).

\(^{50}\) Ibid.

\(^{51}\) 258 F.2d 452 (1st Cir. 1958).

\(^{52}\) A summary of the judgments in the *Paramount* case is found in CCH Federal Antitrust Laws, Case No. 434, at 180 (1951).

\(^{53}\) 258 F.2d 452.

\(^{54}\) Id. at 455.

\(^{55}\) Brief for Appellant, p. 38.
decision on this ground would be a presumption that the unlawful conduct of the defendants in the government suit ended with the taking of evidence on November 20, 1945, and that the proceedings in the government case subsequent to the taking of evidence, including the remedy prescribed by the judgments, are immaterial. Both courts ignored plaintiff’s argument that the conspiracy in the government case could not have terminated with the trial of that case since (1) the judgment showed the conspiracy had been in continuous existence for at least fifteen years before the trial; (2) the conspiracy was of a continuing nature; (3) there was a presumption of continuation; and (4) the judgments postponed termination by deferring compliance until 1948 and 1950. The earliest time at which termination of the restraints would be probable—and could, with any trace of logic, be presumed—was upon expiration of the time stipulated by the judgments for compliance.

Likewise, *Orbo Theatre Corp. v. Loew’s, Inc.*[^56] held that a difference in time in the government and private suits means a difference in the antitrust violations in the cases. “Consequently,” concluded the trial judge, “it is not the same conspiracy as that found to exist in the Paramount case. It should be emphasized that the decree is prima facie evidence only of a conspiracy covering the same area and existing during the same time as that involved in the case on trial.”[^57]

The requirement of coincidence in time was even more stringently enforced in *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*[^58] where Fanchon & Marco brought action against Paramount to recover treble damages for depriving plaintiff, by alleged monopolistic practices, of first run pictures. The Government had secured an earlier decree in which it was found that Paramount had established a “system of fixed runs and clearances which prevented any effective competition by outsiders.”[^59] On the theory that the claim of Fanchon & Marco had arisen subsequent to the decree, the trial judge held that the burden was on the plaintiff to show that the proscribed acts continued, for there is an “inference that a person against whom a decree has been directed has complied with it.”[^60]

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[^57]: 156 F. Supp. at 776.

[^58]: 215 F.2d 167 (9th Cir. 1954), cert. denied, 348 U.S. 912 (1955).


[^60]: Record, vol. II, p. 677. The basis of the private suit was in fact precisely contemporaneous with that of the government suit. Not only was there a perfect parallel in time, but also of place and subject matter. The theatre involved was specifically named in one of the judgments for divestiture.
The "presumption is that a man follows the law, and that if a man has been under the interdiction of a court, the presumption is that he obeyed the interdiction."61

The decision is an extreme deviation from the language and purpose of section 5 of the Clayton Act. Not only is any presumption that the restraint had terminated contradicted by the very terms of the judgment upon which it is supposedly based, but by the express terms of the judgment compliance therewith was deferred until long after the judgment was entered. The Supreme Court in fact had denounced these same defendants for a "proclivity for unlawful conduct" in violation of the antitrust laws.62 Furthermore, no such presumption is known to the law. In Local 167, Teamsters Union v. United States,63 the Supreme Court rejected the contention that a criminal conviction for violation of the antitrust laws, upon which the Government was subsequently seeking an injunction, was the basis of an inference or presumption that defendants had ceased their unlawful conduct upon entry of the judgment of conviction.

In a second group of cases, another obstacle was artificially imposed in the path of section 5—the test of locality. Unless the violation of which plaintiff complains is specifically "located" in the government judgment, no evidence may be derived from the judgment, for the wrongful activity in each case is considered separate and distinct. Illustrative of this approach is Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.,64 in which Paramount was sued for withholding licenses to exhibit motion pictures in Baltimore until the pictures had been shown by certain other exhibitors in that city. Theatre Enterprises charged that the refusals stemmed from a distribution system which had already been attacked by the Government and found unlawful. The wrong complained of by Theatre Enterprises occurred after the entry of the judgments in the government case, but the system of distribution then in effect at Baltimore was the same as that condemned in the government case as furthering a conspiracy to restrict first run pictures to favored exhibitors on a comprehensive "nationwide" scale. The trial judge in the private suit, however, instructed the jury that the nationwide conspiracy had no application to Baltimore,65 and this instruction was upheld by

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63 291 U.S. 293 (1934).
64 346 U.S. 537 (1954).
65 201 F.2d 306, 315 (4th Cir. 1953).
the Supreme Court on the ground that "the Paramount decrees did not rest on findings, nor were the findings based on evidence, of a particular conspiracy concerning restrictions on runs and clearances in Baltimore theatres."

The Supreme Court thus asserted that while the proven conspiracy was nationwide in scope, it applied to no particular place in the nation—at least not to Baltimore. Aside from the logical impossibility of a whole without parts, the fact is that the conspiracy as actually put into effect was composed of particular applications throughout the country and had a specific situs wherever there was a motion picture theatre. On these particular applications was based the ultimate finding of a nationwide conspiracy. Moreover, the judgment did, in fact, rest in part on findings of a conspiracy in Baltimore.

In 1952 District Judge Nordbye, in *Homewood Theatre, Inc. v. Loew's, Inc.*, accepted and used the judgments in the Paramount case as evi-

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66 346 U.S. at 543.
68 The evidence in the Paramount case shows no exception of places, and no exceptions are stated in the findings. Not only was Baltimore not excepted or in any manner differentiated, but the evidence disclosed many specific instances of the restriction on runs and clearances and of all other features of the conspiracy and monopolization at Baltimore. Some of the evidence relative to the conspiracy and monopolization at Baltimore in the Paramount case is contained in: Record, vol. I, pp. 452, 557, 753, 1076, 1083-84, 1106, 1143, vol. II, p. 1364, vol. III, p. 2498, Paramount Pictures, Inc. v. United States, 70 Transcripts of Records and File Copies of Briefs, United States Supreme Court (Oct. Term 1947).

The geographical application of the remedy in an antitrust case should be completely coincident with the geographical occurrence of the restraints. The remedies prescribed in the judgments in the Paramount case, conforming to this rule, were coterminous with the distribution and exhibition of pictures throughout the country. One of the major remedies—probably the most important one—was the divestiture of theatres. The basis for divestiture was that the ownership of theatres was an incentive and aid to the conspiracy, and embodied as well, massive and monopolistic purchasing power for pictures. It was found as a fact that

All the defendants entered into a horizontal conspiracy to fix prices, runs and clearances which was powerfully aided by the system of vertical integration [ownership and operation of theatres] of each of the five major defendants. Such a situation has made the vertical integration an active aid to the conspiracy. Vertical integration has furnished an incentive for such conspiracy.

Finding 147(a), Equity No. 87-273 (S.D.N.Y. 1950).

Accordingly, the defendants who owned and operated theatres were required to give them up, including those at Baltimore. If the general conspiracy and monopolization had no effect at Baltimore, and if there were no particular conspiracy at that place, the remedy of divestiture in its application to Baltimore was without factual or legal justification.

dence that an unlawful conspiracy for runs and clearances of pictures had been applicable to theatres in Minneapolis:

It is apparent from the findings in the Paramount cases that there was found to be in existence a uniform system of runs and clearances created by a concert of action of the distributor defendants in violation of the Sherman Act. The national system of runs and clearances condemned in the Paramount case had its counterpart here in a local phase.\textsuperscript{70}

Yet in 1955, the same judge in \textit{Robbinsdale Amusement Corp. v. Warner Bros. Picture Distrib. Corp.}\textsuperscript{71} refused to use the Paramount judgment as evidence that the conspiracy was applicable to theatres at Robbinsdale, a town “bordering” Minneapolis:

The issues involved here were not determined in the paramount \textsuperscript{[sic]} case. Here we have a local situation which has no relationship to the so-called Paramount conspiracy. In other words, there is no connection between the local practice of move-overs or clearances in Minneapolis and the issues resolved in the paramount case.\textsuperscript{72}

In \textit{Monticello Tobacco Co. v. American Tobacco Co.},\textsuperscript{73} the plaintiff was denied the use of the judgment in a government suit because without the judgment the plaintiff had been unable to prove the unlawful conspiracy. In that case plaintiff sued American, Reynolds, and Liggett & Meyers for damages resulting from an alleged conspiracy to exclude Monticello from the cigarette business. In a prior government action these same cigarette companies had been convicted of a conspiracy to monopolize the trade in leaf tobacco and cigarettes. The verdict there determined that the object of the defendants was to prevent the sale of cigarettes of other manufacturers at prices lower than their own. To accomplish this end the defendants prevented competitors from getting cheaper leaf tobacco and coerced dealers to cut prices against competing cigarettes. The verdict also found that the defendants had acquired the power to control the trade in cigarettes and intended to exercise that power.\textsuperscript{74} Monticello offered this judgment into evidence and further

\textsuperscript{70} Id. at 409.

\textsuperscript{71} 141 F. Supp. 134 (D. Minn. 1955).

\textsuperscript{72} Id. at 143. It should be noted that there was a difference in the time of impact of the conspiracy in these two cases. In \textit{Homewood} the restraint lasted from 1935 to 1948; in \textit{Robbinsdale} it began in 1949. The trial judge in \textit{Robbinsdale} commented: “In this litigation . . . we are concerned with what defendants are doing today and not with the period covered by the Paramount decrees.” Ibid. Thus the decrees may have been excluded because the injury complained of lacked coincidence in time.

\textsuperscript{73} 197 F.2d 629 (2d Cir. 1952).

\textsuperscript{74} American Tobacco Co. v. United States, 147 F.2d 93, 108-09 (6th Cir. 1944), aff’d, 328 U.S. 781 (1945).
showed that it had endeavored to sell its cigarettes to wholesale dealers at prices less than those charged by the big companies, thus engaging in the very merchandising conduct which the defendants desired to prevent. The trial judge excluded the judgment and dismissed the case on its merits.\textsuperscript{75}

Since the elimination of Monticello as a competitor was the particular type of result which the defendants sought to achieve, it would seem a logical inference that the elimination did in fact result from an exercise of the defendants' monopoly power. At least the inference was sufficiently plausible to require rebuttal. But the trial court held that it would be “to the last degree irrational”\textsuperscript{76} to conclude that the exclusion of Monticello was caused by the big companies. On the premise that under the doctrine of estoppel the judgment in the government case was evidence only of facts “necessarily” adjudicated, and that the only fact that was necessarily adjudicated was price pressure on dealers and not coercion to stock certain brands of cigarettes, the court of appeals affirmed the dismissal.\textsuperscript{77}

The infirmity of the Monticello decision lies not only in the refusal of the court to consider a plausible inference but also in the decision to confine the scope of estoppel to facts “necessarily” adjudicated. Such a limitation affords to the private litigant scarcely half the benefits that section 5 might provide, for it represents only the advantage afforded by collateral estoppel. Direct estoppel has application where the claims are the same and includes not only matters which were actually determined in the antecedent case, but any other admissible matters which might have been determined. As evidence of the exclusion of Monticello and others similarly situated clearly would have been admissible in the government case, such matters might have been determined in that case. Therefore, the judgment would be an estoppel as to these matters between the government and American Tobacco and, as provided by section 5, should have been prima facie evidence in the private suit.

The scope of section 5 was limited in like manner in \textit{Eagle-Lion Studios, Inc. v. Loew’s, Inc.},\textsuperscript{78} where plaintiff charged that RKO and Loew’s, conspiring to discriminate against independent distributors, had refused to exhibit Eagle-Lion pictures on terms equal to those granted other distributors. RKO and Loew’s had been defendants in \textit{United States v.}

\textsuperscript{75} 197 F.2d 629 (2d Cir. 1952).
\textsuperscript{76} Id. at 630.
\textsuperscript{77} Id. at 631.
\textsuperscript{78} 248 F.2d 438 (2d Cir. 1957), aff’d per curiam, 358 U.S. 100 (1958).
Paramount Pictures, Inc.,79 in which it was found that they had conspired to prevent the exhibition of pictures circulated by certain named distributors. In support of the complaint the court received the Paramount judgment and findings of fact, but concluded that the conspiracy established therein related solely to distributors who had been defendants in that case and had no application to independent distributors such as Eagle-Lion Studios. Plaintiff contended that the Paramount findings made no such distinction among distributors, and that furthermore the fact that the defendants imposed similar restraints upon other distributors in the same theatres, at the same time, and under the same circumstances compelled the inference that the conspiracy affected independent distributors. The court answered this argument, not by denying that such an inference would be correct, but by the assertion that the court was barred from making any inference: "It is not our function to consider inferences, whether reasonable ones or not . . . from the judgment."80

The Eagle-Lion decision treats the government judgment as a distinct species of evidence and thereby creates a perplexing problem for the juridical fact finder, be he judge or jury member. It requires him to avoid drawing any form of inference from the judgment, but permits him freely to infer what he will from any other relevant evidence. This calls for the performance of mental gymnastics which few people have the ability to execute. In effect, Eagle-Lion negates the utility of a government judgment as evidence except in the rare situation when the government and private suits happen to be identical in every respect.

The rules established in the cases discussed above may be summarized as follows: (1) a judgment for the Government may not be used in support of a private claim that is not precisely coincident in time with matters in the government action; (2) a judgment, while proving the existence of an antitrust conspiracy, gives rise to no presumption in favor of the private plaintiff that the conspiracy is continuing, but instead creates a presumption favorable to defendants that the conspiracy ended upon entry of judgment, even though compliance with the judgment has not occurred and is, by the very terms of the judgment, postponed until a considerably later date; (3) a judgment may

79 334 U.S. 131 (1948).
80 248 F.2d at 444. The court may have intended to prohibit drawing inferences only at the time of determining the evidentiary scope of the judgment, and not to bar inferences from that evidence, once admitted. However, neither the district court nor the appellate court expressly made this distinction.
not be used in a private suit based on matters which did not occur at a place to which the judgment specifically refers; (4) a judgment based on findings of a nationwide violation is not prima facie evidence that any part of the violation occurred at a particular place in the nation, even when that place was among those showing the conspiracy to be nationwide; (5) a judgment may not be used unless the private suit and the government suit are based on the same subject matter; and (6) no inference—reasonable or unreasonable—may be drawn in favor of the private litigant from any facts proven by such a judgment. Such limitations, foreign to the spirit and letter of section 5, perpetrate a fatal evisceration of the statute. If left uncorrected, they render it useless as an instrument for enforcement of the antitrust laws.

V

The Vindication of Section 5

Analysis of the above judge-made rules engrafted onto section 5 reveals, then, that three conditions precedent must be met before evidentiary use will be made of a government judgment: the private plaintiff must satisfy the court that his complaint is grounded on events occurring at the same time as those leading to the judgment; that his injury took place in the locality specified by the judgment; and that the basis of his claim is identical with that of the government case.

1. Coincidence in Time

The requirement that the wrongful activities attacked in the government and private suits coincide in time limits the impact of the government suit to that point in time when either the evidence at trial terminated or judgment was entered. As noted earlier, this approach presupposes that the unlawful conduct and restraint came to an end with the close of the evidence or with the entry of judgment. Such decisions, however, deny to private plaintiffs the benefit of the rule that once a conspiracy is shown to have existed, it is presumed to continue until the contrary is shown—a presumption especially apposite to antitrust conspiracies which are essentially continuous in nature.

A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they

81 Local 167, Teamsters Union v. United States, 291 U.S. 293 (1934); Hyde v. United States, 225 U.S. 347 (1912); United States v. Kissel, 218 U.S. 601 (1910); Marino v. United States, 91 F.2d 691 (9th Cir. 1937); Coates v. United States, 59 F.2d 173 (9th Cir. 1932).
succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success.82

The findings of fact in Paramount, for example, show that the conspiracy had been in existence at least since 1917.83 Thus at the close of the trial in 1945, it had been in continuous existence for 28 years. Nor was there any evidence that any of the practices had been or would thereafter be discontinued voluntarily. To exclude the judgments in a situation such as this, on the assumption that there must be coincidence in time, requires the court to dissipate the presumption of continuance, to ignore the long and unswerving tendency of the defendants to violate the law,84 and to overlook defendants' continued effort after trial to resist government attempts to procure an effective injunction. If the conspiracy were actually coterminous with the trial of the government action, then appeals to the Supreme Court would seek merely a moot and academic determination of the legality of defendants' business conduct.

Fortunately, not all courts have accepted the fiction that business monopolies mend their ways overnight. In Alamo Theatre Co. v. Loew's, Inc.,85 Judge La Buy rejected the defendants' contention that the judgment should be excluded because entered prior to the injury in the private suit. He pointed out that the court must consider

the question of whether the plaintiff's damage flowed from a "continuing" conspiracy of the same nature . . . . The mere fact of plaintiff's entry into the motion picture field subsequent to a conspiracy found to exist in 1945 is not alone sufficient for the court to rule as a matter of law that the Paramount decree has no relevance to the instant suit.86

2. Application to a Particular Place

The decisions that the judgments in United States v. Paramount Pictures, Inc.87 are not prima facie evidence that the restraint occurred at any particular place overlook the fact that those judgments, and the findings and evidence on which they rest, specifically named many particular places at which the conspiracy and monopolization was effected. The judgments name approximately 3,137 theatres, located in

82 United States v. Kissel, supra note 81, at 607-08.
83 Finding 4, Equity No. 87-273 (S.D.N.Y. 1950).
85 143 F. Supp. 419 (N.D. Ill. 1956).
86 Id. at 420.
87 334 U.S. 131 (1948).
922 towns in 48 states and the District of Columbia, for divestiture. The findings show that the "vertical integration" of the defendants' business activities (ownership of studios, distributing companies and theatres which handled the films) was "a means of carrying out" and an "incentive" to form the conspiracy to fix prices, runs and clearances. Logically, the conspiracy would continue as long as vertical integration continued. The divestiture requirement was premised on that belief, for it was found that divorcement of the theatres was necessary to remedy the unlawful conditions.

The findings also expressly locate the conspiracy to fix admission prices and runs and clearances at each and every motion picture theatre in the United States. Among the conclusions in Paramount, it is stated that the defendants have violated the antitrust laws by conspiring "to maintain a nationwide system" of fixed admission prices, and "to maintain a nationwide system of runs and clearances which is substantially uniform as to each local competitive area." Even without the findings, this conclusion alone would seem sufficient to throw upon the defendants in any private suit the burden of proving that the conspiracy had not occurred at a particular place.

In the Emich case, the Supreme Court held that the judgment in the government suit was evidence of a nationwide conspiracy, of wrongful action against "particular" people located in numerous "particular" places all over the country. The judgment was evidence "of the general conspiracy for the purpose of monopolizing the financing of General Motors cars and also of its effectuation of coercing General Motors dealers to use GMAC." An intention to coerce coupled with actual coercion of the dealers in the mass would appear to be at least prima facie evidence of actual coercion of all dealers, generally as well as particularly.

In De Luxe Theatre Corp. v. Balaban & Katz Corp., District Judge Campbell reasoned that a government suit against a nationwide conspiracy to stifle competition fixes the conspiracy at particular places:

88 Judgment was entered as to RKO defendants, Nov. 8, 1948; judgment as to Paramount defendants, March 4, 1949; judgment as to Warner defendants, January 4, 1951; judgment as to Fox defendants, June 7, 1951; judgment as to Loew's defendants, February 6, 1952.

89 Finding 156(b), Equity No. 87-273 (S.D.N.Y. 1950).
90 Findings 16, 118, Equity No. 87-273 (S.D.N.Y. 1950).
91 Conclusion 8(b), Equity No. 87-273 (S.D.N.Y. 1950).
92 340 U.S. at 570-71. (Emphasis added.)
93 95 F. Supp. 983 (N.D. Ill. 1951).
The previous decrees should be available to the plaintiff to show the existence of a conspiracy and the violation of the public interest. Obviously it is incumbent upon the plaintiff to demonstrate the impact of that conspiracy upon plaintiff in the local sphere, but this does not mean that, in the prior case, the government was obliged to litigate all the issues that might arise in any given locality.\(^\text{94}\)

The burden of these conclusions would appear to be that once an unlawful restraint has been established, there arises at least a prima facie case that the restraint had its effect locally upon all competitors in the same field. A fortiori the same would be true when the conviction is based on findings made across the nation. To require that each private litigant who proposes to use the government judgment as evidence be located in the area in which the restraint was specifically found to exist imposes an unreasonable limitation on the usefulness of section 5. Certainly a plausible argument can be made that the burden of disproving the local effect of a given restraint be placed on those found guilty of causing the restraint.

3. Same Basis for Both Cases

The requirement that the government and the private cases must have the same factual basis as to time, place and subject matter overlooks the fact that neither estoppel nor section 5 require such identity. Estoppel by judgment applies where the cases are the same, but is not limited to such instances. It extends also to those situations where the claims are different—“where the second action between the same parties is upon a different claim or demand.”\(^\text{95}\) Where the claims are different, however, the estoppel is limited to those facts actually litigated and determined in the prior suit.

Section 5 is devoid of language to the effect that the government and the private suits shall have the same basis. It describes the government case as “any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws” and the private suit in which the judgment is to be used as “any action or proceeding brought by any other party against such defendant under said laws.” Hence, under section 5 the only unity which need characterize private and government suits is that both be brought under the antitrust laws and against the same defendants.

Section 5 assimilates the full scope of estoppel by judgment and makes it, mutatis mutandis, the measure of the prima facie evidence in the

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\(^{94}\) Id. at 986. (Emphasis added.)

\(^{95}\) Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).
private suit. Hence, a judgment may be used where the bases of the government and the private suit are different, as well as where they are the same, so long as both suits are based on antitrust violations by all or some of the same defendants. Where the bases are different, the judgment is evidence only of facts actually determined in the government suit that may be relevant to the private suit.

VI

Genesis of the Limited Interpretation of Section 5

The decisions that have limited the effective use of section 5 flow in the main from two causes: (1) the faulty and at times unfounded application of the rules of estoppel in construing the language and purpose of the statute; and (2) the hostility of judges to antitrust cases, especially to private treble-damage and injunction suits.

1. The Misapplication of Estoppel

Section 5 clearly relates only to evidence. It defines the nature of the evidence made available to private litigants, the manner in which it shall be ascertained, and its probative value. Equally clear is the fact that section 5 is not an estoppel statute. As mentioned earlier, the statute and estoppel by judgment are radically different in the public policies and purposes on which they rest. Nevertheless, the courts have narrowly circumscribed the evidence afforded by section 5 and have fettered its remedial purpose with limitations which may be attributed only to the misapplication of the doctrine of estoppel by judgment. Underlying each of these limitations is the theory that section 5 is comprehensively governed by the doctrine of estoppel, except as to the prima facie effect to be given the evidence. The word "estoppel" in section 5, while clearly intended to serve only as a measure of the evidence admissible, has permitted the unimaginative insertion of strict estoppel rules where a broader evidential opportunity should lie.

A look at the statutory language discloses the origin of the error. According to the text of section 5, a judgment in an action brought by the Government shall be prima facie evidence "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." The word "estoppel" is part of a clause dominated by the word "matters." It seems unmistakably clear that the words "respecting which said judgment or decree would be an estoppel" are merely definitive and adjectival. Because they limit and modify the word "mat-

ter," they can perform no other function than that of specifying what matters are to be taken from the government case. In other words, estoppel is to be used simply as a formula for ascertaining those matters which were or might have been determined in the government case. The adjectival significance of the words exhausts their use and purpose in section 5. They are incapable of implying or drawing into the statute any other part, incident, or quality of estoppel.

Yet, reviewing the cases, it is evident that the concept of estoppel has dominated judicial interpretation of section 5. The prohibition against inferences enunciated in Eagle-Lion is attributed by the court to "the relatively narrow limits of the doctrine of estoppel." The denial that a conspiracy proven by the Government is presumed to continue, although not expressly based on the doctrine of estoppel, clearly relates to it. The rigid and narrow restriction of the evidence, as proving nothing beyond the time of the government trial or entry of judgment thereon, is also an offshoot of that doctrine. The requirement of coincidence of place and subject matter in the private and government suits, is likewise—but erroneously—attributed to the doctrine.

In the conventional application of estoppel—in litigation between the same parties, either in a second suit on the same claim previously adjudicated, or in a second suit on a different claim—the question is merely whether the claims are the same, or whether matters were determined in the first suit which are pertinent to the second suit. Such questions rarely, if ever, present any necessity for evidential inferences or presumptions. So also the time of trial, of entry of judgment, or of compliance with its mandates are immaterial in determining the substantive factual matters proved by the judgment. Section 5 has thus been improperly equated with estoppel by judgment, with the result that a large and beneficial part of the statute has been cut away.

The Supreme Court began this eviscerating process when it wrote in Emich that "such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution," a view since adopted by a number of other courts. The statement in Emich,

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97 248 F.2d at 444.
98 340 U.S. at 569.
99 In Orbo Theatre Corp. v. Loew's, Inc., 156 F. Supp. 770, 776 (D.D.C. 1957), the court said, "Such a decree, however, is prima facie evidence only as to matters actually determined and does not extend to all issues that might have been adjudicated." In Eagle-Lion Studios, Inc. v. Loew's, Inc., 248 F.2d 438 (2d Cir. 1957), the court refused to give effect to a judgment as evidence of a general conspiracy aimed at distributors of motion
however, accurately describes only the collateral estoppel aspect of estoppel by judgment. While the Court's use of the word "only" has led lower courts to interpret this statement as an intention to limit section 5 to collateral estoppel, such a meaning is emphatically contradicted by the further statement in Emich "that Congress intended to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit." Moreover, the addition of the world "only" to the estoppel rule was obiter, for this limitation was unnecessary and was not applied in the Emich case.

2. Judicial Hostility to Antitrust Policy

Hostility on the part of judges to antitrust cases has deprived private litigants of the benefits intended by section 5 of the Clayton Act. This hostility is inferred here in no part from the number of adverse decisions; it is disclosed by declarations of judges in the course of the exercise of their judicial functions in antitrust cases.

There have always been two general schools of thought about the antitrust laws. One school believes that the best economic policy for America is the so-called free enterprise competitive system. The other is convinced that the competitive system and the policy of the antitrust laws is impractical and mythical, and that a privately controlled, monopolistic economy should be permitted. Notorious is the fact that in basic and other industries actual conditions are very much more like monopoly than free enterprise. There is also strong evidence that national and state legislation has long and increasingly favored and produced monopoly conditions in many important areas. It would therefore be strange if some judges, like other people, were not confirmed skeptics about and hostile to the antitrust laws.

Judge Clark of the United States Court of Appeals for the Second Circuit, in emphatically denouncing the decision of his court in Eagle-Lion Studios, Inc. v. Loew's, Inc., said:

There seems to be a developing trend in some of our trial courts of hostility toward the "big" antitrust case and of discovering obstacles—going back even to matters of pleading and pre-trial—in the way of a free showing of the need of remedial relief. Humanly speaking we can well sympathize, for these trials are a burden, if not a bore, to a busy, overworked court. But we are dealing with settled and cherished Congressional policy which is not for us to change or hamper. I
suggest that these judicially formed limitations are a definite infringement of legislative policy.101

In 1950 Judge Augustus Hand of the same court declared his strong aversion to the use of antitrust judgments as evidence in private suits, in an instance where he granted a request of the defendants to recover the evidentiary value of the judgments to private litigants: "This business of using a pretty obscure decree and decisions as they have tried to do before, to lick somebody in litigation between themselves and other parties is crude judicial stuff, from the point of view of the judge, very, very crude stuff."102

This supposed crudity, so strongly resented by Judge Hand, is nevertheless sanctioned in practice, and by logic and law, in instances which are legion. The use of the judgments from government litigation has no taint of unfairness about it, nor is it likely to result in a miscarriage of justice against previously conspiring defendants. It is elementary that prior conduct is logically and legally used as evidence of the character of a person's present similar conduct, especially in conspiracy cases where intent is an issue, as is almost invariably the case in antitrust litigation.

