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CORPORATE CONTROL AS A STRICT TRUSTEE

DAVID C. BAYNE, S.J.*

Juxtaposing recent sale-of-corporate-office litigation against century-old trust precedent, and building upon a philosophical analysis of the nature of the trust, the author demonstrates that the relation persisting between the office of corporate control and the corporation and its shareholders is in all essentials verifed in the trust relationship existing between the office of trustee and the beneficiaries. In this, the second of a series of articles on the nature of corporate control, the author concludes that since this relationship persists, corporate control is a strict trustee and must deport itself in corporate dealings in accordance with the legal and moral duties generated by the trust relationship.

[S]ome day when English history is adequately written, one of the most interesting and curious tales that it will have to tell will be that which brings trust and corporation into intimate connexion with each other.

—Maitland (circa 1902)1

Over the last decade the concept of corporate control has begun slowly to emerge as one of the most powerful forces in shaping the law of the modern corporation.2 At the very foundation of the philosophy of

* Professor of Law, Saint Louis University School of Law. A.B. 1939, University of Detroit; M.A. 1946, Loyola University of Chicago; LL.B. 1947, LL.M. 1948, Georgetown University; J.S.D. 1949, Yale University; S.T.L. 1953, West Baden College. Member of the Bars of the District of Columbia and the States of Michigan and Missouri.

1 Maitland, Selected Essays 129 (1936).

corporate control\(^3\) lies that maltreated arbiter of corporate conduct—fiduciary duty. In the expatriation and refinement of the fiduciary duty of corporate control—and there would seemingly be no more worthwhile endeavor toward an increasingly more enlightened corporate code—it was inevitable that the question would soon arise: Is corporate control a strict trustee? The answer will elicit principles and conclusions integral to corporate control specifically and fiduciary duty in general.

The juxtaposition of the highly opportune Lionel litigation,\(^4\) adjudicated in mid-1964 by the New York courts, over against the century-old, refreshingly fresh Sugden v. Crossland\(^5\) sets a parallel that might well characterize the thesis of this article.

**Sugden v. Crossland**

In the year of our Lord 1852, William Sugden of Leeds by his will "devised and bequeathed his real and personal estate to the use of Joseph Sugden and William Crossland, upon certain trusts for his infant son, with the ordinary power to the trustee . . . to appoint new trustees . . . in the place of any trustee . . . becoming incapable of acting."\(^6\)

As the event would have it, however, before his death William Sugden removed his two trustees and substituted two others, one of whom was Jervis Horsfield. For reasons left to conjecture William Crossland took ill indeed his displacement as trustee and shortly after Sugden's death

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\(^6\) *Ibid.*
sought out his successor Horsfield in the thought that "he should retire from the trust and cause Crossland to be appointed; in consideration of . . . the sum of £75."7 To this Horsfield was amenable. The money changed hands, Horsfield withdrew, and Crossland was appointed according to agreement.

Shortly thereafter the administrators of the estate filed a bill against Horsfield with a double prayer: (1) "[T]hat Crossland might be removed from the trust . . ."8 and (2) "[T]hat the sum of £75 paid to Horsfield might be treated as a part of the testator's estate, and applied for the benefit of the persons entitled under the will."9 "It appeared from the evidence that £75 was paid by Crossland out of his own pocket."10

The Vice-Chancellor, Sir John Stuart, granted the double prayer. Since this was a case of first impression, the sureness of his reasoning and unhesitating approach to his conclusions are all the more remarkable. "This is a very extraordinary case. . . . I do not remember a case where the office of a trustee has been purchased for money."11

The opinion of the Vice-Chancellor was brief, but extremely relevant to the present consideration. In removing Horsfield from the office of trustee12 the Vice-Chancellor summarized his holding thus:

Horsfield abandoned his duty and office as trustee for a valuable consideration, and made over the trusteeship to a person who was deliberately excluded from that office by the testator. Such a transaction, as well as the instrument by which it was sought to be carried into effect, was entirely unjustifiable, and the deed, in accordance with the terms of the prayer, must be delivered up to be cancelled.13

In his response to the second part of the plaintiff's prayer, Vice-Chancellor Stuart ordered Horsfield to pay over the money, not to the out-of-pocket Crossland, but into the trust fund itself.

It has been further asked that the sum of £75 may be treated as a part of the trust fund, and as such may be directed to be paid by Horsfield to the trustee

7 Ibid.
8 Ibid.
9 Id. at 192-93, 65 Eng. Rep. at 621.
10 Id. at 193, 65 Eng. Rep. at 621.
11 Ibid.
12 For the philosophy underlying the specific question (in both Sugden and Lionel): May the office ever be sold?, irrespective of the restitution of the premium, see Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 442 (1965); Bayne, The Sale-of-Control Quandary, 51 Cornell L.Q. 1 (1965). Crossland was also removed, not because of the premium, but because he was unsuitable for the office according to the fiduciary norms for the selection of a successor trustee.
for the benefit of the *cestui que trusts* under the will. It is a well-settled principle that, if a trustee make a profit of his trusteeship, it shall enure to the benefit of his *cestui que trusts*. Though there is some peculiarity in the case, there does not seem to be any difference in principle whether the trustee derived the profit by means of the trust property, or from the office itself. I shall therefore direct that the £75 be repaid by Horsfield and dealt with as part of the assets.\(^{14}\)

**THE LIONEL LITIGATION**

Hapless Lionel Corporation (electric trains, electronics) had been moved like a pawn so often in a series of control gambits that minority shareholders (principally Hyman Caplan and Gabriel Industries) finally decided that the game was up. Although details of the machinations were numerous and complex, the essentials of the plan that goaded Caplan and friends to litigation were as stark and simple as the £75 sale by Horsfield to Crossland.

Defiance Industries, Inc. (the three "muscateers"—Muscat, Huffines, Krock) had a deferred-sale agreement with the redoubtable Roy M. Cohn (McCarthy, Patterson-Liston, United Dye), providing for the transfer of Cohn's 55,000 shares of Lionel—just three per cent of the outstanding Lionel stock—for a sum of 281,875 dollars (5.125 dollars per share at the current market).\(^{15}\) This agreement was dated March 8, 1963.\(^{16}\) The other major term of the agreement was the seriatim resignation of six Cohn board members and their replacement on the Lionel board by six nominees of Defiance.

Onto this scene walked A. N. Sonnabend (Premier Corporation, women's apparel, dolls, *Mad*), latterly deceased, who immediately consummated a deal to take over from Defiance the Cohn control package for a sum of 135,000 dollars in excess of the amount Defiance had agreed to pay Cohn. The same condition of course was attached: seriatim resignation of the Defiance directors. "[T]he ultimate sale for $415,000 clearly establish[es] that the premium price was being paid for the accompanying transfer of managerial control that was the all important emolument of the transaction."\(^{17}\) Sonnabend also threw in an extra 75,000 dollars of Lionel money toward salaries over the coming five-year period for outgoing Defiance men. Sonnabend furthermore felt that it would be to Lionel's interest to take over several Sonnabend companies.

\(^{14}\) Id. at 194, 65 Eng. Rep. at 623.


\(^{16}\) Id. at 302, 246 N.Y.S.2d at 914.

\(^{17}\) Special Term App. A21.
in exchange for Lionel stock (which would increase Sonnabend's holdings from three to thirty per cent).

"When the transaction is stripped of its somewhat complicated facade, what was originally offered by Cohn, and in turn subsequently offered for sale by Defiance, was Cohn's power, which later became Defiance's power."

In separate litigations in the Supreme Court, New York County, shareholders Caplan and Gabriel Industries respectively sought the same double relief of Sugden v. Crossland: (1) "'[T]o set aside the election of the board of directors' as "illegal" and (2) To force Defiance to hand over to the Lionel Corporation the 135,000-dollar control premium received from Sonnabend. "Defiance Industries, Inc., controlled and dominated the board of directors of Lionel . . . [and] sold such control to A. N. Sonnabend without selling a majority of the stock or a clearly defined controlling block of stock and thus made an illegal profit, which profit should inure to the benefit of Lionel."

In the first litigation, In re Caplan's Petition, the Court of Appeals affirmed the Appellate Division without opinion. As the four-man court in the Appellate Division summarized it: "Special Term found the elections to be illegal and vacated them. With this finding and disposition we are in accord." Special Term had founded its holding on a long line of New York cases.

As early as McClure v. Law . . . and as late as Essex Universal Corp. v. Yates . . . it is the law of this State that "it is illegal to sell corporate office or management control by itself."23

18 Ibid.
19 Id. at A13.
20 Gabriel Indus., Inc. v. Defiance Indus., Inc., No. 17122/1963, Sup. Ct., N.Y. County June 15, 1964, 151 N.Y.L.J. 13, col. 8 (June 17, 1964) (Special Term). The amount of the premium was left for determination in the assessment of damages. "If, as asserted by Defiance, it made no profit, such question will be determined on the assessment of damages." Ibid.
22 Id. at 303, 246 N.Y.S.2d at 915.
23 Special Term App. A17. It would be misleading to give the impression that the reasoning of Special Term in Caplan was unimpeachable. The result may well have been correct, but the reasons adduced were neither perfectly clear nor exactly valid. See Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 442 (1965); Bayne, The Sale-of-Control Quandary, 51 Cornell L.Q. 1 (1965).
In regard to the premium for the sale of control Special Term in an obiter laid down the governing principle:

Nor may controlling stockholders receive a bonus or premium specifically in consideration of their agreement to resign and install the designees of the purchasers of their stock, above and beyond the price premium normally attributable to the control stock being sold. . . . The remedies applied where such regressions have occurred have been to impose liability upon the resigning directors . . . and to require that any bonus received for such transfer of their office be returned to the corporation.24

Special Term had particular reference to Essex Universal Corp. v. Yates25 in support of its decision: "The rationale of the rule is undisputable; persons enjoying management control hold it on behalf of the corporation's stockholders, and therefore may not regard it as their own personal property to dispose of as they wish. . . ."26 Special Term had further resort to Essex Universal in a statement by Judge Friendly:

A mass seriatim resignation directed by a selling stockholder, and the filling of vacancies by his henchmen at the dictation of a purchaser and without any consideration of the character of the latter's nominees, are beyond what the stockholders contemplate or should have been expected to contemplate.27

In the second litigation the New York Supreme Court built on the foundation established by Caplan. "No question of fact therefore remains with respect to this issue of the legality of the sale of seats on the Lionel board. When such sale is made, the illegal profit received must be accounted for to the corporation (McClure v. Law, 161 N.Y. 78)."28 With that the court concluded that "Defiance, who controlled the management of Lionel, when it illegally sold such control, must account to Lionel . . . for the illegal profit."29 As Horsfield to the trust.

The Sugden-Lionel parallel fulfills a twofold purpose. It supplies excellent materials and subtle questions for later analysis. But perhaps even more important, it suggests the distinct possibility of a working analogy—even an identity—between trustee and corporate control, extending

24 Special Term App. A18.
25 305 F.2d 572 (2d Cir. 1962).
26 Special Term App. A18.
27 Id. at A19-20. There is an inaccuracy here. See Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 442 (1965); Bayne, The Sale-of-Control Quandary, 51 Cornell L.Q. 1 (1965).
28 Gabriel Indus., Inc. v. Defiance Indus., Inc., No. 17122/1963, Sup. Ct., N.Y. County June 15, 1964, 151 N.Y.L.J. 13, col. 8 (June 17, 1964) (Special Term).
29 Ibid.
beyond the limits of the single question of the sale of control. At the least it sets the mind to thinking and serves as an apposite introduction.

**The General Thesis**

Max Pam, writing fifty years ago, marks a point in the history of the fiduciary-duty concept which asserts strongly that the *Sugden-Lionel* parallel is by no means a new thought.

The law-books and the decisions of the highest courts of many of the states and of the United States are replete with text and pronouncements holding that the relationship between a director and the corporation is fiduciary, and that the director for all practical purposes is a trustee, the corporation and its stockholders the *cestui que trustent*, and the property of the corporation a trust fund.\(^{30}\)

Some years earlier the Supreme Court of Illinois enunciated this same general thesis.

It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust fund, \ldots and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que trust*, to themselves, or to waste, destroy, give away or misapply them. \ldots Ordinarily, an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist and to which the same legal principles are applicable,—and such appears to be the relation established by law between directors and the corporation.\(^ {31}\)

Thirty-five years ago Adolf A. Berle, Jr., in one of his earliest works, exhibited his usual prescience. Although Mr. Berle was more guarded in his statement, he is reducible to substantially the same stand:

It is believed that examination will show the holders of such management stock to be subject to greater equitable control than generally supposed—control rendering them analogous to trustees, imposing many of the duties which trustees normally have toward their *cestui que trustent*.\(^ {32}\)

These preparatory thoughts set the stage for a general statement of the thesis of this article:

*The relation persisting between the office of corporate control and the corporation and its shareholders is in all essentials verified in the relationship between*...
the office of trustee and the beneficiaries. With only accidental qualifications, therefore, corporate control is a strict trustee.

Such a statement could conceivably raise some hackles. This is (however regrettable) to be expected and undoubtedly makes one scrutinize more closely the advantages of utilizing the trust philosophy in the control field. Undeniably there is no particularly consuming beauty in the technical terms "trust," "trustee" or "cestui que trust"; but one compelling consideration—beyond, of course, the cogency of the general thesis that the two relationships are virtually identical—does shift the balance in favor of a whole-hearted incorporation of trust philosophy, reasoning and rules into the nascent corpus of the law of corporate control.

It comes to this: To ignore, once proven, the intrinsic identity of the two relations would be grossly wasteful of centuries of thorough thinking on trust principles, now apt for application to corporate control. As Maitland said so many years ago:

If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.33

It would be prodigal indeed to reject through prejudice the distillate of decades of refined reasoning, trial and error, elimination and retention. The philosophy on which these rules of law and equity rest came down through the centuries from the Chancellor of Galilee. The wisdom and necessity of such doctrines become more apparent as the forms in which property is held multiply under new conditions, and as earning capital in the custody and control of agents or trustees follows new enterprises over the world, where it is not under the watchful eye of the owner. Courts of equity do not set bounds to the principles which control the conduct and fix the accountability of trustees. The elasticity of these rules extends their applicability to all of the devices invented by unfaithful fiduciaries to evade their obligations or to defeat the imperative demands of business integrity and sound public policy.34

The attempt then will be to demonstrate the essential oneness of the two systems, to trace the parallel of the major elements of each relation, to separate the accidentals from the essentials, to retain the relevant and remove the irrelevant.

The analysis will begin with the nature of the trust itself, the trust essentials, and proceed from there to justify application to corporate

33 Maitland, Selected Essays 129 (1936). The excerpt was written circa 1902.
34 Nebraska Power Co. v. Koenig, 93 Neb. 68, 77, 139 N.W. 839, 842 (1913).
control. The viewpoint will be that of the trust, looking outward toward corporate control.

A caution is in order. It is true that corporate control and the trust are identical relations. It is also true that the trust rules should, therefore, apply with equal logic to corporate control. But it is not clear that every trust rule, down to the most minute, is altogether tenable. Four or five hundred years old they may well be, but in the more specified areas further refinement may yet be required. This fact is important. Justified criticism might well be leveled against this or that trust rule. Insofar, however, as a trust rule applies to the trust relation so also does it apply, with the same logic or perchance illogic, to the relation of corporate control.

Moreover, there will be no attempt here to apply the corpus of trust law to the minutiae of corporate control. Once the parallel philosophy has been established, the implementation in the ad hoc cases will be the journeyman work for the future. Note well: At each stage of progress reflect that what is being said of the trust applies to control. Constant written adversion to this parallel would pall.

Ultimately, the objective is the maximum insight into the subtle concept of corporate control. Even if one were to disagree throughout, some further light on the fiduciary duty of corporate control would nonetheless be inevitable.

The thesis set for proof will be approached in four parts: I. The Trust Essentials; II. Custody and Confidence—The Foundation; III. Benefit to Beneficiary; IV. Conflict of Interest.

I. THE TRUST ESSENTIALS

Any penetrating comparison of the trust with corporate control must begin with an exact philosophical definition. Such an intensive analysis will permit segregation of the trust essentials for later specific application to corporate control. As a departure point the Restatement of Trusts offers the current legal consensus. The trust is

a fiduciary relationship with respect to property, subjecting the person by whom the title to property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.35

Such a definition requires some expansion and restatement, even

35 Restatement (Second), Trusts § 2 (1959).
emendation. Present purposes, however, would indicate that explana-
tion or justification of any such changes is for later.

The elaboration will build on the two major concepts latent in the
definition of the Restatement: (1) The Relation of Custody; (2) Bene-
fit to Beneficiary. Around these two concepts all the nonessentials group
themselves. From these two all the lesser principles are derived. In these
two, therefore, lies the fundamental philosophy of the trust.

THE RELATION OF CUSTODY

[A] fiduciary relationship with respect to property ... held ... which arises as
a result of a manifestation of an intention to create it.86

This excerpt contains three distinct elements which coalesce into one
concept. Paraphrased it reads: A (1) fiduciary (2) relationship (3) in-
volving property tenure coupled with an administrative intent.

A Relationship

Although the Restatement does not specifically state that the relation
persists between "the person by whom the property is held"—the trustee
—and "another person"—the beneficiary—this would be the only justifi-
fiable inference. In this way does the Restatement specify the terminal
units, the terms of the relation—trustee as subject, beneficiary as object.

The Restatement would have been better advised to designate the office
rather than the officeholder as the subject of the relation. Thus
spoke Vice-Chancellor Stuart in Sugden v. Crossland: "I do not remem-
ber a case where the office of a trustee has been purchased for money."87

This is more exact terminology since the office continues in existence
irrespective of the resignation or death of the trustee. This terminology
does not preclude the loose identification of officeholder with office in
everyday parlance. Exact thinking, however, must recognize that the
person occupying the office is not the office any more than the president
is the presidency. The astute Pierre Lepaulle adopted the same approach
in his reference to the office as "a legal 'person.' "88

Attention perhaps should next be called to the obvious. The relation
is the trust itself, not the office of the trust. It is in the office that the

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86 Ibid.
87 3 Smal. & Giff. at 193, 65 Eng. Rep. at 621. The Vice-Chancellor was inaccurate in
another particular. The occupancy of the office, not the office itself, was sold.
88 Lepaulle, An Outsider's Viewpoint of the Nature of Trusts, 14 Cornell L.Q. 52, 57
(1928).
relation inheres. Nor is it the trustee himself. Nor finally is it the asset of value, the trust fund. The fund could be called the matter, the material cause, of the relation or the subject \textit{circa quam}.

At this point it could be objected that certain prominent terms which have emerged, especially "custody," beg the question. They do. Since, however, their legitimacy is to be established apropos, their admirable suitability and the advantage of uniformity dictated their use at the outset.

A Fiduciary Relationship

The term "fiduciary," in its original Latin form \textit{fiduciarius}, was a technical legal term relating to an actual holding in trust. As such it was synonymous with the present-day technical usage "in trust." The English term, however, has been eroded and has far broader applicability. Over the years the "tenure" element has disappeared. It means, as Webster defines it, "of, relating to, or involving a confidence or trust." Ultimately it is reducible to \textit{fides}, "faith" or "confidence." Thus broadly defined as "confidence," the term is a genus of which a multitude of species accounts for the multitude of nontrust relations, which in turn account for much of the difficulty over the decades with the term "fiduciary duty." One of this number of species, however, is the trust. The word, therefore, was not inappropriately included in the \textit{Restatement} definition. The broader note of "confidence" will have important relevancy in later analyses. The word "fiduciary"—as defined as "confidence"—takes on genuine importance, however, only when joined to the other elements under consideration.

Property Tenure

The term "property"—independent of the tenure—refers to any \textit{asset of value} at all—patent, plant, formula, money, stock. This asset is the trust fund, the material cause of the relation. It serves, moreover, to distinguish the trust from other merely confidential relationships. Confidence as a genus is unrelated as such to property, or consequently to tenure.

In the apparently insignificant word "held" is the heart of the trust relation. It is this \textit{holding} of the trust fund, the tenure of the property, which is the intrinsic cause—technically the foundation—of the relation. On this philosophical base of property tenure is built the entire law of trusts.

Mere tenure, however, is not the whole of the matter, albeit the base. To actual property tenure must be joined what the \textit{Restatement} calls the
“manifestation of an intention to create” the trust. The trustee must accept the stewardship of the fund, either by the direct expression of intent or indirectly by implication or inference of law. The mere physical holding without the intention of custodial administration would result in many another possible relationship, from escrow to bailment, but would not be a trust.

The conjunction of these two essentials—(1) actual property tenure and (2) an intention to administer as a custodian—gives rise to the custodial relationship of trust. The Restatement could be misleading in this particular. The trust does not arise “as a result of the manifestation of an intention to create it” without the simultaneous property tenure. Both are essential. Neither naked tenure nor mere intention alone would create a trust.

Pierre Lepaulle uses an entirely felicitous term definitive of this conjunction: “Appropriation.” The technical appropriation of an asset of value, the acceptance of dominion of property by the office of trustee, effects the first essential of the trust: Custody. In appropriation there is not only the denotation of a simple passive tenure but also the dynamic concept of an actual administration of the trust. Here also is the actual passage and holding of title which is traditional to a trust. (Appropriation also denotes the initial act of the settlor in creating the trust, but this action is only a condition not a cause of the relation and hence irrelevant to the instant analysis.)

The appropriation moves a step beyond the reposal of mere confidence. It is a confidential holding. In this last step the first major trust concept is completed. Custodial tenure is joined to the fiduciary relation.

The Principle of Finality

By some herculean interpolation the Restatement could be conceived to have injected a second important constituent into its phrase “a manifestation of an intention.” The more onerous and subtle role of the “intention to create” is the determination of the nature of the custody, not its mere existence or scope. This is another way of saying that the intention of the parties can be one of the primary factors in spelling out the purpose, objective, goal of the trust relation. The application of the principle of finality to the custodial relation determines not only the nature of the custody itself but also consequently the nature of those duties flowing from the custody. Pierre Lepaulle expressed the finality of
the trust relation in the more appealing and concrete term "mission." To him the determination of the nature of both custody and resultant duties was expressed in the adverb "properly."

The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the res be properly appropriated to the aim to which it has been devoted, either by the settlor, by the court, or by operation of law.¹⁰

Close scrutiny might reveal that this is the idea which the Restatement is expressing implicitly. When the asset is "properly appropriated" it is administered according to the finality expressed in the intention, the "mission," the "aim to which it has been devoted."

(The mere appropriation without specification effects a double result: (1) It brings about the fact of custody; and (2) It determines in the same act the extent or scope of the custody. Mere tenure with an intention of administration of some unspecified nature or kind results in custody, determined as to scope, but not as to nature.)

**BENEFIT TO BENEFICIARY**

[S]ubjecting [the trustee] . . . to equitable duties to deal with the property for the benefit of [the beneficiary] . . . . ⁴¹

This entire participial excerpt is nothing more than a logical evolution of the initial act of intentional appropriation of the trust asset.

The participle "subjecting" is the causal nexus between the intentional appropriation and the consequent complexus of duties. The duties—and their scope and nature—are the direct effect of the custody. The custodial appropriation elicits, induces, causes, gives rise to the duties.

The phrase "to deal with the property" is almost redundant, since the duties could scarcely concern themselves in any other manner. Implicit in these duties is the obvious understanding that they will be directed to the **benefit of the beneficiary.** Also implicit is a corresponding complexus of rights and a just **remuneration** for the performance of the duties and the utilization of the rights.

**THE PHILOSOPHICAL DEFINITION**

The complexity of the final product prompts a schematized presentation:

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⁴⁰ **Ibid.**
⁴¹ **Restatement (Second), Trusts § 2** (1959).
The trust is a relation—
—a relation between the office of trustee and the beneficiary.
—a relation inhering in the office of trustee.
—a relation effected by the intentional appropriation of an asset.
—a relation of total custody—
—total custody giving rise to a complexus of duties.
—a complexus of duties giving rise to a corresponding complexus of rights.
—a complexus of duties the performance of which merits remuneration.
—a complexus of duties directed to the benefit of the beneficiary.
—a complexus of duties determined as to scope by the scope of the custody.
—a complexus of duties determined as to nature by the finality of the custody.

This definition could be stripped to essentials: A trust is a relation of total custody, effected by appropriation of an asset, giving rise to duties directed to the benefit of the beneficiary.

II. Custody and Confidence—The Foundation

In one major respect the role of custody in the philosophy of the trust is unusual. The concept is not only far and away the most important of the trust essentials, but it is the logical base on which all the other essentials—and hence the philosophy of the trust itself—rest. So truly is custody the keystone that it might be described as an exponible proposition in which is latent without more the whole of the trust. But from whatever aspect, the custodial relation remains both the heart and the source of the trust.

Over the centuries the equity courts and the trust commentators have struggled continually to penetrate the trust. This court has conjectured one theory, that commentator another. In the main, however, there has been no consensus as to the ultimate and central element.42 Least of all has there been a recognition of custody as the core and the font. "Most of those writers or judges who have attempted... a definition have done little to assist the world to a clear conception of what a trust is."43 This

42 Long, The Definition of a Trust, 8 Va. L. Rev. 426 (1922).
43 Id. at 426 n.2, citing Maitland, Equity 44 (1920).
is remarkable considering the importance of the philosophical foundation to the elaboration of a body of dependent rules.

Yet the centuries of trust reasoning have been by no means barren. Through the years court and commentator have in fact yielded up all the basic components of the concept of custody. It only remains, therefore, to assemble these components through logical process into a viable concept of custody.

CONFIDENCE—RELIANCE—DEPENDENCE

From the earliest times the notion of confidence has intruded itself most consistently into the concept of the trust. Lewin, the chief authority of the early 1800’s, quotes Coke who virtually equated the two: The trust, “a confidence reposed in some other . . .”44 In more recent years, both Scott and Bogert leave little doubt about the relevancy of the “confidential relation”45 to the essence of the trust, but neither of them defines it exactly or relates it adequately to the trust.

It is understandable that there would be frequent resort to the term “confidence” since its meaning is synonymous with “trust” in the broad sense. The etymological derivation, moreover, is the same as that of “fiduciary,” from fides, “faith,” “trust,” “confidence.” For the present analytical purposes, however, it is more important to realize that the essence of confidence is nothing other than reliance on another.

Finally and most important, both confidence and reliance are reducible to dependence. It is interesting that Webster gives two direct synonyms for dependence: “reliance” and “trust.” The note of dependence is the element most expressive of the true status of one who reposes confidence in another. A dependent person is subject to, in the power of, another. This dependence is coterminous with the orbit of reliance or confidence. The dependence in the one finds the correlative independence in the other. It is “a relation of inequality.”46

No more ultimate constituent of the trust lies beyond or beneath this dependence.

CUSTODY THE ULTIMATE

The confidence-reliance-dependence is the quintessence, the prime ingredient, of all fiduciary relations—guardian and ward, principal and

45 1 Scott, Trusts § 2.5, at 38 (2d ed. 1956); Bogert, Trusts and Trustees § 482 (2d ed. 1960).
agent, attorney and client, priest and penitent. This element could be aptly called *fiducial*, the essential constituent of a confidential relationship.

Although this fiducial content may become greater and greater in any relationship, it only reaches the maximum in the actual appropriation of that asset which is the subject of the confidence. Here is the point of distinction between the trust relation and all others (except, of course, corporate control). In every confidential relation the fiducial element is present, but to a partial degree. Only with formal entrustment does it become total. Although reliance remains the essential element, the tenure makes the reliance absolute.

**APPROPRIATION**

The term “appropriation” is singularly suited, in its derivation from the Latin *ad proprium*, to express this distinctive blending of the fiducial with the tenure. In *ad* is the dynamic note of “towards” denoting not only the handing over of the asset by the settlor but also the dedication to the continuing administration of the custody. More expressive in the *ad* is the principle of finality: The striving toward the goal and objectives of the trust. *Proprium* means “that which is proper to someone,” “that which is his very own,” “something under his own proper dominion,” “something in his own personal control.”

When joined, therefore, the *ad* and the *proprium* carry to the technical term “appropriation” certain nuances beyond the two essentials of: (1) Actual property tenure; and (2) An undertaking of custodial administration. Beyond the mere dominion is a personal dedication of the administration to goals and objectives that are as exacting as if they were the trustee’s own. The trustee acts as he would with his own property. The devotion to the stewardship of another’s goods is as individual and meticulous as if it were *ad proprium*.

Both the property and its tenure are indispensable to the trust. Although the property may be of any kind, from a patent to a factory to a bond, property it must be, since counsel and advice are not transferred into custody. This does not mean that property may not be the subject of a nontrust, merely confidential relation. A noncustodial relation may involve counsel and judgment about either property (the purchase of a home, stock) or nonproperty values such as a course of action (marriage, a career). But custody involves only property. “In every trust, however, there is something more than a merely personal relation-
ship . . . 147 Confidence without custody is dependence on counsel and advice. Confidence with custody is dependence on tenure and administration. Thus the transferral of the property is essential. Short of such transferral there may be a confidential relation, but it is a noncustodial one. All other fiduciary relations (except corporate control) stop short with mere noncustodial confidence or reliance. Although formal passage of title is often involved, this is not necessary for the trust—and certainly not for custody—because the trustee “need not have the legal title to the subject matter, since an equitable interest may be held in trust.”

A mere physical holding, however, without the intention to administer as a steward falls far short of a trust relation. The trust asset must not only be removed from the dominion of the beneficiary and handed over to the complete control of the trustee; it must also be accepted by the trustee upon terms of dedication to the purposes of the trust. “[T]he essence of such legal institution can only be found in the res and its appropriation to some aim.” 148 Such entrustment then becomes formal stewardship. “Trusts appear to us, then, a segregation of assets from the patrimonium of individuals, and a devotion of such assets to a certain function, a certain end.”

The trustee has the same custody over the fund as that of “a good father of a family.” This is tenure as if ad proprium, a true appropriation.

These fundamentals, which distinguish total custody from all other fiduciary relations, are characterized by discernible earmarks. The independence of the trustee is unfettered, unqualified, without conditions. “The whole responsibility for the management of the property is thrown upon the trustee.”

The judgment of the trustee is final, his power is untrammeled. Correlatively, the beneficiary is completely dependent, with no opportunity for any independent judgment. He can never assert dominion over the trust fund.

On the other hand, in a noncustodial confidential relation, albeit fiduciary, the dependent party still makes the final judgment and consequent decision. He retains possession and control of the asset of value. He may depend in varying degrees, true, on the advice, counsel or judgment of his counselor, but his is the final and ultimate responsibility.

47 1 Scott, op. cit. supra note 45, § 2.6, at 41.
48 Ibid.
49 Lepaulle, supra note 38, at 55.
50 Ibid.
51 Roman Catholic Bishop of Jaro v. De La Pena, 26 Phillipines 144, 146 (1913).
52 1 Scott, op. cit. supra note 45, § 1, at 4.
may act on advice with some reliance, but he it is who nonetheless acts. His reliance is partial. There is no appropriation, no entrustment. Thus a priest may counsel restitution in a theft case. The penitent may rely heavily on the priest's advice, but the penitent remains \textit{sui juris} and his is the decision to restore or to retain. In merely confidential relations not even partial custody exists.

(An interesting query: Is the difference between the custodial and noncustodial relations merely one of degree? Since the essential element of both is dependence is it a question of more or less or does a difference in kind result at the point of total custody? This question has implications in the definition of the fiduciary duty in noncustodial relations. Should the trust rules be extended to all confidential relations? The answer is for elsewhere, and does not concern the trust, or corporate control, since both are truly custodial. To both, application is a fortiori.)

\textbf{THE CUSTODY OF CORPORATE CONTROL}

Custody, thus elaborated as the first of the two major trust concepts, is uniformly applicable to corporate control in both nonessentials and essentials.

The relation, in parallel to the trust, persists between the office of control and the corporation/shareholders. The problem raised by the objective term of the relation is not crucial to the present. Strict-entity theorists would push the shareholders behind the veil and regard the corporation itself as the sole object. An enlightened corporate realism, it is submitted, understands that the entity exists for the members and that primarily the shareholders are the object of the relation or at least of equal rank with the corporation.\textsuperscript{53}

The relation itself could be called \textit{the corporate control} in analogy to \textit{the trust}. Here too the relation is not the office, which is a legal person and in which the relation inheres. Nor is it the officeholder, who is a nonlegal human person. Nor further is it the corporation viewed as the asset committed to the custody of the office. The corporation, as the appropriated asset, is the matter, the material cause, of the relation—the subject \textit{circa quam}.

The essential element, the intrinsic cause, of the relation is the appropriation of the corporation to control: (1) The tenure; and (2) The intention to accept custody. Bear in mind throughout that these two—

tenure and intent—form a single indivisible moral act. The severance of one from the other is conceptual at best.

PROPERTY TENURE

For the proponent of the trustee theory, it is somewhat unsettling to hear courts and commentators speak of the actual passage of title as an insurmountable barrier to a trust-control parallel, let alone an identity. Austin Wakeman Scott, undeniably a modern authority, seemingly so speaks:

The officers and directors of a corporation are responsible for the management of the corporate affairs. They are in a fiduciary relation to the corporation. They are sometimes said to be trustees, but they are not trustees in the strict sense. They do not hold the title to the property of the corporation which they manage.\textsuperscript{54}

Yet from the custodial aspect the formal passage of title means nil. The property tenure of corporate control is fully tantamount to actual possession of title and could scarcely be more complete.

One must not be deflected, however, from the correct definition of corporate control. \textit{Ex hypothesi} corporate control is the ultimate power in the policy-making hierarchy. It is, of course, a question of fact in any given case as to whether corporate control is truly such. This eliminates any lesser members of the hierarchy—directors, officers, agents. Whereas one might hedge in attributing custody, even partial, to others with less than total tenure, with corporate control the dominion is absolute.

Sveinbjorn Johnson, whose 1929 commentary is excellent, was diverted by this title-passage obstacle. Trust and trustee were traumatic words to Johnson (his mother, enceinte, must have tangled with a trustee), yet Johnson in arguing almost fulsomely against the trust-control thesis is willy-nilly an effective proponent.

The title to the property is not vested in the directors or the officers, but in the corporation. Power is given the directors to control and set in motion that intangible and utterly helpless creature, the holder of the title to all the property committed by the shareholder to the business venture for the promotion of which the corporation was launched. They (the directors), through the joint operation of statute and the action of the members, are the recipients or donees of a power which is primarily lodged in the shareholders, namely, to control the business in which they have associated themselves under the corporate form. The donors (the shareholders) of this power, through election to the board, have not vested title to the property in the directors; that title is in the legal person,

\textsuperscript{54} 1 Scott, \textit{op. cit. supra} note 45, § 16A, at 155.
the corporation; but they have clothed them with the power of full control over the inanimate legal person in which the legal title is lodged.\textsuperscript{55}

Once prescind from the title problem and Johnson's analysis is unassailable. Correctly he refers to the corporate control as "a confidential relationship, the essence of which lies in the grant of power of management and control of the artificial person which holds the legal title for certain definite objects."\textsuperscript{56} Johnson has commendable insight.

The directors are not trustees of an express trust in any other sense than this: They are donees or recipients of powers of control and management, which it is their duty to execute, given them under statutes and through election by the original owners, to be carried out in good faith and lawfully for the accomplishment of the purposes the stockholders intended to realize when they organized the corporation. It is not a power, in the technical sense, for the duties devolving on the directors are imperative; it more resembles a trust power which must be executed.\textsuperscript{57}

Here are all the essentials to the total tenure of actual passage of title. Johnson reasons through every stage short of the formal denomination of control as a strict trustee. The property held is the corporation with every conceivable asset of value, both tangible and intangible, aggregated to it as an entity.