In the course of the trial of the private antitrust case of Fanchon & Marco, District Judge Yankwich said that "antitrust laws are a part of America's romantic dream, which can never be realized in modern economics and actually maintain competition in a modern industrial system";103 and "of necessity, this business by its very nature, is monopolistic";104 "free trade would destroy the industry."105

101 248 F.2d at 451 (dissenting opinion). In concluding, Judge Clark said, "I feel the greater confidence in the views I have expressed because Judge Frank, who originally heard the appeal, voted to reverse and set forth similar conclusions in a tentative memorandum he had prepared before he died."
102 Stenographer's minutes, pp. 40-45, United States v. Loew's, Inc., Equity No. 87-273: (S.D.N.Y. 1950).
104 Record, vol. IV, p. 1721.
COMMENTS

TO BOND OR NOT TO BOND — SECTION 502 OF THE LANDRUM-GRIFFIN ACT

FRANK J. DUGAN*

The Labor-Management Reporting and Disclosure Act of 1959 has since its passage evoked numerous cries of distress, not all of which have issued from union headquarters. Non-partisan observers have had equal occasion to level important criticism at many provisions of the new act. In this thoughtful study, Dean Dugan objectively reviews the linguistic ambiguities to be found in the act's bonding provision—section 502—and, in comparing the intent of Congress underlying the provision with the interpretation given it by the Secretary of Labor, projects the practical difficulties likely to follow the adoption of one view or the other.

Union leaders old enough to recall the jailhouse days that followed organized labor's rowdy but unfortunately well-policied birth on the picket lines doubtless experienced something akin to a chill when the 1959 Landrum-Griffin Act was passed containing a provision which apparently required that fund-handling union officials be personally bonded.1 The remark of Congressman Barden, Chairman of the House Committee on Labor and Education, that the purpose of the bonding provision was to eliminate those who had prior criminal records from positions of control over union funds, cannot have passed unnoticed.2 While it is true enough that the provision may be troublesome, the difficulty is initially less in its effect, which unions anticipate with anxiety, than in its meaning, which is not completely clear. The object of this comment is to examine the history and language of the provision in order to evaluate the conflict of opinion now attending non-judicial interpretations of it, and to raise several questions which the courts will doubtless be moved to resolve when finally confronted by a demand for definition.

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Suggestions and assistance in research by Max Gutierrez, Jr., Research Fellow, Georgetown Law Center, are gratefully acknowledged.


2 105 Cong. Rec. 18128 (1959). Senator Goldwater also stated: "The important protection sought by a bonding requirement is not the financial reimbursement a bond provides, but rather, the weeding out through an effective investigation of individuals whose past records mark them as untrustworthy." 105 Cong. Rec. 10100 (1959).
The Kennedy-Ervin bill\(^8\) which the Senate Labor Committee reported to the Senate floor did not contain a bonding provision at all. Originating with Senator McClellan's amendment, which was accepted by agreement as a new section,\(^4\) the Senate bonding provision ultimately appeared as section 308\(^8\) of the bill passed by the Senate on April 25, 1959:

**SEC. 308.** All officers, agents, representatives, and employees of any labor organization engaged in an industry affecting commerce who handle funds of such organization or of a trust in which such organization is interested shall be bonded for the faithful discharge of their duties in the handling of such funds, and the bond of each such person in effect during any fiscal year of such organization shall be an amount, (A) in the case of a labor organization, not less than one-tenth of the gross income of such organization for the fiscal year of such organization immediately preceding such fiscal year, or $250,000, whichever is the lesser; or, (B) in the case of a trust in which a labor organization is interested, not less than 25 per centum of the amount of such trust, or $250,000, whichever is the lesser.

The House Labor Committee reported the Elliott bill\(^6\) which contained a bonding provision designated section 502. The Landrum-Griffin bill\(^7\) contained an identical section, also designated section 502. Curiously enough, section 502 was the only section of Title V of the House bill which escaped the disapproval of the Chamber of Commerce of the United States in its report submitted to Senator Goldwater on July 27, 1959,\(^8\) and which escaped comment in the statement of President George Meany in his summary of the AFL-CIO's bill of objections\(^9\) to the proposed law as reported by the House Labor Committee.

On August 13, 1959, the House approved the Landrum-Griffin bill,\(^10\) section 502 of which differed from the Senate-passed bonding provision in many significant aspects. The House bill required the surety to be a corporate surety holding a grant of authority from the Secretary of the Treasury, and one in which the union had no interest. The House bill also imposed a criminal penalty for violation of the provision. Further, the House bill specified that the bonds had to be individual or schedule in form. The Senate bill was silent on all these points. In the House bill the amount of the bond was fixed by a percentage of the

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\(^8\) 105 Cong. Rec. 14272 (1959).
amount of money handled by the labor organization, whereas a percentage of the gross income of the organization fixed the bond amount under the Senate bill. While the House bill exempted labor organizations whose property and annual financial receipts did not exceed $5,000 in value, the Senate bill carried no exemption.

During the conference called for by both Senate and House to settle the differences between the bills, the bonding provision of the House bill was adopted after being modified to provide a maximum limitation so that no union person subject to the provision would be required to be bonded in an amount greater than $500,000. The conference substitute for the bonding provision, subsequently passed by both Houses, reads:

Sec. 502. (a) Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded for the faithful discharge of his duties. The bond of each such person shall be fixed at the beginning of the organization's fiscal year and shall be in an amount not less than 10 per centum of the funds handled by him and his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than $500,000. If the labor organization or the trust in which a labor organization is interested does not have a preceding fiscal year, the amount of the bond shall be, in the case of a local labor organization, not less than $1,000, and in the case of any other labor organization or of a trust in which a labor organization is interested, not less than $10,000. Such bonds shall be individual or schedule in form and shall have a corporate surety company as surety thereon. Any person who is not covered by such bonds shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. No such bond shall be placed through an agent or broker or with a surety company in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization has any direct or indirect interest. Such surety company shall be a corporate surety which holds a grant of authority from the Secretary of the Treasury under the Act of July 30, 1947 (6 U.S.C. 6-13), as an acceptable surety on Federal bonds.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

Among the many obvious problems raised by the language of this section, the following are most striking:

1. Must the required bond be a personal bond or is some form of blanket position bonding also permitted?

2. Does the section call for an honesty bond, merely covering the loss of union funds through dishonest or fraudulent acts, or does it con-
template coverage of the faithful performance of all duties of the official bonded?

3. Should the bond afford protection from violation by union officials of the fiduciary obligations imposed by section 501 of the act, namely, conflict of interests and profiting-from-position situations?

4. Must management-appointed trustees of a trust in which a labor organization is interested be bonded in the amount required by the statute?

In an attempt to resolve these and other problems that arose from the enactment of the bonding provision, the Secretary of Labor, James P. Mitchell, issued an interpretative bulletin construing certain sections of the statute including section 502.

It is significant that the Secretary was not expressly authorized by the statute to issue regulations as to section 502, much less interpretative bulletins, which would have the force and effect of law if within the granted power. Nevertheless, as in the case of the Fair Labor Standards Act, the Secretary issued an interpretative bulletin on section 502 for the purpose of providing "a practical guide . . . as to how the office representing the public interest in its enforcement will seek to apply it." The Secretary admits that the correctness of his interpretation can be determined finally and authoritatively only by the courts. Approxi-

mately two months after Secretary Mitchell issued this interpretative bulletin, Senator Barry Goldwater of Arizona, a member of the Senate Committee on Labor and Education and one of the members of Congress who was most active in the passage of the Landrum-Griffin bill, wrote to the Secretary as follows:

On December 12, 1959, there appeared in Title 29 of the Code of Federal Regulations an amendment to Chapter IV thereof, designated as Part 453, entitled "General Statement Concerning the Bonding Requirements of the Labor-Management Reporting and Disclosure Act of 1959." Section 453.18 of this new

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12 1 Davis, Administrative Law Treatise § 5.03 (1st ed. 1958). Here the author points out that the courts are much more apt to substitute their judgment in the case of an interpretative rule than when dealing with a legislative rule or regulation.
15 The Secretary finds his authority to issue an interpretative bulletin on the bonding section by virtue of the fact that section 502 is subject to his power to investigate alleged violations of certain titles of the statute under section 601, and, under section 602, to forward evidence of violations of section 502, developed in such investigations, to the Attorney General for criminal prosecution.
amendment deals with the form of bonds required by section 502 of the new labor law and construes section 502 to require a personal bond for a named individual where the bond secured is individual in form but permitting either a personal or position bond where the bond secured is schedule in form.

This construction of section 502 requires the conclusion that where a union official secures an individual bond covering himself alone, Congress intended that it be personal in form because it sought a preceding investigation of such individual by the bonding company, but if the same union official were only one of several officials to be covered by a schedule type of bond, Congress was willing to dispense with such an investigation. Section 453.18 makes no attempt to explain why Congress should have intended such an absurd result, and completely ignores the legislative history of section 502 which makes it plain beyond doubt that Congress intended all of the bonds required by that section to be personal bonds regardless of whether they covered one union official or several, and that the term “schedule” in form in section 502 means “name schedule” and not “position schedule.”

In support of the foregoing I enclose herewith a memorandum setting forth the legislative history of section 502 which contains the bonding provisions of the new labor law. I sincerely hope that you will give this material your most serious consideration with the object of revising your Statements of Interpretation (Title 29 of the Code of Federal Regulations, Section 453.18) so as to make them consistent with the intent of Congress.16

On March 21, 1960, Secretary Mitchell made public his reply to Senator Goldwater:

As I promised you on March 2, I have had a review made by the Department’s legal staff of the memorandum you sent me on February 22, setting forth your interpretation of the legislative history of Section 502 of the Labor-Management Reporting and Disclosure Act of 1959. Based on this analysis, it is my opinion that neither the language of the Act itself nor the legislative history leading up to its passage are clear and conclusive enough to indicate any error in our interpretation of what Congress meant by the requirement in Section 502.

The statute requires that the bonds be “individual or schedule in form.” We were informed by leading representatives of the bonding industry that there were two kinds of bonds in current usage which are “schedule in form”—name schedule bonds and position schedule bonds. Surely, Congress knew this before it agreed on language for this provision and it did not qualify or restrict the word “schedule” in any way. Therefore, it seemed to me reasonable and proper that any schedule bond which meets the currently accepted usage of that term should be acceptable. Consequently, I decided that an individual bond, a position schedule bond, or a name schedule bond would meet the statutory requirement, “individual or schedule in form.”

If a majority of the members of Congress feels that such bonds should be only individual in form, I assume they will tell me so by amending the law to that effect. Meanwhile, I intend to follow the plain English of the law and accept, as meeting the criteria of the statute as to form, any bond which is either “individual or schedule in form.”17

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17 Letter From Secretary Mitchell to Senator Goldwater, March 21, 1960.
Obviously, the crux of the disagreement is whether the Secretary correctly determined that union personnel could be covered by position, schedule or blanket bonds and still comply with section 502. To be especially noted is the Secretary’s heavy reliance on his belief that “neither the language of the Act itself nor the legislative history leading up to its passage are clear and conclusive enough to indicate any error... [in his] interpretation of what Congress meant by the requirement in Section 502.”

The Secretary points out that the language of the section requires that the bonds be “individual or schedule in form.” An examination of the authorities in the bonding field reveals that the act properly divides bonds into their two basic types: (1) individual and (2) schedule.18 As the names indicate, the individual bond covers a single person, while the schedule bond encompasses several persons or a group. In addition, both types of bonds are open to two descriptions—they may be either personal bonds or position bonds. If personal, the bond covers a particularly named individual or set of individuals, and normally requires an investigation of background and character. If of the position description, the bond covers a specified position regardless of who the occupant is, and no investigation is required. The Secretary of Labor found that the act made plain that individual bonds are to be personal in nature, issued to cover one named investigated person. His interpretation is consistent with trade usage, which automatically equates “individual” with “personal.” But the Secretary, not unjustifiably, thought that the act had not so clearly resolved the dichotomized quality of scheduled bonding. When more persons than one are to be covered by a single bond, it may be that the particular individuals are to be listed on the name schedule bond. But the schedule bond noted by the act can also be a blanket position protection, covering anyone and everyone in the offices listed on the schedule, without reference to their individual backgrounds and character.

Consequently, when Congress chose to use the words “individual or schedule in form,” it interjected an ambiguity in the provision in that actually there are two types of schedule bonds—name schedule and position schedule. Buttressed by trade terminology and usage in the bonding field, Secretary Mitchell chose to conclude that Congress sanctioned the use of position schedule bonds.

In so selecting in favor of position bonding, Secretary Mitchell was

18 Mackall, The Principles of Surety Underwriting 50-52 (5th ed. 1940); Wentz, Fidelity and Surety Bonding 36-37 (1939).
undoubtedly influenced by certain serious practical problems which are likely to arise if personal bonding is required. To begin with, premium rates on personal bonds are extremely high compared to position bonds. Personal bonding would require an individual investigation of every person required to be bonded under the act—his background, his reputation, and any possible criminal record or connection. Plainly, considering the thousands of persons to be bonded under the act, the task would be practically impossible and the costs certainly prohibitive. In addition, many officials who have long since proven their honesty and integrity in the labor movement might find it impossible to continue performing their duties because a "picket-line" sentence incurred many years ago would prevent their obtaining a bond.

While Secretary Mitchell is supported by trade terminology and the "plain English of the law" as to the meaning of the language used in section 502, his contention that the legislative history is also not clear and conclusive enough to indicate that only personal bonding was intended by Congress is quite another story.

At the core of the disagreement between Secretary Mitchell and Senator Goldwater is the fact that the basic premises from which each of these officials builds his argument represent conflicting philosophies as to the purpose of the bonding provision. Either the section was intended to eliminate the untrustworthy from the labor movement by the requirement of personal bonding and its concomitant personal investigations, or the section was merely intended to protect union funds for the rank and file from the risk of substantial defalcations. An objective examination of the legislative history with respect to the bonding provision seems clearly to indicate that, at the time of its enactment, Congress intended that the bonding provision act as a bar to the hoodlum element in the labor movement even though it meant higher premium rates for the required bonds. For example, Representative Robert P. Griffin, co-sponsor of the act, summarized the agreement worked out in conference on the bonding provision and reported the following to the House:

Bonding: Senate bill provides for blanket bonding of union officers and employees handling union funds . . . House bill required personal bonding . . . . Conference adopted House provision.19

Again, Senator Goldwater, a conference committee member, had this to report to the Senate on September 3, 1959:

While both the Senate and House bills contained a provision requiring every union officer who handles funds or property to be bonded, the Senate bill would have permitted blanket bonding with a maximum bond of $250,000. The House provision was much stricter, requiring personal bonding of not less than 10 percent of the amount handled by the union officer.20

And, as if to dispel any doubts on the subject, Representative Barden, Chairman of the House Committee on Education and Labor, and a manager on the part of the House of the conference committee, clearly disclosed the purpose of the bonding provision which the House was soon to vote into law when he reported the action of the conference committee to the House:

With respect to the bonding provisions, there are many sections in the bill that were perhaps touched up some but personally I was so enthusiastic over the bonding provision, I think it will be satisfactory. It makes the person himself responsible for that bond instead of its being an office bond or a position bond. It is a personal bond.

I think it is well within the knowledge of everyone that in the handling of finances there have been many wrongs committed and there was a very high risk run by all the members who had an interest in those funds. With respect to the matter of a personal bond, I think it is clear to everyone that a bonding company is not going to write a bond for a bad risk. In that manner I think this will be of tremendous value to the unions because of the fact that when the bond is written, they will know that the man involved will be a good man to start with and will not be some criminal who has just been released from prison after having robbed a bank.21

Senator Goldwater's agreement with Representative Barden's understanding of the basic purpose of the bonding provision is unequivocally reflected by his criticism of the Senate version of the bonding section: "The important protection sought by a bonding requirement is not the financial reimbursement a bond provides, but rather, the weeding out through an effective investigation of individuals whose past records mark them as untrustworthy."22

Not one Democratic voice was raised in Congress in opposition to the statements by Republican Senators and Representatives to the effect that a personal bond was intended. Indeed, Senator Wayne Morse (Dem.) of Oregon, a member of the conference committee, supported the proposition that personal bonding was intended by the provision when he related to the Senate his failure to have the conference committee amend the provision to permit position bonding:

20 105 Cong. Rec. 17903 (1959). (Emphasis added.)
21 105 Cong. Rec. 18128 (1959). (Emphasis added.)
During the conference I offered an amendment which would have changed one sentence so as to read:

"Such bonds shall be individual or position schedule in form—"

I was unsuccessful in my attempt to have my amendment adopted.

What was I seeking to do? I was seeking to prevent the laying down of a discriminatory rule against union officers that we do not apply to the officers of other organizations. I was taking the position that I thought what we were seeking to accomplish was to protect the rank and file member of the union in respect to the union's funds. That is what I thought we were after. I thought we were seeking a bonding provision which would guarantee to the rank and file member that the union funds had bonding protection.

Position bonding provides that an organization, whether it be a bank, a corporation, a trade union, or any other institution, may go to a bonding company and say, "We want a bond for our president, vice president, secretary and treasurer, and nine members of the board of directors," or any other officers they may have.

The bonding company sells them the bond. It is a bond for the office or position. It is a bond for the roster of officers in that organization. If the president of the organization dies tonight and the union, bank or any other organization, elects a new president tomorrow, he is automatically covered under the position schedule. But the language of the conference report provides otherwise.23

In short, every member of either House who did express his views as to the meaning of section 502 interpreted the section to require personal bonding. The significance of this phenomenon is apparent when it is recalled that to arrive at the congressional intent the Supreme Court frequently used statements of men in positions similar to those held by the men quoted above.24

Senator John L. McClellan (Dem.) of Arkansas, a strong advocate of the Landrum-Griffin bill, has also taken the position that Senator Goldwater correctly stated the intent of Congress in passing the bonding provision. However Senator McClellan refuses to condemn the Secretary of Labor for his present interpretation on the grounds that the dispute may well indicate that the language of the section is mis-

24 Statements by men holding the following positions have been looked to by the courts as reliable sources of the congressional intent:
leading. With equal magnanimity, one of the co-sponsors of the new act, Representative Robert P. Griffin (Rep.) of Michigan, has stated that while individual bonding was the "original intent" of the Landrum-Griffin Act framers, that is not the way the legislation shaped up: "The language as adopted leaves room for the secretary (of labor) to place the blanket bond interpretation on it. So I, for one, am not criticizing the secretary." In its final form, Mr. Griffin said, the bonding provision in the labor reform provided that bonds covering union officials may be "individual or schedule (blanket) in form."

The Secretary of Labor states that the legislative history of the section is not so clear and convincing as to require personal bonding. Assuming, arguendo, that it is clear that Congress intended personal bonding, it is not too difficult to see why a person in the Secretary's position would seize the opportunity presented by the patent ambiguity in the language of the act, and thereunder allow position bonding. To illustrate, assume that the Secretary of Labor had adopted the interpretation that all persons required to be bonded under section 502 would have to have a personal bond.

First of all, the premium costs of such a bond would impose a substantial drain on union treasuries because of the added expense of conducting the personal investigations required when issuing these bonds. Moreover, the Surety Association of America, which fixes rates for all member companies, would err, if at all, toward higher premiums in determining the almost incalculable cost involved in setting up the clerical and processing facilities to handle the proposed personal investigations.

Second, individual or personal bonding would not provide any greater protection for union funds than position bonding and thus would not justify the added expense on this account.

Third, the necessity for personal investigations slows the process of obtaining the bonds necessary for these union officials to assume the performance of their duties and hence interferes with efficient internal union administration.

26 As quoted in The Muskegon Chronicle, March 22, 1960, p. 11, col. 1. This statement seems to be in direct conflict with the statements of Representative Griffin made on the floor of the House to the effect that the Conference Committee had adopted the House bill which required personal bonding. 105 Cong. Rec. 18022 (1959).
28 The experience of one international union indicates that the first premium rate offered to them when a personal bond was thought to be required was $13 per thousand.
Fourth, the requirement of personal bonding would delegate to private surety companies the right to investigate and to determine whether a union official was fit to hold union office.

Lastly, such a requirement would create bad labor relations since union officials would feel that they were singled out for discriminatory treatment in that corporate officials or bank officials need only use position bonds rather than the personal bond. Consequently, the Secretary of Labor appears to have taken the practical way out in implementing a perhaps unworkable section of the new act. Indeed, a realization of these practical problems explains the change in position of Representative Griffin when he stated: “I’ve been concerned about the cost. We should wait until we have some experience with union officer bonding before we consider any drastic change that might place an unreasonable burden on honest unions.”

One might reasonably surmise that the next time Congress writes a bonding provision in a controversial field, it will consult the surety industry in advance.

A further question left in doubt by the language of section 502 is whether the type of bond now required should encompass the faithful performance of the official’s duties, or whether it should merely cover loss resulting from dishonest or fraudulent acts. The statute merely states that every official “who handles funds or other property thereof shall be bonded for the faithful discharge of his duties.” Secretary Mitchell has apparently interpreted this clause as requiring a bond that does not have as broad a coverage as might be required in the case of a public official. While not sanctioning the honesty bond, his language lends itself to the conclusion that he believes something less than a faithful performance bond will satisfactorily comply with the section. It appears that the Secretary has again been cost-conscious and has leaned toward the lower-premium honesty bond. The legislative history of the section sheds no light on this problem.

In the case of a public official, an oath of office is normally involved by which he swears he will “faithfully discharge the duties of his office.” In such case the surety company issues a faithful performance bond which covers not only loss resulting from dishonesty but also any loss that might occur from neglect of duty, loss by reason of non-legal investment, et cetera. Generally, the premium for a faithful performance bond is higher than that set for the honesty bond.

The probabilities confronting the suretyship industry are obscure in the absence of a determination whether an "honesty" or "faithful discharge" bond is contemplated by the act, since limits of surety liability will vary depending on the choice. Does "faithful discharge of the union official's duties" mean adherence to the union's constitution and bylaws, and to the provisions of the act? Does the fiduciary provision, section 501, subject the union official to responsibilities not heretofore covered in the surety company's intended bond coverage? These are questions that are vital in fixing the premium rates to cover this new provision.

Allied to this problem is the question of whether the required bond should cover losses resulting from violations of the fiduciary obligations imposed by section 501 of the act.\(^\text{32}\) To illustrate the significance of this question as to how far coverage should extend, assume that a union official accepts a bribe from management in order that the company receive favored treatment over other companies in the area. The money received by the union official is not part of the union funds. Yet under section 501 it is clear that a union member could force the dishonest union official to relinquish the bribe and pay it into the union treasury. The reason is that the union official has breached his fiduciary obligation to the union by personally profiting from his union position.\(^\text{33}\) Should the required bond be written so that the union could look to the surety company to recover the amount of the bribe rather than merely having recourse to the official?

Again the cost of the more extensive coverage would be a factor pointing to higher premium rates, and this factor may have contributed to the definite "no" answer given the question by the Secretary of Labor. With no uncertainty he found the act not to require coverage of the obligations of section 501 by the new labor bond. Secretary Mitchell supports this conclusion by pointing out that section 502 deals only with personnel in their relation to their handling of funds or other property without making any reference to the obligations imposed by section 501(a). He further noted that section 501(b) provides a civil remedy for a breach of the fiduciary duties. His answer tends to corroborate the earlier inference that he does not foresee the need for a full faithful discharge bond, but rather tends toward a mere honesty bond: a faithful discharge bond would cover losses from violations of fiduciary obligations, while an honesty bond would not. While the Secretary's intentions are undoubtedly good, there is something to be said for providing the


union rank and file with the fullest protection of union funds possible under the circumstances.

The surety industry has responded with a consolidated bond covering losses occasioned by the failure of the person bonded to faithfully discharge his duties in handling funds or other property of the union as prescribed by law or by the constitution and bylaws, or by resolution of the union’s governing body adopted thereunder. While the exact limitations of such a bond can only be determined by the courts, the coverage thus proposed is certainly more extensive than that which an honesty bond provides.

Theoretically, the cost of a faithful performance bond would be considerably higher than for an honesty bond. But discussions with leading figures in suretyship circles have revealed that the volume of business generated by the bonding of an international union and its hundreds of locals, coupled with the discounts allowed on the actual liability (as distinguished from the theoretical liability), places the cost of the new labor-organization bond at a figure which approximates the cost of honesty bonds. Perhaps the more extensive coverage at such a small difference in the cost is due to the fact that in actual practice there are few instances where a loss cannot be attributed to dishonesty or bad faith.

By providing a bond which covers the “faithful discharge” of duties the surety industry has literally complied with the language of the statute. Since it appears that the difference in rates between the honesty bond and the consolidated bond is insubstantial where contracted for in volume, it appears that the Secretary should revise his interpretations so as to give the union members the benefit of the more extensive protection. In this case there is no practical reason why the plain language of the act should not control.

The major issue remaining in interpreting section 502 is whether a management-appointed trustee of a trust in which a labor organization is interested must be bonded in the amount required by the statute. The language of the section is susceptible to two constructions which alternatively include or exclude trustees from the scope of the provision. The legislative history on this point is completely inconclusive. The truth of the matter seems to be that Congress did not really consider this problem at all. Secretary Mitchell has concluded that management-appointed trustees are within the coverage of section 502.

34 See, e.g., Labor Organization Bond (Consolidated Form), Edition of Dec. 1959, issued by Fidelity and Deposit Co. of Maryland.
Since one of the major objectives of the bonding provision is the protection of union funds within the organization or in trust, an equitable view favors the interpretation adopted by the Secretary.

A study of the bonding provision, then, and of the controversy surrounding it, reveals the creation of new obligations framed in hasty language, ostensibly the flurried result of drafting highly controversial material on the floor of the House and Senate or in conference. Given the technicality of the bonding field to begin with, the executive branch has in consequence been left with serious problems of enforcement. The Secretary of Labor has tentatively resolved these problems by interpreting the section in as workable and practicable a manner as possible. While it is true that he may be accused of having rewritten the statute in some instances, it is fair to assume that the courts will accept the realities of the situation and act accordingly.
SECTION 7 OF THE CLAYTON ACT: 
THE “FAILING COMPANY” MYTH

MARTIN F. CONNOR III*

Taking issue with the widespread belief that section 7 does not apply to acquisitions by one corporation of the stock or assets of another which is in failing condition, the author carefully indicates that the cases from which the idea of an exemption sprang, provide no true basis for it, and that the 1950 amendment to the Clayton Act foreclosed the possibility, real or imagined, of a per se rule announcing such an exemption.

INTRODUCTION

Among the defenses to proceedings under section 7 of the Clayton Act, the so-called failing-company “doctrine” or distress defense is in particular vogue today. Thus the Federal Trade Commission was recently told that “acquisition of a ‘failing’ firm is not a violation of section 7.”1 Respondent’s answer in another recent case stated by way of affirmative defense “that certain of the acquisitions referred to in the complaint were of companies which were incurring losses and were in failing circumstances so that the acquisition of their assets or stock did not tend substantially to lessen competition or to create a monopoly within the meaning of Section 7 of the Clayton Act . . . .”2 Indeed the defense has won such wide acceptance that the attention of counsel and court in recent cases seems to have been focused on only one question: the degree of financial difficulty which a firm must have encountered before it is “failing” within the context of this defense. The validity of the underlying principle has generally gone unchallenged.

Furthermore, although the statement cannot be documented for obvious reasons, it is safe to say that the greatest impact of the failing-company “doctrine” lies in its use by the Government in determining whether or not to challenge an acquisition. Thus Stanley N. Barnes, then Assistant Attorney General in charge of the Antitrust Division, told the Section on Antitrust Law of the New York State Bar Association in 1955:

Many of the mergers we have to consider present a financial consideration and that is perhaps our single most difficult question. . . .

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2 Respondent’s Answer, p. 4, Crane Co., F.T.C. No. 7833 (filed April 18, 1960).
[I]t is evident that Section 7 is not applicable to the acquisition of a failing company "provided there is no other prospective purchaser."

Of course, the applicability of this doctrine is not always clearcut.3

[T]he problem is where to draw the line in these situations which do not involve bankruptcy, but we are asked to agree that the company is "heading" in that direction.4

The purpose of this comment is to trace the growth and weigh the validity of the failing-company "doctrine." The pertinence to a section 7 case of the failing condition of an acquired company will not be questioned. The only issue here is whether there exists a rule of law which exempts such an acquisition, absolutely or with qualification, from the prohibitions of section 7.