An early opinion of the New York Court of Appeals regarded the passage of title as the mere technicality that it is and consequently located control where it properly was.

While not technically trustees, for the title of the corporate property was in the corporation itself, they were charged with the duties and subject to the liabilities of trustees. Clothed with the power of controlling the property and managing the affairs of the corporation without let or hindrance, as to third persons they were its agents, but as to the corporation itself equity holds them liable as trustees. . . . While courts of law generally treat the directors as agents, courts of equity treat them as trustees and hold them to a strict account for any breach of the trust relation. For all practical purposes they are trustees when called upon in equity to account for their official conduct.\textsuperscript{58}

\textbf{THE INTENTION TO CONTROL}

When corporate control accepts dominion, either implicitly or explicitly or effectively (by inference of law) and undertakes the stewardship of the entity, the relation of custody commences. The continuing

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\textsuperscript{55} Johnson, \textit{Corporate Directors as Trustees in Illinois}, 23 Ill. L. Rev. 653, 669 (1929).
\textsuperscript{56} Id. at 670.
\textsuperscript{57} Ibid.
\end{flushleft}
act of dominion, the exercise of control over top-level policy of the entity, is the technical foundation and intrinsic cause of the control relation. Mere high-office incumbency—chairman, chief executive officer, chairman of the executive committee—without more is not enough. There must also be actual assumption of ultimate authority.

An early federal case, showing rare insight, defined the essence of the relation as the power of control.

In this country the courts have accepted the essential principle laid down in the English cases, and hold, with scarcely any variation to the doctrine, that the promoter of a company stands in the relation of a trustee to it and those who become subscribers to its stock, so long as he retains the power of control over it.59

The manner of control take-over is various. At incorporation the promoters may assume and maintain control. In other instances the initial parties entrust control immediately to another, either indefinitely or for a limited period. Control may be wrested illegitimately in a power struggle. It may drift to management imperceptibly over years of slow stock dispersal and remain by mere management incumbency. Where corporate control belongs as a matter of right is an interesting and important question, but for treatment elsewhere. The genesis of corporate control is no matter. At some point the various parties to the corporate venture find themselves in total dependence for ultimate disposition of their contributed assets on the judgment and act of corporate control. Entrustment of assets has been joined with acquiescence in dominion. A technical appropriation has been effected.

Excepting only formal title, therefore, the custody of control parallels perfectly the trust. The logical consequences of such custody—both ad hoc rules of law and broad philosophy—cannot be ignored. The philosophical consequences find chief expression in the traditional duty of loyalty.

III. Benefit to Beneficiary

The first of the two major trust concepts is the cause of the second: All benefit from the administration of the trust must redound to the beneficiary.

Inexplicably trust theorists have never attempted an intensive breakdown of this principle. They accept it, enunciate it, never question it. Necessarily they understand its rationale, albeit subliminally. Here and there they even inadvertently express its philosophy.

The full import of the rule, however, as is often the case where the

organized philosophy is weak, can only be gleaned from its application to specific cases. Traditional trust law has not constructed a systematic philosophy of the benefit-to-beneficiary principle, but rather intuited a set of rules from a brooding sense of the principle.

Although the present deductive approach seems more rational, support for this second axiom could be gathered inductively, as Mr. Berle does in two separate treatises. In one article on control he sets up three major corporate areas—"since a general principle like that stated may have an indefinite field of application"—where the rigid trust theory can be found in practical application. In "Corporate Powers as Powers in Trust," he uses four such categories. The proof of a general principle from a multitude of applications, however, is always risky. First, an infinite number of specific instances can arise. Second, as the specificity increases so does the danger of error. Third, one false application undermines confidence in the validity of the principle itself. Better to reason to a sound theory and relegate the application to the day-to-day work of the courts.

THE PHILOSOPHY OF THE RULE

The explanation of the dearth of intensive trust commentary could be simple. The principle is axiomatic and therefore virtually indemonstrable. Hence it has been taken for granted and no one has bothered to explore it deeply. Yet it is possible to evolve the chief constituents of the rule from the principles thus far deduced as latent in the custodial relation. The essence of custody is the confidence-reliance-dependence carried to the maximum in the formal appropriation of the asset to the trustee.

Beginning with this dependence, therefore, the reasoning moves one uncontroversial step forward to the elemental conclusion: Dependence begets responsibility. "From the conception of a trust as a confidence reposed in the trustee it is easy to pass to that of a trust as an obligation resting upon the trustee, and a trust has often been defined from this point of view." "[R]esponsibility goes with power." Merrick Dodd writing thirty years ago could have been more forceful in expressing this same thought: "Power over the lives of others tends to

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60 Berle, op. cit. supra note 32, at 51.
61 44 Harv. L. Rev. 1049 (1931).
62 Long, supra note 42, at 429.
create on the part of those most worthy to exercise it a sense of responsibility."64

The obvious extension of this principle produces the next major axiom: "The greater the independent authority to be exercised by the fiduciary, the greater the scope of his duty."65 "The standard required of them varies as the confidential nature of their position varies."66 The responsibility is always in direct ratio to the dependence. "[T]he rigor of... application is [governed] by the varying dependence of the beneficiary on the fiduciary's judgment."67 In every case the reliance must be justified, either by implicit or explicit acknowledgment or inference of law. No responsibility could be consequent on anything less than a justified reliance.

The junction of these two—(1) dependence as the chief determinant and (2) the direct ratio to responsibility—supplies the material for further illation.

Because this dependence is total in the complete appropriation of the fund—a total tenure tantamount to title plus acquiescence in the stewardship status—the resultant responsibility is total. "This duty of loyalty extends to every incident of their position and requires of them an unbending adherence."68 Implicit, of course, in such total responsibility is the absence of all ownership in the trustee. If the trustee owned some of the asset, he would obviously not be responsible to another for it. Any personal ownership is inconsistent with stewardship, which concerns another's property. Acknowledgment by the trustee (1) that ownership of the asset is in another and (2) that the owner depends fully on the trustee for complete care, gives rise to the obligation to act in accordance with this acknowledgment.

This total responsibility for the stewardship of another's assets is merely a collective noun describing a complexus of duties in regard to these assets. This complexus is the essence of the benefit-to-beneficiary rule. This in turn is only another way of saying that the custodian has a duty to care for the assets entrusted to him as if they were his own.

This reasoning coalesces into one simple unqualified rule enunciated

64 Dodd, For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145, 1157 (1932).
67 Id. at 236.
68 Id. at 221-22.
in the *Restatement*: "The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary."69

Over the years the benefit-to-beneficiary rule has often been called the Duty of Loyalty. Austin Wakeman Scott entitled one of his articles "The Trustee’s Duty of Loyalty"70 and wrote another on the subject in which he discussed Josiah Royce’s *The Philosophy of Loyalty*.71 Royce defined loyalty as "the willing and practical and thoroughgoing devotion of a person to a cause."72 "In loyalty, when loyalty is properly defined, is the fulfillment of the whole moral law."73

Whatever the designation, trust writers and courts have been uniformly successful in the statement of the rule, at least in its broadest sense. Scott goes to the heart of the custodial obligation in describing the trustee as a steward.74 One court held the trustee to "the diligence . . . [of] a good father of a family"75 which is the prototypal norm of custody. In 1810 the Maryland Supreme Court noted the element of acquiescence to the appropriation in its enunciation: "[H]e who accepts a trust takes it for the benefit of the persons for whom he is trusted and not to benefit himself."76

Lewin, in his classic of the early 1800’s, likened the care and diligence to that of a person supervising his own property:

> Lord Northington once observed, "No man can require or with reason expect that a trustee should manage his [another’s] property with the same care and discretion that he would his own." . . . [B]ut the maxim has never failed, when mentioned, to incur strong marks of disapprobation. A trustee is called upon to exert precisely the same care and solicitude in behalf of his *cestui que trust* as he would do for himself; but greater measure than this a court of equity will not exact.77

Willis, in a work contemporary to Lewin, founded his rule on the custodial relation: "So long as they retain possession of the trust property, the trustees are bound to act respecting it with the care and diligence of provident owners."78

69 Restatement (Second), Trusts § 170(1) (1959).
70 49 Harv. L. Rev. 521 (1936).
71 Scott, supra note 65, at 540.
72 Royce, The Philosophy of Loyalty 16 (1930).
73 Id. at 15.
74 Scott, supra note 65.
75 Roman Catholic Bishop of Jaro v. De La Pena, 26 Phillipines 144, 146 (1913).
77 Lewin, op. cit. supra note 44, at 299.
78 Willis, Duties and Responsibilities of Trustees, The Law Library 79 (1835).
THE FINALITY OF THE TRUST

The reasoning thus far has established the existence only of a broad undefined responsibility, with a scope that is all-compassing, true, but without definition of the subtleties and nuances of its nature. Merely to state the general rule and the extent of the duty does not specify the kind of duties, their quality, nature or essence. The finality of a time-piece determines the nature of its mechanism. So also does the purpose of the trust reveal the nature of the trustee's duties. Whatever the deficiencies of traditional trust philosophy, astute eclecticism and the principle of finality can produce a reliable synthesis of the nature and quality of the complexus of duties. Willis in 1835 stated the approach: "The duties of trustees may, however, be more particularly collected from an investigation of their powers and responsibilities."79

These purposes may be discerned in the indenture, the conduct of the parties and the circumstances of the entrustment. Principally, however, the finality is disclosed in the intrinsic nature of the trust itself, e.g., the management of real estate, the supervision of a portfolio, the manufacture of a commodity. Beyond the fact of "the general rule, that every act of the trustee should tend to the benefit of the cestui que trust,"80 it is more to the present point "that trustees must execute their trust faithfully, according to the terms of them, and the intention of the parties by whom the trusts have been created."81

Arguably, the finality of a trust is always implicitly contained in the Restatement phrase "interest of the beneficiary." This is true, but it is more exact and refined to distinguish the quality and nature of the duty from its mere existence and scope. The latter results from the simple fact of custody. The former, however, determined by the principle of finality, can be discerned only by study of the purposes of the trust. Of all of the modern commentators Pierre Lepaulle has shown the greatest insight into this distinction. Moreover, his felicity of expression persists. He begins the discussion of finality by an extremely succinct but complete definition of the trust as "a res and an appropriation of that res to some aim."82 He next embarks on an incisive analysis of the nature of the trust obligation.

79 Id. at 59.
80 Ibid.
81 Id. at 79.
82 Lepaulle, supra note 38, at 55.
The rights and obligations of the trustee will vary according to only one thing, his mission. Such mission always consists in insuring that the res be properly appropriated to the aim to which it has been devoted, either by the settlor, by the court, or by operation of law.  

In the word "properly" is the limitation of the activity of the trustee to what is just—what is right—neither more nor less, neither this quality nor that, but exactly the proper quantity and quality, exactly that activity best suited to the aim of the trust.

Hitherto in this article the existence of a complexus of rights correlative to the complexus of duties has been taken for granted. Lepaulle remedies this neglect and correctly groups rights with duties.

The rights that the trustee will have in each particular case depend on his obligations; they are tools given to him for the fulfillment of his duties, and such duties are determined by the appropriation to which the res has been devoted. Hence, it is apparent that: trustee, cestui, rights and obligations of either of them are only means for reaching an end . . .

Since rights correspond to duties, it follows that both "are determined" by the appropriation, although Lepaulle does not so state. Thus the finality of the custody extends its influence through the duties to the rights.

At another point Lepaulle defines the trust again. Here he implicitly enunciates the principle of finality and repeats the correlative nature of rights to duties:

We are therefore in a position to propose the following definition of the trust: an appropriation of assets realized by means of a legal "person" who is subjected to the obligation of taking all reasonable steps to realize such appropriation, and who has all the rights necessary to fulfill such an obligation.

But probably Lepaulle's best statement of the finality of the trust comes on the concluding page of his provoking commentary:

The only possible theory is that the rights of the trustee have their foundation in his obligations: they are tools given to him in order to achieve the work assigned to him. The trustee gets all the tools necessary for such end, but only those, in order to allow him to insert his effort in society and to work either for someone else, or for an idea recognized as worthwhile in the community in which he lives.

The application of the principle of finality to the unqualified trust

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83 Ibid. (Emphasis added.)
84 Id. at 55.
85 Id. at 57.
86 Id. at 61.
duty specifies its nature and gives the full compass of the benefit-to-beneficiary rule.

THE LESSER LOYALTY RULES

Once both scope and nature of the duty of loyalty have been described whatever follows is simply exposition, expatiation, explanation. The lesser rules as derivatives obviously support the principal rule and clarify as they specify.

The benefit-to-beneficiary rule may be analyzed in three major sub-rules: (1) Both the office and its assets belong to the beneficiary; (2) Any increment in the assets inures to the beneficiary; and (3) The remuneration of the trustee is limited by contract and labor expended.

The Office and its Assets

Trust law has always realized that every asset originally appropriated belongs completely to the beneficiary. There has, however, been some hesitation in later years in determining who owns the office. *Sugden v. Crossland* was apparently without precedent. Vice-Chancellor Stuart knew he had a question beyond mere ownership of assets. Yet he summarily concluded that the office also belonged to the fund. "Though there is some peculiarity in the case, there does not seem to be any difference in principle whether the trustee derived the profit by means of the trust property, or from the office itself."\(^{87}\)

Concededly some meditation is required to conclude that the office-holder does not himself own the office. Why could not Horsfield sell the office to Crossland? The answer lies in the fact that the office remains always integral to the relation. It was the occupancy of the office that Horsfield sold. The original appointment to the trusteeship was the privilege of the settlor. The duty of successive appointments was one of the several duties placed on the trustee. Neither did the settlor give the first trustee the office itself—rather merely its occupancy—nor did the succeeding trustee receive it as his own. Once incumbent the trustee assumed all the duties, directed to the benefit of the beneficiary, among them the duty to appoint a successor. For the proper performance of these duties he received a compensation but he did not receive the office itself. That belonged to the settlor first and later passed with all the other assets to the beneficiary.

When it is understood that the right to appoint a successor trustee

\(^{87}\) 3 Sma. & Giff. at 194, 65 Eng. Rep. at 623.
rests in the incumbent trustee and that the actual appointment for a price
is the so-called sale of the office, it is a ready step to the realization that
two—not one—questions are involved in this sale of the office: (1) May
the office ever be sold at all? and (2) If sold, where does the sale price
belong? The answers: (1) The legitimacy or propriety of the "sale"
depends on the definite norms of selection determined ultimately by the
fiduciary duty of the custodian and obviously directed to the benefit of
the beneficiary. This is a complex subject worthy of detailed study;88 and
(2) If "sold," either legitimately or no, the price indisputably belongs to
the beneficiary. These insights Vice-Chancellor Stuart may not have had. But his was the correct conclusion, whether from intuition or a
visceral sense: (1) That the price for the sale belonged to the fund and,
(2) That the right and obligation to select the trustee was a matter for
the prudence and discretion of the officeholder, true, but a duty shaped
by the fiduciary relation governing the suitability of the appointment. He
directed the £75 into the trust fund and removed Crossland from the
office.

Perhaps no case is more pertinent to the benefit-to-beneficiary rule
(or to the broad thesis of this study) or a better junction between the
trust case Sugden and the control case Lionel than the oft-quoted McClure
v. Law.89 In the 1899 McClure the facts were on all fours with Sugden
and Lionel. The court not only reached the same conclusion but applied
Sugden by name to the corporate situation and quoted Perry on Trusts
to the following effect:

Trustees hold a position of trust and confidence, the legal title to the trust prop-
erty is in them, and generally its whole management and control is in their hands.
... They cannot use the trust property, nor their relation to it, for their own per-
sonal advantage. All the power and influence which the possession of the trust fund
gives must be used for the advantage and profit of the beneficial owners and not
for the personal gain and emoluments of the trustees. ... So, where a trustee
retired from the office in consideration that his successor paid him a sum of
money, it was held that the money so paid must be treated as a part of the trust
estate, and that the trustee must account for it, as he could make no profit, di-
rectly or indirectly, from the trust property or from the position or office of
trustee.90

The nexus with corporate control was further emphasized by resort to
Cook on Corporations:

88 See Bayne, The Definition of Corporate Control, 9 St. Louis U.L.J. 442 (1965); Bayne,
89 161 N.Y. 78, 55 N.E. 388 (1899).
90 Id. at 51, 55 N.E. at 389, quoting Perry, Trusts § 427, at 686-88 (6th ed. 1911).
It is a well-established principle of law that a director commits a breach of trust in accepting a secret gift or secret pay from a person who is contracting or has contracted with the corporation, and that the corporation may compel the director to turn over to it all the money or property so received by him. 91

Thus understood, both the office and any premium from its sale are directed to the benefit of the beneficiary.

The Increment to the Fund

Trust law has unvaryingly insisted that all trust profits be deposited in the trust fund. The Restatement expresses this elementary variant on the duty of loyalty as a corollary: "The trustee is accountable for any profit made by him through or arising out of the administration of the trust . . . ." 92

It should be equally clear—although it has not always been—that the time, energy, imagination, judgment and skill of the trustee are all trust assets purchased through the funds of the trust paid as compensation to the trustee. As such these services are also increment from the trust fund and come immediately within the purview of the benefit-to-beneficiary rule. "While he is employed in his fiduciary capacity, his entire energies must be devoted to the advancement of the beneficiary's legitimate interests." 93

The Remuneration of the Trustee

The entire answer to the question of the remuneration of the trustee—the last of the duty-of-loyalty discussion—rests in the acknowledgment of one truth: In theory the trustee is being adequately and justly compensated by salary set by contract, express or quantum meruit, by stipend or honorarium, by fee or retainer. If this emolument is proportioned (and if it is not it should be) to the labor and difficulty, the talent and imagination, the time and energy expended in the performance of the trust duties and in the utilization of the trust rights, any occult compensation is patently illicit, whether in the form of assets annexed from the fund or premiums received for the sale of the office or profits pocketed from its administration. "Although a fiduciary is generally entitled to compensation from the trust estate for his work, he is not permitted to accept additional compensation or commissions from persons

91 Ibid., quoting Cook, Corporations § 650, at 2426 (8th ed. 1923).
92 Restatement (Second), Trusts § 203 (1959).
93 Clapp, supra note 66, at 232.
with whom he deals in performing his fiduciary duties."94 Nor for any other work whatsoever which has already been paid for. "The rights of the trustee . . . may vary in each case, and are simply means allowing him to perform his duties, or to be reimbursed, or compensated, for having performed them . . . ."95

THE LOYALTY OF CORPORATE CONTROL

The temptation at this point would be to descend to detail in relating the trust philosophy—in particular the benefit-to-beneficiary principle—to corporate control. This is neither necessary nor advisable. Most of the comparison of control to trust has already been achieved, in the very exposition of the trust. Wherever the word "trustee" occurs or will occur, simply read "corporate control." The only requisite adversions, therefore, are general appraisals or in questionable areas.

There was a fleeting time—the late 1800's and early 1900's—when some courts conceded the applicability, in varying degrees and jurisdictions, of the trust-control parallel. As fleeting as it was, it indicates that what once was could again be and that at least the thought had once occurred to some thoughtful jurists. The Illinois Supreme Court, speaking in the second decade, was reflective of this attitude. Specifically, the court applied the benefit-to-beneficiary rule to corporate control.

The directors of a corporation are intrusted with the management of its business and property for the benefit of all the stockholders and occupy the position of trustees for the collective body of stockholders in respect to such business. They are subject to the general rule which prevails in regard to trusts and trustees, that they cannot use the trust property, or their relation to it, for their own personal gain.96

In the court's reasoning, beyond the succinct enunciation of the duty of loyalty, are contained the essentials for the trust-control analogy: (1) An entrustment to control of the management (2) of the corporate business and property. From this custody and tenure the court concluded to the benefit-to-beneficiary rule. This same court some ten years later retrod the same ground but characterized the rule in rather arresting phrases: "It requires no very keen moral perception to recognize the obvious justice of this universal rule of law, of justice and of morality."97

94 Id. at 229.
97 Dixmoor Golf Club v. Evans, 325 Ill. 612, 616, 156 N.E. 785, 787 (1927).
Earlier, in 1865, the Pennsylvania Supreme Court had placed directors in a position of confidence and hence denied them the right to "consume that which they are appointed to preserve." As late as 1930 the Indiana Court of Appeals incorporated the strict trust rule of loyalty into the corporate field: "Directors of a business corporation act in a strictly fiduciary capacity. Their office is a trust. . . . The first principal duty arising from his official relation is to act in all things of trust wholly for the benefit of his corporation."

The point is not so much that isolated courts imposed the benefit-to-beneficiary rule on corporate control (since such is quite clearly not the case today) but that the intrinsic identity of the two relations should impel court and commentator to reassess the law and return to the turn-of-the-century philosophy. In each of the three subrules of loyalty the parity seems to persist.

The Office and its Assets

As with the trust, there should be no question of the inviolability of corporate assets. Thus an early federal court: "His liability rests upon the fundamental principle that one who occupies a position of trust and confidence—such as a president, or director, of a corporation—shall never be permitted to abuse his official position by dealing with the corporate property for his private gain." The ownership of the office, however, has been a tortuous question. The New York courts in *Lionel* adduced no reasons in support of their double decision to remove control and hand over the premium to *Lionel*, but the identity of facts and result with the 1856 *Sugden* should give pause. A full analysis, under the *Lionel* facts, would conceivably suggest that the strict trust philosophy was the only rational explanation of such a conclusion. Implicit in such a holding is the recognition that the ownership of control, as of the trust office, lies in the totality of beneficiaries, here the shareholders comprising the entity. L. C. B. Gower, the capable English writer, places his endorsement on what he conceives is an American trend.

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88 Kilpatrick *v.* Penrose Ferry Bridge Co., 49 Pa. 118, 122 (1865).
101 The only purpose in the use of *Lionel* in this study is to show the parallel in general with the trust. There can be no cavil with the return of the premium to the fund in either *Lionel* or *Sugden*. As to reasons supporting the removal of the officeholder, *Sugden* is sound, *Lionel* questionable. See Bayne, *The Definition of Corporate Control*, 9 St. Louis U.L.J. 442 (1965).
The American courts are beginning to come round to the view that directors (or, indeed, other controllers who are not directors) are not entitled to retain the increased price obtained because their shares confer such control. This seems eminently desirable—control is valuable because it enables the company's assets to be dealt with; all members should share rateably in this, not just the lucky few. But this would be a highly novel doctrine in England.

In this highly technical area of the trust-control question any expatiation beyond the fundamentals would seem to defeat the purpose in establishing the intrinsic identity of the two relations. The philosophical conclusions and principles resultant on this identity should aid in the solution of specific problems surrounding the ownership of the office and the sale of control.

**Increment to the Beneficiary**

Max Pam not only equated control with trustee but applied the trust rule to corporate control.

It is the unvarying rule that an agent or a trustee dealing with the property of the principal or *cestui que trust* cannot profit thereby. All directors realizing any profits or benefits from such transactions may be held accountable therefor, and required to surrender them to the corporation.

In support of his stand Max Pam quoted Taylor.

Corporate officers may not buy from or sell to their corporation and retain any profits from such transactions, unless the profits are known and the transactions acquiesced in by all who could claim any interest in the profits. For all secret profits derived by them from any dealings in regard to the corporate enterprise, they must account to the corporation, even though the transaction may have benefited it.

**Remuneration**

Here again the parallel with the trustee is so pat as to suggest no further comment. The problem with the compensation of control rests not in the simple statement of the rule. All admit that control should at least, but only, receive a *guid pro quo*. The difficulty lies in application. The subtleties which may lead control to overcompensation are legion. But these are common to, not distinct from, similar subtleties practiced over the centuries by trustees, and are, therefore, to be dealt with on the same grounds and by the same ground rules.

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Sveinbjorn Johnson has deserved so well of this study, in spite of his polemical opposition (at least nominal) to its major thesis and is so reminiscent of the equally well-deserving Pierre Lepaulle, as to merit the last word. Johnson seems to express all of the foundations of the benefit-to-beneficiary rationale and rule, at least implicitly.

Power is given the directors to control and set in motion that intangible and utterly helpless creature, the holder of the title to all the property committed by the shareholder to the business venture for the promotion of which the corporation was launched. . . . There is an imperative duty resting on the board to set in motion and manage, lawfully, in good faith, and for the ends for which the creature came into being, the corporation . . . [T]he duty is . . . for certain definite objects . . . for the accomplishment of the purposes the stockholders intended to realize when they organized the corporation. 106

This concludes the analysis of the second major trust concept. From this principle and the relation of custody the remaining corollary concept can be constructed.

IV. Conflict of Interest

I venture to assert that when the history of the financial era which has just drawn to a close comes to be written, most of its mistakes and its major faults will be ascribed to the failure to observe the fiduciary principle, the precept as old as holy writ, that "a man cannot serve two masters". More than a century ago equity gave a hospitable reception to that principle and the common law was not slow to follow in giving it recognition. No thinking man can believe that an economy built upon a business foundation can permanently endure without some loyalty to that principle.

—Harlan Fiske Stone (1934) 108

The conflict-of-interest rule has been hedged around with some serious misunderstanding. On first face the rule may appear to have its foundation in causes unrelated to the main body of trust reasoning. The rule has often been presented as purely pragmatic, a blanket, fearful ban rooted in a preoccupation with the innate and inevitable weakness of post-lapsarian human nature, a no-exception prohibition founded on the senseless if-you-are-allowed-to-do-it-everyone-will-want-to-do-it fear of opening the dike, an inflexible and unreasoning attempt to avert temptation from the trustee’s path. None of these presents the truth. Yet so salutary is this rule that its clarification and crystallization could prove to be the major contribution of this study of the trust-control parallel.

106 Johnson, Corporate Directors as Trustees in Illinois, 23 Ill. L. Rev. 653, 669-70 (1929).
108 The Public Influence of the Bar, 48 Harv. L. Rev. 1, 8-9 (1934).
The rule, in truth, is uncompromising and unadorned with qualifications. In 1837, Lewin stated the historical formulation: "[F]or he who undertakes to act for another in any matter cannot in the same matter act for himself." Bogert uses the California Code, among others, to give the modern statement: "If a trustee acquires any interest, or becomes charged with any duty, adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof, and may be at once removed." In 1880, the Supreme Court of the United States applied the rule to the corporation:

Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule; they are not permitted to occupy a position which would conflict with the interest of parties they represent and are bound to protect.

The questions clouding the rule, however, are not to be answered by ascribing its rationale to an arbitrary or pragmatic genesis. The answer lies in one controlling truth: The conflict-of-interest rule is ultimately dictated by the custodial relation and is a subrule derived directly from the benefit-to-beneficiary principle. It is essentially and inevitably related to the first two major trust concepts.

The misconception surrounding the rule and the principal analyses of its nature may be conveniently grouped at three major embarkation points: (1) Basic Loyalty; (2) Quid pro Quo; and (3) Prevention of Temptation.

BASIC LOYALTY

One source alone without more could account completely for the entire efficacy of the conflict-of-interest rule, could supply the innermost rationale which justifies and explains its inveterate and universal application. This source? The dictates of the basic loyalty of man to man, of man to a cause. The mandates of the rule are nothing more than the codification of the elementary commands of human loyalty.

More than that. The basic loyalty of the trustee and corporate control is a fortiori. It is founded on more than mere fidelity—adherence to one's word. Whence comes this a fortiori loyalty, this special allegiance? The basic loyalty of trustee/control is caused directly by the commitment of custody. This is not a bare commitment. It is a commitment expressed

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and fortified in the formal assumption of the stewardship of a cause, a dream, a person, a corporation. This custodial commitment is an agreement implicit at the least, solemn possibly, but morally binding in any case, to keep safe, to guard with vigilance, to protect always, to hold dear as one's own, the cause, the person, the corporation. This commitment has engendered confidence, inspired reliance, created dependence. It has bound the two together, steward to stewardship, custodian to custody, control to corporation. This commitment is a complexus of duties, an acknowledgment of obligation, a recognition of responsibility. Mr. Justice Field reduced his statement of the rule to this obligation.

It is among the rudiments of the law that the same person cannot act for himself and at the same time, with respect to the same matter, as the agent for another whose interests are conflicting. . . . The two positions impose different obligations, and their union would at once raise a conflict . . . .

This line of reasoning leads to the one thought—the basic loyalty, unswerving allegiance of custody. (Needless to say, even noncustodial commitment binds to the most stringent loyalty. The actual assumption of dominion adds the graver responsibility of custodial loyalty.)

Quite logically, therefore, this dedication of a steward may be expressed in the first rule of loyalty: Every thought, word, and deed must be directed to the best interests of the cause. Here is the epitome of loyalty. This is what Royce meant when he said that loyalty properly defined is the fulfillment of the moral law.

If follows, then, that the chiefest breach of loyalty would be the faithlessness of the steward. "And the lord commended the unjust steward, because he had done wisely: For the children of this world are in their generation wiser than the children of light." Wherein lay this devil's "wisdom"? In the rejection of the commitment, in the deliberate embrace of interests antagonistic to the master's. There is a fundamental repugnance in serving two masters. This is what Christ meant when he said "He who is not with me is against me." A man cannot serve "two masters at once." It is not a question of breach of contract, of illicit gain, but of simply being "against me." Sworn allegiance has been broken by the very act of serving the second master. Basic loyalty is an elemental virtue and goes to the heart of human nature. Without more,

101 Ibid.
111 Royce, op. cit. supra note 72, at 15.
113 Matthew 12:30.
just being on the other side is inconsistent with true honor and devotion.
In the leading corporate case (long since overruled), Metropolitan Ry. v. Manhattan Ry., a contract between the two concerns was avoided because of "the divided allegiance" of an interlocking directorate.

Basic loyalty becomes vividly realistic when reduced to two simple human participants, father and son, priest and penitent, attorney and client, husband and wife. The anguish and shock of a son, a penitent, a client, a wife, at the slightest intimation of infidelity are most forceful expressions of the innermost essence of the virtue of loyalty. Merely, moreover, because the innocent and trusting party happens to be the millions-plus shareholders of A.T.& T. does not diminish an iota the natural-law demands of the utmost in loyalty. Here the requirement is "not honesty alone, but the punctilio of an honor the most sensitive."

Later reflection will convince that unqualified custodial loyalty alone accounts for the rule itself and all the stringencies which have been set up around it. There are, however, other considerations which would independently demand and justify the invocation of the rule, and hence thereby add further support to this principal foundation.

**Quid Pro Quo**

Were the trustee, as was the case in the early Anglo-Saxon trust, to serve without emolument, his obligation of unswerving dedication would stem solely from the loyalty consequent on his undertaking of stewardship. The modern custodian, however, whether trustee or corporate control, is remunerated in one or more of the manifold forms of present-day compensation. This remuneration gives rise to a second, conceptually distinct basis for the rule: Commutative justice. This basis is completely unrelated to the commitment of custody or even to the virtue of loyalty in the strict sense (i.e., custodial). Messner comments that "commutative justice directs the individual and corporate person to render to each in full measure what he is entitled to claim as his own." He rightly adds: "Since rights and claims of commutative justice come into existence mainly through contracts, it is also called contractual justice." And the essence of the justice of the contract is the equality of the consideration. Commutative justice requires an exact return for what has been received, a just quid pro quo.

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115 14 Abb. N. Cas. 103, 272 (N.Y. 1884).
117 Messner, Social Ethics 218 (1949).
118 Id. at 219.
Trustee and corporate control both receive under contract a salary or fee commensurate with the onerousness of the office. The source of this payment is the trust fund or the corporate assets. In return, trustee/control, within the scope of his employment, must devote himself exclusively to the best of his ability to the prosecution of his undertaking.

(Ultimately, but in a different sense, the quid-pro-quo basis for the conflict-of-interest rule can be referred to the benefit-to-beneficiary principle and finally to the custodial relation. Since the compensation paid to the trustee or to corporate control came from the fund of assets originally appropriated into the custody of the trustee, the totality of services supplied by the trustee/control could be viewed as merely the proper return of assets into the fund. Any activity therefore envisaged as within the scope of the stewardship is properly the property of the fund.)

One of the better modern statements of the correct quid-pro-quo rationale came from the pen of Justice Denning:

It matters not that the master has not lost any profit, nor suffered any damage. Nor does it matter that the master could not have done the act himself. It is a case where the servant has unjustly enriched himself by virtue of his service without his master's sanction. It is money which the servant ought not to be allowed to keep, and the law says it shall be taken from him and given to his master, because he got it solely by reason of the position which he occupied as a servant of his master.119

As with the loyalty foundation, the quid-pro-quo basis for the rule admits of no exceptions whatsoever. Witness Clapp: "While he is employed in his fiduciary capacity, his entire energies must be devoted to the advancement of the beneficiary's legitimate interests."120 Speaking in general terms Morawetz applied the rule to the corporation:

It follows, therefore, that the directors, or other agents of the corporation, have no implied authority to bind the company by making a contract with another corporation which they also represent. Each company would be interested in obtaining an advantageous bargain at the expense of the other company, and each would have a claim upon the best endeavors of its agents, unbiased by favor to others.121

Some meditation on the various elements constituting the "entire energies" of Clapp and "the best endeavors" of Morawetz will reveal how all-pervasive is the conflict-of-interest rule. Whatever the talents and abilities, knowledge and skill, prudence and judgment, time and energy,

120 Clapp, A Fiduciary's Duty of Loyalty, 3 Md. L. Rev. 221, 232 (1939).
121 Morawetz, Private Corporations § 528 (2d ed. 1886).
imagination and resourcefulness of the trustee/control, they all comprise that totality of services offered in return for the compensation of the office, the *quid pro quo*. As the English court put it in the famous *Aberdeen Ry. v. Blaikie Bros.* case: 122 "It was Mr. Blaikie's duty to give to his codirectors and through them to the company, the full benefit of all the knowledge and skill which he could bring to bear on the subject." 123

Singling out one of these many elements Lewin remarked: "[A]s he acquires that knowledge at the expense of the *cestui que trust*, he is bound to apply it for the *cestui que trust*’s benefit." 124 The conclusion therefore is inescapable: However infinitesimal the diversion of energy or endeavor —particularly the representation of an adverse interest—it is inconsistent with the custodian's contract of hire.

The simple command of a *quid pro quo* is not founded on the virtues of loyalty or fidelity, but is a natural-law dictate of contractual justice.

PREVENTION OF TEMPTATION

Of all the traditional arguments in support of the conflict-of-interest rule the most frequently adduced is the prophylactic purpose of shielding the trustee from all temptation. "Remembering the weakness of humanity, its liability to be seduced, by self-interest, from the straight line of duty, the sages of the law inculcate and enjoin a strict observance of the divine precept: 'Lead us not into temptation.'" 125 The New York Court of Appeals held the director of a corporation, as "a trustee," to "the same disability, which attaches to all trustees" and founded its reasoning on the prevention of temptation: "It is against public policy to allow persons occupying fiduciary relations to be placed in such positions as that there will be constant danger of a betrayal of trust by the vigorous operation of selfish motives." 126

As salutary as the objective of prevention may be, this reliance on the avert-temptation argument has been a chief source of confusion and a downright handicap to the proper understanding of the rule. Clearly the objective is praiseworthy. The harm comes in the inaccurate application of the argument.