I

International Shoe and Its Precedents

The acquisition of a failing firm first figured in a Clayton Act case in International Shoe Co. v. FTC.5 In 1921 International Shoe had acquired virtually all of the capital stock of the W. H. McElwain Company. Both companies were engaged in the manufacture and sale of men's dress shoes throughout the United States. The Federal Trade Commission charged a violation of section 7 of the Clayton Act and in due course issued an order requiring International to divest itself of the stock and assets of McElwain.6 Commissioner Humphrey registered a very strong dissent which in some respects anticipated the position of the Supreme Court.7 The Court of Appeals for the First Circuit upheld the Commission's order.8 The Supreme Court, speaking through Mr. Justice Sutherland, began by summing up the issues presented for its consideration:

The principal grounds upon which the order here is assailed are (1) that there never was substantial competition between the two corporations, and, therefore, no foundation for the charge of substantial lessening of competition; (2) that at the time of the acquisition the financial condition of the McElwain Company was such as to necessitate liquidation or sale, and, therefore, the prospect for future competition or restraint was entirely eliminated.9

In other words, the issue was framed in terms of the first of the three

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3 Barnes, Mergers, CCH Anti-Trust Law Symposium-1955 at 49, 50.
4 Id. at 52.
5 280 U.S. 291 (1930).
7 Id. at 463.
8 International Shoe Co. v. FTC, 29 F.2d 518 (1st Cir. 1928).
9 280 U.S. at 294.
statutory tests of the pre-1950 act: Whether "the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is acquired and the corporation making the acquisition . . . ." However, in discussing the first of these tests, Justice Sutherland interpolated a general discussion of section 7:

Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. In Standard Oil Co. v. Federal Trade Commission . . . the Court of Appeals for the Third Circuit applied the test to the Clayton Act which had theretofore been held applicable to the Sherman Act, namely, that the standard of legality was the absence or presence of prejudice to the public interest by unduly restricting competition or unduly obstructing the due course of trade. In Federal Trade Comm'n v. Sinclair Co. . . . referring to the Clayton Act and the Federal Trade Commission Act, this Court said:

"The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain."

Mere acquisition by one corporation of the stock of a competitor, even though it results in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . that is to say, to such a degree as will injuriously affect the public.11

This position is clarified by reference to Standard Oil Co. v. FTC,12 whose view of section 7 was expressly adopted by Justice Sutherland. "[T]he theory of injury to the public lies at the bottom of the statutes . . . ."13

10 38 Stat. 731 (1914) (amended by 64 Stat. 1125 (1950), as amended, 15 U.S.C. § 18 (1958)). At the time of this proceeding and until the 1950 amendments, the pertinent paragraph of section 7 of the Clayton Act read as follows:

[N]o 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 also 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.

11 280 U.S. at 297-98. (Citations omitted.)
12 282 Fed. 81 (3d Cir. 1922), aff'd, 261 U.S. 463 (1923).
13 Id. at 87.
14 Id. at 85.
Thus the Court transported the "rule of reason" from the Sherman Act to the Clayton Act and held (1) that the statutory language quoted above prohibited only such acquisitions as "unduly" lessen competition, and (2) that competition is "unduly" lessened only when such lessening "injuriously affects the public." With this theoretical discussion behind him, Justice Sutherland turned to the first of his two issues and found, despite a contrary finding by the Commission and the court below, that past competition between International and McElwain had been de minimis. The Court then turned to the second test, that of prospective competition. It found that "the company had reached the point where it could no longer pay its debts as they became due." The company had come "to the point of involuntary liquidation."

Shortly stated, the evidence establishes the case of a corporation in failing circumstances, the recovery of which to a normal condition was, to say the least, in gravest doubt, selling its capital to the only available purchaser in order to avoid what its officers fairly concluded was a more disastrous fate.15

The Court reviewed alternative courses of action which McElwain might have taken and concluded that "all of these may be dismissed as lying wholly within the realm of speculation."

Then, instead of the finding it had promised, that McElwain's condition precluded future competition between it and International, the Court proceeded to a complete determination of the issues on the ground that competition had not been lessened so as to "injuriously affect the public."17

In the light of the case thus disclosed of a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury to the communities where its plants were operated, we hold that the purchase of its capital stock by a competitor (there being no other prospective purchaser), not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser and with the effect of mitigating seriously injurious consequences otherwise probable, is not in contemplation of law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act. To regard such a transaction as a violation of law . . . would "seem a distempered view of purchase and result."18

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15 280 U.S. at 301.
16 Ibid.
17 Id. at 298. The argument is sometimes made that the Court completely disposed of the case in its consideration of the first issue and that all that follows may be regarded as dicta. As an abstract exercise in logic, this argument may have some merit. But in view of the subsequent decisions, this is a late date to contend seriously for such an interpretation of the case.
18 280 U.S. at 302-03.
The first of the cases cited by Mr. Justice Sutherland, in chronological sequence, is *American Press Ass'n v. United States*. In 1912 the United States had brought charges under the Sherman Act against the Western Newspaper Union. A consent decree was entered which, among other things, enjoined Western from ever acquiring an interest in the American Press Association. The only sellers of "readyprint" in the relevant market were American Press Association and Western Newspaper Union. In 1912 American had 5% of the market; by 1917 it had less than 1%. It was losing money in increasing amounts with no prospect of reversing the trend. It had to choose between sale to Western and liquidation. *There was no other prospective buyer.*

American, therefore, filed a petition that the consent order referred to above be modified to permit its acquisition by Western. The district court denied the petition and appeal was taken. The Court of Appeals for the Seventh Circuit reversed the decree, stating that each situation must be measured by the "rule of reason" and that a fundamental test was "injury to the public." The court reasoned that "after the American Company quits, if the Western is left alone in this field, the ultimate situation of the country newspapers would be the same whether the plant be scrapped or sold as an integer." Thus it was held that no injury could accrue to the public from Western's acquisition of American since the only alternative to such acquisition was the liquidation of American. Either eventuality would give Western 100% of the market.

An inquiry into the public interest, pursuant to the rule of reason, required dismissal of the action. It is clear that this case was decided not by shibboleth but on the broad principles laid down not long before this decision in *Standard Oil Co. v. United States* and *United States v. American Tobacco Co.*

The second case cited by Mr. Justice Sutherland, also a Sherman Act case, is *United States v. United States Steel Corp.* In what it labeled a "digression," the court there stated:

There is, however, an important circumstance in connection with that [the acquisition] of the Tennessee Company which is worthy to be noted. It was submitted to President Roosevelt and he gave it his approval. His approval, of course, did not make it legal, but it gives assurance of its legality, and we know from his earnestness in the public welfare he would have approved of nothing.

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19 245 Fed. 91 (7th Cir. 1917).
20 Id. at 93.
21 221 U.S. 1 (1911).
22 221 U.S. 106 (1911).
23 251 U.S. 417 (1920).
that had even a tendency to its detriment. And he testified he was not deceived and that he believed "the Tennessee Coal and Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people whose possession of it would be a guarantee that there was value to it." Such being the emergency it seems like an extreme accusation to say that the Corporation which relieved it, and, perhaps, rescued the company and the communities dependent upon it from disaster, was urged by unworthy motives. Did illegality attach afterwards and how? And what was the Corporation to do with the property? Let it decay in desuetude or develop its capabilities and resources? In the development, of course, there would be profit to the Corporation, but there would be profit as well to the world. For this reason President Roosevelt sanctioned the purchase, and it would seem a distempered view of purchase and result to regard them as violations of law.\textsuperscript{24}

In this dictum the court regarded the Tennessee Company's precarious financial condition as ground for establishing (1) a public interest ("profit to the world") in its acquisition by U. S. Steel and (2) the "worthy" motivation of U. S. Steel in so acquiring it. These are conventional Sherman Act tests, however unconventional the dictum may seem in other respects. Thus, for reasons that will be examined later, the court brought \textit{International Shoe} and section 7 of the Clayton Act squarely into line with Sherman Act precedents.

The specific circumstances in view of which the acquisition of McElwain was found not injurious to the public might be schematized as follows:

(1) The officers of McElwain were honestly convinced that the company had only two available courses of action: involuntary liquidation or acquisition by another. (Careful reading of the opinion leads one to suspect that Mr. Justice Sutherland was primarily concerned not with the objective trust of this conviction but with the subjective sincerity of those who entertained it. Their \textit{intent} was honest.)

In the year 1920 McElwain had sustained a loss of over $6,000,000. Whereas it had a surplus of about $4,000,000 in May 1920, it had a deficit of almost $4,400,000 twelve months later. In the spring of 1921 McElwain owed the banks $15,000,000 and had accounts payable of $2,000,000. It had ceased to pay dividends and was unable to pay its debts as they came due. Its plants, with a capacity of 38,000 to 40,000 pairs of shoes a day, were producing only 6,000. Its next annual statement, required by Massachusetts law, would have shown that the company was

\textsuperscript{24} Id. at 446-47.
insolvent, as defined by that law, and would thus have forced it into involuntary liquidation. Thus the Court found a "grave probability" of bankruptcy. There were no available means of refinancing which would avert bankruptcy and no prospect that McElwain could be salvaged as a competitive entity subsequent to bankruptcy.

(2) Involuntary liquidation would have resulted in grave loss to McElwain's stockholders and serious injury to the communities in which its plants were located.

(3) McElwain spontaneously sought out International, not vice versa.

(4) There was no prospective purchaser other than International. This criterion, twice repeated, is given no explanation or elaboration, but great weight has been placed upon it in discussions of the "doctrine."

(5) International's purpose was not "to lessen competition, but to facilitate [its] accumulated business." Thus it was absolved of any untoward intent to monopolize. Under such conditions the acquisition "is not in contemplation of the law prejudicial to the public and does not substantially lessen competition or restrain commerce within the intent of the Clayton Act." It is to be noted that the Court based its conclusion on this entire complexus of findings. There is no reason to conjecture that it would have so found if any one of these five elements had been lacking.

II
ACQUISITIONS OF A FAILING FIRM SUBSEQUENT TO International Shoe

The first appearance of a failing company in a merger proceeding after International Shoe is a negative one, so far as the "doctrine" is concerned. In 1936 the Pressed Steel Car Company of New Jersey was in bankruptcy and undergoing reorganization. Under the reorganization plan, General American Transportation Corporation was to acquire some of the company's stock. The District Court for the Western District of Pennsylvania was apprehensive that such a plan might violate section 7. Despite the fact that Pressed Steel Car was in receivership, testimony was taken on the effect this transaction might have on competition. It was found that there was almost no competition between the companies, and hence no probability of lessening competition.

25 280 U.S. at 302.
26 Ibid.
27 Id. at 302-03.
court clearly believed that competition could be lessened, within the meaning of the Clayton Act, by the acquisition of a company which is in bankruptcy.

The first case to enunciate the failing-company "doctrine" in express terms was Beegle v. Thomson a private action alleging violation of section 7 of the Clayton Act. The pertinent part of the opinion reads:

The court found . . . that the evidence established, beyond peradventure, that there was in fact no competition between the Steel Company and the Supply Company. . . .

Furthermore, as we pointed out in American Press Ass'n v. United States, . . . a firm closing out its business because of financial difficulties may sell its plant even to a competitor without violating the Anti-Trust Law. See also International Shoe v. Federal Trade Commission . . . 30

In this dictum the failing condition of an acquired company is treated as an absolute defense to an action under section 7 of the Clayton Act. No rationale is given; the "doctrine" is treated as a matter of law, settled once and forever by the two cases cited. Nor is there any reference to, nor application of, the elaborate criteria set out in International Shoe.

The failing condition of the acquired company was proposed as a defense in two cases recently decided by the Federal Trade Commission. In each instance it was held that the acquired company was not in fact "failing" and hence the validity of the defense as such was not determined. In the decision of Farm Journal, Inc., the Commission held:

The record here does not show that Curtis had to sell, or that it had no other reasonable, possible, or feasible alternative. Rather it shows an un compelled decision to sell at what certainly cannot be regarded as a distress consideration in the exercise of business judgment profitwise. It would be naive to assume, as respondent contends, that Curtis could not continue with Country Gentlemen.31

In the case of Crown Zellerbach Corp., Crown argued that:

The legislative history of the amended Section 7 makes it plain that the statute was never intended to cover a distress sale of manufacturing facilities such as is shown by this record. St. Helens was not yet insolvent, but like the acquired company in International Shoe Co. v. Federal Trade Commission . . . its "prospect of rehabilitation" was "remote" . . . . There is no evidence that, from the point of view of the public interest, there was any better solution to the St. Helens problem than its acquisition by Crown.32

29 138 F.2d 875 (7th Cir. 1943), cert. denied, 322 U.S. 743 (1944).
30 Id. at 880-81.
31 53 F.T.C. 26, 48 (1956).
32 Brief for Appellant, pp. 109-11, Crown Zellerbach Corp., 54 F.T.C. No. 6180 (Dec. 16,
The Commission rejected this contention:

Respondent argues that since St. Helens was in some financial difficulty as a result of its modernization program, it was not an effective competitor but, rather, was in a failing condition. Under these circumstances, respondent contends that the Commission cannot find the acquisition to be in violation of Section 7, citing as authority International Shoe Co. v. Federal Trade Commission... In that case, the facts disclose a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of business failure. Such is not the case here... We are of the opinion that St. Helens had been and was at the time of the acquisition an effective competitor, and that there was no sufficient reason to believe that it was in a failing or bankrupt condition.33

These two cases are also of some interest for the indicia they use in identifying a "failing company": (a) a company compelled to sell at a distress consideration; (b) a company which has ceased to be an effective competitor. In United States v. Maryland & Virginia Milk Producers Ass'n,34 one of the acquired companies was alleged to have been failing. The Richfield Dairy Corporation was insolvent in August 1957. Its current assets were 43% of its current liabilities and only 25% of its total debt. It had a deficit of about $364,000; it had no working capital; its current debt exceeded its current assets by nearly $387,000. A certified public accountant testified that the company was "insolvent" and "bankrupt." The district court held:

The acquisition of capital stock or assets of a failing corporation is not within the ban of Section 7 of the Clayton Act. While the statute does not expressly so provide, this conclusion is inherent in the statutory provision because the acquisition of a failing corporation that is on the verge of going out of business cannot result in lessening competition or in creating a monopoly. Be that as it may, the Supreme Court so held in International Shoe Co. v. Federal Trade Commission...35

As in Beegle, the court cites International Shoe as controlling, without regard for the rationale of that case. However, the qualification implicit in the court's phrase, "Be that as it may," is most striking. This is the only reported case decided solely on the bare proposition that the failing-company "doctrine" is an absolute defense to an action under section 7 of the Clayton Act. The dogmatic stand of this opinion has wide currency today, and is the principal concern of this study.

1957). (Emphasis added.) In essence, Crown's contention seems to have been that the Sherman Act test of International Shoe, remains valid under the amended section 7.

35 Id. at 808.
III
APPRAISAL OF THE CASE LAW

The first three cases involving acquisition of a failing company are the "precedent cases" on this question. They are the omnipresent authority for a "doctrine." The first two of these, in chronological sequence, American Press Ass'n and United States Steel, are Sherman Act cases. Consistent with the principles of Standard Oil Co. v. United States, *36 United States v. American Tobacco Co.***37 and other cases in that line of precedent, they determine legality and illegality in light of the "rule of reason." Absent an intent to monopolize, they hold that the "reasonableness" of an acquisition is to be judged primarily by a determination of public interest in its regard. In other words, the legality of an acquisition is decided by balancing its advantages and disadvantages to the public. So in American Press Ass'n it was held that the acquisition was without significance as far as the public was concerned; in United States Steel it was found, by way of dictum, that grave injury would result to the public if the acquisition were to be disallowed.

The third of these cases, International Shoe, held that the identical test was to be applied in section 7 cases. Having absolved the parties of any "intent to monopolize" the Court examined the acquisition to determine whether it would "injuriously affect the public." It found that the company's stockholders and employees had an immediate interest in the preservation of McElwain as a going enterprise. Its liquidation would have "injuriously affected" them. Careful scrutiny revealed no countervailing injury likely to result from the acquisition. The lessening of competition, therefore, was not "unreasonable."

In each of these three cases, then, the legality of the acquisition is not an immediate inference from the fact of the acquired firm's failing condition; it is a conclusion reached only through the application of Sherman Act tests. Thus these cases enunciate no per se rule with respect to the acquisition of a failing firm. This point cannot be emphasized too strongly, for from this fact it follows that anyone who rejects the ultimate conclusions of this discussion in favor of a return to International Shoe must submit the facts of his case not to a per se rule but to the elaborate tests whereby International Shoe adjudged the public interest.

Following International Shoe, Sherman Act tests were consistently

36 221 U.S. 1 (1911).
37 221 U.S. 106 (1911).
applied by the courts in section 7 cases. This recourse to Sherman Act tests was caused in great measure by the broad language of the statute itself. If literally applied, section 7 would have absolutely prevented the merger of competing firms, and the Seventh Circuit so held in *Swift & Co. v. FTC*. By injecting the Sherman Act rule of reason, the courts had attempted to avoid this impasse.

Congressional recognition of this judicial effort was an important motive for the 1950 amendment to section 7. A Senate report to the Eighty-first Congress states:

The Committee believe that the excessive sweep that has been given to Section 7 of the present Clayton Act . . . has been largely responsible for the tendency of the courts in cases under that section to revert to the Sherman Act test. By eliminating the provisions of the existing section that appear to reach situations of little economic significance, it is the purpose of this legislation to assure a broader construction of the more fundamental provisions that are retained than has been given in the past. The Committee wish to make clear that the bill is not intended to revert to the Sherman Act test.

Accordingly, Congress amended the act so as to interdict acquisitions "where the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Recognizing this legislative intent, the Federal Trade Commission in *Pillsbury Mills, Inc.* made the following comments on the test of legality under amended section 7:

Section 7 . . . is directed toward adverse changes in competitive patterns that may result from mergers. It is concerned with the effects of acquisitions on the character of competition, with the maintenance of competition in every market to the end that business rivalry may produce better products at lower costs. [O]ne of the purposes of amended Section 7 was to reestablish the difference between Sherman Act and Clayton Act violations and to restate the legislative view, largely repudiated by the case law [citing *International Shoe Co. v. FTC*],

38 See, e.g., Temple Anthracite Coal Co. v. FTC, 51 F.2d 656 (3d Cir. 1931); V. Vivaudou, Inc. v. FTC, 54 F.2d 273 (2d Cir. 1931); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935).
39 8 F.2d 595 (7th Cir. 1925), rev'd on other grounds, 272 U.S. 554 (1926).
[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
42 50 F.T.C. 555 (1953) (interlocutory order).
43 Id. at 563.
Thus the amended act calls for no inquiry into the public interest generally. In fact such an inquiry would be totally inconsistent with the act, for it recognizes an overriding public interest in maintaining competition. This point was emphatically repeated in the *Erie Sand & Gravel Co.* case:

Respondent asserts that "public interest" is a relevant test under amended Section 7 and for this proposition cites cases decided before the 1950 amendment to Section 7. The cases mentioned are grounded in the language of *International Shoe Company v. Federal Trade Commission* . . . in which it was held that a showing of public injury is required in a Section 7, Clayton Act case as well as in a Sherman Act case. Congress, however, clearly did not intend the Sherman Act tests to apply in amended Section 7 cases. In amending Section 7, Congress determined, in effect, that the public interest requires corrective action where the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly "in any line of commerce in any section of the country." The court cases litigated under amended Section 7 have applied this statutory test. Thus, the pre-amendment cases are not controlling in determining whether the acquisition under consideration is a violation of Section 7, as amended, and respondent's contentions in this regard are clearly without merit.45

Hence, two important conclusions can be drawn at this stage of our inquiry:

(1) The cases cited as precedent for a failing-company "doctrine" actually announce no general "doctrine" at all. They do not exempt the acquisitions in question from the operation of the Clayton Act but merely apply Sherman Act tests to their specific facts. In other words, the failing condition of the acquired company was merely a fact used in assessing public interest in the acquisition. There was never, then, any basis in these cases for such a generalized per se rule as the failing-company "doctrine."

(2) Moreover, in an action brought under amended section 7 there is no place for such an inquiry into the public interest at large, for the statute now enunciates a transcendent public interest in preserving the competitive process. Thus the line of inquiry underlying what have been called the "precedent cases" has been completely foreclosed by the 1950 amendment. The rationale of these cases is therefore obsolete, and any attempt today to hang a legal doctrine on this peg is utterly ana-

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44 Id. at 566.
45 56 F.T.C. No. 6670 (Oct. 26, 1959). (Citations omitted.)
IV
LEGISLATIVE HISTORY OF AMENDED SECTION 7

However, this discussion has so far omitted one important item. It is still necessary to face up to the legislative history of the bill which in 1950 amended section 7 of the Clayton Act to its present form.\textsuperscript{46} In point of fact, this legislative history is the most compelling single reason for acknowledging the validity of a failing-company "doctrine." Appended to the House report on the proposed amendment is a series of questions and answers. The first is as follows:

1. Would the bill prevent a corporation in failing or bankrupt condition from selling its assets to a competitor?

   The argument that a corporation in bankrupt or failing condition might not be allowed to sell to a competitor has already been disposed of by the courts. It is well settled that the Clayton Act does not apply in bankruptcy or receivership cases. In the case of International Shoe Co. v. The Federal Trade Commission the Supreme Court went much further, as is shown by the following excerpt from the decision: (Quoting final paragraph of International Shoe).\textsuperscript{47}

   It is perhaps significant that this entire appendix is taken verbatim from an earlier congressional document.\textsuperscript{48} It might be rash to place too much emphasis on this circumstance, but analysis suggests that the confusion which attends the legislative history of amended section 7 might be merely a product of congressional inadvertence. The 1950 amendment of section 7 did two things: (1) it extended the scope of the section to include acquisitions of assets; and (2) it altered the statutory test. If only the first of these changes had been made, one might reasonably have asked whether the acquisition of the assets of a failing firm would receive the same treatment under the amended section as stock acquisitions had received in the past. And obviously since the statutory test would have been unchanged, the answer would be "yes." It would appear that this is in fact the question which is asked and answered in the congressional reports.

   The Senate report of 1950\textsuperscript{49} is merely a paraphrase of the House report of 1949. The language of the House report of 1949, as pointed out above, is taken verbatim from a House report of 1947. The language of the 1947 and 1949 House reports is, in turn, adapted from a letter of William T. Kelley, then General Counsel of the Federal Trade Com-

\textsuperscript{46} H.R. 2734, 81st Cong., 1st Sess. (1949).
\textsuperscript{47} H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949).
\textsuperscript{48} H.R. Rep. No. 596, 80th Cong., 1st Sess. 5-6 (1947).
\textsuperscript{49} S. Rep. No. 1775, 81st Cong., 2d Sess. 7 (1950).
mission, to Congressman Gwynne. The 1947 bill on which Mr. Kelley was commenting, would, at the time of his letter, have simply amended section 7 to include asset acquisitions. Mr. Kelley had been asked whether, after such an amendment, acquisition of the assets of a failing firm would be treated as the acquisition of stock of a failing firm had been treated in the past. He answered that it would, since the amendment in no way impugned the principles on which *International Shoe* had been decided. This position was unquestionably correct; and it is quite understandable that the subcommittee was sufficiently concerned about the question to seek Mr. Kelley's advice, since the statutory test of the 1947 bill would have expressly forbidden a firm to acquire the assets of a competitor and would thus have made a bankruptcy sale virtually impossible if the statute were literally applied. But, however appropriate it might have been in its context, Mr. Kelley's opinion became absolutely irrelevant when incorporated into reports on a bill which changed the test of section 7.

The Senate report on the amendment to the Eighty-first Congress elaborated on what the House had offered:

The argument has been made that the proposed bill, if passed, would have the effect of preventing a company which is in a failing or bankrupt condition from selling out.

The committee are in full accord with the proposition that any firm in such a condition should be free to dispose of its stock or assets. The committee, however, do not believe that the proposed bill will prevent sales of this type.

The judicial interpretation on this point goes back many years and is abundantly clear. According to decisions of the Supreme Court, the Clayton Act does not apply in bankruptcy or receivership cases. Moreover, the Court has held, with respect to this specific section, that a company does not have to be actually in a state of bankruptcy to be exempt from its provisions; it is sufficient that it is heading in that direction with the probability that bankruptcy will ensue. On this specific point the Supreme Court, in the case of *International Shoe Co. v. Federal Trade Commission* . . . said: (Quoting final paragraph of *International Shoe*).

These are the only references to this matter in the Committee reports. Substantially the same position was taken by Representative Celler during a colloquy with Senator Donnel in Senate hearings on the bill.

But if the foregoing analysis is correct, it would be paradoxical indeed

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50 Hearings on H.R. 515 Before Subcommittee No. 2 of the House Committee on the Judiciary, 80th Cong., 1st Sess. 12 (1947).


to have to hold, on the basis of these reports, that one must interpolate into the statute an absolute defense which is neither expressed nor implied in the language of the statute. If these reports were to be so construed, it would necessarily follow that they contain an inherent contradiction in expressly rejecting the Sherman Act test of International Shoe on the one hand, while on the other hand predicting that a "rule" formulated in International Shoe on the basis of the test will remain applicable. Such a position would be patently untenable. It can be avoided only by recognizing that the primary fact emerging from the legislative history of the amended act is the intent of Congress to reject Sherman Act tests in favor of a new standard. This must be regarded as the essential point of innovation; all other related expressions of congressional intent are subsidiary to this broad intent and should be interpreted in light of it. Thus it may—and must—be assumed that the language cited here from the legislative history does not express an expectation that the standards of International Shoe will be used in future cases involving the acquisition of a failing firm, or that a per se rule will be used which is merely a generalization of the conclusion of that case.

Congressional accord with the proposition that a failing firm should be free to dispose of its stock or assets must mean, in the absence of any specific reference to such a situation in the statute itself, that the failing or bankrupt condition of an acquired firm is to be one of the factors used in defining the impact of an acquisition on competition. Thus the intent of Congress is not to create an exception to the test of amended section 7, but merely to point out a specific situation to which that test will be applied.

53 A plausible argument can be made for circumventing this entire problem by denying the propriety of recourse to legislative history in the case of a failing company. The failing-company problem sought to be resolved by reference to the legislative history of amended section 7 is, in fact, not the product of ambiguity in the statute but of ambiguity in the legislative history itself. In other words, the legislative history is not being used to clarify an ambiguous statute but to introduce an inconsistency into a statute which is, in this one respect at least, clear and unambiguous on its face. Section 7 assumes that the same test will be applied in judging the legality of all acquisitions. It declares that where this statutory test applies, "no corporation" shall acquire the stock or assets of "another corporation." The suggestion that Congress may have intended certain exemptions from the application of this test arises not from the statute but from the legislative history. The language of the Supreme Court in United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929), indicates that recourse to that legislative history would therefore seem improper:

[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed.
CONCLUSION

In rejecting the failing-company "doctrine" and the Sherman Act tests of *International Shoe*, it is not declared that the bankrupt or failing condition of an acquired firm is irrelevant to a section 7 proceeding. In *Pillsbury Mills, Inc.* the Commission had this to say about proof of injury to competition under amended section 7:

Analysis of the competitive effects of an acquisition should begin, we believe, with the relevant facts concerning the competitive pattern of the industry as a whole and its markets, particularly in the period preceding the acquisition. From such facts, and from information about the specific merger, it should be possible to determine what changes the acquisition can be expected to make in the character of competition in the markets concerned.54

One of these "facts" might certainly be—and there is no need to conjure up hypothetical examples—the financial distress of the acquired company. But this "fact" may be used in formulating an answer to only one question: May the effect of the acquisition "be substantially to lessen competition or to tend to create a monopoly?" And there is no a priori reason to assume that, under such circumstances, this question will invariably be answered in the negative.

The sort of inquiry that is appropriate is totally devoid of the conceptualism and dogmatism implicit in the failing-company "doctrine"; it is a pragmatic, case-by-case investigation of the "changes the acquisition can be expected to make in the character of competition in the markets concerned."55 Thus it may be that the acquisition of a company whose bankruptcy is inevitable can be a "neutral" commercial transaction devoid of any anti-competitive effects. But that a specific acquisition is in fact such a "neutral" transaction cannot properly be determined as a matter of law through the application of a per se rule. This "neutrality" is the *Q.E.D.* of a section 7 proceeding.

54 50 F.T.C. 555, 571-72 (1953) (interlocutory order).
55 Ibid.
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NOTE

SECTION 1503 AND THE ADMINISTRATION OF JUSTICE—
INTERPRETATIONS AND IMPLICATIONS

INTRODUCTION

In 1826 a judge in the United States District Court in Missouri held one Luke Lawless, an attorney, in contempt of court for writing a series of articles criticizing one of his decisions.\(^1\) The widespread publicity given this unrestrained use of the contempt power inflamed public opinion, which in turn contributed to the congressional decision to pass the Act of March 2, 1831.\(^2\) Section one of the act limited the broad contempt powers of the Federal Judiciary;\(^3\) section two transferred to the Executive the power to prosecute by criminal indictment those acts now outside the contempt power of the court.\(^4\) Section two, except for minor amendments,\(^5\) was re-enacted as Section 1503 of Title 18 United States

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\(^1\) For a full description of the proceedings, see Stansbury, Trial of James H. Peck (1833).

\(^2\) Ch. 99, 4 Stat. 487.

\(^3\) Section one provided:

'[T]he power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.

\(^4\) Section two provided:

'[I]f any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

\(^5\) (1) The first modification of section two of the Act of March 2, 1831, resulted from the passage of the Act of June 10, 1872, ch. 420, 17 Stat. 378, which specified that jurors within the meaning of the statute included both grand and petit jurors. This act also raised the maximum penalty for tampering with a witness or juror to six months imprisonment or a fine not exceeding $1,000 or both.

(2) Section two of the Act of March 2, 1831, was subsequently codified into Rev. Stat. § 5399 (1875), and the Act of June 10, 1872, became Rev. Stat. § 5404 (1875).

(3) Because sections 5399 and 5404 were so closely related in subject matter (see S. Rep. No. 10, 60th Cong., 2d Sess. 19 (1909)), they were consolidated into section 135 of the Criminal Code by the Act of March 4, 1909, ch. 321, § 135, 35 Stat. 1113. The most

101
Code, the section under consideration in this note.6

United States v. Bonanno7 arose out of a recent and well-known meeting of suspected underworld leaders at Apalachin, New York. Those attending the meeting were indicted for conspiracy to frustrate grand jury proceedings by resort to evasion, lies or silence, thereby obstructing the due administration of justice in violation of section 1503. Since, as noted, section 1503 (originally section two) embraced only those acts formerly subject to the contempt powers of the court,8 the successful prosecution in Bonanno under section 1503 graphically illustrates the extent to which the courts have amplified its meaning and purpose. This tendency to broaden the scope of section 1503 far beyond its original bounds has introduced into the administration of justice complex problems of statutory interpretation as well as significant constitutional issues.

This note will attempt to develop the history of the Act of 1831 by which section two, or the present-day section 1503, achieved a status independent of section one. Against this background, the cases construing each clause of section 1503 will be compared in an effort to bring to the fore the varied and at time labyrinthine problems raised under the statute. In the process, a number of solutions will be proposed.

Notable change in section 135 was inclusion of the language: “when a matter is pending before any United States Commissioner or an officer acting as such commissioner.” This addition was made necessary by the narrow construction given the statute by Todd v. United States, 158 U.S. 278 (1895), in which actions before commissioners were held non-judicial proceedings.


(5) By the Act of June 8, 1945, ch. 178, 59 Stat. 234, due to the request of Attorney General Biddle, section 135 was amended so that tampering with former witnesses, jurors or court officers, on account of their acting in such capacity, became violative of the statute.

(6) The Act of June 25, 1948, ch. 645, 62 Stat. 769, enacted 18 U.S.C. into positive law, codifying under this title former section 135 as section 1503. Only a minor alteration in wording was made, “officers acting as such commissioners” being changed to “other committing magistrate.”

6 The Obstruction of Justice chapter (73) of 18 U.S.C. includes 8 sections: Section 1501—Assault on a process server; Section 1502—Resistance to extradition agent; Section 1503—Influencing or injuring officer, juror or witness generally; Section 1504—Influencing a juror by writing; Section 1505—Influencing or injuring witnesses before agencies and committees; Section 1506—Theft or alteration of record or process; false bail; Section 1507—Picketing or parading; Section 1508—Recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting.


I

HISTORY OF SECTION ONE

The power of the several courts of the United States to . . . inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts or so near thereto as to obstruct the administration of justice . . . .

The incident that gave immediate rise to the Act of 1831 was the celebrated Peck-Lawless case which shed new light on the contempt power of the federal courts and the abuses to which it was subject. Lawless had written a series of articles criticizing one of Judge Peck's decisions and was cited for contempt by Judge Peck in a proceeding marked by obvious rudeness and bias. Prompted by the injustice of the situation, Congress impeached Judge Peck but failed to remove him from the bench because ample authority for his action was found in the broad provisions of the Judiciary Act of 1789. However, the possibility of further abuse under the provisions had not failed to arouse congressional concern. Scarcely one month later, Congress passed the Act of March 2, 1831, the first section of which removed from the contempt power of the federal courts all conduct except "misbehaviour . . . in the presence of the . . . courts or so near thereto as to obstruct the administration of justice."

Ex parte Poulson was the first case in the federal courts to construe section one. Though questioning the legislative wisdom of the act, Poulson held that under section one Congress manifestly intended to limit the court's summary jurisdiction over contempts, and it was therefore not for the courts to give the section contrary effect. The Supreme

9 Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.
10 Stansbury, op. cit. supra note 1.
12 The Supreme Court, interestingly enough, rejected Judge Peck's narrow interpretation and reversed the criticized case, Soulard v. United States, 29 U.S. (4 Pet.) 312 (1830), generally adopting the reasoning set forth by Lawless in his article.
13 Ch. 20, § 17, 1 Stat. 83. It provides: "That all the said courts of the United States shall have the power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same . . . ."
Court in *Ex parte Robinson*\(^\text{16}\) gave similar meaning to section one: "[T]he power of these [federal] courts and the punishments of contempts can only be exercised to insure order and decorum in their presence, to secure faithfulness on the part of their officers in their official transactions, and to enforce obedience to their lawful orders, judgments, and processes."\(^\text{17}\) Under *Poulson* and *Robinson*, therefore, section one would permit the contempt power to be exerted only upon those acts directly connected with the courtroom drama. Despite the limitations thus imposed on the courts, two interpretations of section one subsequently arose—both at variance with this earlier precedent.

The first appeared in a number of cases which sought to confine the Act of 1831 to its historical setting. In an effort to retain their historically broad contempt powers, the courts in these cases construed section one to prohibit the exercise of the contempt power only in a *Peck-Lawless* situation.\(^\text{18}\) The second interpretation, appearing for the first time in *United States v. Anonymous*,\(^\text{19}\) denied that Congress intended to impose geographical limitations on the court’s power and held that under section one any act was sufficiently “near” the court if it obstructed the administration of justice. Following the same line of reasoning, *Toledo Newspaper Co. v. United States*\(^\text{20}\) further expanded the limited use of the contempt power that section one originally envisioned. The Supreme Court in *Toledo* rejected what had been implicitly established in *Poulson* and *Robinson* and stated that sections one and two were merely alternative sanctions: "[T]here can be no doubt that the provision [section one] conferred no power not already granted and imposed no limitations not already existing. In other words, it served but to plainly mark the boundaries of the existing authority resulting from and controlled by the grants which the Constitution made and the limitations which it imposed."\(^\text{21}\) The Court further held that any conduct which obstructed or tended to obstruct the due administration of justice—irrespective of where it occurred—could be punished under the contempt power.\(^\text{22}\) In effect, the Supreme Court nullified the con-

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16 86 U.S. (19 Wall.) 505 (1873).
17 Id. at 511.
18 E.g., In re Independent Publishing Co., 240 Fed. 849, 854 (9th Cir. 1917).
20 247 U.S. 402 (1918).
21 Id. at 418. (Emphasis added.)
22 Id. at 421.
gressional limitations of 1831, and returned to the federal courts the full measure of their original contempt power.

Persuasive criticism of the Toledo decision soon followed. It was left to the Supreme Court, however, in the landmark case of Nye v. United States, to reject the rationale of Toledo by refusing to give the words “so near thereto as to obstruct the administration of justice” a causal significance: “It is not sufficient that the misbehavior charged has some direct relation to the work of the court. ‘Near’ in this context juxtaposed to ‘presence,’ suggests physical proximity not relevancy. In fact, if the words ‘so near thereto’ are not read in the geographical sense, they come close . . . to being surplusage.” In the course of its decision, the Court laid down a body of rules as to what acts remain subject to the contempt power under section one, and relegated to the sanctions of section two all those acts now outside the contempt power. The Court concluded that under section one the congressional intent in 1831 was not only to limit severely the contempt power of the federal courts, but also to make all misconduct formerly subject to this power now amenable to criminal prosecution under section two. With this opinion, the Supreme Court recognized that there exists an entire category of offenses punishable only under section two—the present-day section 1503.

II
PROBLEM AREAS OF SECTION 1503

The statute under consideration reads as follows:

Section 1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or

23 Frankfurter and Landis, Power of Congress Over Procedure In Criminal Contempts in “Inferior” Federal Courts—A Study In Separation of Powers, 37 Harv. L. Rev. 1010, 1029-38 (1924). In Coll v. United States, 8 F.2d 20 (1st Cir. 1923), the court decided that an attempted bribe of a witness four miles from the courtroom, when the court was not in session, did not fall within the reach of the court’s contempt power.

24 313 U.S. 33 (1941), 1 Bill of Rights Rev. 303.

25 Id. at 49.
injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on the account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.26

For purposes of this study, section 1503 is divided into two parts: the "first part" and the "omnibus clause." The first part, indicated above by the non-italicized portion, makes specific reference to the individual participants of the courtroom drama, for example, judges, jurors, and witnesses, the "corrupting" of whom will obstruct the administration of justice; the omnibus clause, in italics, mentions no specific way in which the administration of justice will be obstructed, but prohibits generally any obstruction to the administration of justice. Hence, violations of the first part of the section are by definition violations of the omnibus clause, while, conversely, not all that violates the omnibus clause necessarily infringes the specific prohibitions of the first part. This conclusion is borne out in subsequent pages of this note through a study of the important clauses of the statute and the problems raised by each, followed by a separate discussion of the omnibus clause. Questions arising under the federal conspiracy statute in prosecutions for conspiracy to violate section 1503 and fifth amendment problems in section 1503 cases are also given individual treatment.

1. Corruptly

Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness . . . or corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due administration of justice shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The term "corruptly" introduces the first significant problem raised by the language of section 1503. A literal reading of the statute would seem to indicate that the mere commission of the prohibited acts does not of itself constitute a violation. That a mens rea of one kind or another is also required may be inferred from the decision in Martin v. United States.27 Here the court, in what shall later be referred to as the "improper motive" test, defined "corruptly" as improper motive, prompted either by the desire to aid another or by the hope of pecuniary

27 166 F.2d 76 (4th Cir. 1948).
reward. Additional support for the requirement of mens rea may be found by comparing section 1503 and section 1504. The latter section, which prohibits written communication with jurors upon any issue or matter pending before them, significantly omits the word "corruptly" and hence is violated by the commission of the overt act alone. Although the Fourth Circuit, in noting the distinction between the sections, has thus inferred the necessity of improper motive, the courts in many other circuits have apparently overlooked the term "corruptly" and have construed section 1503 otherwise.

Illustratively, the court in Astwood v. United States indicated the sufficiency of an indictment under section 135 (now section 1503) of the Criminal Code when it stated: "Where a specific intent is not an essential element of the offense and the act necessarily includes the intent, it is sufficient to allege the act constituting the crime in apt and technical terms, because from such act the intent will be inferred without express averment." In so far as the Astwood court demands only an overt act for a violation of section 1503, it is difficult to justify the presence of the word "corruptly" in the statute. Part and parcel with the questionable reasoning employed in Astwood was that of Bosselman v. United States. There the court answered defendant's contention that his conduct was not "corrupt" within the meaning of the statute thus: "The word 'corruptly' is capable of different meanings in different connections. As used in this particular statute, we think any endeavor to impede and obstruct the due administration of justice in the inquiries specified is corrupt."

In both Astwood and Bosselman the facts would justify a finding of

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28 Id. at 79. In the Fifth Circuit, the proof of corruption has been held to be in the intent. Tyson v. United States, 54 F.2d 26 (5th Cir. 1931), cert. denied, 285 U.S. 551 (1932) (evil intent); Johnston v. United States, 87 Fed. 187 (5th Cir. 1898) (corrupt intent).
31 1 F.2d 639 (8th Cir. 1924).
33 1 F.2d at 642; see Seawright v. United States, 224 F.2d 482 (6th Cir. 1955). Here the court held the "indictment" sufficient even though the statutory word "corruptly" was omitted. This appears correct as long as the holding is restricted to the indictment and not extended to the instructions at trial.
34 239 Fed. 82 (2d Cir. 1917).
35 Id. at 86. (Emphasis added.) Accord, Broadbent v. United States, 149 F.2d 580, 581 (10th Cir. 1945).
corrupt intent to obstruct the due administration of justice, but valid criticism may be leveled at the "overt act" theory on which the decisions are based. Situations exist in which the role of motivation and intent may well be a decisive factor. When an attorney, for example, approaches a prosecutor and requests him to enter a nolle prosequi, it would appear that unless there were some inquiry into his purpose, the attorney has obstructed the administration of justice by merely making the request. A parallel situation was presented in United States v. Polakoff. Polakoff had approached the district attorney, a friend of his, and requested that a criminal case be brought before another judge. As a bit of added persuasion, he fabricated that the defendant in the criminal case was bonded by him. Polakoff was subsequently convicted of conspiracy to obstruct the administration of justice. The court stated: "That endeavor was corrupt because it was a fraud. . . . To misrepresent one's motives in such an effort is really a fraud." Thus Polakoff's act violated the statute because of the falsehood employed. However, given the same set of facts, absent falsehood or fraud, it appears that the Polakoff court would not have found a violation in attempting to bring a case before a more lenient judge. It is only when such acts are accompanied by corrupt intent that the statute is violated.

Somewhere between the "overt act" theory of Astwood and Bosselman and the "improper motive" test mentioned earlier, one case appears to have struck a middle ground, Caldwell v. United States. Defendant in Caldwell was convicted of corruptly endeavoring to obstruct the due administration of justice because he sought to influence another to obtain information from petit jurors before return of their verdict. The district court charged the jury "as a matter of law, that if any person endeavors to ascertain the feelings or opinions of jurors while they are sitting in a case and prior to their verdict, that is a corrupt endeavor to obstruct or impede the due administration of justice." The court of appeals characterized this charge of the lower court as overly broad and noted that "attempts by some persons in some circumstances to ascertain the feelings or opinions of jurors in a pending case might not be corrupt endeavors to obstruct or impede justice." Although declining to remand the case because of harmless error, the court proposed a

36 121 F.2d 333 (2d Cir.), cert. denied, 314 U.S. 626 (1941).
37 Id. at 335.
39 Id. at 36, 218 F.2d at 371.
40 Id. at 37, 218 F.2d at 372.
basis worthy of consideration in solving the problem of *mens rea*. This basis will be referred to as the "justification, excuse, or privilege" test; *i.e.*, where one commits an overt act that falls within the sanctions of section 1503, he violates the statute unless he can show circumstances creating justification, excuse or privilege.41

By comparison, this last test would appear superior to the "overt act" or "improper motive" bases for determining *mens rea*. "Overt act" in obviating the need for corrupt intent, fails to comport with the principle that criminal statutes are to be strictly construed.42 "Improper motive" is essentially subjective and therefore difficult to apply. The "justification, excuse, or privilege" test recognizes the necessity of corrupt intent for any violation of the statute and provides an objective method whereby it may be ascertained. Assuming a hypothetical set of facts, it may be shown that the application of "improper motive" criteria is less objective and leads to far different results than application of the "justification, excuse, or privilege" test. Assume, for example, that A, B and C who have been jointly involved in crime, are called before a grand jury and there, in accord with a prior agreement, urge one another to remain silent. In such circumstances a clear case of obstructing the administration of justice can be made because the parties, motivated by self-interest, have frustrated the inquiry of the grand jury. Violations have in fact been upheld in similar situations on the basis of the "improper motive" test.43 However, had the parties been given opportunity to show justification, excuse, or privilege, a conviction for the same offense would probably not be sustained, for urging another to assert his constitutional right not to testify is a legitimate defense in multi-party prosecutions.44 If in effect a particular concept of corrupt intent, such as "improper motive," invalidates a recognized legal defense—and, a fortiori, this would be true of "overt act" which ignores intent—it is submitted that corrupt intent be re-defined as the absence of justification, excuse or privilege.

The "justification, excuse, or privilege" test may perhaps be criticized as shifting the burden of proof to defendant in a criminal case. However, in view of the subsequent section (1504) which likewise protects the administration of justice but requires for violation only commission

41 Ibid.
42 Todd v. United States, 158 U.S. 278, 282 (1895).
44 See United States v. Herron, 28 F.2d 122 (N.D. Cal. 1928).
of the overt act, the burden on defendant to go forward in his own behalf does not appear unreasonable. Furthermore, any procedural disadvantage suffered in the process is ultimately counterbalanced by the protection afforded thereby.

2. **Witnesses**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States . . . .

One of the purposes of section 1503 is to safeguard the mental and physical integrity of witnesses in the interests of the due administration of justice. A literal interpretation of the phrase "witness in any court of the United States" would seem to indicate that the term "witness" refers to one presently testifying or subpoenaed to testify in a judicial proceeding. However, so narrow a construction falls short of the purpose of the statute, and the courts have accordingly attached wider significance to the term. In Smith v. United States, for example, one Bohannon, who was not under subpoena, was physically accosted on the way to the courtroom by defendant Smith who was subsequently convicted for a violation of section 135 (now section 1503) of the Criminal Code. Smith contended that Bohannon was not a witness within the meaning of the statute because he was under neither subpoena nor any other direction of the court to appear. The court of appeals rejecting the contention stated:

The terms of the statute, the evil it was enacted to prevent, and the protection it was intended to provide, leave no doubt that under its true interpretation each of those who are subpoenaed to come, of those who are called and accept the call to come without subpoenas, of those who are prompted to come by their interests, of those who expect to come, and of those who are selected and expected to come to testify . . . falls within the class described by the terms "any witness, in any court of the United States," . . . .

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46 E.g., Catrino v. United States, 176 F.2d 884 (9th Cir. 1949). It is noted, however, that section 1503 does not create a civil cause of action against the one injuring a witness. O'Dell v. Humble Oil & Ref. Co., 201 F.2d 123 (10th Cir.), cert. denied, 345 U.S. 941 (1953).
47 It should be noted that this statute applies to both criminal and civil proceedings, "in any court of the United States." E.g., Wilder v. United States, 143 Fed. 433 (4th Cir. 1906), cert. denied, 204 U.S. 674 (1907).
48 274 Fed. 351 (8th Cir. 1921); see Odom v. United States, 116 F.2d 996, 998 (5th Cir.), rev'd and remanded per curiam, 313 U.S. 544 (1941).
49 274 Fed. at 353.
In support of this broad definition of the term “witness” the court noted that the congressional purpose underlying the statute was not to charge witnesses with a duty or liability, but rather to protect them and thereby enhance the due administration of justice. To the same end, a witness is shielded from corrupt influences even after he has testified.  

A close question arises, therefore, as to what state of mind is necessary to make one a witness within the meaning of the statute when he has been neither selected, designated, nor subpoenaed to appear. The importance of the answer may be seen in *Berra v. United States;* where defendant objected that the government’s evidence failed to prove that Schmidt (alleged witness) was in fact a witness under section 1503. The evidence showed that during the period of February 21-23, 1954, defendant tried to influence Schmidt to destroy certain business records which were important to the Internal Revenue Service. Schmidt testified that it was a month later, March 18, that he first met revenue agents conducting the investigation and still another month before Schmidt was subpoenaed to testify before a grand jury. The government urged that if the defendant had reasonable grounds to believe that Schmidt would be called before the grand jury, then Schmidt was a witness within the meaning of the statute. The court, adopting the language of the *Smith* case, rejected the government’s contention. Because Schmidt had yet to be contacted by government agents, the court held that prior to this time he could not have intended, desired or expected to testify before the grand jury and thus was not a witness. Hence, the endeavor to influence a potential witness, regardless of corrupt intent, does not violate section 1503 unless the government proves that the potential witness so influenced had intended, desired or expected to testify.

This technical concept of witness introduces close issues of fact into the administration of justice, which perhaps may be better served in most instances by a more practical definition. Suppose A, for example, were an eyewitness to a federal offense. After judicial proceedings are initiated, B confronts A and attempts to persuade A not to testify. If A had intended or desired to appear as a witness at the time of B’s ap-

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50 The statute was amended in 1945 to provide protection to any party or witness “on account of his attending or having attended” court, and to the juror “on account of his being or having been a juror.” Ch. 178, 59 Stat. 234 (1945). (Emphasis added.) O’Dell v. Humble Oil & Ref. Co., 201 F.2d 123, 127 (10th Cir.), cert. denied, 345 U.S. 941 (1953); see McCarthy v. Zerbst, 85 F.2d 640, 642 (10th Cir.), cert. denied, 299 U.S. 610 (1936).

51 274 Fed. 351, 353 (8th Cir. 1921).

52 221 F.2d at 596-97.
approach, A would have been a witness deserving of protection under section 1503. But absent intent or desire, the status of A as witness would depend on an expectation to testify. Whether B then violates the statute depends on the meaning of expectation—a state of mind inherently subjective and difficult to establish. It is submitted that the mere knowledge of any facts material to the prosecution of an offense would give rise to a reasonable expectation on the part of A to testify, and hence B, in the hypothetical proposed, would have violated the statute. This position has definite advantages in that it removes from trial the subjective issues of intent, desire, or expectation. Furthermore, if the threat to a potential witness were sufficiently strong, he might never admit to such desire or expectation, and the aim of section 1503—to protect witnesses—would be thereby frustrated. Hence any extension of the term “witness” to include even the least potential witness would seem to comport with the underlying purpose of the statute.\(^{54}\) It is essential to the due administration of justice to overcome whatever fears and natural reluctance the public may have in coming forward to testify in criminal proceedings.

The broad scope of the term “witness” must be limited, however, where the potential witness may himself be a party-defendant. Assume, for example, that A, B and C have been jointly indicted for a violation of the federal narcotics law. B and C (co-defendants) then approach A and tell him to lie about certain facts. At the time B and C approached A, have they so tampered with a witness as to violate section 1503? The answer depends on whether A is a witness. Even though A knows, by assumption, facts material to a prosecution, the test set forth above as to expectation is not applicable in determining his status. Because A is not only a potential witness but also a defendant, he enjoys a constitutional right not to testify and therefore may never become a witness. *Walker v. United States*\(^ {55}\) suggested one solution to the problem on a similar set of facts. There the test of witness *vel non* was whether the witness-defendant, at the time he was approached by his co-defendants, intended to waive his constitutional right not to testify.\(^ {56}\) Had he so intended, he would have been a witness and his co-defendants would be

\(^54\) Of course any extension is limited by the scope of a “court proceeding.” Odom v. United States, 116 F.2d 996 (5th Cir.), rev’d and remanded per curiam, 313 U.S. 544 (1941). Thus a person cannot become a witness until a complaint is filed with a United States Commissioner. United States v. Bittinger, 24 Fed. Cas. 1149 (No. 14598) (W.D. Mo. 1876).

\(^55\) 93 F.2d 792 (8th Cir. 1938).

\(^56\) Id. at 795; see Samples v. United States, 121 F.2d 263, 266 (5th Cir.), cert. denied, 314 U.S. 662 (1941).
subject to prosecution for obstructing the due administration of justice. Absent such intention, he is not a witness, even though he may later decide to testify. Any attempt by his co-defendants to coerce or influence him either by subtle persuasion or force could not be construed as "endeavors to influence, intimidate, or impede any witness" within the meaning of section 1503. It is legally impossible to obstruct the administration of justice by tampering with a potential witness, who is also a defendant, unless that defendant has decided to take the stand. This is not to say, however, that a conviction for violation of section 1503 would not be possible under the omnibus clause. 67

Unfortunately, the Walker decision, which thus established the rule that the intention to testify by a potential witness-defendant is paramount, does not answer the following problem often likely to arise: If A, intending not to testify, is offered favorable treatment by the Government in return for his testimony, does he then, upon forming the intent to testify, become a witness such that subsequent efforts by his co-defendants B and C to dissuade him from testifying violate section 1503? Two solutions are possible: (1) If it is held that A must have formed the intent to testify prior to being approached by the Government, then no act or attempt by B and C, regardless of its nature, can violate the statute. (2) If, on the other hand, it is only necessary that A form his intent to testify prior to being approached by B and C, then he is a witness and any wrongful attempt to prevent his testimony is criminal. Both solutions are not without their difficulties.

The first, because it precludes a violation of the first part of section 1503 by B and C, would permit them to use not only exhortation and persuasion, but even physical violence to keep A from testifying; the second, because it prevents virtually any association between co-defendants, deprives B and C of the right to counsel A in the use of his fifth amendment rights. The source of both difficulties would appear to lie in the emphasis placed on A's intent to take the stand. It is submitted that whenever physical force is employed to prevent one from being a witness, even if employed by co-defendants, the first part of section 1503 is violated. Any extension of the term "witness" in this respect fulfills a primary purpose of the statute—to ensure the bodily

67 See United States v. Meltzer, 100 F.2d 739, 741 (7th Cir. 1938). In United States v. Mannarino, 149 F. Supp. 351 (W.D. Pa. 1956), the Government used the omnibus clause instead of part one of the statute. This permitted the prosecution virtually to disregard the status of the alleged "witness" and merely concentrate on the broader charge of endeavoring to obstruct justice. See Berra v. United States, 221 F.2d 590 (8th Cir. 1955), aff'd on other grounds, 351 U.S. 131 (1956).
integrity of witnesses. On the other hand, the attempt to persuade one's co-defendant to invoke his fifth amendment right not to testify, would not seem to violate the first part of section 1503 since the original purpose of the statute was not to deprive co-defendants of any right legally recognized as a defense in multi-party prosecutions.  

Where neither force nor legitimate counsel is employed, but other means such as bribery, lies, or promises are used to prevent one from testifying, it is suggested that emphasis be placed not on the nature of the wrongful attempt but on the intent of the potential witness to testify. If a defendant intends to testify, without having been first encouraged to do so by the Government, then any attempt by co-defendants to prevent his testimony, other than the exhortation to invoke the fifth amendment, violates the first part of section 1503. On the other hand, when the Government has first requested a defendant to testify, it would seem just to permit co-defendants to employ at least counterpromises to dissuade him from taking the stand. To hold otherwise would allow the Government an undue advantage in that it may offer favorable treatment to one defendant to secure his testimony, while his co-defendants may exert no effort to prevent his becoming a witness against them.

In every prosecution for corruptly influencing a witness, another essential part of the Government's case is to establish the corrupt intent discussed earlier. However, in establishing this corrupt intent it is not necessary to prove that the witness was actually known to be such; all that is required is a reasonable belief that the person approached was a witness. This belief may be circumstantially inferred by the jury from facts elicited at trial. On the other hand, it must be shown that the assault or attempted influence upon the witness was carried out because of the victim's status as a witness and not for wholly collateral reasons.

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59 Broadbent v. United States, 149 F.2d 580 (10th Cir. 1945); Odom v. United States, 116 F.2d 996 (5th Cir.), rev'd and remanded per curiam, 313 U.S. 544 (1941); Kloss v. United States, 77 F.2d 462 (8th Cir. 1935).