A capitulation of the several levels of larceny—the larceny the temptation into which the trustee must not be led?—open to trustee/control

123 *Id.* at 316.
124 *Lewin, op. cit. supra* note 107, at 377.
will lead to the fallacy in the avert-temptation reasoning: (1) A simple breach of allegiance, without more, e.g., moral support to an adverse interest; (2) Services expended on behalf of an adversary, e.g., time, counsel, in violation of a contractual quid pro quo; (3) Monetary return, e.g., fees, profits, received as an adversary, licit if transaction were arm’s length; (4) Gains, e.g., bribes, fraud, received as an adversary, illicit even if arm’s length. Note well that each of the four instances is equally larcenous. The only difference lies in the gravity of the sin. Encouragement to the opposition could be fully as reprehensible as cozening a widdie-woman—and as wounding to the victim.

The question then arises: What is the temptation into which trustee/control is not to be led? Quite clearly the assumption is that trustee/control has a perfect right (1) to encourage an adversary, (2) to give him counsel, time and labor, (3) to bargain successfully for him, so long as the deal is “just” for both sides. The temptation to be guarded against is only (4) outright fraud; as if (1), (2), and (3)—from the merest flicker of disloyalty, through diversion of the weakest energies, on to the pocketing of “legitimate” profits—are not also rapine in the holocaust. When the New York court will not “allow persons . . . in . . . positions . . . [of] constant danger of a betrayal of trust,” it obviously does not consider the adversary position itself or service to the adversary or even adversary profits as such a betrayal. Fraud is the only “danger” to be averted, the only real “betrayal of trust.”

Implicit, therefore, in the customary avert-temptation argument is the approbation of disloyalty, of illicit services, even of unearned fees and profits. The one act that is assumed to be wrong—the temptation that the rule is calculated to avert—is “arm’s-length” fraud.

Read the statement of the Supreme Court of the United States in the celebrated Michoud v. Girod127 with this analysis in mind.

The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. . . . In this conflict of interest the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty.128

This is garbled thinking. The first sentence is perfectly correct. But in relation to the proper purpose of the rule this is misleading. The trustee

\[\text{127} 16\text{ U.S. (4 How.) } 188 \text{ (1845).}]\
\[\text{128 Id. at } 191-92.\]
must "refrain" from relations which "excite" a conflict, true, but more to the present point he must "refrain" from relations which are a conflict. The "placing" itself is disloyalty, not an occasion of disloyalty. Working for an adversary is wrong, not merely such as will "excite" to wrong. So-called legitimate profits are illicit, not merely a temptation to something even more illicit. The Court seemingly would permit a trustee to represent an adversary if there was neither the "probability" nor even the "danger" that "self-interest" would "exercise a predominant influence and supersede that of duty." In this the Court misses the point. It is a question rather of the faithlessness in "placing ourselves" in an adversary position in the beginning, of an unjust diversion of energies to the aid of an adversary, of illicit "just" profits.

Does this mean that there is no temptation to be averted? To the contrary, the rule does shield the trustee from palpable fraud. But this is the least of its purposes. First, it eliminates any disloyalty at all. Next, it precludes unjust services. Finally, unearned profits.

What harm in the fallacy, then? That courts and commentators should see no need for the rule absent any danger of fraud. That they should fail to found the rule on the two true supports: (1) Basic loyalty; and (2) Contractual justice. Remove the danger of the fraud and the reason for the rule ceases. Hence remove the rule. This is the obvious consequence of founding a rule on a false premise. Destroy the premise, the rule falls. Here, this is particularly dangerous since those who would erode the rule are seemingly not cognizant of its two true bases.

The avert-temptation argument, therefore, should be minimized. Query, even, if the rule would be warranted if there were nothing wrong in representing an adversary, if the only purpose were to shield from outright fraud. The remedy would seem, under that hypothesis, too harsh.

**NO INQUIRY**

The joint contribution of these three sources makes highly intelligible the culmination in the no-inquiry qualification to the rule. The English court in *Aberdeen Ry. v. Blaikie Bros.*<sup>129</sup> corroborates the present analysis and adds the qualification:

So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the *cestui que trust* which it was possible to ob-

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<sup>129</sup> 23 L.T.R. 315 (H.L. 1854).
tain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interest of those for whom he is a trustee have been as good as could have been obtained from any other person; ... But still so inflexible is the rule, that no inquiry on that subject is permitted.130

Now it is clear why the courts—without perhaps full adversion—added the no-inquiry prescription. It is not a question of good faith or fairness because there is never good faith or fairness when a trustee stands on both sides of a bargain. There is no question of damages because there are always damages when an employee performs service for one while in the pay of another. There is no question of fraud since the disloyalty is wrong at the outset. There need be no inquiry because the proof of the very act of divided allegiance ends the matter. Whatever follows belongs to the fund.

The various applications of the conflict-of-interest rule are legion, the infinity of ways in which one person tries to serve two masters. The application of this philosophy, therefore, is an infinite task. In one word: Any intimation of disloyalty is forbidden.

Conclusion

The last fifty years, decade by decade, have seen creditable advances in the atomic and medical sciences, in international economics and politics, in religion and moral theology. The progress in the civil law has been less perceptible. Yet the sophistication and discernment of man, the social being, should show itself prominently in this very sphere—and where more characteristically and properly than in his corporate life? True, there has been progress. The crass days of the robber barons were supplanted by the reforms of the thirties. The stirrings of the early sixties presage progress emulatory of the physical sciences and economics. This is as it should be. The human intellect is fully capable of perfecting an ever more enlightened and meticulous corporate code. The more law-conscious corporate man becomes, the more discerning he will be of the nuances of corporate right and wrong. The intellectual sophistication of the day can produce a truly refined system of corporate law.

More than this, as social man becomes more sensitive of subtle evils, more delicate in his moral and legal sense, the greater becomes his idealism and his desire for legal and moral perfection. He not only perceives the niceties and subtleties of right and wrong but he wants to see them

130 Id. at 316. (Emphasis added.)
operative. He works that much harder for the actual attainment of a legal and moral millennium. Moreover, to him to whom much is given, of him much is demanded.

The refinements and stringencies of the strict trust philosophy are completely consonant with such intellectual sophistication and such moral idealism. Gone should be the clumsy norms, the crude club-like approach, the looseness of the laissez-faire of corporate control.
Examining the English and American development of privilege as it applies to discovery, the author first considers the English decisions and determines that the courts failed adequately to delineate the “communications” and “investigatory” privileges and to examine the rationale of discovery. Mr. Gardner proceeds to examine the American state decisions, and notes that the early cases were guilty of similar error, which, the author concludes, must be analyzed to permit developing discovery procedures to avoid them.

The English Development

The development of the law of attorney-client privilege in England began earlier and has proceeded somewhat differently than in the United States. In England, the courts have spoken in terms of “professional privilege” without regard to the distinction between the privilege for the client’s communications and the privilege for the lawyer’s preparation of his case in anticipation of litigation, although there are sound policy reasons why the two legal conceptions, whether referred to as diverse aspects of a single privilege or as distinct privileges, should be kept separate and distinct in the minds of the court and counsel. In England, the communications aspect of the privilege has been kept fairly narrow in scope as a result of a process of strict interpretation, whereas the preparatory privilege has been expanded broadly as a result of a number of factors. Perhaps the two most important factors in the expansion of the preparatory privilege are the nature of the adversary system of litigation generally and the special division of legal practice between the solicitor and the barrister, with “the case made for counsel” which is prepared by the solicitor and transmitted to the barrister, setting out the position of the client in detail.1 The cases in these areas have

* LL.B., Harvard University Law School; LL.M., Columbia University School of Law. Member of the Bars of the States of California and Illinois. Recently with the Office of the Chief Counsel, Internal Revenue Service, Washington, D.C. This article is part of a larger work by Mr. Gardner to be published seriatim in 42 U. Det. L.J. Nos. 1-5 (1964-1965).

1 Under the English system the solicitor prepares a written statement of facts communicated to him by his client. This written statement becomes part of the “case for counsel” upon which the barrister will base his decision as to whether litigation is desirable. If litigation occurs both solicitor and barrister utilize the “case for counsel.” The “case for counsel” was therefore a most desirable target for bills of discovery in equity and only the expanded communications privilege itself protected it. Much of the English law of privilege
generally not considered the rationale of the respective aspects of the privilege, though in the area of the communications privilege, the policy promotive of free communications of the client with his counsel has been frequently mentioned; and, in the case of the preparatory privilege the surprise element that is a factor in the trial in open court has been noted. In general, the English cases have proceeded more along the lines of authority, without seeming to feel required to give any justification for their particular line and scope of development—probably because the English judges have never had a Wigmore to challenge them.

The English decisions have been rendered in a different context than the American decisions on privilege. Not only was the solicitor-barrister division an important factor in the English development, but English discovery procedures were more conducive to general use and were better administered and better understood than their counterpart in the United States. Also, it should be noted, liberal discovery developed somewhat earlier in England than in the United States. While the discovery statute did not specifically recognize the existence of the common-law privilege, the English courts never hesitated to read privilege into the statute as an exception to the right to discover all evidence in the possession of the opponent and his counsel. Moreover, the scope of the communications aspect of the English privilege became well settled in the nineteenth century and has produced few appellate cases since then. The scope of the preparatory privilege seems never to have caused any substantial litigation outside of the expanded area of the lawyer's investigations. But in this latter area, though the precedential guides to decision are generally deemed settled, there has been a plethora of appellate decisions, and

developed out of the demands of the opposing party for the production of the client's "key to his case." In the United States where there is not this separation of function, the client's statements are likely to be oral and there is little possibility of gaining anything so valuable as the written statement submitted by the solicitor. 8 Wigmore, Evidence § 2290, at 565-67 (3d ed. 1940) [hereinafter cited as Wigmore]; see Gardner, Agency Problems in the Law of Attorney-Client Privilege, 42 U. Det. L.J. 1, 5 (1964).

Lyell v. Kennedy, 9 App. Cas. 81, 86 (1883) (Blackburn, L.J.). Wigmore designates this as the great modern case on privilege. 8 Wigmore § 2318, at 618 n.3; Anderson v. Bank of British Columbia, 2 Ch. D. 644, 649 (C.A. 1876) (Jessel, M.R.).

See note 78 infra.

The English treatises on evidence are short and practical. The main ones which are of current value are the following: Cockle, Evidence 335-38 (7th ed. 1946); Nokes, Evidence 190-92 (3d ed. 1962); Phelpson, Evidence 210-11 (9th ed. 1952); Wills, Evidence 281-91 (3d ed. 1938). Also of value are Bray, Discovery 350-443 (1885) (old but good); 12 Halsbury, Laws of England 39-49 (3d ed. 1955); Odgers, Pleading and Practice 279-306 (8th ed. 1918) (later editions less valuable); Ross, Discovery 213-62 (Can. ed. 1912).
vigorously contested matters continue to plague the courts down to the present time. The English cases are important for our purposes because they have had influence upon the decisions of the state courts prior to the adoption of the Federal Rules of Civil Procedure in 1938. They still have relevance as precedents when conservative state law is being made, since this law developed with reference to the English law, particularly as interpreted by the writers on evidence, chief among whom are Wigmore and Jones. But more important, consideration of the English precedents is essential for comparative purposes when we attempt to evaluate the course of development which our law of privilege has taken thus far, in order that we may better chart its course for the future.\(^5\)

The English rules of practice provide as an aid to discovery that counsel may request his opponent to furnish a list of documents. The answer setting forth the documents is called an “affidavit of documents,” because it is made under oath, and if the opponent claims the privilege as to any document specified in the affidavit, he must state the grounds of his objection in the answer.\(^6\) The courts will not allow an attack on an affidavit claiming the privilege when the affidavit appears sufficient on its face, and they will require that the affiant give additional information


\(^6\) While as an initial procedure the use of an affidavit is satisfactory, the area of discovery is too important to be left ultimately to turn on the standardized form of an affidavit of privilege. Such a procedure must inevitably result in a stereotyped situation, rigid and artificial, turning on formal recitals, which become a matter of routine and result in extension of the scope of the privilege by the familiar device of a procedural fiction. This has been recognized by the English judges on occasion:

> I think it a dangerous proposition that any particular formula must as such be conclusive even against the evidence of the scheduled documents themselves. The clause of the affidavit is a hybrid, made up by combining a variety of phrases which have passed muster in decided cases. It is dangerous to rely on these artificial creations . . . .

Hamilton, L.J., in Birmingham & Midland Motor Omnibus Co. v. London & N.W. Ry., [1913] 3 K.B. 850 (C.A.). The last mentioned development has occurred in the stage of the maturity of the law but should not be permitted to continue to exist in its present stage of further equity and naturalization. Cf. Pound, The Spirit of the Common Law 139-65 (1921). This rigidity might be ameliorated somewhat by the court’s right to inspect the document itself, though the policy against inspection except on rare occasions would render this device largely ineffectual. The right to cross-examine counsel as to the circumstances of the claim of privilege when it is asserted during pretrial discovery proceedings would seem to be a more effective remedy, though the writer has nowhere found this to have been done. For the standardized form of objection to production of documents on the ground of privilege see Odgers, op. cit. supra note 4, at 470-71.
only when there is more than a mere suspicion of doubt that the claim of privilege is justified.7 If the court is still in doubt it has power to inspect any document, but this power is exercised conservatively.8 Yet, within the limitations of the case law on privilege, the English procedures are arranged in a manner which facilitates the discovery of the opponent's evidence and prevents him from asserting the claim of privilege unjustifiably.9 However, this does not mean that the English courts are without problems in the area of privilege. Although they have expanded the privilege rather broadly in the area of the lawyer's preparations, difficult problems continue to plague them, especially in connection with the application of the facts to the law. Resistance to discovery occurs because different inferences can be drawn from the facts to show that the privilege is or is not applicable. The result is that the goal of extrajudicial discovery is not achieved, unnecessary time is consumed, and even with additional appellate decisions, the ultimate solution tends to remain at a stalemate.

The English law of privilege may be briefly summarized as follows:

7 This has been made a matter of the attorney's honor. "I think the true canon to be always borne in mind, is this: that you are appealing to the oath or conscience of the other side, and that you cease to appeal to his oath the moment you begin to contest his accuracy." Bowen, L.J., in Lyell v. Kennedy, 27 Ch. D. 1, 30 (C.A. 1884) (explaining the court's refusal to require an additional affidavit).

8 In Bustros v. White, 1 Q.B.D. 423, 427 (1876), the court recognized the practice of inspection by the judge in chambers of challenged documents when the affidavit is defective as a means of avoiding delay and expense but stated that in such case it was by consent and that thereafter neither party could question the decision on appeal. Nevertheless, the power of the court to inspect is broader than one based on consent. See cases cited note 9 infra.

9 The rule providing for inspection is set out in Rules of Supreme Court 1883, Order XXXI, Rule 6 which is explained in 4 Moore ¶ 26.23[2], at 1322. See, e.g., Westminster Airways, Ltd. v. Kuwait Oil Co., [1951] 1 K.B. 134, 22 A.L.R.2d 648 (1952); Birmingham & Midland Motor Omnibus Co. v. London & N.W. Ry., [1913] 3 K.B. 850 (C.A.), where the court said that "no particular formula of words can be conclusive against evidence furnished by the documents themselves or inferences to be drawn from their contents and from a reasonable view of the circumstances under which these documents of their class came into existence." Id. at 856-57. See also note 6 supra. The right to examine the documents themselves is recognized in both the Birmingham and Westminster decisions, though the court in both instances declined to exercise this prerogative.

In Longthorn v. British Transp. Comm'n, [1959] 2 All E.R. 32 (Q.B.), where the affidavit stated that the report sought was prepared "inter alia" for purposes of litigation, the court held this insufficient as a matter of law to support the claim of privilege, inspected the report, and determined from information contained therein that it was prepared for business purposes.
Communications between the client and his solicitor are privileged. In addition, the courts have extended the concept of privilege to include specific evidence obtained in the course of preparing one's case for litigation. Under this aspect of the privilege, all documents prepared by or for counsel with a view to litigation are held to be immune from pretrial discovery by the opposing party. While legal advice might be sought when litigation is not anticipated, documents obtained by the client prior to the time when litigation might reasonably be anticipated will be scrutinized and ordinarily treated as business documents rather than privileged items, except for actual communications between the client or his agents and the solicitor. On the other hand, documents obtained from agents and other third parties by the solicitor in behalf of the client or by the client to be placed before the solicitor will be held privileged when litigation is anticipated at the time. The basic principles are well settled, though occasionally rules of law develop within this framework, and in recent years there has been an apparent trend in the direction of liberal interpretation of the various factual situations so as to favor the recognition of the privi-

10 To some extent the English courts apply a kind of objective time test. The time when documents thereafter prepared will be in contemplation of litigation is when the party ceases to be interested in the matter as one of business and becomes interested as agent for the legal adviser. Westminster Airways, Ltd. v. Kuwait Oil Co., [1951] 1 K.B. 134, 147-48, 22 A.L.R. 2d 648, 658 (1952).

11 The theory of protecting communications from third parties to the solicitor is that the communications were called into existence for purposes of litigation. Wooley v. Northern London Ry., L.R. 4 C.P. 602 (1869); Friend v. London C. & D. Ry., 2 Ex. D. 437 (1877); Wheeler v. Le Marchant, 17 Ch. D. 674 (C.A. 1881); see Bray, op. cit. supra note 4, at 399, 403, 406; Nokes, op. cit. supra note 4, at 156-57; Peppiott, op. cit. supra note 4, at 210-11; Ross, op. cit. supra note 4, at 216-24; Wills, op. cit. supra note 4, at 281-82. Bray criticized the rule unless it be limited to materials gathered for evidence. It is not so limited. Wheeler v. Le Marchant, supra at 681; Anderson v. Bank of British Columbia, 2 Ch. D. 644, 649-50, 652-53 (C.A. 1876).

Wills summarizes the law thus: The privilege protects two classes of communications: (1) It is broader in a narrower area, namely, where litigation is on foot or intended, in which case it protects not only statements of the client and his agents but also statements of third parties received by the solicitor; (2) It is narrower in a broader area, in that it does not protect statements of third parties not agents made to the solicitor (or to the client for transmission to the solicitor) when litigation is not anticipated. Wills, op. cit. supra note 4, at 281-82.