60 Odom v. United States, supra note 59.

61 Kloss v. United States, 77 F.2d 462 (8th Cir. 1935); United States v. Kee, 39 Fed. 603 (D.S.C. 1889). But see Smith v. United States, 234 F.2d 385 (5th Cir. 1956). Here defendant's conviction for intimidating a witness was upheld, even though any intimidation, if in fact there was any, appears to have been wholly collateral. The dissenting opinion offers an excellent rebuttal. Id. at 394-97.
3. **Jurors**

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede . . . any *grand or petit juror* . . . or injures any such *grand or petit juror* in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such *juror* . . . .

Unless jurors are fully shielded in the discharge of their duties, fear of reprisal may inhibit public willingness to serve on federal juries and thereby obstruct the due administration of justice. Accordingly, the courts, by a liberal construction of the word "juror" in section 1503, have protected individuals from the moment they are summoned to jury duty. In *Calvaresi v. United States*, for example, defendant contended that section 1503 did not extend to prospective jurors or jurors summoned on panels, but rather was limited to jurors actually selected and sworn to try the case under indictment. The court decidedly rejected defendant's position when it stated:

> It is difficult to believe that Congress in the passage of this Act intended to protect the inviolability of twelve men, after they had been selected from a jury panel and had been sworn and placed in the jury box, yet permit one with impunity to corrupt them with bribes and offers of bribes while a member of the jury panel, but before they had been selected in a particular case.

In order to remove from the jury all obstacles to complete freedom of action, Congress in 1945 extended the same protection to those who had completed jury duty.

4. **Omnibus Clause**

Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Because of its all-encompassing scope, this part of section 1503 has been termed the "omnibus clause." No specific acts are set out by which the administration of justice will be obstructed. Under the principle of *ejusdem generis*, it would appear initially that the sweeping language of the omnibus clause is to be confined to the specific violations enumer-

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64 216 F.2d 891 (10th Cir. 1954), rev'd and remanded per curiam, 348 U.S. 961 (1955).
65 Id. at 898.
66 See authorities cited note 50 supra.
67 2 Sutherland, Statutory Construction §§ 4908-09 (3d ed. 1943).
ated in the first part of the statute. Unfortunately, only a few courts have followed this rule of construction, and any act, if accompanied by corrupt intent, which obstructs the due administration of justice violates section 1503. The meaning of the "due administration of justice" is essential, therefore, since it imposes the only limitation on the "dragnet" effect of the omnibus clause.

The due administration of justice has been defined as follows:

Justice is administered, in the sense of this statute, only by bringing rights or wrongs, and the persons or things concerned in them, before a judicial tribunal, and there dealing with each particular case as it arises. Every instrumentality or power, the exercise of which is proper or necessary to the accomplishment of any of these ends, is part and parcel of "the due administration of justice."70

This definition clearly establishes that under the omnibus clause, it is legally impossible to find an obstruction to the due administration of justice before a judicial proceeding has been instituted, i.e., before a complaint has been filed, for prior to that time, no justice is being administered. Despite the limitation thus imposed on the use of the omnibus clause, the Government has attempted at times to prosecute under its broad scope well in advance of judicial proceedings. For example, in United States v. Scoratow, the government charged Scoratow with intimidating certain of their informants and a federal grand jury indicted him for obstructing the investigations of the Federal Bureau of Investigation in violation of section 1503. The district court, dismissing the indictment, held that such investigations were not judicial proceedings within the meaning of the statute. In Haili v. United States, the government contended that any interference with the terms and conditions under which a convict is released on probation violates the omnibus clause. The appellate court, reversing for defendant, refused to extend the statute to proceedings after conviction—again illustrating

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68 Haili v. United States, 260 F.2d 744 (9th Cir. 1958).
71 Ibid.; United States v. Armstrong, 59 Fed. 568 (S.D. Cal. 1894). Originally, the terms "judicial proceeding" did not encompass grand jury investigations; however, such an extension was made in 1872 by an amendment to the original statute. Ch. 420, 17 Stat. 378.
74 260 F.2d 744 (9th Cir. 1958).
that the only miscarriage of justice sought to be prevented by the statute is that of the judicial process.75

Given a judicial proceeding, however, whether grand jury or trial, the violations of the omnibus clause assume many forms: removing a witness from the jurisdiction during trial;76 using force to prevent witnesses from testifying;77 changing the verdict of jurors;78 conspiring to violate court injunctions;79 destroying material documents sought by a grand jury;80 altering records material to a grand jury investigation;81 informing jurors out of court of pending proceedings.82 Conduct which does not obstruct the administration of justice is illustrated by the following three cases. In Harrington v. United States83 defendant sought from a witness who had already testified a sworn statement that contradicted her former statement before a grand jury. Because there was no intent to induce the witness to lie in making the second statement, no violation was found. In United States v. Potash,84 requesting a witness to reveal his proposed testimony as well as counsel's instructions did not violate the omnibus clause. In Rosner v. United States,85 defendant advised a party, who had been requested in writing to answer an information, not to appear. The court conceded that justice had been obstructed, but declined to find a violation of the omnibus clause since the due administration of justice would have required a subpoena rather than written notice.86

Because the omnibus clause fails to enumerate specific acts which may obstruct the administration of justice, violations have been found in situations where the obstruction is not so readily apparent: causing the postponement of trial by improper methods,87 attempting to "feel the

75 Id. at 746.
76 Pollock v. United States, 35 F.2d 174 (4th Cir.), cert. denied, 280 U.S. 600 (1929); Heinze v. United States, 181 Fed. 322 (2d Cir.), cert. denied, 218 U.S. 675 (1910); see United States v. Cusson, 132 F.2d 413 (2d Cir. 1942); Etie v. United States, 55 F.2d 114 (5th Cir. 1932).
77 Kloss v. United States, 77 F.2d 462 (8th Cir. 1935).
78 Sneed v. United States, 298 Fed. 911 (5th Cir.), cert. denied, 265 U.S. 590 (1924).
79 Taylor v. United States, 2 F.2d 444 (7th Cir. 1924), cert. denied, 266 U.S. 634 (1925).
81 Bosseman v. United States, 239 Fed. 82 (2d Cir. 1917); accord, United States v. Siegel, supra note 80.
82 Slade v. United States, 85 F.2d 786 (10th Cir. 1936).
83 267 Fed. 97 (8th Cir. 1920).
84 118 F.2d 54, 57 (2d Cir.), cert. denied, 313 U.S. 584 (1941).
85 10 F.2d 675 (2d Cir. 1926).
86 Id. at 766.
87 United States v. Minkoff, 137 F.2d 402 (2d Cir. 1943); Samples v. United States, 121
pulse” of the jury, and withholding facts from a grand jury. This variety of successful prosecutions under the omnibus clause suggests the wide compass of acts which the courts will construe as posing a threat to the integrity of the judicial process. However, while the preservation of the court’s integrity is certainly essential, as subsequent discussions will attempt to show, such laudable goals have at times been attained at the expense of an overly broad construction of the statute, setting precedents which threaten individual liberties.

5. Endeavor

Whoever corruptly . . . endeavors to influence, intimidate, or impede any witness . . . or endeavors to influence, obstruct, or impede, the due administration of justice . . .

The term “endeavor” appears both in the first part of section 1503 and in the omnibus clause. Hence, the endeavor corruptly to influence witnesses and jurors or to perform those acts specifically proscribed in the first part of the section, as well as the endeavor generally to obstruct the administration of justice, subjects one to criminal prosecution. Two questions naturally present themselves: (1) Is endeavor to be equated with common-law attempt? (2) If the endeavor should terminate in the completed act, are the endeavor and the completed act separate offenses?

The Supreme Court in United States v. Russel noted that by the word “endeavor” Congress intended to make criminal a certain class of acts even though the elements of common-law attempt were not present. Endeavor was defined rather as “any effort or essay to accomplish the evil purpose that the section was enacted to prevent.” By way of clarifying this original concept, it may be helpful to review the facts in Russel. Defendant had approached the wife of a juror not yet selected or sworn and asked her to reveal the sentiments of her husband towards defendant’s client. Implicit in the request was a hint of reward for her husband should he agree to cooperate. When the government charged defendant with corrupt endeavor to obstruct the due administration of

90 255 U.S. 138 (1921).
91 Id. at 143.
justice, defendant contended that his act was merely in the stages of preparation and not an attempt. The Court held: "The section . . . is not directed at success in corrupting a juror but at the 'endeavor' to do so. Experimental approaches to the corruption of a juror are the 'endeavor' of the section." 92 Thus the most remote act tending to obstruct the administration of justice becomes criminal. 93

Some limitations on the concept of endeavor necessarily exist, however, as exemplified in the case of Calvaresi v. United States. 94 Calvaresi presented two factually related situations which the government contended were endeavors to obstruct justice. In the first, defendant had casually introduced himself to a petit juror and asked whether or not juror remembered defendant. When the juror replied in the negative, defendant stated that he was merely "looking up some of the boys [I] used to know." 95 Nothing was said of the pending trial. On these facts the court held that it could not be fairly inferred that defendant's purpose was to interfere with the due administration of justice.

In the second incident defendant Lawson, at the urging of a co-defendant, contacted a juror concerning the purchase of a new car and told the juror that the co-defendant, who was on trial at the time, was not guilty, was a sterling fellow, had done much business with Lawson, and in short was being "framed." At the time of the conversation, the juror had actually been dismissed from jury duty. The court nevertheless found an endeavor to obstruct the due administration of justice and a conviction was accordingly rendered. A comparison of the two situations suggests a working guide to the limits of endeavor. Apparently it is not criminal endeavor to converse with a juror on matters apart from pending proceedings, even though surrounding facts give rise to a strong suspicion that the conversation was intended to influence the juror. However, the attempt by word or action to influence a juror in the dutiful consideration of the merits of a case is endeavor sufficient to violate the statute. 96 The same is true of requesting another to make the attempt. 97

92 Id. (Emphasis added.) Accord, Roberts v. United States, 239 F.2d 467, 470 (9th Cir. 1956).
93 See Thomas v. United States, 15 F.2d 958 (8th Cir. 1926).
94 216 F.2d 891 (10th Cir. 1954), rev'd and remanded per curiam, 348 U.S. 961 (1955).
95 Id. at 903.
To the rules thus established must be added a further consideration. At no time can endeavor be found within the meaning of the statute if the object of the endeavor—the completed act—would not obstruct the administration of justice.\(^98\) Where the completed act violates the statute, however, both the endeavor and the act are substantive offenses. This departure from the common-law position that attempts are generally merged with the completed crime\(^99\) may be attributed to the broad meaning that Congress and the courts have given to the term “endeavor.” Thus in *Slade v. United States*,\(^100\) the court held that since Congress had made endeavor a separate substantive offense, endeavor may be punished together with the successful act which completes the endeavor.\(^101\)

### III

**Conspiracy To Violate Section 1503**

1. *From Perlstein*\(^102\) to *Bonanno*:\(^103\) *Legal Impossibility*

A substantial number of convictions for obstructing the due administration of justice stem from the use of the federal conspiracy statute\(^104\) in conjunction with section 1503.\(^105\) The reason for this is readily apparent: any difficulties in proving the elements of a substantive 1503 violation may be overcome by using the conspiracy vehicle.\(^106\) This

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\(^98\) See *Ethridge v. United States*, 258 F.2d 234 (9th Cir. 1958); cf. *Rosner v. United States*, 10 F.2d 679 (2d Cir. 1926).

\(^99\) *Perkins, Criminal Law* 480-81 (1957).

\(^100\) 85 F.2d 786 (10th Cir. 1936).

\(^101\) Compare *Prince v. United States*, 352 U.S. 322 (1957), where the Supreme Court ruled that the Federal Bank Robbery Act, 18 U.S.C. § 2113 (1958), did not impose a double penalty for an attempt plus the completion of the attempt, even though that statute makes punishable both the attempt and the completed offense.


\(^105\) Since the federal conspiracy statute is violated either by conspiring to commit an offense against the United States, or by conspiring to defraud the United States, it is generally possible to find a two-fold violation of the conspiracy statute in the typical section 1503 situation: conspiracy to violate section 1503 and conspiracy to defraud the United States by defrauding it of “doing justice.” E.g., *Outlaw v. United States*, 81 F.2d 805 (5th Cir.), cert. denied, 298 U.S. 665 (1936).

\(^106\) For an excellent critical discussion, see Mr. Justice Jackson concurring in *Krulewitch v. United States*, 336 U.S. 440, 445-46 (1949):

The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

The modern crime of conspiracy is so vague that it almost defies definition.
ability to prosecute under a conspiracy charge goes beyond that enjoyed by the Government in a prosecution for endeavor, for unlike the endeavor to obstruct the due administration of justice, a conspiracy may be found even where a substantive violation of the statute would be legally impossible.

Illustratively, in Perlstein v. United States107 defendants agreed to induce and exhort certain potential witnesses not to identify defendants as the possessors of an illegal still. The agreement was made nearly two years before revenue agents began an investigation of defendants. At trial it was established that of seven overt acts allegedly part of a conspiracy to violate section 1503, only five took place after the commencement of proceedings (filing of the complaint and empanelment of the grand jury). On the basis of all seven acts, however, defendants were convicted of conspiracy to obstruct the due administration of justice. Since five overt acts followed the institution of judicial proceedings, the court's decision appears well taken; however, as the dissent noted,108 because two overt acts which occurred before the institution of proceedings were used to prove the conspiracy, the majority of the court could have found an indictable criminal conspiracy without the five subsequent acts. Stated otherwise, it was possible to find a conspiracy to violate the statute when it was legally impossible to violate it.

In answer to the charge in Perlstein, the defense cited Pettibone v. United States,109 in which an indictment was presented for conspiracy to violate section 5399 of the Revised Statutes of 1875 (now section 1503) by corruptly interfering with a federal injunction. However, fatal error was found in the failure of the indictment to allege knowledge that the injunction was in effect and hence, no intent was shown to obstruct this form of the administration of federal justice. In demanding intent, the Supreme Court presupposed the existence of the administration of justice: "The obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offence cannot be committed . . . ."110

The majority opinion in Perlstein distinguished Pettibone on its facts, regarding the decision as precedent only in situations which involve court

107 126 F.2d 789 (3d Cir. 1942).
108 Id. at 802.
110 Id. at 207.
orders. However, the language of Pettibone apparently was not meant to be thus restricted, for it announced a basic interpretation of the statute.  

"It is enough," stated the Court, "if the thing is done which the statute forbids, provided the situation invokes the protection of the law . . . but not otherwise."  

Thus, the question is whether or not the situation invokes the protection of the law. It is submitted that if at a given time no administration of justice exists to be protected, neither a violation of section 1503 nor a conspiracy to violate section 1503 is possible.

The majority of the court in Perlstein supported their holding with an analogy taken from cases decided in New York and England. It is noted, however, that these cases are not concerned exclusively with obstructions to the due administration of justice, but with the obstruction of justice as well. They interpret conspiracy statutes which speak of "defeating the course of public justice" and "perversion and obstruction of justice or the due administration of the law." The Perlstein opinion draws further support from the common-law misdemeanor of conspiracy to obstruct justice. The decisions on which the court relied, however, indicate that under the common-law offense the conspiracy was criminal even though judicial proceedings had not been initiated. Thus the holding of the majority appears considerably weakened. As the dissent points out, section 1503 is a federal statute and does not refer to the obstruction of justice, but rather to the obstruction of justice as being administered in the federal courts.  

The dangers inherent in the decision are well stated by the dissent:

If what the majority now hold be the law, then all that will be necessary to convict of conspiracy to intimidate witnesses and to obstruct justice under Sec. 135 of the Criminal Code [now section 1503] will be a couple of locally unpopular defendants who happened to be seen talking together. The overt act necessary to mature the time for indictment and punishment may, as is well known, be a very incidental and inconsequential thing. The threat to individual liberty concealed in the proposition now approved by this court is not to be minimized and,  

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111 See Odom v. United States, 116 F.2d 996, 998 (5th Cir.), rev'd and remanded per curiam, 313 U.S. 544 (1941).
112 148 U.S. at 207.
115 Criminal Procedure Act, 1851, 14 & 15 Vict. c. 100, § 29 (repealed).
116 N.Y. Penal Law § 580(6).
118 Rosner v. United States, 10 F.2d 675, 676 (2d Cir. 1926); accord, United States v. McLeod, 119 Fed. 416, 417 (C.C.N.D. Ala. 1902).
particularly, not in times when popular passions may be more easily aroused. It invites the sort of possibility which courts should ever be alert to prevent.\textsuperscript{119}

The foresight of the dissenting judge is revealed in the recent case of \textit{United States v. Bonanno},\textsuperscript{120} in which the indictment charged a conspiracy to obstruct by evasion, silence or lies, any inquiry into the circumstances of a meeting of the alleged conspirators at Apalachin, New York. The government maintained that since inquiry might well come from a federal grand jury, it was possible to find a conspiracy to obstruct the due administration of justice in the form of lies and evasiveness before grand juries not yet empaneled. Although the overt acts proving the conspiracy occurred both before and after the grand jury was empaneled, the court found that an indictable conspiracy to obstruct the administration of justice existed even before such proceedings had commenced. The decision parallels \textit{Perlstein}, for it raises again the possibility of an indictable conspiracy to obstruct the administration of justice at a time when justice is not being administered.\textsuperscript{121} It is submitted that \textit{Bonanno} like \textit{Perlstein} is a correct decision only if it were proved that the conspiracy arose \textit{after} judicial proceedings were instituted. For if such proof is not required, the successful combination of the conspiracy statute with section 1503, when section 1503 itself could not be violated, creates a general obstruction of justice statute from a law originally intended to protect only the administration of justice in the federal courts.

There is no federal statute which makes it a crime to obstruct justice; section 1503 makes criminal only the obstruction of the due \textit{administration} of justice. To obliterate this vital distinction makes any act obstructive of justice criminal. Furthermore, it would permit a conviction for conspiracy to frustrate grand jury proceedings, even though a grand jury is never empaneled. For example, if the parties to a federal crime should agree to conceal information of the crime from all official inquiry, including that by some grand jury not yet empaneled, at the time of the agreement there exists an indictable conspiracy to violate section 1503. The overt acts, by which the conspiracy

\textsuperscript{119} United States v. Perlstein, 126 F.2d 789, 805 (3d Cir. 1942). It is interesting to note that there have been attempts to enact “gang” statutes; however, such statutes have generally been ruled unconstitutional. E.g., Lanzetta v. New Jersey, 306 U.S. 451 (1939), 23 Minn. L. Rev. 823.

\textsuperscript{120} 177 F. Supp. 106 (S.D.N.Y. 1959).

is established, need go no further than lying to federal officers investigating the crime. To empanel the grand jury would be unnecessary since the conspiracy is the gist of the indictment. In effect, the parties may be convicted of conspiracy to violate section 1503 because, in carrying out their agreement to prevent official inquiry, they have lied to federal police officers. Such use of the statute would be a far cry from the original purpose of its framers: to ensure the integrity of the judicial process while imposing limitations on the contempt power of the Federal Judiciary.

2. Compounding the Crime

A defense that is raised to an indictment for conspiracy to violate section 1503 is comparable to the defense used against an indictment for conspiracy to bribe. In United States v. Sager the government alleged a conspiracy to bribe, naming a juror bribed as one of the conspirators; the court of appeals reversing his conviction applied the rule established in Dietrich v. United States: a conspiracy to bribe cannot exist since bribery, by definition requiring two parties, does not give rise to the added danger of concerted action upon which the conspiracy charge is based. A similar result might conceivably obtain when a witness who has accepted a bribe is charged with conspiracy to endeavor to obstruct the administration of justice. However, United States v. Brothman rejected the Dietrich defense in this situation, the court deciding that since endeavor which was the gravamen of the offense does not require concerted action, a conspiracy could be found between the parties to endeavor to obstruct the administration of justice. The one who bribes the witness may be convicted of both the conspiracy to obstruct the administration of justice and the substantive offense of bribery, for "a single act may be an offense against two statutes, and if the offense defined in one embraces an element not included in the other, an acquittal or conviction under one does not exempt the defendant from prosecution and punishment under the other."

A similar problem presents itself where subornation of perjury is concerned. Assume, for example, that A approaches B and requests B to perjure himself. While A has performed only one illegal act, he is amenable to prosecution not only for subornation of perjury, but also

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122 United States v. Perlstein, 126 F.2d 789, 802 (3d Cir. 1942) (dissenting opinion).
123 49 F.2d 725 (2d Cir. 1931).
126 Slade v. United States, 85 F.2d 786, 791 (10th Cir. 1936).
for endeavor to obstruct the due administration of justice.\textsuperscript{127} He may also be prosecuted for conspiring with the perjurer to violate section 1503.\textsuperscript{128} Hence, $A$ has violated three federal statutes by the commission of a single act. Furthermore, if $B$ in fact perjures himself, no reason appears why a further count may not be brought against $A$ for obstructing the due administration of justice. Finally, if the act is committed within the presence of the court, $A$ may also be cited for contempt.\textsuperscript{129} Compounding the sentences for all violations which stem from one overt act, however, appears to impose an unduly severe penalty.

\section*{IV
\textbf{The Fifth Amendment and Related Problems}}

The federal courts have long recognized that there exists a myriad of ways by which the due administration of justice may be obstructed. As one court has stated: "The obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined."\textsuperscript{130} Perhaps the most imaginative way by which the due administration of justice appears to be obstructed stems from the tendency of "the criminally inclined" to invoke their fifth amendment rights and remain silent. A most serious problem facing the Federal Judiciary today is a resolution of the inherent clash between the protection of this fifth amendment right and the obstruction of the due administration of justice. For example, assume that $A$ and $B$ have been indicted for a federal offense and are presently standing trial. In the course of the proceeding, $C$, a witness, is subpoenaed to appear and testify for the Government. Subsequently $A$ and $B$ approach $C$ and influence him to assert his fifth amendment right and thereby conceal testimony which would be damaging both to $C$, and $A$ and $B$. $A$ and $B$ then introduce $C$ to $D$, an attorney, for the purpose of having the attorney assure $C$ of his legal right to remain silent. It is assumed that $A$, $B$ and $D$ are interested only in keep-

\begin{itemize}
\item \textsuperscript{127} Doan \textit{v.} United States, 202 F.2d 674, 677 (9th Cir. 1953); accord, Catrino \textit{v.} United States, 176 F.2d 884, 887 (9th Cir. 1949).
\item \textsuperscript{128} Brothman \textit{v.} United States, 93 F. Supp. 924 (S.D.N.Y. 1950), aff'd, 191 F.2d 70 (2d Cir. 1951).
\item \textsuperscript{129} See O'Malley \textit{v.} United States, 128 F.2d 676 (8th Cir. 1942), rev'd on other grounds sub nom. Pendergast \textit{v.} United States, 317 U.S. 412 (1943).
\item \textsuperscript{130} Catrino \textit{v.} United States, 176 F.2d 884, 887 (9th Cir. 1949).
\end{itemize}
ting testimony from the Government which would be damaging to A and B and are completely unconcerned with the personal rights of C.

Two problems present themselves: (1) Has D, even though his motive be an improper one, corruptly endeavored to obstruct the due administration of justice by giving this advice to C? (2) Have A and B violated the statute by advising C to invoke his fifth amendment right? The first problem was squarely met in United States v. Herron, where, on an identical set of facts, a grand jury indicted an attorney for corruptly endeavoring to obstruct the due administration of justice. The court held, however, that an attorney advising a client to invoke his fifth amendment right does not violate the statute regardless of the attorney's motive. An answer to the second problem is suggested in the rationale used by the court to answer the first: "[I]t is [not] the law or the policy of the law to make criminal, no matter what the motive might have been, the advising a witness to do that which was lawful and would in fact have protected the witness from disclosing self-incriminating matter." Thus, A and B apparently do not commit a criminal act in urging C to invoke his fifth amendment right. It follows also that they could not be convicted for conspiracy to do the same act.

Unfortunately, the decision in United States v. Grunewald casts doubt on the conclusions and rationale employed above. In Grunewald a gigantic tax-fixing ring had been discovered and a grand jury empanelled to indict those involved for conspiracy to defraud the United States by violating the revenue laws. One of the conspirators, Halperin, was indicted for corruptly endeavoring to influence witnesses before the grand jury then investigating the tax fraud. The endeavor count was based on Halperin's request to three co-conspirators to approach one Marks, who was to testify before the grand jury, for the purpose of asking him "not to talk." A further count was based on Halperin's personally requesting two other parties connected with the tax-fixing ring to stand on their constitutional rights and not divulge information to the grand jury. The court ruled that both acts violated section 1503 although no evidence was presented that Halperin had asked the parties to lie before the grand jury.

It is immaterial that Halperin did not ask these witnesses to tell deliberate falsehoods. The whole tenor of the conversations, which took place after the . . .

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131 28 F.2d 122 (N.D. Cal. 1928).
132 Id. at 123. (Emphasis added.)
134 233 F.2d 556 (2d Cir. 1956), rev'd on other grounds, 353 U.S. 391 (1957).
taxpayers had talked freely with government investigators, was that of impeding justice and maintaining secrecy with respect to the operations of the conspirators.135

This ruling of the court on Halperin’s request to the two parties is difficult to justify. A purpose of the statute is to prevent the corruption of witnesses, not the counseling of witnesses to invoke their fifth amendment right. Despite the background and motives of the defendant, it does not appear just that the meaning of section 1503 be extended to “make criminal ... the advising a witness to do that which was lawful and would in fact have protected the witness from disclosing self-incriminating matters.”136 When Halperin defended that his exhortation was the legitimate advice of an attorney to his client, the court answered that such a contention was “nothing short of fantastic.” This summary dismissal of an apparently sound defense sets dangerous precedent, especially since Halperin was an attorney. In effect it transforms the attorney’s duty to defend his client into endeavor to obstruct the administration of justice.

The recent case of United States v. Bonanno137 raises a fifth amendment problem having great potential significance. Defendants in Bonanno were indicted for agreeing among themselves “that if they were asked by any one, including Federal grand juries, about the nature and circumstances of that meeting they would endeavor to frustrate the inquiry by evasion, silence or lies.”138 The offense charged in the indictment bears close scrutiny since the use of the disjunctive “or” in the language of the indictment, namely, “evasion, silence, or lies” would indicate that any one of the acts enumerated would have sufficed to frustrate inquiry by the grand jury and thus have obstructed the due administration of justice. The Government, however, expressly denies that silence was a basis for defendants’ convictions,139 and the claim is well supported by the trial court’s instructions to the jury which, omitting silence, demanded a finding of falsehoods or evasiveness for conviction.140 Unfortunately, since the term “silence” remained in the indictment without apparent objection by the defendants or question by the court, its presence inspires valid fear that the decision may suggest

135 233 F.2d at 571. (Emphasis added.)
136 United States v. Herron, 28 F.2d 122, 123 (N.D. Cal. 1928).
138 Id. at 111. (Emphasis added.)
140 Id. at 43.
precedent for subsequent prosecutions under section 1503 where silence is the sole means of frustrating grand jury inquiry.

V

PERSONS PROTECTED BY SECTION 1503

As indicated earlier, section two of the Act of 1831, was intended by Congress to offset the limitations imposed on the federal contempt power by section one. It may be recalled that under section two (now section 1503) any conduct now removed from the reach of the court, but which nevertheless obstructed the administration of justice, was made the object of a federal criminal prosecution. In thus ensuring the integrity of the judicial process, Congress in effect spread its protective mantle over those who form an essential part of the courtroom drama, namely, judges, jurors and witnesses. The question that now presents itself is whether these judges, jurors or witnesses for whose benefit the statute was enacted may themselves be successfully prosecuted for violation of it.

United States v. Solow strongly suggests that at least a witness may be capable of violating the statute. There defendant had in his possession certain letters known by him to be material to a pending grand jury investigation. Anticipating that he would be called to testify before the grand jury, defendant destroyed the letters to preclude all inquiry into their contents. Although defendant qualified as a witness, he was found guilty of obstructing and endeavoring to obstruct the due administration of justice. In referring to the omnibus clause under which defendant was convicted, the court stated: "This latter provision . . . is all-embracing and designed to meet any corrupt conduct in an endeavor to obstruct or interfere with the due administration of justice." A similar result obtained where two witnesses, agreeing to lie before the grand jury, were convicted of conspiracy to violate section 1503. In Anderson v. United States, the defendant, a material witness in a pending criminal case, entered an agreement with a third party, to change his own testimony and also to influence a fellow witness to change his.