12 Halsbury, Laws of England 39-40 (3d ed. 1955), explains privilege thus: Communications to and from a legal adviser for the purpose of obtaining legal advice and assistance are privileged. Other communications which are reasonably necessary to protect these communications are privileged. But in the case of communications to or from a nonprofessional agent or third party, the privilege only arises if litigation is threatened or contemplated.
lege in doubtful cases. The cases most often revolve around two points: (1) whether the materials were obtained for purposes of litigation; and (2) whether the materials were created for purposes of professional advice.

In 1914, a famous edition of a standard text on evidence summed up the second and broader aspect of the English privilege as follows:

The same principle which protects the communication between attorney and client from disclosure would seem to call for the extension of the privilege to communications between the party and his attorney and their witnesses made during necessary preparation for trial. Several elementary writers have given their approval to such an extension of the privilege, and to a certain extent the cases are in accord with them.

This is undoubtedly a good summary of the second aspect of the English privilege as it existed at that time. Yet it has been a factor in the creation of the confusion which has become apparent in the American decisions, in that it couches the investigatory aspect of the privilege in terms which appear to subsume it under an expansion of the communications privilege, whereas clear thinking would be promoted by treating the communications aspect and the preparatory aspect of the English privilege as separate and distinct categories. The learned writer went on to state that there were comparatively few decisions upon this branch of the law of attorney and client, because it resolved itself into a question of whether the facts would bring the case within the established rule of privilege. The reference was to the two broad classifications of documents which the English courts have treated as mutually exclusive, although in actuality these categories frequently tend to overlap. They are (1) the category of ordinary business documents and (2) the category of documents prepared in anticipation of litigation.

12 In Seabrook v. British Transp. Comm'n, [1959] 2 All E.R. 15 (Q.B.), the court pointed out that from about 1869 to 1913 the emphasis was placed on discovery of all available evidence, and that since 1913, it has been placed on protection of the privilege in case of documents prepared in anticipation of litigation.

13 See 4 Moore ¶ 26.23[2], at 1321-29 (the best discussion of English case law in the area); 8 Wigmore ¶ 2319, at 618-22 n.1; English texts cited in note 4 supra; Annot., 139 A.L.R. 1250 (1942); Annot., 146 A.L.R. 977 (1943).

14 4 Jones, Evidence ¶ 751b, at 509 (Horowitz ed. 1914).

15 Id. ¶ 751b, at 511. Later developments have shown this conclusion to be erroneous. The decisions are numerous today, in fact too numerous, because there is no satisfactory way of determining into which of the two categories formulated by the courts the particular case fits. The result is that unnecessary work is imposed on the courts and counsel, and the problem remains a recurrent one. That this condition has persisted for so long a period of time constitutes a strong ground for questioning the validity of the categorization, while the necessity for repeated judicial rulings violates a basic procedural principle.
in anticipation of litigation. These classifications are exemplified by two leading English cases that reach opposite results. Though the facts are distinguishable, these cases illustrate the difficulty involved in separating the two categories of documents when placed in close juxtaposition.

The first case is *Anderson v. Bank of British Columbia.* In this case after litigation had been threatened, the bank's manager in London wired its branch in British Columbia for full particulars of the transaction. The reply letter was held not to be privileged. The court felt that there was nothing to show that the report was requested for the submission to counsel (though it was apparently turned over to counsel when suit was filed). The court said that if the manager had indicated that the request had been made in anticipation of litigation, the reply would have been privileged under well known principles.

Sir George Jessel, M.R., after stating the general justification for the rule of privilege, proceeded to summarize the modern English law of privilege. He divided the area which the courts will recognize and protect into four parts. The first part covers communications from the client to his solicitor:

It (the privilege) goes not merely to a communication made to the professional agent himself by the client directly, it goes to all communications made by the client to the solicitor through intermediate agents, and he is not bound to write letters through the post, or to go himself personally to see the solicitor; he may employ a third person to write the letter, or he may send the letters through a messenger, or he may give a verbal message to a messenger, and ask him to deliver it to the solicitor, with a view to his prosecuting his claim, or of substantiating his defense.

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16 The ordinary case of communications between principal and agent, without the intervention or suggestion of professional advice, is not privileged. "All matters, for instance, in connection with litigation, the outcome of the attorney's advice or direction, the preparation of the case for trial, of briefs, of confidential import are clearly privileged." 4 Jones, *op. cit.* supra note 14, § 751b, at 511. "All matters which do not spring from such advice, request or suggestion [and which] cannot be traced to that source" are outside the pale of the attorney-client privilege. *Ibid.*

17 2 Ch. D. 644 (C.A. 1876); *accord,* Wheeler v. Le Marchant, 17 Ch. D. 674, 682 (C.A. 1881), wherein Sir George Jessel, M.R., explains the meaning of "litigation commenced or threatened." Compare The Hopper, [1925] P. 52 (1924) (shipmaster's report required by general rule on form headed "confidential report . . . in view of litigation" held privileged).

18 2 Ch. D. at 649. Did Jessel, M.R., have in mind something broader than mere transmission of communications? Earlier in the same opinion he had written: "If you ask your agent to draw out a case for the opinion of your solicitor, or for the opinion of your counsel, that is a confidential communication made for that purpose." *Id.* at 648. Was he speaking here of the communications aspect of the privilege? If so, he failed to develop the point. In fact, the decision in the case tends to deny any such broad meaning to this language.
At this point, it might be noted that the communications privilege as defined by Jessel, M.R., one of the great English judges, extends only to communications originating with the client. Such communications may be transmitted to counsel by the client himself or through the use of an intermediary, commonly known as a transmission agent. However, the communications aspect of the English privilege is no broader in scope than that.

Second, the acts of the solicitor in behalf of the client, including information obtained from third parties are covered:

Again, the solicitor's acts must be protected for the use of the client. The solicitor requires further information, and says, I will obtain it from a third person. That is confidential. It is obtained by him as a solicitor for the purpose of litigation, and it must be protected upon the same ground, otherwise it would be dangerous, if not impossible, to employ a solicitor. You cannot ask him what the information he obtained was. It may be information simply for the purpose of knowing whether he ought to defend or prosecute the action, but it may be also obtained in the shape of collecting evidence for the purpose of such prosecution or defense. All that, therefore, is privileged.19

It will be noted that this category of evidence is not concerned with the client's communications, but rather with the lawyer's preparations. While the client's communications may be embraced within the broader category of the lawyer's preparations, this will not always be the case, and the purpose in according protection to this category is different from the purpose recognized in according protection to the first category. Thus, the dividing line, in the dichotomous classification of privilege in the English law, between the communications aspect of the privilege and the investigatory aspect is drawn between the first and second of Jessel's classifications.

Third, the solicitor may use agents to obtain this information for his use. This is also a part of the investigatory aspect of the English privilege. Jessel, M.R., continues:

Then the rule goes a step further. The solicitor is not bound any more than the

19 Id. at 649-50. Note that the court here distinguishes information from evidence but recognizes that when obtained by the solicitor for the client, both are privileged, including information obtained from third parties. This distinction is also recognized by Mellish, L.J., in the same case:

To be privileged it must come within one of the two classes of privilege, namely, that a man is not bound to disclose confidential communications made between him and his solicitor, directly, or through an agent who is to communicate them to the solicitor; or, secondly, that he is not bound to communicate evidence which he has obtained for the purpose of litigation.

Id. at 658.
client to do this work himself. He is not bound either to collect information or
to collect testimony. He may employ his clerks or other agents to do it for him,
and upon the same principle as the information acquired by himself directly is
protected, so the information acquired by a clerk or agent employed by him is
equally protected.20

Fourth and finally, the solicitor may have the client obtain the informa-
tion for the solicitor's use. This information is also protected. Thus, under
the English law, the investigations of the client which are transmitted to
counsel may be protected under both the communications aspect of the
privilege and the investigatory aspect of the privilege; the investigations
of the client's agents transmitted to counsel are protected, however, only
under the investigatory aspect of the privilege. Jessel, M.R., sums up this
facet of the investigatory aspect of the privilege as follows:

But then the cases go still a step further. Suppose the information required is
in a foreign country, where neither the solicitor nor his clerk nor an ordinary
agent can obtain it, he may request the client to obtain it himself, and then the
information so obtained by the client at the request or under the advice of the
solicitor is in a sense obtained by the agent of the solicitor, although it is a very
odd way of expressing it. It is turning the client, so to say, into the agent of the
solicitor for the purpose of obtaining information; but it is clearly within the
rule of privilege.21

The learned judge further stated that the true test is not whether the
person communicating the information is the agent of the solicitor of
the party and sent out by him, "but the true test is, whether such person,
in transmitting that information, was discharging a duty which properly
devolved upon the solicitor, and which would have been performed by the
solicitor if the circumstances of the case had admitted of his performing
it in person."22

In the same case, Lord Justice James said:

Looking at the dicta and the judgments cited, they might require to be fully
considered, but I think they may possibly all be based upon this, which is an
intelligible principle, that as you have no right to see your adversary's brief, you
have no right to see that which comes into existence merely as the materials for
the brief. But that seems to me to have no application whatever to a communi-
cation between a principal and his agent in the matter of the agency, giving in-
formation of the facts and circumstances of the very transaction which is the

20 Id. at 650.
21 Ibid.
22 Id. at 652, quoting V.C. Sir W. Page Wood, in Lafone v. Falkland Islands Co., 4
K. & J. 34, 36, 70 Eng. Rep. 14, 15 (Ch. 1857), who in turn relied upon the decision of
subject-matter of the litigation. Such a communication is, above all others, the very thing which ought to be produced.\textsuperscript{23}

Mellish, L.J., also distinguished between what he called the two classes of privilege: (1) confidential communications; and (2) evidence obtained for the purpose of litigation.\textsuperscript{24} The corollary case is *Southwark & Vauxhall Water Co. v. Quick.*\textsuperscript{25} This was an action by a corporation against its former engineer to recover moneys alleged to have been wrongfully charged. Transcripts of notes of interviews between employees and officers of the company obtained to be reported to the board of directors and submitted to the company's solicitor for his advice were held privileged, even though they were never actually submitted to counsel as intended. Thus, it appears that the actual test is the state of mind of the parties, as determined by the circumstances.\textsuperscript{26}

In *Wheeler v. Le Marchant,*\textsuperscript{27} plaintiff brought suit for specific performance of a contract to lease land. Prior to the commencement of the suit, defendant had hired a surveyor to make certain surveys and report thereon. After suit had been commenced, plaintiff sought discovery of the reports, and the court denied defendant's claim of privilege. While the reports were prepared by the surveyors for transmission to the solicitor for legal advice thereon, the court said that this is not enough. There must be an apprehension of litigation which was lacking here.\textsuperscript{28}

\textsuperscript{23} 2 Ch. D. at 656-57.

Look at the circumstances of the present case. A man makes a claim against a bank in London; the bank in London not having all the facts in their knowledge, send out to their agent who transacted the business a telegram to this effect, "Give us the fullest information that you have of all the facts and circumstances of the case, all about the shipping document, and everything of the kind connected with it." That is exactly what they ought to do. It is the duty of a man, in the ordinary course of business, to do it, and it is not necessarily connected with the litigation either actually commenced or expected. It is the information of the agent, and the principal ought to know what the agent knows. *Id.* at 657.

\textsuperscript{24} *Id.* at 658.

\textsuperscript{25} 3 Q.B.D. 315 (C.A. 1878).

\textsuperscript{26} The court distinguished *Jones v. Great Cent. Ry.*, [1910] A.C. 4, where an employee's letters to the union were written to enable the union to decide whether litigation should be pursued.

\textsuperscript{27} 17 Ch. D. 674 (C.A. 1881).

\textsuperscript{28} The problem here was to prevent mere business documents from masquerading under the aegis of privilege, and mere vague apprehension of litigation is not deemed sufficient. Therefore, the court held that the privilege did not extend to documents which were prepared to be laid before a solicitor for advice only and prior to the time when litigation was anticipated. The court, per Cotton, L.J., felt that allowance of the privilege in this
To sustain the claim of privilege it is not necessary that the litigation shall have been commenced; reasonable apprehension of litigation is sufficient. But a vague apprehension of litigation cannot protect what would normally be routine business reports. The material need not be gathered at the solicitor's request if it is for his use. Nor is it necessary that the materials actually be laid before the solicitor, as when obtained at his suggestion. But the rule is that evidence once privileged is always privileged, even though particular litigation does not materialize and the evidence is later sought for use in other litigation. A preexisting document cannot be clothed with privilege merely by being turned over instance would open the way for the claim of privilege for all communications between the parties or their solicitors and third parties. Later cases have used language broad enough to make the privilege applicable here, however.

The English rationale for protection of the client's communications with third parties is that the client is obtaining evidence as agent for the solicitor and which the solicitor would obtain himself if he were personally able to do all of his work rather than depend upon agents. Lafone v. Falkland Islands Co., 4 K. & J. 34, 70 Eng. Rep. 14 (Ch. 1857); Wheeler v. Le Marchant, 17 Ch. D. 674, 682 (C.A. 1881); Anderson v. Bank of British Columbia, 2 Ch. D. 644, 650, 656-57 (C.A. 1876); cf. 12 HALSBURY, LAWS OF ENGLAND 39-40 (3d ed. 1955), paraphrased in note 11 supra. The Wigmore rationale is that the client might not transmit the information from the third parties or have them transmit it unless it were privileged. 8 WIGMORE § 2317[2]. But apparently Wigmore would limit the protection to the client's agents, whereas the English decisions do not so limit it.


Graham v. Bogle, [1924] 1 Ir. R. 68; cf. note 28 supra. The "time element" in determining at what point litigation might reasonably have been anticipated has always plagued the English courts. In Birmingham & Midland Motor Omnibus Co. v. London & N.W. Ry., supra note 29, the Court of Appeal reversed the trial court, which had drawn the line between business and legal documents at the time a claims letter had been received. The court said that no particular formula could be established and that the contents of the documents and the surrounding circumstances must be considered. It felt that the particular case was one where "at the very moment when the accident occurs an ordinary employee can anticipate that litigation in respect of it will probably occur," but added that the test of notice is "often unexceptionable, and particularly so in mercantile disputes where it is the receipt by defendants of a letter of claim from plaintiffs." Id. at 861.


Ibid.

Pearce v. Foster, 15 Q.B.D. 114 (C.A. 1885). This is one of the chief advantages of the work product rule of the federal courts over the rule of absolute privilege in the expanded area of the privilege, since the "qualified immunity" of the work product does not extend beyond the duration of the particular suit.
to the solicitor, but it is not classified as preexisting when brought into existence by the solicitor as preparation for litigation.\textsuperscript{34} The courts have hedged on the matter of denying the privilege in the case of reports obtained for more than one purpose, saying that the information need not have been obtained "solely" for legal advice or litigation if obtained "primarily" therefor.\textsuperscript{35}

The problems which the English courts have faced in the separation of business documents from legal documents have remained both troublesome and constant. In each case, the question is basically one of fact. But the procedural method of submission of the matter on affidavits which cannot be controverted has reduced the question to one of law, though with an application unique to the particular factual situation in each case. This means that there is always a basis for maintenance of the claim of privilege in close cases and likewise a basis for opposing it.

\textsuperscript{34} Lyell v. Kennedy, 27 Ch. D. 1 (C.A. 1884). In this case a collection of photographs of tombstones, excerpts from public records, etc., made by the solicitor and his clerks were held privileged from discovery in controversy over title to land because the attorney had used legal reasoning in selection of materials and disclosure might reveal his theories of the case. This privilege also extends to the client. If his only knowledge comes from his solicitor in confidence, he may refuse to answer on the grounds of privilege. Gort v. Rowney, 28 Sol. J. 533 (Q.B. 1884).

\textsuperscript{35} Birmingham & Midland Motor Omnibus Co. v. London & N.W. Ry., [1913] 3 K.B. 850, 856 (C.A.). In City of Baroda, 134 L.T.R. (n.s.) 576 (K.B. 1926), reports of pilferage of cargo of vessel were held not privileged, since they were primarily obtained to ascertain the conduct of the crew. The argument that litigation is always anticipated in such cases was held not sufficient to establish the claim of privilege. In Longthorn v. British Transp. Comm'n, [1959] 2 All E.R. 32 (Q.B.), the claim of privilege was rejected because the affidavit failed to allege that the report was prepared primarily for litigation.

But the English courts have gone even further. See, e.g., Ogden v. London Elec. Ry., 49 T.L.R. 542 (C.A. 1933) (reports of accident made by servants of defendant on the day of its occurrence and two days before plaintiff's solicitor gave notice of claim held privileged as being made for the solicitor and in anticipation of litigation). Scrutton, L.J., quoting from Birmingham & Midland Motor Omnibus Co. v. London & N.W. Ry., supra (Buckley, L.J.), said:

It is not, I think, necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated. If it was obtained for the solicitor, as above stated, it is none the less protected because the party who has obtained it intended, if he could to settle the matter without resort to a solicitor at all.

Ogden v. London Elec. Ry., supra at 543. In Ogden the defendant had a claims department, presided over by a lawyer, which department received the reports and acted upon them before transmitting them to its solicitor for purposes of litigation.
The importance of this type of evidence is indicated by the number of appeals taken from interlocutory orders of the courts of original jurisdiction. The difficulties inherent in this particular test of privilege have been well stated in the following observation of Hamilton, L.J.:

In a sense not altogether illusory every one of these records, from the office boy's postage book to the chief cashier's ledger, comes into existence for the purpose, if peradventure there should be litigation or fear of it, of putting the legal advisors in a position to advise fully and to conduct the case successfully, though in nine hundred and ninety-nine cases out of a thousand no such use of the entries will ever be made. To hold such documents privileged merely because it can be shown of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice.36

Thus, it would appear that by its very nature the test adopted in the English practice is unsatisfactory. Not only does it create a condition in which the percipient stands to gain an advantage—one in which by reason of the fluidity of the facts jurisprudence must remain where it stood before—37—but it violates the first principle of procedure which requires rules that are simple and easily administered. It further violates the principle which requires that pretrial discovery be largely extrajudicially administered.