141 See p. 101 supra.
143 See p. 110 supra.
144 138 F. Supp. at 814.
Defendant's influencing his fellow-witness was found a substantive violation of section 1503, but no reason appears why the corruption of defendant's own testimony would not equally violate the statute. The opposite conclusion was reached in another case in which defendant, accepting a bribe to corrupt his own testimony, was not charged with a section 1503 violation but was cited for contempt of court. Defendant's act had occurred sufficiently near the court to permit the exercise of the contempt power; however, had he accepted the bribe outside the geographical presence of the court, it is suggested that in spite of his being a witness, section 1503 would be the proper remedy.

Similar considerations are applicable in determining whether jurors may be convicted for obstructing the administration of justice. For if they, like witnesses, were not subject to prosecution under section 1503 and if their conduct (assuming it obstructs the due administration of justice in fact) were beyond the contempt power of the court, a major purpose of the statute—to advance the due administration of justice—would be frustrated. Furthermore, the all-inclusive term "whoever" found in section 1503 would indicate that all who obstruct the administration of justice may be successfully prosecuted under the statute.

Unlike witnesses and jurors, judges who in fact obstruct the administration of justice should not be subject to section 1503, for the integrity of the judiciary is traditionally guaranteed by the impeachment process. To permit the conviction of judges under the statute would be to transfer this legislative function to the executive branch. It is submitted that any such transfer of power would jeopardize the independent neutrality of the judiciary, for it vests in the prosecution a capacity to control the judge in the exercise of his official functions.

One inroad in this direction has been made, however, in the celebrated case of United States v. Manton. There a federal judge on the Court of Appeals for the Second Circuit was indicted and convicted for conspiring with others to obstruct the due administration of justice and to defraud the United States. A conviction for a substantive violation of the statute was not returned. While a conviction for conspiracy to commit a substantive crime does not necessarily prove that the substantive crime could have been committed, it is felt that, with respect

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147 Keeney v. United States, 17 F.2d 976 (7th Cir. 1927).
148 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940).
149 In United States v. Johnson, 165 F.2d 42 (3d Cir. 1947), cert. denied, 332 U.S. 852 (1948), a similar indictment was handed down against a judge of a federal district court but the judge was acquitted by the jury.
to judges, even a conspiracy conviction sets disturbing precedent, for the next logical step is that the judge himself can violate section 1503.

CONCLUSION

The growth of section 1503 from its humble origin in 1831 to its present day stature reveals an increasing awareness on the part of those who administer the law, of the need for complete impartiality in the conduct of litigation. Anxious to ensure the integrity of its own proceedings by removing from the courtroom all influences that threaten the full disclosure of evidence and the unbiased consideration of its merit, the Federal Judiciary has extended the protections of the statute to all witnesses and jurors, past, present, and future. This goal has been achieved through a broad construction of the several clauses of the statute, particularly the omnibus clause. The facility with which the statute is extended, however, creates a threat to the integrity of the judicial process no less dangerous than that which it is sought to avoid. For if the necessity of corrupt intent is dismissed, the planning of legitimate defenses undermined, and the free association of the "criminally inclined" restrained, the due administration of justice is equally denied.

More than all other clauses of the statute, the omnibus clause is responsible for the exaggerated use that has been made of section 1503. While a certain restraint has characterized the court in construing its undefined meaning—denying its application to FBI investigations, tax investigations, and probation proceedings after conviction—the successful attempt to prosecute for conspiracy to obstruct the administration of justice when justice is not being administered, while owing in part to the breadth of the conspiracy statute, reveals the imaginative uses to which the clause may be put. If a means is required for stamping out organized crime, it is submitted that the broad extension of section 1503 to accomplish this purpose poses a threat no less disturbing than the presence of organized crime—the infringement of basic rights. A strict construction might better attend interpretations of the omnibus clause—perhaps by applying the principle of *ejusdem generis*—for while limiting the statute to its original purpose, this approach assures adequate protection to the administration of justice and to the rights of those for whom justice is being administered. A need to protect the rights of citizens gave birth to the act which is presently section 1503; it would indeed be ironic if section 1503 were now permitted to threaten those rights.

John J. Brandt
Ernest V. Klein
Jerome F. Waterman
CIVIL PROCEDURE—A CROSS-CLAIM FOR CONTRIBUTION AGAINST THE UNITED STATES IS NOT BARRED EVEN THOUGH THE UNITED STATES IS NO LONGER LEGALLY LIABLE TO THE PLAINTIFF DUE TO THE RUNNING OF THE PERIOD OF LIMITATIONS OF THE FEDERAL TORT CLAIMS ACT. Keleket X-Ray Corp. v. United States, 275 F.2d 167 (D.C. Cir. 1960).

On April 27, 1956, a patient at Freedmen's Hospital, a government institution, was injured in the course of an X-ray examination. The patient filed a complaint against the Keleket X-Ray Corporation on February 4, 1958, alleging negligence in the installation and maintenance of the machine, and on May 1, 1958; filed an amended complaint naming the United States as co-defendant, alleging negligence in the use of a defective machine. Keleket filed an answer on February 25, 1959, and included a cross-claim against the United States for indemnity or contribution. Upon motion by the United States, the plaintiff's complaint against it was dismissed as barred by the period of limitations of the Federal Tort Claims Act. The government's motion to dismiss the cross-claim filed against it by Keleket was also granted for the same reason.

On appeal, the United States Court of Appeals for the District of Columbia reversed the ruling on the latter motion. Held, a cross-claim for contribution against the United States is not barred even though the United States is no longer legally liable to the plaintiff due to the running of the period of limitations of the FTCA.

The unique situation presented in the instant case arises from the fact that the period of limitations in suits against the United States under the FTCA is two years, while a three-year statute of limitations is applicable to suits between private parties in the District of Columbia. Two closely related problems thus present themselves, both dependent upon the nature of the claim for contribution. First, does a tortfeasor lose his right to contribution from a fellow tortfeasor where the latter is no longer liable to the injured party; and secondly, at what point does a claim for contribution accrue?

The right to contribution has been recognized in the District of Columbia as between private parties as well as against the Government. The sine qua non of the right to contribution is the culpability, either personally or vicariously, of two or more joint tortfeasors for a single injury of a third party, the

1 28 U.S.C. § 1346 (1958) [hereinafter referred to as FTCA].
plaintiff. If one is not culpable, there can be no assertion that he was partly responsible for the injury of the plaintiff and that it is inequitable to allow his alleged fellow tortfeasor to bear his share of the burden.

It would seem that two requirements must be satisfied for a right to contribution to arise. First, the tortfeasors must at some time have been legally culpable, and secondly, one must have borne the cost of injury partly caused by his fellow tortfeasor. The courts have required at least a possibility of legally recognized liability for the right to accrue. However, two attitudes might be manifested toward the right to contribution. The right could be said to exist because participation in tortious conduct requires nothing less. A second approach might be that contribution is only just once a fellow tortfeasor has shouldered a burden common to both. The first approach recognizes that the essence of the duty to contribute is the participation in the original injury irrespective of supervening events, while the second approach overlooks this aspect of the duty and requires that both tortfeasors be legally liable at the time the injured party seeks recovery.

In the instant case, the lower court found that the Government's liability to the plaintiff had been extinguished by the period of limitations. Since the Government was no longer liable to the plaintiff, satisfaction against the defendant could not be considered as relieving the Government of its liability. The court of appeals rejected this reasoning, declaring that it was sufficient if the Government at some time had been liable to the plaintiff. This, it would seem, is the correct view of the nature of contribution, for it recognizes that both were culpable and that one has inequitably been selected to bear the total responsibility.

This analysis also sheds light on the question when the right to contribution accrues. While the lower court did not state that the right accrues at the time of injury, it did say that it was extinguished by the running of the period of limitations on the original claim. It is not logically imperative to deduce that the right accrues at the time of injury, for a right may be extinguished by processes of law other than the period of limitations. Thus, the lower court did not pass upon this problem and the appellate court did so only vaguely. Since it will not suffice merely to declare that the statute does not run simultaneously with the original claim, it is appropriate to consider the various possibilities as to when the right to contribution accrues and thus when the period of limitations begins to run.

Since the essence of a claim for contribution is the equitable principle of an equalization of a common burden or a common liability, the earliest possible time that the right might arise would be the time of the injury. At least one

9 275 F.2d at 169.
jurisdiction, Rhode Island, adopted legislation which specifies the time of accrual of an action for contribution as the time of the injury and states that all actions for contribution must be brought within two years of that date. The difficulty with such a choice is that it may work undue hardship since the cause of action for contribution may be barred before it ever comes into existence. A delay, whether intentional or not, by the injured party in maintaining an action against one tortfeasor could effectively bar the latter's right to contribution from another tortfeasor. This theory was clearly rejected in the instant case when the court of appeals stated, "[W]e think it clear that Keleket's claim to contribution did not accrue before Keleket had been sued by Slater [the injured party]."

The next point in time when a right of contribution might accrue is when the injured party begins his action against one tortfeasor. It is quite possible that prior to this time the tortfeasor might not even be aware that an accident had occurred or that the injured party intended to hold him responsible for the injury. While the court in the instant case did not state that the right to contribution accrues at this time, it is a possible interpretation of the court's observation that the right did not accrue before Keleket had been sued by Slater. This holding would certainly be more desirable than an accrual at the time of injury and would eliminate many of the difficulties and inequities of that theory. However, if a tortfeasor chose, or was compelled by a state prohibition of joinder, to maintain a separate and distinct action for contribution, problems would still arise. A long delay in the conduct of the injured party's suit against one tortfeasor could bar that tortfeasor's action for contribution against another tortfeasor.

Accrual when the injured party's action is begun as well as the accrual-at-injury theory fails to perceive the true nature of the claim, for it posits the accrual of the right while the inequity is still inchoate, i.e., prior to the reduction of a potential undue burden to actuality. It owes its inception to the Federal Rules of Civil Procedure and those state codes which allow joinder of a party who "is or may be liable" to the defendant. Procedural rules, however, are designed to facilitate justice and not to alter the substantive elements of a party's rights. Although Professor Moore admits that third-party pleading may accelerate the time of accrual of an action for contribution, there is no justification for substituting this accelerated time of accrual in situations where impleader is not permitted or not utilized for the time that a claim actually accrues unless there is an independent rationale for so doing and no persuasive rationale to the contrary.

Rationale to the contrary is found, however, in consideration of the two

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12 275 F.2d at 169.
13 Ibid.
15 3 Moore, Federal Practice ¶ 13.34, at 93 (2d ed. 1948).
remaining possibilities as to the time of accrual. The first is when judgment is entered against the tortfeasor and in favor of the injured party. It is only at this point that the liability of the tortfeasor to the injured party is determined. The advantage of judgment as marking the time of accrual is that it constitutes the first objective fact, the first fact of sufficient significance for the law to recognize that the defendant may be forced to pay a judgment the burden of which should perhaps be shared by the fellow tortfeasor. Its advantage over the preceding theories is one of practicality, since it would discourage the filing of contingent claims.

Accrual at the time of judgment, however, appears inconsistent with the nature of contribution. Until the judgment has been satisfied no inequity has arisen upon which to base the claim. The assumption of the undue burden, although imminent, is still in futuro. It is quite possible that the language of the court in the instant case could be construed to mean that while Keleket's claim for contribution could not accrue until it had been sued by Slater, something more than the initial action by the injured party was necessary for the right of contribution to accrue and the court simply refrained from mentioning this additional requirement in an effort to limit itself to the problem at hand.

By process of elimination, the last event which can be postulated as the condition precedent to the accrual of the claim is satisfaction of the judgment. By citing Chicago, R.I. & Pac. Ry. v. United States which held that a claim for indemnity does not accrue until the party claiming indemnity had paid the injured person, the court in Keleket seemed to draw an analogy between the time of accrual of a claim for indemnity and the accrual of a claim for contribution. This is not a new concept and has been recognized by the District of Columbia and several states. In addition, Professor Moore has stated that the statute of limitations for a claim of contribution or indemnity usually does not begin "to run against the defendant (third-party plaintiff) and in favor of the third-party defendant until judgment has been entered against the defendant, or the defendant has paid the judgment."

In view of the equitable nature of contribution and the concept of a sharing of a common burden, this theory would seem to be the most consistent of those considered, for it defers the reduction of the claim to that point in time when

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17 220 F.2d 939 (7th Cir. 1955).
fact and theory coalesce. An inequity in fact, payment of the judgment, must occur before the defendant can assert an equitable claim.

The fact that Federal Rule 14 accelerates the accrual of the claim at the option of the defendant should present no problem. In accord with the prevailing spirit of the Federal Rules, the contingent nature of contribution is recognized for the sake of expeditious settlement of claims. Acceleration means departure, in this case, from the normal accrual of the right to contribution. In *Jeub v. B/G Foods, Inc.*,21 a joint tortfeasor had been impleaded under the Rules and the claim for contribution subsequently allowed. Execution was stayed, however, until satisfaction of the judgment running against the third-party plaintiff. Even here the substantive element, the equitable nature of the claim, can and should be preserved.

J. KEVIN MAHONEY


The plaintiff, Mrs. Earshlie Albert, brought an action in the District of Columbia against Margaret McGrath, a resident of the District, for alienation of the affections of, and criminal conversation with, Mrs. Albert's husband. Mr. and Mrs. Albert were domiciliaries of Maryland, but the conduct on which the action was based took place, at least in part, in the District of Columbia. A Maryland statute1 had abolished all right of action for alienation of affections, but no such statute had ever been enacted in the District, where recovery in such actions has long been permitted. The jury found for the defendant on the criminal conversation claim but for the plaintiff on the claim for alienation of affections. The defendant theréupon moved for judgment n.o.v., arguing in support of her motion that the law of Maryland should govern, since Maryland was the matrimonial domicile, and only there could a cause of action accrue for a tort against the marital relationship.2 On the basis of the Maryland statute the trial court granted the defendant's motion. The United States Court of Appeals for the District of Columbia Circuit reversed with direction to enter judgment on the verdict. *Held*, liability for alienation of affections is determined by the law of the place where defendant's tortious conduct occurred, not by the law of the matrimonial domicile.3

The issue immediately before the court in the instant case was whether the Maryland statute follows the plaintiff and precludes recovery when the conduct

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21 2 F.R.D. 238 (D. Minn. 1942).


3 Albert v. McGrath, 278 F.2d 16 (D.C. Cir. 1960).
giving rise to the claim occurs in the jurisdiction of the forum.4 This, however, merely suggests the fundamental question to be answered in any case like this one: Where did the tort occur? If in Maryland, then the statute relied on by the defendant would effectively bar the action, not only in Maryland but anywhere; if in the District of Columbia, then the action would lie in any forum, regardless of the Maryland statute.

Every tort can be broken down into two constituent parts—an act or omission by the tortfeasor and a resulting injury to someone else. Where the two incidents which make up a single tort occur in separate jurisdictions, a choice of law must be made. The general rule in the United States is that the lex loci delicti, the law of the “place of wrong,” must be applied,5 and the place of wrong is said to be “in the state where the last event necessary to make an actor liable for an alleged tort takes place.”6 This “last event,” of course, is usually the injury resulting from the tortious conduct of the tortfeasor, for without injury there is no cause of action. Thus, where the conduct of the tortfeasor in state A causes injury in state B, liability will be determined according to the law of state B, even though the tortfeasor may never have set foot within its borders.7 In the instant case it can be readily seen that if the defendant’s conduct were not actionable in the jurisdiction where the injury occurred, the plaintiff would have no cause of action anywhere.8 It was clearly vital for the court to determine whether the locus delicti was Maryland or the District of Columbia.

The precise theory on which actions for alienation of affections are based is not uniformly settled. Indeed, it is not altogether certain whether the alienation is itself a tort or merely an element of another tort. Some courts, in pointing out that alienation of affections and criminal conversation are separate and distinct wrongs,9 seem to suggest that the alienation itself is the tort; others, perhaps a majority, hold that actions for alienation of affections and criminal conversation are essentially the same and are both really for loss of consortium, which is quite a different thing.10 The District of Columbia ad-

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4 Id. at 17.
6 Restatement, Conflict of Laws § 377 (1934).
8 See Alabama Great So. R.R. v. Carroll, 97 Ala. 126, 11 So. 803 (1892); Restatement, Conflict of Laws § 378 (1934).
9 Perry v. Lovejoy, 49 Mich. 529, 532-33, 14 N.W. 485, 487 (1883); Oliver v. Oliver, 159 Neb. 218, 66 N.W.2d 420 (1954).
heres to the loss-of-consortium view, as stated in the early case of *Dodge v. Rush*:

The gist of the action for the alienation of affections is said to be the loss of *consortium,* — that is, the loss of the conjugal fellowship, company, cooperation, and aid of the husband or wife. Loss of *consortium* is the actionable consequence of the injury, and alienation of affections is a matter of aggravation.\(^{11}\)

Can consortium be localized? The lower court in the instant case seemed to think that it could. Indeed, it would appear that that court had a preconceived notion to this effect, for it discussed the matter only briefly near the end of its opinion. At that point the district court stated, without citing any authority for the proposition, that loss of consortium could occur only at the matrimonial domicile.

In action for loss of consortium, loss must be evidenced to establish a cause of action. The "change in the state of mind" must be evidenced by some external conduct. Logically, then, there is no cause of action until there is evidence of the loss of consortium, *but this essential element of the cause of action occurs only at the matrimonial domicile* and, consequently, under the general conflicts rule, the law of the matrimonial domicile will govern.\(^ {12}\)

The appellate court properly questioned the soundness of this view, declaring that "consortium between husband and wife is not necessarily domiciliary nor localized to their common bedroom. . . . There is no isolation of the wife's right or of the husband's duty within the narrow confines of a voting residence."\(^ {13}\) From this the appellate court concluded that the place of wrong had been in the District of Columbia, not in Maryland, and that the law of the former jurisdiction would apply to give relief to the plaintiff.

The court laid considerable stress on the fact that it was administering the public policy of the District of Columbia and that "aid of the injured spouse is an incident of that policy."\(^ {14}\) This is strongly reminiscent of the reasoning in *Gordon v. Parker,*\(^ {15}\) which up to now has been the leading case in this area. In that case the plaintiff and his wife were domiciliaries of Pennsylvania, while the defendant was domiciled in Massachusetts. The action was brought in the federal district court in Massachusetts, with jurisdiction based on diversity of citizenship. The defendant moved for summary judgment on the basis of the Pennsylvania heart balm statute,\(^ {16}\) arguing that the law of the matrimonial

\(^{11}\) 28 App. D.C. 149, 152 (1906), quoted in the instant case by both the trial court, 165 F. Supp. at 462, and the appellate court, 278 F.2d at 17.


\(^{13}\) 278 F.2d at 18.

\(^{14}\) Ibid.

\(^{15}\) 83 F. Supp. 40 (D. Mass.), aff'd, 178 F.2d 888 (1st Cir. 1949).

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domicile should govern in a case where a tort has been committed against the marital relationship. Two reasons were advanced: first, because it is only at the matrimonial domicile that the tortious conduct results in injury; and second, because "that is the state that has the most sustained and profound interest in the marriage. If it does not give the husband a legal interest in protecting his wife's affections and consortium from strangers, no other state should."17 The court, however, rejected this argument on the ground that the interests of Massachusetts in the case clearly outweighed those of Pennsylvania. Admittedly, Pennsylvania had an interest in safeguarding marital relationships between its domiciliaries and in "not having Pennsylvania courts hear this sordid type of controversy."18 However,

as the place where the alleged misconduct occurred and as the place where the alleged wrongdoer lives, Massachusetts also has an interest. She is concerned with conduct within her borders which in her view lowers the standards of the community where they occur. She is also concerned when her citizens intermeddle with other people's marriages.19

The public policy argument is a strong one, but not decisive. There still remains the basic issue of the *locus delicti*—an issue, incidentally, which was sidestepped in *Gordon* by the parties' stipulation "that the alleged acts upon which the plaintiff is bringing this action are alleged to have been committed in . . . Massachusetts."20 Assuming that the cause of action accrues only upon the loss of consortium, one must inquire further: where exactly is consortium lost? Indeed, whether or not loss of consortium is involved at all, where does the alienation itself take place? The answer may perhaps be found by a consideration of when the tort occurs.

Until one is deprived of the legal right to the affection and society of his spouse, the alienator's activities, however reprehensible in other contexts, is *d annum absque injuria* as far as the law is concerned.21 It is only when there is effected in one spouse a change in the state of mind which is evidenced by some overt act conclusively demonstrating that conjugal fellowship has been lost that a cause of action accrues to the injured spouse.22 Herein lies the key to the *locus delicti* problem. If the wrong is made actionable only by a change in the state of mind, and only at the time of such change and not before, then it would seem reasonable to maintain that the law determining the liability of the alienator should be the law of the place where this change has been experienced. In most cases, the alteration in the errant spouse's mental state would probably come about in the jurisdiction where the alienator's tor-

17 83 F. Supp. at 42.
18 Id. at 43.
19 Id. at 42.
20 Id. at 40.
21 See Kasper v. Enich, 265 Wis. 318, 61 N.W.2d 315 (1953).
22 Cf. Orr v. Sasseman, 239 F.2d 182, 185 (5th Cir. 1956).
tious conduct took place, because it is, after all, the proximate result of the acts of the alienator and would more than likely be proximate in time and place as well as in causal sequence. The law of the matrimonial domicile should not be considered at all.

Of those alienation of affections cases that reach the appellate level, only a handful involve matters in the field of conflict of laws. Up to now there has been great need of precise, well-reasoned authority which would put to rest the phantom of matrimonial domicile. The instant case shows every indication of becoming such authority.

JOHN A. TERRY


Joanna Dial was convicted by a military court-martial in Germany of the noncapital offense of involuntary manslaughter. Mrs. Dial had lived with her husband, an American soldier, in government quarters in Germany and had been tried with him for causing the death of their child. The case reached the Supreme Court on appeal by the government after a United States district court granted the petition of Mrs. Dial's mother for a writ of habeas corpus.\(^1\) The trial court had held article 2(11)\(^2\) of the Uniform Code of Military Justice unconstitutional as applied to civilian dependents overseas, charged with noncapital offenses.

In the second of these cases, one Guagliardo, a civilian employee of the United States Air Force performing the duties of an electrical lineman in Morocco, was convicted by court-martial of larceny committed while in that country. Guagliardo's petition for a writ of habeas corpus in district court was dismissed, but the court of appeals reversed, holding that *Reid v. Covert* was binding as to all classes of persons included within article 2(11)

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2 § 802. Art. 2. Persons subject to this chapter.

The following persons are subject to this chapter:

. . . .

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States . . . .

and that each class was nonseverable. 3 Certiorari was granted. 4 Wilson was a civilian employed by the United States Army as an auditor in Germany, and was convicted by court-martial of sodomy. His petition for a writ of habeas corpus was dismissed by a district court. An appeal was granted but the Supreme Court granted certiorari prior to argument. 5 Since both Guagliardo and Wilson were civilian employees court-martialed for noncapital offenses, the Supreme Court considered the cases together.

In the last of the companion cases, Grisham, an accountant employed by the Army in France, was convicted by court-martial of the capital offense of premeditated murder as defined in the UCMJ. After sentencing, he petitioned for a writ of habeas corpus on the ground that article 2(11) was unconstitutional as applied because it deprived him of a civil trial with the protections of article III of the Constitution and the fifth and sixth amendments. His petition was dismissed and the dismissal was affirmed on appeal. 6 The Supreme Court granted certiorari. 7 Held, military courts have no jurisdiction to court-martial any civilian for any crime committed while accompanying the armed forces overseas during peacetime. 8

While there were dissenting opinions in each case, no dissent suggested that the military always has jurisdiction. Justices Frankfurter and Harlan, who believed that the military has jurisdiction in all noncapital cases, dissented in all but the case of Grisham v. Hagan. 9 Justices Whittaker and Stewart, believing that the military has jurisdiction over civilian employees but not over dependents, dissented in all but the Singleton case. 10

Reid v. Covert 11 and Kinsella v. Krueger 12 set the stage for the instant decisions. There, defendants were wives of servicemen stationed in England and Japan, respectively. Over complaint of a denial of the constitutional right to trial by jury, a conviction by military courts-martial for the murder of their husbands was at first upheld by the Supreme Court on the basis of Balsac v. Porto Rico 13 and In re Ross. 14 On rehearing, the Court held article 2(11)

9 Separate opinion appears at 361 U.S. 249 (dissenting in part and concurring in part).
10 Separate opinion appears at 361 U.S. 259 (dissenting in part and concurring in part).
13 258 U.S. 298, 304-05 (1922) (no right to jury trial in United States territories).
14 140 U.S. 453, 464 (1891) (no right to jury trial in consular court outside United States).
unconstitutional as applied to dependents, at least in capital cases. Since trial by jury and fifth amendment due process are not afforded in a court-martial, the Court examined the Constitution to determine the permissibility of the court-martial of a civilian dependent accompanying the armed forces overseas, and concluded that it was "inconceivable" that civilian dependents were within the constitutional power of Congress to regulate "the land and naval Forces." It rejected the government's argument that the necessary and proper clause, when coupled with the land and naval forces clause, would give Congress the right to include dependents. Still to be answered, however, were the questions whether civilian employees of the armed forces could be court-martialled and whether the military had jurisdiction in noncapital cases.

As evidenced by the diversity of opinions in the lower federal courts, clarification of the entire area was sorely needed. In Singleton, the government contended that Covert applied only to civilian dependents in capital cases, that jurisdiction to try lesser offenses was needed to maintain the discipline and morale of the military community, that there was no alternative to court-martial jurisdiction, and that some of our military agreements were contingent upon this authority. The appellee, on the other hand, reasoned that if civilian dependents charged with capital offenses are not within that language ["land and naval Forces"], a fortiori, persons in the same class charged with noncapital offenses cannot be included, since the clause draws no distinction as to offenses. The Court, relying on the landmark case of United States ex rel. Toth v. Quarles which narrowly limited military jurisdiction, and on the second Covert case, agreed that the status of the accused and not the nature of the offense was the test of jurisdiction. The Court denied that failure to give jurisdiction in noncapital cases would result in a critical lessening of discipline, and pointed out the danger that jurisdiction in noncapital cases would give the military "unreviewable discretion to exercise jurisdiction over civilian dependents simply by downgrading the offense, thus stripping the accused of his constitutional rights and protections." Concluding that since the necessary and proper clause cannot expand congressional authority over land and naval forces so as to include prosecution of civilian dependents for capital crimes, the Court held that it cannot expand that authority to include prosecution for noncapital offenses.

As to the civilian employees, Guagliardo and Wilson, their status was con-
trolled by the *Singleton* and *Grisham* cases, decided the same day.\(^{24}\) The Court reiterated its language in the second *Covert* case saying that the few historical instances of military jurisdiction presented by the government “are ‘too episodic, too meager, to form a solid basis in history’,”\(^{25}\) and reaffirmed the *Toth* doctrine that “land and naval Forces” should be limited to the narrowest extent which will still allow the end to be accomplished.\(^{26}\)

In the last of the companion cases, that of the civilian employee Grisham court-martialled for a capital offense, the Court again found *Covert* controlling,\(^{27}\) since no valid distinction could be found between civilian dependents and employees.

In contrast to the questions which followed the second *Covert* holding, the effect of the instant decisions is clear. There are, however, several points left to be specifically determined. Of major importance is the question of who may now exercise jurisdiction over these civilians. Like the defendants in the *Covert* and *Krueger* cases, the four principals in the present cases are completely at liberty. The Court has recognized this situation and has suggested a variety of solutions and possible legislative considerations.

One solution is that the civilian be returned to the United States for trial.\(^{28}\) However, the inability in some cases to require the defendant to return to the United States for trial, the possible unwillingness of foreign nationals to come here as witnesses or to submit to depositions, the financial advantage of the Government, and the unhappy result that trial for minor offenses will be rendered impractical, all suggest practical obstacles to such a solution. Another suggestion of the Court is to adopt the solution in *Ex parte Reed*\(^{29}\) of requiring the civilian who is going overseas to agree in writing to submit to the UCMJ.\(^{30}\)

Assuming that civilians would be willing to do so, the question arises as to whether a civilian may sign away his constitutional guarantees. Still another proposal is to incorporate civilians, while outside the United States, into the armed services either by compulsory or voluntary enlistment.\(^{31}\) In addition to the political liabilities of this plan, it smacks of sheer formalism. Somewhat analogous to the last proposal is a suggested system for voluntary enlistment of specialists, similar to the Seabees of World War II.\(^{32}\) It is doubtful whether sufficient volunteers could be obtained who would subject themselves to the military, particularly in peacetime. A dissent in the *Covert* case suggested

\(^{24}\) 361 U.S. 281, 283-84 (1960).
\(^{25}\) Id. at 284.
\(^{26}\) Id. at 286.
\(^{28}\) 361 U.S. at 246.
\(^{29}\) 100 U.S. 13 (1879).
\(^{30}\) 361 U.S. at 286.
\(^{31}\) Ibid.
\(^{32}\) Id. at 286-87.
that Congress might establish federal courts overseas. Assuming that foreign countries would agree to this proposition (and there are over sixty countries with which we would have to negotiate), a problem of selecting juries arises. Shall we allow foreign nationals to constitute our juries or risk the military influence on a jury selected from a military installation?

It is submitted that in considering the legislation which is needed, we must segregate the offenses: those over which the local foreign government is interested in exercising jurisdiction; and those minor offenses over which it is not. Jurisdiction over our civilians in the Status of Forces Agreement was originally obtained only after considerable opposition by foreign nations. Even now, these countries retain their concurrent jurisdiction; and since the Court has now held that the military no longer has jurisdiction, it is doubtful if these nations will accept other reasons for allowing us to maintain jurisdiction over major offenses. These nations should not be expected to accept the argument (which is probably our real motivation) that their standards of justice do not meet our own. It is suggested then, that the minor offenses over which foreign governments decline jurisdiction will be the only type over which the United States will be able to exercise jurisdiction.

Embodied in any proposed solution should be those punitive articles of the UCMJ which are applicable to civilians, omitting those peculiar to the military, such as being absent without leave. This would insure a parallel system of laws for civilians and servicemen overseas, thus minimizing friction. Standardized penalties should be prescribed for each offense to substitute for the present provisions which leave much to the court's discretion. Civilians, who under the now unconstitutional article 2(11) and article 2(12) were subject to the Code, should be made subject to the new statute. The provisions of such a statute would include any civilian who violated the parallel articles of the Code while subject to military jurisdiction, but who is not detected until he has been detached from military service, thus insuring against a repetition of the circumstances of the Toth case. Applying the venue provision of the United States Code which covers offenses not committed in any district or state, it is suggested that the secretary of the respective armed service department refer each case, arising within its service, to the Justice Department for prosecution.

Unless and until some statute providing for civilian trials overseas is enacted, the result of the instant cases appears to be that the Court, rather than deprive

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33 354 U.S. at 87 (dissenting opinion).
a civilian of some of his constitutional privileges by subjecting him to military trial, may have subjected him to the trials of a foreign government under foreign constitutions.

GREGORY A. COMERFORD


Defendants Elkins and Clark were convicted in the United States District Court in Oregon of conspiracy to violate and violation of the Federal Communications Act of 1934.\(^1\) Evidence consisting of tape recorded wiretaps had been seized by state law-enforcement officers in defendant Clark’s home under circumstances which, as two Oregon courts had found, rendered the search and seizure unlawful. The Oregon courts suppressed the evidence and impounded the tapes in a local bank. Acting upon information provided by Oregon officials, federal officers obtained a search warrant and seized the impounded articles. In the subsequent federal prosecution of defendants, the district court found that federal officers had not participated in the illegal search and seizure, and over defendants’ timely objection admitted the evidence on the basis of the “silver platter” doctrine. The appellate court upheld the ruling of the lower court and affirmed defendants’ conviction.\(^2\) The Supreme Court granted certiorari. \textit{Held,} evidence seized by state officers is not admissible in a federal criminal prosecution where the federal court finds that the search and seizure would have violated the fourth amendment if conducted by federal officers.\(^3\)

While an initial reading of this decision reveals the simple declaration of an evidentiary rule, \textit{i.e.}, the destruction of the “silver platter” doctrine,\(^4\) closer examination discloses the far-reaching conclusion that the search and seizure prohibitions of the fourth amendment to the federal constitution may henceforth apply in their entirety, through the fourteenth amendment, to the several states of the union.

The evidentiary aspect of this decision terminates the long-standing practice in the federal courts of admitting evidence seized by state officers during a search which would have violated the fourth amendment had federal officers been the seizing agents.\(^5\) \textit{Weeks v. United States}\(^6\) first articulated the distinction between evidence inadmissible in a federal court because obtained by federal officers in violation of the fourth amendment and evidence merely

\(^{2}\) Elkins v. United States, 266 F.2d 588 (9th Cir. 1959).
\(^{4}\) Id. at 222.
\(^{5}\) Id. at 210-12.
\(^{6}\) 232 U.S. 383, 398 (1914).
handed on a "silver platter"7 to federal officers by state agents whose actions had been independent. The latter evidence was judged admissible notwithstanding the illegal character of the state agents' methods had the fourth amendment been applicable to them. It appeared in succeeding cases that when federal officers participate in a state seizure characterized by such methods,8 or when the state seizes solely on behalf of the federal government,9 again using means abstractly repugnant to the fourth amendment, the evidence is thereby rendered inadmissible in a federal court. Both the rule excluding and the rule admitting hinge on the judicial belief that the fourth amendment would become a dead letter if evidence unconstitutionally seized were not excluded from trial.10 Stated otherwise, a judicial wish to enforce respect for the constitutional provision triggers the exclusionary mechanism; while, conversely, the admissibility rule reflects the judicial belief that the incoming evidence was not taken in violation of the fourth amendment. Since the fourth amendment has not applied to the states,11 evidence taken in violation of its standard did not violate the Constitution as long as federal officers were not implicated in the taking; therefore, admitting such evidence was not at variance with an exclusionary rule militating only against unconstitutional seizure.

The Court at first appears to be striking this "silver platter" admissibility rule in a sensible effort to avoid troublesome future determinations of whether a federal officer has violated the fourth amendment through subtle collaboration with or encouragement of state officials.12 But the heart of the decision appears in its critical reliance on Wolf v. Colorado.13 The Court reads Wolf as prohibiting the states from "unreasonable searches and seizures" and declares that this prohibition removed the "doctrinal underpinning for the admissibility rule,"14 i.e., the constitutional seizure of evidence by state officers utilizing procedures which would have violated the fourth amendment had they been employed by officers of the federal government. While at no point in the majority opinion does Mr. Justice Stewart openly state that the fourth amendment will now be the measure by which is determined the constitutionality of state searches and seizures, that conclusion, buttressed by statements of other Justices to be noticed momentarily, is difficult to avoid. For, if the constitutionality of seizures by state officials to whom the fourth amendment did not apply was formerly the "doctrinal underpinning" for admitting the evidence to a federal court, the majority's present belief that this "doctrinal

7 This expression was first used in Lustig v. United States, 338 U.S. 74, 79 (1949).
12 364 U.S. at 211.
14 364 U.S. at 213.
underpinning” has been removed by Wolf can only reflect the corollary that state seizures may no longer be constitutional unless they comply with the specific and restrictive protections of the fourth amendment.

Unfortunately, the majority would appear to have misused Wolf, as its author pointedly remarks in dissent. The due process prohibition against “arbitrary intrusion by the police,” embodying “the core of the Fourth Amendment,” was not calculated in Wolf to be, vis-à-vis the states, a measure co-extensive with the fourth amendment restrictions on federal action. Only one federal court had given Wolf this construction; other courts before whom the question had arisen consistently ratified the admission of evidence seized by state officers in ways denied to federal officers by the fourth amendment.

That the Elkins decision does in fact carry a profound constitutional statement as well as an evidentiary pronouncement is amply testified to by the interpretations expressly placed on Justice Stewart’s opinion by five other Justices. In his dissent, Justice Frankfurter stated: “The identity of the protection of the Due Process Clause against arbitrary searches with the scope of the protection of the Fourth Amendment is something the Court assumes for the first time today.” Mr. Justice Brennan, writing for Justices Warren, Black, and Douglas in Ohio ex rel. Eaton v. Price on the same day that Elkins was decided, compared the protections stemming from the Wolf decision with those afforded the individual by the fourth amendment against invasions by the federal government in these words: “The guarantees are of the same dimension, matters of enforcement, such as the exclusionary rule, aside.” As for applying watered-down versions of Bill of Rights protections to the states, he added: “In Elkins today we have rejected such a view of the affirmative guarantees of the Fourth Amendment. Thus, given Mr. Justice Frankfurter’s sense of obligation to follow precedents to which he has not agreed unless they are subsequently challenged, at least six votes appear poised against continued state insulation from the unvarnished interdictions of the fourth amendment.

Several observations may be made in the wake of the Elkins decision. In

15 Id. at 237-38.
18 Gallegos v. United States, 237 F.2d 694 (10th Cir. 1956); Ford v. United States, 234 F.2d 835 (6th Cir.), cert, denied, 352 U.S. 972 (1956); United States v. Moses, 234 F.2d 124 (7th Cir. 1956); Williams v. United States, 215 F.2d 695 (9th Cir. 1954); Burford v. United States, 214 F.2d 124 (5th Cir. 1954).
19 364 U.S. at 239-40.
21 Id. at 274.
22 Id. at 276.
terms of the rule of evidence here promulgated, the "silver platter" doctrine is overthrown in toto. However, evidence seized by state officers in violation of a stricter state standard,24 but not in violation of the fourth amendment, will still be admissible in a federal court.25 This practice, while parallel to, is distinguishable from "silver platter" and should not be affected. Secondly, the freedom of the states to establish their own rules on the admissibility of evidence is left unaffected by the instant decision.26 Wolf determined that a state official's violation of due process did not preclude the evidence thereby obtained from being entered in a state proceeding, as long as some form of sanction existed to be applied to the offending party.27 In now applying the more specific restrictions of the fourth amendment to state action, Elkins in no way alters the power of state courts to admit relevant evidence,28 regardless of its source, although clearly a sanction under the laws of the state will still be required to meet the tenets of due process.

Basic to any discussion raised by this decision is the long-disputed question as to whether the first eight amendments of the Bill of Rights apply to the states through the fourteenth amendment. The advocates of the "incorporation theory"29 would seem now to have achieved the inclusion of the fourth amendment as a limitation on the states through the fourteenth, much in the fashion by which the first amendment was absorbed.30 While a healthy federalism appears somewhat victimized by this process, affording the individual citizen consistent constitutional protection against all police action, regardless of state or federal origin, carries undeniable appeal. To the liberal mind the idea that the Constitution countenances disparate degrees of police morality, depending on the sovereign affiliation of the agency involved, is vaguely anathematic.

In so far as this decision attempts to consolidate varying standards of state and federal official action and precludes quietly unethical collaboration between federal and state agencies, it reaches a meritorious conclusion in the law of evidence. The failure of the Court to restrict itself to this conclusion alone is, however, regrettable. Only the admissibility of evidence was being tested in Elkins; under the Court's broad supervisory powers,31 no constitutional objection had to be raised to alter the "silver platter" doctrine. Thus, the construction of Wolf as applying the letter of the fourth amendment to the states seems to have been unnecessary. So momentous a determination, if to be made at all,

24 E.g., Flannery v. Commonwealth, 324 S.W.2d 128 (Ky. 1959); State v. Buckley, 145 Wash. 87, 258 Pac. 1030 (1927); State v. Adams, 103 W. Va. 77, 136 S.E. 703 (1927).
25 364 U.S. at 246-47 (dissenting opinion).
26 Id. at 221.
27 338 U.S. at 31-32.
28 See 364 U.S. at 221.
29 For an excellent discussion see Fairman, Does the Fourth Amendment Incorporate the Bill of Rights? The Judicial Interpretation, 2 Stan. L. Rev. 140 (1949).
30 Id. at 168-70.
appears deserving of a more noble inception than that provided here. The concrete application of the constitutional principle to be derived from Elkins must necessarily await a case which will directly test the validity of state police procedure, but such an application seems inevitably forthcoming.

JOHN J. FLYNN

EVIDENCE—WIFE'S TESTIMONY AGAINST HER HUSBAND MAY BE COMPelled IN PROSECUTION OF HUSBAND FOR TRANSPORTING HER INTERSTATE FOR IMMORAL PURPOSES IN VIOLATION OF MANN ACT. Wyatt v. United States, 362 U.S. 525 (1960).

Wyatt was convicted of knowingly transporting a woman in interstate commerce in violation of the Mann Act. Subsequent to the time of the unlawful act but prior to the time of trial, the defendant married the woman that he was accused of transporting. Over the objections of both wife and husband, the district court ordered Mrs. Wyatt to testify for the government. The United States Court of Appeals for the Fifth Circuit upheld the ruling and affirmed Wyatt's conviction. The Supreme Court granted certiorari. Held, a wife may be compelled to testify against her husband when he is accused of transporting her interstate for purposes of prostitution in violation of the Mann Act.

Initially the common law looked upon marital partners as without legal competence to testify either for or against each other. Today no question remains that at least the favorable testimony of the marital partner is admissible, but the older rule still prevails and excludes testimony adverse to the accused spouse. This exclusion has been characterized as reflecting less a legal disqualification in the witness than an evidentiary privilege in the accused. Whatever its basis, exclusion has always been subject to one major exception: broadly stated, where spouse has suffered injury at the hand of spouse, adverse testimony is permissible. This inroad, frequently labeled the "necessity exception," issued in reaction to the injustice ministered to injured spouses whose testimony is excluded through an uncompromising application of the general rule.

It is well settled in the lower federal courts that a wife transported interstate for immoral purposes has been the victim of a crime against her person, and the "necessity exception" may therefore be invoked on behalf of the Gov-

2 Wyatt v. United States, 263 F.2d 304 (5th Cir. 1959).
6 Note, 38 Va. L. Rev. 359, 360 (1952).
The instant decision not only affirms this widely accepted rule, but establishes that if the wife refuses to testify voluntarily in such a case, she can be compelled to speak anyway. The Court expressly avoided placing this conclusion on the ground that since the privilege of exclusion is taken from the accused spouse by the nature of his crime, "it is ipso facto lost to the witness [spouse] as well." The exclusionary privilege is retained by both witness and spouse, qualified by the "necessity exception." In most cases invoking that exception, the witness will be able to remain silent if he or she desires. The essence of the Wyatt decision is the creation of an exception to this right of option in the witness spouse. In certain types of cases falling within the "necessity exception," for example, Mann Act violations, the witness has no option, in effect, and the Government can compel the desired testimony. Just when the option will be extinguished is evidently to be decided by posing the "question in each case, or category of cases, whether, in light of the reason which has led to a refusal to recognize the party's privilege, the witness should be held compellable."  

Thus adroitly bypassing the apparently unwanted opportunity to lay down a hard general precept, the Court freed itself to employ a flexible process of balancing conflicting policies in each particular case. Here the Court balanced the policy in favor of the option privilege in the wife against the policy which had first generated and then been incorporated into the Mann Act. The basic reason justifying the existence of the spousal privilege, whether it be exercised by party or witness, is a "natural repugnance in every fair-minded person to compelling a wife or husband to be the means of the other's condemnation, and to compelling the culprit to the humiliation of being condemned by the words of his intimate life-partner." On the other hand, "a primary purpose of the Mann Act was to protect women who were weak from men who were bad." The theory on which the act is based is that women have "no independent will of their own," and must be protected from their own folly. In resolving this conflict, the majority of the Court felt that the Mann Act policy should prevail.

As might be expected in a case where two well-entrenched policies collide, there was a vigorous dissent. The dissenting Justices agreed with the principles of law as stated by the majority but felt the spousal privilege was supported by the paramount policy. It was strongly emphasized that "where the wife refuses to testify, there is strong evidence that there is still a marital relationship to
be protected."\textsuperscript{14} The dissent noted also that the evidence failed to support a finding that the woman was under the influence of her husband; on the contrary, it appeared that she may have been instrumental in initiating the crime.\textsuperscript{15} As if anticipating this latter argument in the minority opinion, the majority had already stated that it would be most undesirable to make \textit{ad hoc} inquiries into the actual state of mind of particular women, thereby encumbering Mann Act trials with a collateral issue of the greatest subtlety.\textsuperscript{16} As a result this decision and the Mann Act will protect married women from their husbands whether this protection is desired or not, deserved or not. It is not unlikely that some convictions may now occur which are not entirely justified because the wife is the dominant force in the unlawful transportation. Or it is conceivable that the woman may have a bona fide desire to protect her husband. It is evident that no matter which approach is taken—the blanket protection or \textit{ad hoc} inquiry—problems will arise. The Court apparently followed the path which it believed would present the fewest obstacles and would best serve the ends of justice.

Clearly, however, the decision is not without its difficulties. Exception may be taken to at least two aspects of the Court's reasoning: first, its choice of interests to be balanced in seeking a resolution of the problem, and second, its utilization of a somewhat old-fashioned concept of the North American woman. Curiously enough, neither deficiency obstructed a most desirable result, and in fact both contributed largely to its attainment.

With regard to the first, it has been strikingly pointed out by a federal court that in Mann Act cases there is an even greater reason than her protection for compelling a wife's testimony; protection of the society itself, which may suffer grievous harm from these illegal transportations, appears the loftier object. In \textit{United States v. Williams},\textsuperscript{17} the court stated that "the many young men whose moral and physical condition has been degraded by the woman's activities at the places to which she has been transported must still be dealt with by society. . . . [T]he marriage of the parties . . . does not alleviate the difficulties."\textsuperscript{18} By balancing the spousal privilege against the interest of the community in preventing these transportations, rather than merely against the interest-prompting congressional intent of a half century ago, a much more forceful case can be made for compelling the witness-wife to testify for the Government.

Part and parcel with the Court's questionable employment of the congressional concern for women was its surprising affirmation of some fairly wearied descriptions of that sex. Determinations that wives "often had no independent will of their own" and that "they must be protected against them-

\textsuperscript{14} Id. at 534.
\textsuperscript{15} Id. at 533.
\textsuperscript{16} Id. at 530.
\textsuperscript{17} 55 F. Supp. 375 (D. Minn. 1944).
\textsuperscript{18} Id. at 380.
selves” seem Victorian and needlessly sentimental in light of current trends in
the legal status of women. Freed from the legal disabilities which surrounded
them at common law, enfranchised, made competent to contract, and elevated
to the responsibilities of property-holding, it is evident that women are today
considered by society as capable of independent judgment and of the critical
exercise of free will. Oddly enough, in terms of the instant case, Supreme
Court recognition of this capacity may be found in the recent decision of
United States v. Dege, where it was held that a married woman could be
guilty of entering into a criminal conspiracy with her husband. Neither the
assumption that the responsibility of husband and wife for joint participation
in criminal enterprise would make for marital disharmony, nor that a wife must
be presumed to be acting under the influence of her husband and, therefore,
could not be a willing participant, had much effect on the Court. The opinion
stated that “the former assumption is unnourished by sense; the latter im-
plies a view of American womanhood offensive to the ethos of our society.”

If a married woman is of sufficiently independent will to enter a criminal
conspiracy with her husband, why is she presumed to be under his influence
when she prostitutes herself for his benefit? Recourse to history provides at
least an insight into the apparent inconsistencies characterizing the Court’s
reasoning in the Wyatt and Dege cases. The Mann Act emerged in the early
twentieth century, at the incipiency of womanhood’s legal emancipation, when
husband and wife were still legally one. The legislative history of the act, cited
in the Wyatt case, reflects the attitude of a previous generation toward
women. Consequently, what can be considered a progressive result in the case
is supported by antiquated reasoning. It is submitted that the Court should
have based its conclusion upon the type of reasoning found in the Williams
case. Williams recognized the interest of society in preventing these trans-
portations, yet it is in accord with modern treatment of women by the law.

Equipped with the Federal Judiciary’s power to interpret the common-law
rules of evidence “in the light of reason and experience,” it is perhaps time
for the Court to consider the proposal to abolish a party’s privilege altogether
and to cast the “necessity exception” in the role of the general rule. Society
would appear to be as deserving of the protection of this exception as is the
wife for whom it was originally designed. A defendant who offends the peace
dignity of the state by violating its criminal laws need not have in his
hands the power to thwart the ends of justice, solely because the only witness
for the Government happens to be his spouse. If the witness refuses to assist
the Government, the testimony need not be compellable. The witness could

19 See 8 Wigmore, Evidence § 2228 (3d ed. 1940).
21 Id. at 53.
determine whether the preservation of the marriage was more important than aiding the state in prosecuting a criminal accused. It is unlikely that the policy in favor of preserving marriages would suffer, because the person having the greatest stake in maintaining the union, the defendant's spouse, would determine whether there was a marital relationship worthy of protection. In appropriate situations, where the interest of society in securing convictions far outweighed its interest in preserving marriages, the judiciary could rely on the logic and precedent of decisions such as Wyatt and order that the testimony be entered.

In support of this proposal to abolish, it has been noted that divorces may be obtained unilaterally, with or without the consent of the affected spouse.\(^{25}\) In lending its weight to this practice\(^{26}\) the Supreme Court has ratified a threat to marital harmony certainly no less disruptive than the practice of admitting adverse testimony by a witness spouse. To raise the "necessity exception" to the level of general rule, then, would be in fair accord with opinions previously issued by the Court.

\[\text{FRANK W. ITTEL, JR.}\]

\(^{26}\) Ibid.
BOOK REVIEWS


Felix Frankfurter Reminisces is taken from tape recordings made by Professor Phillips as a part of Columbia University's Oral History Research Office program. This new technique has produced a lively and interesting book and reveals a portrait of Justice Frankfurter quite at variance with popular ideas. The newspapers over a twenty-five year period have portrayed Justice Frankfurter as the traditional newspaper type of law professor, with little or no experience in the practice of the law and a mere dilettante in the world's affairs. On the contrary, he had considerable experience in court and in office practice, and was preeminently a man of action in both national and international affairs. Also, the present work destroys the columnists' portrait of him as either the indirect Rousseau of the New Deal or, through his pupils, the head of its Personnel Division. As he says:

"The happy hot dogs"—you know, with whom I filled the Departments. It was the most natural thing for him [F.D.R.] to ask suggestions from me as he did from other people, and it was the most natural thing for me to have a wider acquaintance of people who were qualified for government service than anybody else. Why? Because I'd been at the Harvard Law School from 1914, and this was 1933 . . . I was doing for the administration what I had been doing for big offices from the time I was at the Harvard Law School, year after year . . . .

But apart from misconceptions the present book tells the story of an urbane and civilized man, who was blessed with a good mind and by hard work made the most of it. The Justice speaks of luck: "I stand on one of my deepest convictions in life; namely, the importance of luck, contingency." We think the Justice would have made his mark in any field he cared to enter. Added to a good mind and great energy there were the moral qualities: his ideals, his restraint, and his modesty. How often do you find a lawyer who would turn down a federal judgeship at age thirty—or appointment to the Supreme Judicial Court of

1 Phillips, Felix Frankfurter Reminiscences (1960) [hereinafter referred to as The Reminiscences].
2 Mr. Chief Justice Hughes: "The columnists. I beg your pardon. I mean the columnists." The Reminiscences 248. See also id. at 226.
4 Id. at 32. See also id. at 11, 33.
5 Id. at 279.

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Massachusetts at any age? While luck may play a part in what a man achieves, the man himself, in the present case, would be the same with or without luck. Justice Frankfurter has lived a life of the mind in which, since Socrates, luck is unimportant.

The book gets off to a jarring note—a reference to Sir Ernest Jones’ idolatrous biography of a fellow Viennese, Sigmund Freud. But thereafter the Reminiscences have the spontaneous charm of a “full” man who reflects as he goes along, setting down naught in malice. He came of a bookish or intellectual family and his parents finding in him studious instincts, left him alone. His education had its formal side but it was more the people he met. “[M]y definition of education is the air you breathe, what is in the atmosphere.” Anatole France once said that he got more education on his way to school than after he arrived there; this seems to have been true of the Justice. It is interesting to note that he studied Horace and even Greek.

As to the law, “I do not remember the time when I did not know I was going to be a lawyer.” He went to two night law schools and quit—“I knew what bad law schools were.” He missed Columbia because of a $10 holiday at Coney Island and wound up by accident at Harvard.

There he fell under the influence of Williston, “the greatest artist as a teacher I ever encountered,” and James Barr Ames from whom he absorbed ethical concepts that always remained with him. “There weren’t any courses on ethics, but the place was permeated by ethical presuppositions and assumptions and standards. On the whole, to this day I am rather leery of explicit ethical instruction. It is something you ought to breathe in.” Likewise he was inspired by Joseph H. Beale and John Chipman Gray through whom he came to know Justice Holmes. Characteristic of Justice Frankfurter was his action in returning to Gray a check for $100 for work done on Gray’s casebook on Property; quite

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6 Id. at 229-34.
7 Id. at 5.
8 Id. at 9.
9 Id. at 13.
10 Id. at 11-12.
11 Id. at 13.
12 Id. at 15.
13 Id. at 18. Williston demonstrated what a man of courage could accomplish in spite of recurrent nervous breakdowns. See Williston, Life and Law (1940).
14 The Reminiscences 19. Chief Justice Peters of Hawaii once said that a child of seven knew in essentials the entire law of personal property, including possession, title, bailments and loans on security!
uncharacteristic was the action of Gray, a millionaire, in sending it back to the student.15

One of the things about the Harvard Law School which impressed him was its democratic spirit. You got the marks you were entitled to; if you got the right marks, appointment to the Law Review was automatic, no matter what or who you were.16 He made the Law Review.17 Also, there was the education you got from fellow students18 and outside cultural activities.19 Just as Plato thought the best government was the government of the best men, so the Justice thought the best law school was the law school of the best teachers. “I have so little patience with all this talk about method, pedagogic methods, curricula. It’s all the bunk unless you have men of stature and depth and quality in great things.”20

As a lawyer, the Justice got his start as Assistant United States Attorney in New York under Henry L. Stimson, later to become Secretary of State and Secretary of War. Stimson was not only a man of integrity and ability but he had the able man’s confidence that he was quite adequate to do the job, whatever it was. When Theodore Roosevelt appointed him United States Attorney, he stipulated that “whatever legal business arose in the Southern District of New York would be handled by him and not, as had been the custom, have the government hire special counsel whenever there was an important case.”21 The young Frankfurter acquired this pride of craftsmanship and proceeded to try cases as they came along. Stimson’s viewpoint cropped up when the professor became Justice. During a Supreme Court argument Frederic Bernays Wiener happened to state that the case had been tried below by special counsel for the Government. Justice Frankfurter asked, “Why did they need special counsel? When I was Assistant United States Attorney in New York we tried everything ourselves.” Mr. Wiener could only say, “Your Honor, there were giants upon the earth in those days.”22

15 An exception to what Frank Swinnerton calls “the large, loose meanness of those born opulent.”
16 The Reminiscences 26-27.
17 Id. at 19, 32.
18 Id. at 29-31.
19 “I just luxuriated in what is called ‘culture.’ I listened to music. I’m dependent on it.” Id. at 31. It reminds us of Oscar Wilde’s remark. He listened to a child prodigy play the piano and when the fond mother said, “Oh, Mr. Wilde, don’t you love music,” Wilde replied, “No, I don’t like music but I like that.”
20 The Reminiscences 24.
21 Id. at 38.
The era of predatory and antisocial big business with which he came in contact under Stimson probably left its mark on the Justice. Young, idealistic, impressionable, a member of an oppressed people, the relentless greed of the "robin barons"23 of the age must have laid the foundation for viewpoints later exteriorized in World War I, at Versailles and on the bench. Yet, it is significant that no word of bitterness escapes him. Indeed, he refers to that "very nice and very gentle Averill [sic] Harriman of our day"24 as the son of Edward H., a dubious acquisitive genius.