The privilege extends to material in the client's possession so long as it was obtained with intent to deliver it to the solicitor for legal action (or in a proper case, professional advice).38 But if either the client or the agent acts upon such communication, other than to lay it before the solicitor, then the privilege will not attach.39 Furthermore, all prepara-

37 Mr. Justice Cardozo with characteristic insight has observed: [T]he cases where controversy turns not upon the rules of law, but upon its application to the facts ... call for intelligence and patience and reasonable discernment on the part of the judges who must decide them. But they leave jurisprudence where it stood before. Cardozo, The Nature of the Judicial Process 163 (1922).
38 Southwark & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (C.A. 1878) (documents prepared for use of solicitor privileged though never actually transmitted to him); Anderson v. Bank of British Columbia, 2 Ch. D. 644 (C.A. 1876) (privilege denied because report requested by principal did not specify that it was for solicitor; but circumstances indicated that it probably was requested with litigation in view and to be laid before solicitor).
tion for trial is privileged, including the statements of witnesses who are independent third parties. The privilege extends to a statement of the plaintiff taken by the defendant’s agent for transmission to counsel, at least in the absence of fraud, and to the reports of experts obtained by or for the client in anticipation of litigation. When two or more parties stand in a relationship of trust and confidence, no privilege exists as to the communications of one of them to his solicitor. The privilege applies not only to corporations but also to governmental bodies.

The privilege appears to have been intended to protect communications of the client and his solicitor only, but in practice it has been extended to cover communications of the agents of the solicitor and the agents of the client. This extension, however, clearly falls in the category of the

discharged employee, used to determine whether to bring suit for reinstatement prior to laying it before solicitor).

Some consideration of reports by the client apparently will not result in loss of the privilege in the case of insurance claims. Adams S.S. Co. v. London Assur. Co., [1914] 3 K.B. 1256 (C.A.) (report of defendant’s agents to salvage association after notice given of abandonment of stranded vessel held privileged, though not obtained by solicitor). This would be the only explanation for allowance of the privilege in the case of multipurpose documents. See note 35 supra and accompanying text. The Adams case explains Jones v. Great Cent. Ry., supra, by saying that there the letters were written to enable the union to decide whether litigation should be pursued.

40 See cases cited in Gardner, A Re-Evaluation of the Attorney-Client Privilege, 8 Vill. L. Rev. 279, 297 n.60 (1963); authorities cited note 11 supra.

41 Feuerheerd v. London Gen. Omnibus Co., [1918] 2 K.B. 565, 568 (C.A.), where plaintiff, mistakenly believing A represented plaintiff’s solicitor, gave a statement to A and later sought to obtain a copy. The court held that plaintiff’s intent was not a factor, but that the intent of defendant to communicate the statement to his solicitor was controlling and hence, discovery was denied.


44 Auten v. Rayner, [1960] 1 Q.B. 669 (C.A.) (report of police officer to director of public prosecutions); Mayor & Corp. of Bristol v. Cox, 26 Ch. D. 678 (1884) (meeting of corporate officials for purpose of laying matter before counsel for advice in anticipation of litigation held privileged); Bolton v. Corporation of Liverpool, 1 Myl. & K. 88, 39 Eng. Rep. 614 (Ch. 1833) (cases prepared by City of Liverpool and submitted to their counsel for advice concerning suit for town dues held privileged). Attention is called to the probability that the English decisions recognize the corporate privilege only in the area of the lawyer’s preparation, however. The other cases cited above in this note could also be construed to fall under the broad interpretation of the English quasi-privilege.

investigatory aspect of the privilege, though this is not generally understood in the United States. A distinction is made between documents which the agent may communicate to his principal and the knowledge which the principal (client) obtains from the documents. The client may be required to answer as to his knowledge, even when he would not be required to produce the document; and if the agent circumvents his principal by transmitting the document directly to the solicitor, the client may be required to ascertain what the agent has reported and communicate the substance thereof in answer to the opponent's interrogatories. This is true of unprivileged knowledge in the possession of the attorney, though there is some question as to how far the English courts will allow counsel to push the application of this principle when the only source of the attorney's knowledge is a document immune to discovery under the investigatory aspect of the privilege. Its recognition


The expansion of the privilege to cover agents' communications and reports took place in England only at the time of the development of liberal discovery, especially during the last half of the nineteenth century. Due to procedural differences, the investigatory aspect of the privilege appears not to have caused much difficulty prior to the development of liberal pretrial discovery procedures. Questions relating to the communications aspect of the privilege in the earlier period, however, might arise during the trial itself. See generally Gardner, supra note 40, at 286-304.

46 When a document is privileged, a party cannot be compelled to answer interrogatories so as to disclose its contents. London T. & S. Ry. Co. v. Kirk, 51 L.T.R. (n.s.) 599 (P.C. 1894). The document may be privileged, however, when the knowledge contained therein is not privileged. This raises the question as to whether the holding in Lyell v. Kennedy, 9 App. Cas. 81 (1883), constitutes a sound exception to the dicta in Southwark & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (C.A. 1878). Should the actual knowledge of the attorney have any better claim to privilege than that of the client? Should it not be obtainable in any event through interrogatories directed to the client? Was the court merely being unduly technical in Lyell v. Kennedy, supra?

47 See 4 Moore § 26.23[2], at 1328-29; Bray, op. cit. supra note 4, at 138-40, 364.

48 See Southwark & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (C.A. 1878); authorities cited note 47 supra.

49 Professor Moore has commented: "Whether or not this is in practice a convenient means of circumventing the bar of professional privilege is difficult to tell. If it is, the whole basis of the rule denying discovery of such reports and documents would seem to be subject to serious question." 4 Moore § 26.23[2]. Professor Moore's comment is based on the assumption that the report may be privileged while the knowledge is not. This is apparently true in England in general. However, it appears that the English courts treat
here is nevertheless merely another application of the familiar principle that the knowledge of the agent will be imputed to his principal. The best statement of this principle in English case law (as applied to the privilege) is contained in a dictum of Cotton, L.J., in the Southwark case.60 There, the learned judge, after distinguishing between the discovery of documents and discovery by compelling answers to interrogatories submitted by the opponent, said:

As regards the latter, the directors of a company, in answering interrogatories, must not only answer as to their own individual knowledge, but in answering for the company they must get such information as they can from other servants of the company who personally have conducted the transaction in question, and they cannot properly answer interrogatories by saying they know nothing about the matter, when it is in their power to obtain information from other servants of the company who may have personal knowledge of the facts; and it is perfectly clear if the information has been communicated to them from the other servants of the company, in answering interrogatories properly administered to them, they must disclose to their opponent the knowledge which they got from that communication, even though the communication itself may be a document which is privileged.51

information obtained by the attorney directly from nonhuman sources (e.g., records, tombstones) as privileged. See note 34 supra.

It is not clear whether this extension of the rule of privilege also covers the attorney’s knowledge acquired through his agents investigating the case. Obviously, it would not cover the knowledge of the client and his agents, however, because such knowledge would not have been communicated to the client by his counsel in confidence. See p. 601 infra. Consideration of this question as a whole indicates that the English courts have never fully resolved the problem as to just how far they will go in making a client disclose knowledge which came to him through his counsel and is privileged in the sense of being materials obtained by the attorney in preparation for litigation.

There is dictum in Lyell v. Kennedy, 9 App. Cas. 81, 87, 93 (1883), to the effect that a party might not be permitted to close his eyes to knowledge independently available, though what he knew about it came to him through his attorney in confidence and was therefore privileged. This language is disapproved in Wills, Evidence 287-88 (3d ed. 1938). The dicta in Southwark & Vauxhall Water Co. v. Quick, supra note 48, at 321, covers a related situation, i.e., intracorporate communications and knowledge.

50 Southwark & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (C.A. 1878). The parallel rule in the case of the client’s communications privilege is that the client’s knowledge, as contrasted with his communication to counsel, is never privileged.

51 Id. at 321. The principle had been enunciated previously in Anderson v. Bank of British Columbia, 2 Ch. D. 644 (C.A. 1876), where Mellish, L.J., said: “I cannot but think that, as you are entitled to ask the principal what he knows respecting those facts, you must necessarily be entitled to the information which his agent has sent respecting them.” Id. at 659. He goes on to say that it would be no defense to say that he did not have personal knowledge when this could be obtained from his clerks and servants. Id. at 659-60. Baggallay, L.J., noted: “He would be bound for the purpose of making the
The early cases on privilege were litigated in a simple agricultural society. The privilege clearly covered communications between the client and his solicitor, but beyond that its scope was not settled until the last half of the nineteenth century. The need for some protection was self-evident, and lawyers justified this protection on the basis of the honor of the attorney, who was also the holder of the privilege at the time of its origin. When the honor of the attorney as the justification of the privilege fell into discredit and was all but discarded entirely, the courts conceived of the privilege as belonging to the client, and its justification became the promotion of freedom of communication by the client with the solicitor. The expanded privilege was quickly developed during the period following the introduction of modern English discovery, in the reform era of the last century.\(^5\) The English courts kept the communications privilege strictly confined but by a process of loose reasoning expanded the lawyer's preparatory privilege. The American courts, ignoring the second aspect of the English privilege, proceeded to expand the communications privilege. They reasoned loosely\(^5\) so as to comprehend the communications of agents of both the client and the attorney as coming within the purview of the client's communications to counsel.\(^5\) The English courts, perhaps justifiably but certainly without extended analysis such as is taking place in this country at the present time, expanded the solicitor's privilege to cover the investigations of the solicitor's agents; then, more questionably, to cover the investigations of the client and his agents.\(^5\) The English position is logically sound except for the expansion to include the client and his agents.\(^5\) That the justification

discovery, to ascertain from his clerks or managers all the particulars of the case." Id. at 662. This principle was extended by the dictum of the House of Lords in Lyell v. Kennedy, 27 Ch. D. 1 (C.A. 1884). See note 49 supra.

\(^2\) See generally Gardner, supra note 40, at 286-304.

\(^3\) Wigmore has reasoned thus as late as 1942. 8 Wigmore § 2317, at 616.

\(^4\) Here the term "agents of the attorney" is not intended to include the office staff who assist the attorney in working with the privileged information imparted to them by the client of the solicitor. It is limited to investigating agents.

\(^5\) See p. 593 supra.

\(^6\) Hamilton, L.J., apparently overlooked the distinct rationale of the quasi-privilege when he made the following penetrating observation:

If a servant's integrity is such that he will write the truth, even though it presently imperils his own wages or costs himself or a fellow servant his situation, he is not likely to be deterred by the fear that its discovery in litigation some day or other may cost his master the verdict.

of the expanded privilege cannot be the same as that which protects the client’s communications to counsel, though not generally perceived by the American courts, should have been apparent from the beginning. The communications privilege, which covers only the face-to-face situation, is based upon a personal relationship of a peculiar and intimate kind. It is different from the ordinary relationship between principal and agent, which though confidential in nature is not protected by any freedom from compulsory disclosure.\textsuperscript{57} Strong policy reasons militate against the granting of a privilege among agents of the principal, or between principal and agent generally; and there is no strong countervailing policy which would favor the protection of such evidence per se. The language of Sir George Jessel, M.R., quoted previously,\textsuperscript{68} shows the loose reasoning by which the English investigatory privilege was extended, apparently without serious challenge. Yet, the English privilege as a whole is treated as absolute in nature and permanent in duration. This treatment of the privilege as an entirety obviously resulted from the failure of the English courts to distinguish between the distinct rationales of the communications aspect and the investigatory aspect of the privilege, though they saw the distinction plainly enough elsewhere. Generally speaking, we may conclude that the law of privilege, both in England and the United States, has remained in some confusion, due to a lack of adequate attention to the rationales involved. While analytical reasoning has been sparse, no better result could have been hoped for until better starting points for reasoning were delineated. The area certainly represents a failure of the common-law judicial empiricism to measure up to its usual standard of rational crystallization. Dare we then speculate upon the reasons? At least three possible contributory factors come to mind: (1) the felt need of the profession for protection of their preparations for litigation; (2) the traditional conservatism of the practicing bar in procedural matters; and (3) the absence of any tendency towards philosophical speculation. Yet, the problems certainly do lend themselves to easy philosophical speculation, while there is no lack of opportunity for empirical verification.

Moreover, there was incipient recognition of the distinct nature of the investigatory aspect of the privilege in English law in at least two instances. Sir George Jessel, M.R., in \textit{Bustros v. White},\textsuperscript{69} recognized the

\textsuperscript{57} English v. Tattie, 1 Q.B.D. 141 (1875); Slade v. Tucker, 14 Ch. D. 824 (1880); Kerr v. Gillespie, 7 Beav. 572, 49 Eng. Rep. 1188 (Ch. 1844).

\textsuperscript{58} Text accompanying notes 20 & 21 supra.

\textsuperscript{59} 1 Q.B.D. 423 (1876).
diverse nature of the investigatory aspect of the privilege, without actually explicating it, by characterizing it as a "quasi-professional privilege." In holding certain correspondence between principals and their nonlegal agents unprivileged, the court explained the matter thus:

There is nothing . . . which brings the matter of opinion within the rules as to professional privilege, or within what is sometimes called quasi-professional privilege, by which I understand this: that, where the advice or communication does not proceed from the solicitor directly, but is information sent at his instance by an agent employed by him, or even by the client on his recommendation, or in some way or other procured by a solicitor acting in the case for the plaintiff or defendant, the communication is privileged.60

The distinction has been stated most clearly by a text of that period:

There are two different points of view from which the subject has been regarded or rather perhaps two different tests which have been applied. In some cases and by some judges the question has been as to whether the person concerned in the preparing sending or receiving the documents or oral communications could be considered as performing duties which properly devolved upon the professional adviser: in other cases and with other judges the question has been whether the documents or oral communications could be considered as evidence or materials for the brief or rough notes for such evidence or materials. The former view has been perhaps generally dwelt upon by equity judges, the latter view principally in the common law courts. . . . Now the principles underlyng these views are different. Professional privilege rests on the impossibility of conducting litigation without professional advice, whereas the ground on which a party is protected from disclosing his evidence is that the adversary may not be thus enabled so to shape his case as to defeat the ends of justice. No doubt as a rule evidence obtained for the purpose of litigation is usually collected directly or indirectly by a solicitor, still there might be evidence or materials thereof of which it could not be said that it had been so collected. . . . [S]till there are communications undoubtedly privileged to which it might be difficult to assign the character of evidence or of materials for the brief. . . . Neither view therefore by itself seems complete and sufficiently inclusive.61

Yet, in the present century, the English cases have generally followed precedent, without any careful attempt to analyze and systematize the law. Thus, they have not lived up to their early promise. The American

60 Id. at 427. Exactly what Jessel meant by this language is not clear, but the statement certainly comprehends something different from and beyond the communications between the client and solicitor.

61 Bray, Discovery 406-08 (1885); Odgers, Pleading and Practice 284-85 (8th ed. 1918), lists "Communications between Solicitor and Client" and "Documents prepared with a view to Litigation" as separate categories.
decisions, however, only in recent years have begun the long-called-for work of analysis, rationalization and systematization.

The distinction between one’s personal or vicarious knowledge, which is not privileged, and a document that is privileged because of the circumstances under which it came into existence has already been mentioned. This is an important category that deserves further consideration, since diligent counsel will frequently be able to obtain the essential knowledge though the more desirable document is simply not available. In many instances, this factor may substantially reduce the harmful effect of the privilege. Counsel may choose to fight for discovery of the document itself; if he loses, he may yet have the substance of its contents. On the other hand, he may prefer to avoid a difficult fight for a document in a doubtful case, since some capsular knowledge of its contents will be deemed sufficient in advance of trial.

Understanding of the English law begins with what Wigmore has termed “the great English case on privilege,” Kennedy v. Lyell. In the original case, Lyell brought an action against Kennedy to recover possession of real estate formerly belonging to a spinster named Ann Duncan, who had died intestate. Lyell’s title was under a conveyance from persons who claimed as coheiresses of Ann Duncan. Kennedy in turn brought an action against Lyell for penalties under The Maintenance and Embracery Act on the ground that Lyell had bought a pretended title. Lyell exhibited interrogatories in the latter action for the examination of Kennedy, some of which inquired as to the pedigree of the alleged coheiresses. Kennedy answered that he had no personal knowledge of the matters inquired after and that such information as he had received was derived from information procured by his solicitors and their agents for the purpose of defending his title and that he ought not to be required to answer further. The Court of Appeal held that since Kennedy’s only information arose from privileged communications which he was not required to disclose and the matters inquired after were not simple matters of fact patent to the senses, he should not be compelled to answer on his belief as to those matters.

The decision was affirmed on appeal to the House of Lords. Here the rule was laid down that the character of the knowledge was determined by its source, and the source being privileged, the information

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63 32 Hen. 8, c. 9 (1540).
64 9 App. Cas. 81 (1883).
would be privileged also. The argument which had troubled the court was the principle that a party must answer not only from his own knowledge but also from the knowledge of his agents, including his solicitor. It was also argued, from the familiar rule of equity that one may search the conscience of the party "by inquiring as to his information and belief from whencesoever derived," that a party should be required to answer as to knowledge derived from reading his solicitor's brief. The court declined to apply this rule under the circumstances, however.

In the original action of *Lyell v. Kennedy,* Kennedy's solicitor, for the purpose of Kennedy's defense in the action, had procured copies of and extracts from certain entries in public registers, and photographs of certain tombstones and houses, as to which Kennedy in his affidavit of documents claimed privilege. The court of first instance upheld the claim of privilege, and this was affirmed on appeal to the Chancery Division. The court recognized that prima facie privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris* but held that the whole collection, being the result of the professional knowledge, skill, and research of the solicitors, obtained for the defense of the action, must be privileged, as any disclosure of the copies and photographs might afford a clue to the view entertained by the solicitors of their client's case.