It is clear that the Justice is keenly aware of large-scale social wrong; however, this book is free of hate or even undue indignation. He had a sort of intellectual contempt for certain people—Governor Charles S. Whitman,25 Henry Morgenthau, Sr.,26 and a nameless prosecuting attorney in the Sacco-Vanzetti case.27 He despised but respected the impossible Justice McReynolds. "He is a good illustration of my deep conviction that on the whole as good a dividing line as any between men is those who love and those who hate ... McReynolds was a hater."28 He was unenthusiastic about Woodrow Wilson, whose doctrinaire mind led him to appoint Lindley M. Garrison Secretary of War. Garrison was a New Jersey equity judge and as the Phillipines were to be dealt with equitably, Garrison, in Wilson's estimate, was the ideal man for the job.29 The Justice appears to have caught on to Wilson's cemeterial prose style, which laid each idea in its grave and then marked it with its proper headstone.30 However, Wilson was not without wit. I had a case with Judge Garrison in the twenties and he told me about the cabinet going down to Congress for a Presidential message. They watched the Congress file in. As the President seated himself, Garrison said, "Mr. President, as we sat here we've had a little argument as to who is the biggest damphool in Congress. We've nominated Tom Heflin." Wilson instantly replied, "No, I'm rather committed to Hoke Smith." It is a tribute to Justice Frankfurter's perspicacity that he was one of the

23 "Behold, the wages of the laborers who reaped your fields, which have been kept back by you unjustly, cry out." Ep. St. James 5:4.
24 The Reminiscences 46.
25 Id. at 45-46.
26 Id. at 145-53.
27 Id. at 211-13.
28 Id. at 101.
29 Id. at 72. The Justice thought this a simple-minded approach and it was. "Fantastic," he called it.
30 See id. at 130, 144, 161.
few who perceived, at the time, Wilson's fatal mistake in attending the Peace Conference in person. 31 How this decision was made is almost incredible. Joseph P. Tumulty, Wilson's able secretary, told me in the early twenties that after a lot of hard work he had "argued the Governor out of it." Then the White House physician, Dr. Cary T. Grayson, and his wife appeared on the scene. Grayson was a Virginia race-horse breeder whose ideas on international affairs were likely to be derived from the Daily Racing Form. However, he proceeded to talk the President back into the plan of going to Paris, and after some days succeeded. The result was that off he went on a warship, as George Harvey put it, "huffing and puffing along at 20 may-I-nots an hour." It was one of the most fateful mistakes in history and led directly to the exactions of Versailles, the fiasco of the League of Nations, Wilson's illness and early death, and ultimately to Hitler and World War II. It is too bad Dr. Grayson did not own Man O'War, or a dozen of them, to occupy his time.

The Justice's Washington years under Stimson, Roosevelt I, and Wilson, his trouble-shooting with the labor unions, show that basically he was as much a doer as a thinker. 32 However, unlike most "practical" men he could not help generalizing on his experience. Thus, he thinks the lawyers must share responsibility for the excesses of industry in the so-called "golden age" of acquisitiveness. As he says:

[A] lawyer is a counselor, an adviser. He isn't just a hired man to do the bidding of his clients, but he must exert the independence of his mind and understanding upon his client's business. Instead of being advisers, lawyers were collaborators in their client's short-sightedness in large measure. I should say that from the time things got booming after the Civil War—from the Eighties on certainly—the legal profession's contribution was that of collaborators in the rampant, short-sighted laissez-faire outlook. The lawyers did their client's bidding instead of illuminating their minds to understanding something about the forces with which they were dealing. 33

This presupposes that the lawyers themselves, as a whole, realized the abuses of the industrial struggle—of which there is little evidence. The advice is good and the duty is clear. But how many lawyers today are warning their clients against "bigness"—big industry, big unions, big taxes. Or about Lenin's remark that if let alone this country will spend

31 Id. at 158–63.
32 "Anybody can construct wonderful policies on paper." Id. at 186. "Generalities don't amount to a hill of beans." Id. at 198. And note also his strike-settling activities. Id. at 113–29.
33 The Reminiscences 128.
itself into destruction? Or about abuses of installment buying and the two-car, one-child family? And looming behind everything else—Washington, in the Justice's phrase, "taking in more than it could absorb."34

The average man, certainly the average lawyer, associates Justice Frankfurter (a) with Harvard Law School; (b) with the Supreme Court; (c) with Justice Holmes. It comes as a surprise, therefore, to find how little mention is made of these subjects in the Reminiscences. We are told how he joined the Harvard faculty and how he was appointed to the Supreme Court. There is nothing mysterious about either appointment; he got both jobs on strict merit in our opinion, "as the papers were graded."35 We can put aside his possible discussion of the Supreme Court in the present work; it would obviously be out of place; we must, unfortunately, leave it to the Drew Pearsons36 and the Fred Rodells.37 However, as to the law school, we all have a legitimate curiosity: what did he teach and how, has he any ideas as to method, can we improve our law schools? We know he has little confidence in curricula38 and that, quoting Ames, "the strength of the Harvard Law School is its student body."39 He had a tremendous loyalty to Harvard, evidenced by his continual recommendations of Harvard Law graduates,40 and regarded it as a progressive place. "Anybody who thinks the Harvard Law School was a stick-in-the-mud place and new light has come out of the East, or New Haven,41 is just ignorant of American legal education, that's all."42 On the other hand, in 1913 he considered the role of the lawyer as mediator and coordinator in shaping "the Great State" and said:

This organized thinking must be assumed by our law schools, and the most hopeful center, the rightful leader, is the Harvard Law School. As a matter of fact, it has been creatively stagnant for almost a generation. Since Langdell and Ames did their epoch-making work in the revolution of the method of law teaching, nothing has been done except the perfection of technique.43

34 Id. at 122.
35 Id. at 27.
38 The Reminiscences 24.
39 Id. at 25, 81.
40 See, e.g., id. at 141, 158, 247-49.
41 Yale Law School.
42 The Reminiscences 21. See also id. at 26-31, 166-67, 190.
43 Id. at 81.
It would be interesting to have the Justice's views on these subjects brought up to date. Also, as to Holmes, the reminiscences, it is true, mention him from time to time, but there is no substantial discussion of his life or work or place in the law,\(^{44}\) or any report of their intimate discussions, which were numerous.\(^{45}\) This would make an interesting book in itself. So, too, as to the Justice's ideas about jurisprudence, that Dark Continent of the legal mind. We know he has something to say on these subjects; his opinions prove it. Perhaps we should not complain; it is as if being presented with *Hamlet* we should complain that Shakespeare should have given us *Othello* instead. Maybe these things will come in due course.

Lastly, as to Professor Phillips' Oral Method, in writing the history of a man of action, it is what he *did* that interests us. By the same token, where a man of thought is involved, it is the life of his mind which makes the appeal. In the latter case there is a certain weakness in the Oral Method. What interests us most in Mr. Justice Frankfurter is what he is intellectually and how he got that way. The Reminiscences do not, perhaps cannot, re-create his intellectual life—what formed the finished product of his mind and heart. We are given, quite adequately, events, but events did not produce Justice Frankfurter. He would have been pretty much as he is, as a personality, if the events had been in reverse—if instead of Harvard he had gone to Michigan, Cornell, or Virginia, or if he had stayed in his native Vienna. No doubt he was affected by the first-rate people he came in contact with in his formative years. However, it was what they said that affected him, not the mere fact of meeting and talking to them. Perhaps we cannot, in the nature of things, obtain this missing information. Nonetheless, we must note its absence as a defect, though perhaps not a curable defect in method.

*William J. Hughes, Jr.*

\(^{44}\) There is much more of Holmes both as a man and as a lawyer in the Holmes-Pollock Letters (Howe ed. 1941), in Bowen, Yankee From Olympus (1945), and in Bent, Justice Oliver Wendell Holmes (1932).

\(^{45}\) The Reminiscences 58-59.

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The Price Discrimination Law provides the first comprehensive examination of our experience with the price discrimination provisions of the Clayton\(^1\) and Robinson-Patman Acts.\(^2\) The study is based almost entirely on primary source materials, the decisions of the Federal Trade Commission and the courts, the legislative history of the act and its amendments, and interviews with those “involved” in the Commission’s cases. The exhaustive analysis rests largely upon 84 cases decided before 1955, selected for their focus on representative critical problems in the enforcement of the act, supplemented by a review of 160 other cases decided before 1955 and some 67 cases in which orders were issued in the years 1955 to 1957.

Professor Edwards is eminently qualified to undertake the difficult task of appraising the accomplishments of the Robinson-Patman law. In his many years at the Federal Trade Commission, he was in the midst of many of the most controversial price discrimination cases; he is familiar with the enforcement tribulations of the attorneys and the fact-finding perplexities of economists; he has advised commissioners on policy and has been a consultant to Members of Congress faced with amendatory legislation. And now he has talked with scores of businessmen whose operations have been influenced by Robinson-Patman Act proceedings.

In the foreword the author explains that this is not the book he started to write. As originally conceived, the enterprise was to take the findings and decisions of the Federal Trade Commission as a starting point, and then by interviews with interested parties (respondents, buyers and sellers, and their competitors), to analyze the impact of the statute on business practices. A large number of interviews were conducted, but the yield was not wholly satisfactory: the parties interviewed were imprecise in their recollections and in identifying the influence of other factors; others could not be located, and some were uncooperative. The design for the study was an intriguing one, but it could have been carried out only with the mandatory investigatory powers of government, starting promptly after the conclusion of the case and continuing, with a requirement that appropriate records be kept, until both the short-run and the long-run consequences of each order could be identified. But

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even then one would not, as Dr. Edwards notes, have a full picture of the impact of the statute on business practices, for the statute and the litigated cases exert an influence beyond the parties immediately involved, even beyond the industries in which the respondents are occupied.

The study consequently became a close and critical analysis of the legal and economic theories guiding the enforcement of the act, of trial records and formal orders, illumined by interviews with affected persons when they could be helpful. The analyses are not confined to the records in the cases. Indeed, the scanty character of many of these records is one of the weak features of the law's history.

A survey of the legislative history of the price discrimination laws serves to explain some of the difficulties encountered in its enforcement. It was designed primarily to meet the problem of the powerful buyer and to provide equality of opportunity for commercial buyers. Some of the uncoordinated applications of different principles of legality, some of the specific prohibitions, as brokerage and the requirement of proportionality of payments and services, are explained by the fact that the authors of the legislation had their attention focused on the growing chain stores in the food industry and gave little thought to the enforcement of these provisions in other industries and markets.

The history of enforcement shows a very uneven application of the law, both in terms of offenses attacked and industries covered. A considerable proportion of the orders have been uncontested, and when a consent order is entered, the record normally supplies few facts upon which to base an examination of the economic foundations or consequences of the proceeding. Moreover, the cases carried to the courts have not yet brought a judicial review of all of the provisions of the law or of its impact in varying circumstances.

Dr. Edwards is critical of the Commission's enforcement record on several counts. In uncontested cases, the Commission has often issued perfunctory orders, but in others obscurity and vagueness are said to enter into both findings and orders. The extent of compliance with the Commission's orders and the effectiveness of those orders in achieving intended results has only infrequently been checked. Single enforcement proceedings, rather than in coordinated groups, have placed the firms first subjected to Commission orders at a competitive disadvantage, but this procedure has been forced on the Commission by the scope of its task and the limitations on staff. The author suggests, however, that cases against the more powerful concerns should be decided before
orders are issued against their less powerful competitors. And, as will subsequently appear, the Commission's theories of injury to competition are charged with having distorted the application of the act.

Cases critical to a judgment concerning the philosophy and economic reach of the price discrimination laws are analyzed with respect to each area of enforcement. Examining the application of the brokerage provisions to chains, it is concluded that neither the effectiveness of the law in preventing discriminatory concessions to powerful buyers nor the importance of alternative ways of buying at low prices has been fully tested. However, the application of the brokerage rule is said to have reduced the size and effectiveness of voluntary groups that had grown up in competition with the chains. Thus the author concludes that "the difficulties that the brokerage provision presents to independents appear to be more enduring, more general, and less readily avoided than those that it presents to corporate chains."

The wisdom of the statutory absolute, that there shall be proportionality in payments and in sales services rendered to customers, is questioned, not because these practices may not sometimes involve concealed price concessions but because legitimate promotional efforts may be outlawed without regard to their competitive effects. The examination of enforcement with respect to quantity and volume discounts yielded no clear conclusions respecting effects either upon respondents and their competitors or upon prices. Other changes in the economy far overshadowed any consequences traceable to the orders. Dr. Edwards questions whether the application of Robinson-Patman to functional discounts has not tended adversely to affect the economy by imposing hazards to experiments with more efficient methods of distribution. Discriminations inherent in functional discounts, he argues, should be tested primarily in terms of general injury to market competition or tendency toward monopoly rather than in terms of the narrower concept of injury to competitors or their customers.

The cases dealing with territorial discrimination by pricing formulas—uniform delivered prices, zone prices, and basing-point prices—have provided the principal enforcement fireworks, both before the Commission and on appeal to the courts. Because the more crucial cases involved issues of conspiracy, these cases are less informative than they would otherwise be for present purposes, but the price discrimination features are fully analyzed. An additional chapter is devoted to the political

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4 Id. at 400-38.
controversy over amending the Federal Trade Commission and Clayton Acts that followed the Supreme Court’s decision\(^5\) upholding the Commission’s order against the use of a basing-point price system in the cement industry.

Dr. Edwards’ appraisal of the effects of the Robinson-Patman Act are necessarily tentative: the consequences of the price law frequently cannot be isolated from other economic influences; the most important effects are presumably indirect and practically untraceable; the different provisions of the law have operated in different directions; and there are serious gaps in the facts about business behavior before and after the proceedings—a flaw which it was the original purpose of this study to resolve.

Clearly there are problems of price discrimination affecting both buyers and sellers that are significantly related to the maintenance of competition. It is concluded that the law has afforded effective protection against predatory price-cutting and has substantially reduced the discriminatory advantages in price enjoyed by large buyers. On the other hand, the law has had its failures. The most important is its failure to reach the powerful buyer directly. It strikes at manifestations of the power of the big buyer rather than at that power itself. “[T]he part of the statute that establishes the buyer’s liability was badly conceived and has proved to be so burdensome that it cannot be expected to play a major part in future proceedings.”\(^6\) Since the law must be separately applied against each seller or buyer except in conspiracy cases, the disadvantages created by enforcement may be as burdensome as market discrimination itself. The law has curbed not only the economically powerful but also the independents seeking to protect themselves through group buying and otherwise. Furthermore, it is believed that the law has interfered with efficiency, conspicuously in the application of the brokerage and proportionality provisions.

Some of the undesirable effects of the law are charged to the Commission. The Commission is sharply criticized for relying so largely upon injury to the narrow line of commerce (to competitors and their customers) rather than upon the economically more significant broader injury to market competition. Underlying all such criticism is the thought that there has been a deficiency in competent and sophisticated economic analysis with respect to both findings and orders. With enforcement founded upon injury to competition in the primary line (to


competitors), competition itself has been made more hazardous. The basic difficulties, however, are with the law itself:

Some of the difficulties that have developed under the Robinson-Patman Act were obviously avoidable. There was no need to apply the proportionality sections against the seller alone, with exemption for the buyer. There was no need to make disproportionate payments and services or the payment of brokerage to a person on the other side of the transaction automatically illegal, regardless of competitive impacts. There was no need to deprive the offender under these sections of whatever benefit he might obtain from the defenses that are applicable to violations of the price discrimination section. Similarly, there was no need to make the treatment of buyers’ conduct under Section 2(f) a mere corollary of the treatment of sellers’ conduct under Section 2(a). It should have been possible to establish by statute or by interpretation a concept of injury to competition more closely related to the problems of predatory selling and of advantage enjoyed by the powerful. If the principles of Section 2(a) had governed the other sections concerned with sellers’ conduct, if there had been a carefully drawn section of similar scope concerned with buyers’ conduct, and if the concept of injury had not been exaggerated, a considerable number of the evils that have developed in the administration of the law would have been reduced or eliminated. What was important would have been more enforceable. There would have been less of what was unimportant or anti-competitive.\footnote{7 Id. at 632-33.}

In offering suggestions as to policy, Professor Edwards approves of attempting to cope with discriminatory practices by powerful competitors when there is a significant lessening of competition in the broad or market sense, but he questions the wisdom of making injury to competitors a test of illegality. He notes that to make successful competition which diverts business from competitors a legal hazard is to foster anti-competitive consequences. He would also accept as a reasonable objective the protection of market competition in the secondary line, the customers (or suppliers) of competitors, but he deplores the rigorous application of the narrow standard of injury (to competitors) whenever a discrimination involves a price difference large enough to have a perceptible effect on market behavior. He argues further that the second objective of the law—to assure equality of opportunity for all competing enterprises that buy from the same seller—has no proper place in the price discrimination law, and in any event, he would have the law relating to effects in the secondary line concern itself only with problems created by the powerful buyer. In essence he contends that the focus of public policy should be shifted from efforts to control market behavior to efforts to prevent undue concentrations of market power. He suggests, but does not recommend, that an attempt could be made to
define the types of buying conduct that express undue buying power and that such conduct be prohibited directly through proceedings against buyers using such tactics. With respect to the brokerage and proportionality sections of the statute, he decries their subjection to a special rule of law and their exemption from the general law of price discrimination. These provisions have deprived the law of consistency and prompted its enforcement in situations where there were no injurious effects. He would drop the criminal penalties from the price law, leaving the more serious offenses that warrant criminal penalties to a Sherman Act\(^8\) prosecution.

The Price Discrimination Law represents a major contribution to our understanding of one of the most controversial aspects of American antitrust policy and practice. The proposed revisions will be differently received by economists, lawyers and businessmen, depending on their experience with the law, and controversy will continue to flourish in the Robinson-Patman vineyard. Whether the study leads to sound revisions in the statutes will depend on the politics of competing pressure groups, but at least attorneys and economists, politicians and businessmen, concerned with the discipline of competition, have a meaningful road map through an otherwise perplexing maze of litigation.

Irston R. Barnes*


The number of books and articles on constitutional questions filled with clichés, name-calling, and personalities is so great today that it is refreshing to find one which relies solely on scholarship and logic. Professor Mayers' lucid dissection of the privilege against self-incrimination is a model of hard-hitting advocacy carried on with scrupulous fairness—an effective demonstration that impact is increased and not lessened by sticking to the subject at all times. His plea for restriction of the privilege, under an overly-broad title, is well worthy of attention.

Professor Mayers commences his assault with an analysis of the historical genesis of the privilege, pointing out that the odium attached to self-incrimination originated in reaction to proceedings by ecclesiastical courts guilty of a variety of abuses of which this was only one.


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He contends that the historical conditions which produced the privilege are nonexistent in modern trials, and moreover that the privilege has been extended far beyond its historical confines. Of least importance today, it is asserted, is exercise of the privilege at trial.

Professor Mayers pens a devastating indictment of the extent to which the privilege impedes the investigation of crime prior to trial. The inability of a grand jury to compel a witness to testify fully may not only make unavailable the information sought by the specific inquiry, but may also block leads into further investigation of the crime under consideration. The resulting incompleteness of investigations permits numerous criminals to evade detection, and lessens generally the deterrent effect of criminal laws. He demonstrates, too, that numerous methods are available to protect the witness and potential accused alike from abuse at the hands of the overzealous grand jury. It is urged that the privilege fails to serve as a protection against third-degree methods of police interrogation, carried out without benefit of an oath. The existence of the privilege serves rather as an impetus to police and prosecutor to extract as much information as possible from a suspect during the initial period of detention because thereafter the suspect’s lips may be sealed against them.

The reasons for permitting a witness to claim the privilege are even more insubstantial, Professor Mayers contends, than those allowing it to an accused. The privilege is assailed as an especially unjustified obstacle where public officers or documents are involved, or where the privilege may in rare instances be wrongfully invoked by a hostile witness who is in fact in no danger of prosecution and seeks only to prevent an innocent man from clearing himself. He would, however, broaden the privilege before legislative committees to protect non-incriminatory disclosures tending to injure the witness where the needs of the inquiry did not imperatively require the information.

Professor Mayers dissents from the commonly accepted theory that the privilege against self-incrimination is defensible as a reflection of a proper humaneness of the criminal law towards the accused. He concludes with a scholarly demonstration that the protections of the privilege against self-incrimination have been broadened much beyond the intentions of the framers of the fifth amendment. He contends, in part, that the amendment itself was only intended to apply to the accused, with other protections being available to witnesses. We are not impressed that the intent was so narrow.

Many of the author’s points are unquestionably valid. Certainly, the
privilege against self-incrimination has been subject to repeated abuse in recent years. Courts have sanctioned uses thereof which by no stretch of the imagination can be said to have been within the contemplation of the framers of the fifth amendment. With persuasive logic Professor Mayers points out the need to correct these abuses.

This reader, however, remains unconvinced that either the complete abolition or drastic limitation of the privilege which the author recommends is demanded. True, abolition of the privilege would in many cases produce information now in the hands of suspects and witnesses hiding behind the fifth amendment. But what should be done in those cases where, upon withdrawal of the privilege, the witness still refuses to answer? This possibility is far from remote.

In the attempts of the New York Investigation Commission in the recent "Apalachin trial" to determine the purposes of the meeting, the defendants either repeatedly refused to answer or gave evasive answers notwithstanding grants of immunity, and still remain silent despite prison terms and federal prosecution to make them talk. The number of recalcitrant defendants and witnesses can be expected to skyrocket if the privilege against self-incrimination is eliminated, for the penalty for contempt is far less severe than that for the crime that might be uncovered. Are we to see a parade of balky potential defendants go to jail because they will not reveal their own crimes? And what if that proves fruitless? There is nothing to stop the prosecution from asking the same question every three months, getting the expected refusal, and keeping the individual in jail for the rest of his life. It is certainly conceivable that where the suspected crime is a serious felony, a person may prefer indefinite jailing for civil contempt to a definite jail term for the crime, with its attendant permanent record and permanent disgrace. Professor Mayers' suggestions, carried to their logical conclusion, might revive in modern form the ancient penalty of piene forte et dure for one who stands mute.

Perhaps this view is oversensitive to dangerous criminals, but to jail a man indefinitely because he will not supply evidence of his own crimes seems more than merely grim; it oversteps the bounds of legitimate investigation. It is felt that a man's mind, even more than his stomach,
should be safe from involuntary pumping. Even more efficient than mere elimination of the privilege would be injecting truth serum into the suspect; but such a practice, involving negation of the individual’s dignity, could not be commended. A man’s mind sets him off from the lower animals, and the privacy of the mind should not be violated even to detect crime. These principles cannot be proven; they can only be believed in. This reader cannot adopt the author’s thesis in toto, since its implementation would doubtless aggravate the disturbing problems of the Apalachin inquiry.

This sound, thought-provoking book should be read by all persons interested in constitutional or criminal law as it does much to clear up hazy thinking in this area. Teachers of these subjects should especially take note for no thoroughly intelligent debate on the privilege can be hereafter attempted without recourse to this analysis. Whatever one’s position, Professor Mayers must be applauded for presenting his so forcefully and well.

**ALFRED AVINS***


This concise volume on criminal legal aid is full of food for thought for the bench, the bar, and the student of law but unlike many a multi-volume legal tome, is much more digestible. In *Equal Justice for the Accused* a Joint Committee drawn from the Association of the Bar of the City of New York and the National Legal Aid and Defender Association has produced a report which is well written, timely, and important. It should be noted that the Legal Aid Commission of the District of Columbia Bar Association and the Judicial Conference of the District of Columbia Circuit have engaged in a parallel study in this field of criminal legal aid. This book represents a study of what has been done and what remains to be done to bring equal justice to the accused who cannot afford an attorney’s fee.

The book is characterized by the Committee as a comprehensive study of legal aid. It is and it is not. Legal aid, as the Committee points out, is a generic term, while the actual scope of its study is criminal legal aid.

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Although compact, the report represents a thorough and far-reaching study, conducted by a capable group of attorneys who have guided the project through almost three years of extensive field studies. The presentation by the Committee is in two parts. Part One demonstrates the need for criminal legal aid, sketches its history, and discusses the methods of satisfying the need. Part Two offers the Committee's conclusions and recommendations for more effective defender systems.

The rock on which all legal aid is built is our continuing national concern for individual rights. Chief Justice Warren expresses this as "our insistence upon making justice equal and accessible for all." On this note the Committee begins its report by eloquently demonstrating the need for criminal legal aid, from the point of view of the accused: "A layman is usually no match for the skilled prosecutor whom he confronts in the court room"; and from the point of view of a democratic society: "Any society which does not afford the right to defense counsel gravely endangers judicial search for truth and risks its replacement by the purge or the ceremonial public trial."

A brief but illuminating history of the defender systems enables the reader to place in perspective the substantive and analytical portions of the report which are to follow. The right to assistance of counsel and the right to have counsel assigned are not one and the same thing. The Committee cuts away much confusion by dissecting the right to counsel into its component parts: the right to hire counsel, and the right to have counsel even when no fee will be forthcoming. This study is concerned with the latter right.

Organized legal aid in this country began with the Irish and German social service organizations of the mid-nineteenth century. The report traces the criminal legal aid movement in the United States from these parochial-minded beginnings through the fermentation of the twenties and then portrays the present status of legal aid for the indigent accused.

Through its extensive field reports the Committee has gathered information showing the typical means of dispensing legal aid in American cities. They have observed four methods by which legal representation is afforded the indigent accused. The most widely used is the assigned counsel system by which the indigent defendant is represented by a member of the bar appointed by the court. A second category is the

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1 Association of the Bar of the City of New York and the Nat'l Legal Aid Ass'n, Equal Justice for the Accused 34 (1959).
2 Id. at 36.
3 Id. at 38.
voluntary defender system, a nongovernmental organization supported by charitable donations. Such a system is likened to a "law-office" through which assignments are made by the court. The public defender system is a third method of criminal legal aid. The defender, like the prosecutor, is a government officer and has the duty to represent all indigent defendants in criminal actions. Recently added to these established methods has been a mixed private-public defender system. Protean in nature, this fourth approach can conceivably assume many forms depending on which features of control and support are borrowed from the public and voluntary systems. This mixed, public-private method has been adopted by Congress upon recommendation from a Special Committee of the Judicial Conference for the District of Columbia Circuit as best for meeting local needs.4

The Committee then moves to the second phase of its report, viz., conclusions and recommendations for more effective defender systems. Six criteria are suggested as the standards by which the legal aid systems should be evaluated.

1. The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction.
2. The system should afford representation which is experienced, competent, and zealous.
3. The system should provide the investigatory and other facilities necessary for a complete defense.
4. The system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal.
5. The system should assure undivided loyalty by defense counsel to the indigent defendant.
6. The system should enlist community participation and responsibility.5

From these premises, the authors proceed to evaluate each of the defender systems in terms of these standards. The result is an analytical examination which presents the plus and minus features in the principal legal aid systems functioning in the United States.

Affording equal justice is an old problem. The diagnosis which has been made is neither new nor novel. However, in a sixteen page chapter entitled "Recommendations,"6 the real significance of the study becomes apparent. Here is the primer for the neophyte in legal aid, the brief

5 Association of the Bar of the City of New York and the Nat'l Legal Aid Ass'n, op. cit. supra note 1, at 56.
6 Id. at 78.
for its experienced advocates, the guide book for bar associations. The report is buttressed by an impressive collection of notes which make up in some degree for a curious paucity of statistical tables and charts. It is particularly disappointing, however, that the Committee has not seen fit to append the bibliography which must have been collected in the course of its study.

The basic suggestion proposed is that "each community study the problem of the indigent defendant as it exists for it and take, as soon as possible, whatever action is required to provide adequate representation . . . [of the indigent] accused." Other recommendations encompass the choice of a legal aid system, its basic organization, and specific suggestions relating to the various types of defender systems.

The careful, albeit crisp, commentaries in this key chapter typify the approach of the Committee throughout the 144 pages of the report. This conciseness makes a reading possible in one sitting—an inviting feature for the busy attorney and the layman. A reading by both would be appropriate because, though the indigent accused is the sometimes unwanted stepchild of the legal profession, he is also, unfortunately, the illegitimate offspring of an unthinking society.

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7 Ibid.
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