These decisions go to the very heart of the matter of discovery in relation to the claim of privilege. First, we begin with the principle that the client is protected from disclosing what he said or wrote to his professional adviser or what the latter said or wrote to him, or what the client or anyone else said or wrote under privileged circumstances. Further,

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65 See pp. 599-600 *supra.*
66 *Lyell v. Kennedy,* 9 App. Cas. 81, 86 (1883). The three opinions by Blackburn, Watson, and Bramwell are primarily an affirmation of the position of the Court of Appeal. Watson, L.J., weakened his opinion by saying that the client would not have any strong knowledge on the subject by a mere reading of the solicitor's report. *Id.* at 89-92. This reasoning does not face up to the real issue. The court recognized that a man may have a personal knowledge from "evidence calculated to induce a reasonable belief," *id.* at 91 (Watson, L.J.), and that one might conceive of a case where a party could be expected to form such a belief on such information that he would be required to answer, *id.* at 93-94 (Bramwell, L.J.). But it had no difficulty in deciding that the situation in this case did not go so far. Perhaps the answer is that the English courts will not apply the general rule so as to enable a party to discover facts which at the time when collected were a part of "the strict work product of the lawyer."
67 27 Ch. D. 1 (1884).
68 This was admitted by Kennedy in his answers to the interrogatories.
69 Bray, *op. cit. supra* note 61, at 358.
the professional adviser is not bound to disclose his knowledge, information or belief on matters in question when such knowledge, information or belief has been derived from privileged communications or sources. The client, however, is required to disclose all he knows, believes, and thinks respecting his case. The two cases therefore involved the proper delimitation of conflicting principles.

The question in *Kennedy v. Lyell* was how far the client can avoid disclosure when the sole knowledge, information and belief which he possesses have been derived from privileged communications from his professional legal adviser. The reports were admittedly privileged, but the question was whether the knowledge derived from those reports was privileged. The Court of Appeal, which delivered the best opinion, solved the matter by drawing a distinction between bare facts, "patent to the senses," and the results or deductions drawn by the legal adviser from the facts relating to pedigree which came to their knowledge. Cotton, L.J., in his opinion, stated:

The information which a solicitor employed to obtain materials for his client's defense communicates to the client is privileged, if it is not merely the statement of a fact patent to the senses, but is the result of the solicitor's mind working upon and acting as professional adviser with reference to facts which he has seen or heard of. . . . [T]he client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him, or as to the effect on his mind of what he has seen or heard, any more than he would be bound to produce as a whole the confidential reports made to him, whether in writing or verbally, by his solicitor, as to the results of the inquiries which the solicitor has made.

In this respect, the opinion of Baggallay, L.J., takes the same line as the opinion of Cotton, L.J., considering that if the questions had been as to mere matters of fact, the plaintiff would be bound to answer, though he only learned the fact from his solicitor who had discovered it while seeking evidence for his defense. But none of these interrogatories were questions about mere matters of fact, each involving either a single matter of fact taken in conjunction with other matters of fact derived from other sources, or a matter of fact in connection with an inference of law. Yet the views of the two judges seem to run to some extent on different lines. Those of Cotton, L.J., are based on the notion that discovery

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72 23 Ch. D. at 407-08.
73 *Id.* at 407-08 (Cotton, L.J.).
74 *Id.* at 399-403 (Baggallay, L.J.).
cannot be made without disclosing the view taken or the advice given by the solicitor, while the view of Baggallay, L.J., seems to rest partly on the fact that the information comes within the purview of evidence obtained for the purpose of litigation and is therefore privileged in the client's hands to the same extent as in the hands of the solicitor.75

The English cases protect materials for evidence from discovery.76 This is apparently the basis for the privilege for documents and other items gathered in anticipation of litigation.77 It is apparently the explanation for the limitation of the solicitor's privilege to those instances when litigation is anticipated or in esse.78 These materials have never been

75 Brax, op. cit. supra note 61, at 361. To some extent Cotton, L.J., seemed to be confused as to the basic principle involved. Thus, after referring to the privilege for communications between the client and his solicitor, he continued:

There is another principle, that no one is to be fettered in obtaining materials for his defense, and if he for the purpose of his defense obtains evidence, the adverse party cannot ask to see it before trial. I do not think that this principle applies here, but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor.

23 Ch. D. at 404.

Actually, the case does not involve the privilege as to confidential communications but that of the solicitor's preparation. Whether this information is communicated to the client is not germane to the issue, since the agent's knowledge will be imputed to the principal, and the client is therefore bound to answer (except to such extent as he is protected by the privilege for the solicitor's activities). The communications privilege is recognized to protect the client's communications to the lawyer, and the lawyer's communications to the client are protected only to the extent necessary to protect the client's communications to the lawyer. See 8 Wigmore § 2320, at 625.

76 Brax, op. cit. supra note 61, at 392; see 6 Wigmore §§ 1845-63, especially §§ 1845-48, 1856-59.

77 The scope of the privilege is broader than the protection of the materials gathered for evidence, but the protection of such materials is subsumed under the privilege as originally formulated in England. See Brax, op. cit. supra note 61, at 406-08; cf. id. at 403.

78 See note 11 supra and accompanying text. Discovery was limited to "such material facts as relate to the plaintiff's case, and do not extend to a discovery of the manner in which or the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence." Wigram, Discovery §§ 31-32 (1st ed. 1836), quoted in 6 Wigmore § 1856, at 423. The opponent's own case is not discoverable except for opponent's own testimony and knowledge. This remains the law of England today, Hublock v. Hubock, [1948] 2 All E.R. 412 (C.A.) (plaintiff's application for particulars held not discoverable), and of Canada, Heider & Co. v. The Hanna Neilson, [1926] 2 D.L.R. 1059 (defendant need not disclose evidence of his defense). The reasoning was explained by Lindley, L.J., in In re Strachen, [1895] 1 Ch. 439, 445, quoted in 6 Wigmore § 1856b, at 433-34:

[The applicant] wants to see how her opponent hopes to prove his case, and what
protected per se in the United States. The question therefore arises whether if these materials are not protected the whole category must fall. The answer is in the negative, on a single ground with two aspects: While the evidence will not be privileged if the source is not protected, there may be a document (e.g., a witness' statement) pertaining to the evidence which is accorded the privilege, either because it has been gathered by the lawyer in anticipation of litigation or because it reflects his legal theories of the case or for both reasons. As a leading English text author has expressed it, when an interrogatory is put to the test of privilege, the question is not "whether the matter inquired after is contained in a privileged document but rather whether it is privileged in itself independently of the document in which it may be contained." In *Lyell v. Kennedy*, tangible evidence, abstract knowledge, extracts from public documents, legal research, theories and conclusions were all involved. In upholding the defendant's refusal to answer certain interrogatories, Bowen, L.J., made the following explanation:

We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of a solicitor .... [A]nd even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labor which the solicitor has bestowed in obtaining them.

Presumably it is still possible to obtain the bare facts when separated from the solicitor's work product by reason of the client's duty to

she wants to see is the evidence he has procured to prove the insanity which he alleges and she disputes.

In *England*, it is considered contrary to the interests of justice to compel a litigant to disclose to his opponent before the trial the evidence to be adduced against him. It is considered that so to do would give undue advantages for cross-examination and lead to endless side-issues; and would enable witnesses to be tampered with and give unfair advantage to the unscrupulous.

It is very true that an honest and fair-dealing litigant, on seeing how strong a case his opponent had, might at once withdraw from further litigation. But our rules of evidence and of discovery are not based upon the theory that it is advantageous to let each side know what the other can prove, but rather the reverse.

See Bray, *op. cit. supra* note 61, at 406-08, quoted in text accompanying note 61 *supra.*

79 Bray, *op. cit. supra* note 61, at 365. This distinction has also been made in the federal decisions in this country. De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947).

80 27 Ch. D. 1 (C.A. 1884).

81 Id. at 31.
answer generally from his knowledge and that of his agents.\textsuperscript{82} These three decisions have settled important questions in the English practice. Furthermore, by the specific recognition of and emphasis upon the solicitor's shaping of the evidentiary facts as a distinct and broader basis for denial of discovery, they have important implications for the development of our qualified privilege for the work product of the lawyer in the United States.\textsuperscript{83}

Another factor which might well be considered is the role which the attorney plays in investigation in England. It is well settled in this country (at least in the federal courts) that the investigator is not acting

\textsuperscript{82} Discovery was never applicable to third persons not parties so as to secure disclosure of evidence including documents before trial. 6 Wigmore §§ 1856d, 1857, 1859f. But English chancery practice was too cautious, and modern discovery statutes tend to acknowledge this. Id. § 1856d.

\textsuperscript{83} The point which stymied the English courts in the three decisions of Lyell however was that Kennedy's counsel used his special expertise in examining sources of evidence to ferret out the essential facts, applying his industry and learning to them in order to reach a certain legal position in the case. The same original sources were available to Lyell's counsel; and, unlike the case with human witnesses, where fact fluidity is a factor to be reckoned with, the fact sources were permanent and stable and would remain that way. These original sources were not privileged, however, and the writer submits that to the extent that the underlying facts could have been unraveled from the attorney's theories concerning the strategy and tactics to be developed, Kennedy should have been required to answer. The objective of the English courts in these cases was to prevent one barrister from taking advantage of the legal astuteness and industry of the other. The English courts were undoubtedly influenced by the fact that the attorney's mental processes went into the making of the finished product, and to some extent, the separation of the facts from their entanglement with his thought processes would have required some effort. Yet, to such extent as the actual result denied Lyell access to the factual information acquired by Kennedy, it did violence to the equitable principle that a party must answer as to his total knowledge.

It is not certain what effect these decisions may have had upon subsequent English discovery practices, but they must have cramped it somewhat. Furthermore, recent developments in this country have shown that the discovery of one's legal position and contentions generally (as contrasted with the miniscule detail of one's legal research) is a positive advantage from the standpoint of narrowing the issues and advising both parties as to the legal points which they must meet.

If the basic equitable principle involved be not stoutly adhered to, a Pandora's box is opened for the consumption of time and disputation of close questions in each instance, resulting in both dubious and tenuous line-drawing, and a large area of additional evidence is made unavailable to the triers of fact. That the particular case is a complicated one is all the more reason that the facts should be made fully available to the interrogator.
in a legal capacity, and that an attorney acting in the capacity of investigator has accordingly stepped outside his capacity of attorney.\textsuperscript{84} What the lawyer does as an investigator is not immune from discovery under the communications privilege; but all of the investigations of the lawyer qua lawyer, done in anticipation of litigation, is qualifiedly immune from discovery as "the work product of the lawyer," and this probably includes the work done by the lawyer's agents working under his direction and control.\textsuperscript{85} There is some conflict in the cases as to just where the line is to be drawn, both in the definition of principles and in their application to the particular case.\textsuperscript{86} If legal investigation is traditionally the work of the bar itself in England, then this factor might have had an effect in the drawing of broad lines to protect the fruits of such legal work on the facts by the formulation of broad rules of privilege.\textsuperscript{87} This of course does not explain the fact that the English courts have made the investigatory aspect of their privilege both absolute and permanent in nature. Perhaps this may be best explained by analogizing it to the communications aspect of the privilege, which originated out of the notion that the attorney ought to be permitted to maintain his honor inviolate. The felt need of the attorney to be free not to testify and the strong desire to be free to maintain his files inviolate undoubtedly continued to exist after the attorney's honor ceased to be an articulated facet of the rationale of the latter privilege. Yet, these aspects of the investigatory privilege (unqualified immunity and permanency) are

\textsuperscript{84} Hickman v. Taylor, 329 U.S. 495 (1947); Allmtont v. United States, 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).


\textsuperscript{86} Ibid.

\textsuperscript{87} The English decisions have spoken of the fact that an attorney can act through his agents where he can act personally. But this ought not to be so unless there is some policy which is implemented by the recognition of the attorney's right to act through his agents. The surprise element in the trial is made more potent through the enlargement of the scope of the investigatory aspect of the privilege by its inclusion of the work of agents, without regard to whether their work is actually lawyer-oriented, lawyer-directed and lawyer-controlled; and the English courts continue to use this surprise element at least as one of the bases of their rationale of the investigatory aspect of the privilege; whereas, in the United States, we recognize only the rationale which holds that trial preparation can be done more effectively when the actual work of the lawyer is immune from discovery during the time the particular lawsuit continues. The surprise element in the English rationale is of course contrary to the principles of open discovery, but the English do not have open discovery, because they do not permit the pretrial discovery of the testimony of witnesses who will be available to testify at the trial itself.
difficult to justify today, even under the more limited discovery procedures of the English system. Nevertheless, the same aspects of the passing legal Zeitgeist might be a part of the explanation for the Supreme Court’s recognition of an investigatory privilege in the United States, while at the same time laying the foundation for a narrower and more restricted interpretation of the privilege than that which is followed in the English practice.

At this point, attention should be called to the first part of the area of protection accorded by the privilege, which is indicated in the language heretofore quoted from the opinion of one of the great English judges. This language goes no further than to recognize the communications aspect of the privilege as protecting the communications of the client to counsel. It recognizes that the client’s communications to counsel are privileged, and this privilege for the client’s communications exists whether the client makes them directly to counsel or transmits them through an intermediary. The English courts do not recognize a privilege for the communications of the client’s agents to the client or to counsel under the aegis of the communications aspect of the English privilege. To such extent as the English decisions do recognize a privilege for communications originating with the client’s agents and ultimately transmitted to counsel, they do so under the fourth category set out by Jessel, M.R., according to which both the client and his agents investigating the matter are treated as agents of the attorney for the purposes of making the investigation. This is one of the categories which Jessel, M.R., elsewhere designated as quasi-professional privilege. Thus, it appears that insofar as the English law of privilege is concerned, Wigmore’s statement to the effect that the communications of the client’s agents to counsel (i.e., communications originating with the client’s agents) are within the purview of the communications privilege is not correct. To the extent that the communications of the client’s agents to

89 Text accompanying note 21 supra.
90 Bustros v. White, 1 Q.B.D. 423, 427 (1876), quoted in text accompanying note 60 supra.
91 8 WIGMORE § 2317, at 616-17.
92 Of the English cases cited by Wigmore in support of his statement, 8 WIGMORE § 2318, at 617 n.4, only one, Carpmael v. Powis, 9 Beav. 16, 20, 50 Eng. Rep. 248, 249 (Ch. 1845), appeal dismissed, 1 Phil. Ch. 687, 41 Eng. Rep. 794 (Ch. 1846) (communications from brother of client to counsel held privileged), is in point; and even here the point is not well considered, and the case has not been followed. The court does not reason out the
counsel are privileged, they are privileged as a part of the investigations of counsel made in anticipation of or for purposes of litigation, and hence can be recognized only under the investigatory privilege, which Wigmore fails to recognize at all.

manner and does not note the distinction between a source agent and a transmission agent. That the agent was also the client's brother might have been a factor at that time, though technically irrelevant. The court cited as authority Walker v. Wildman, 6 Mad. 47, 56 Eng. Rep. 1007 (Ch. 1821) (letters from mother and son to solicitor held privileged). This case held, however, only that the protection of the privilege is "the same whether the client communicates directly with his professional adviser, or through the intervention of a third person." There is nothing to indicate that the son was more than an agent for the transmission of the communications of the mother to counsel, as, for example, if she instructed him what to write.

The other cases cited by Wigmore are Hooper v. Gumm, 2 J. & H. 602, 606, 70 Eng. Rep. 1199, 1201 (Ch. 1862), and Russell v. Jackson, 9 Hare 387, 391, 68 Eng. Rep. 558, 559 (Ch. 1851). In the former, letters of the client's agent to the solicitor were protected, but it does not appear that they were not written in anticipation of litigation, in which case they were protected under the quasi-privilege. In the latter, the communications to counsel made by an agent of the client were held privileged, but there is nothing in the opinion to indicate that the communications did not originate with the client. The American decisions cited by Dean Wigmore are considered in note 138 infra.

Other English cases do not lend support to the proposition. Reid v. Langlois, 1 Mac. & G. 627, 41 Eng. Rep. 408 (Ch. 1849) (Cottenham, L.J.), goes no further than to recognize the communications aspect of the privilege for messages sent to counsel by the client through the latter's agents. In Steele v. Stewart, 1 Phil. Ch. 471, 41 Eng. Rep. 711 (Ch. 1844) (Lyndhurst, L.C.), the court was required to rule on the status of letters written by a shipmaster to the defendant and his solicitor, and the court upheld the claim of privilege, in effect holding the true test of privilege to be not whether the client was acting under the direction of and as agent of the solicitor but whether he was discharging a duty which properly devolved upon the solicitor and would have been performed by him if the circumstances had admitted of his performing it in person. Here, the court was obviously referring to the investigatory aspect of the privilege (the lawyer's privilege), whereas, in Reid v. Langlois, supra, the court was dealing with the communications aspect (the client's privilege). As the language in Steele shows, that the investigation is deemed to fall under the aegis of the lawyer's work is the factor which has caused the English courts to continue to adhere staunchly to the requirement that the evidence be acquired in anticipation of litigation, whether acquired by the client or the lawyer; whereas this requirement has been relinquished in the case of clients' communications to counsel. These two cases might be said to indicate the respective boundaries of the two aspects of the English privilege which we will be dealing with throughout this work. This position of the writer is also supported by the language of the court in Anderson v. Bank of British Columbia, 2 Ch. D. 644 (C.A. 1876), discussed in text accompanying note 17 supra. See the language of James, L.J., quoted in text accompanying note 23 supra.

Though the English courts refer to the two categories of privileged evidence under the common denomination of "privilege," the categories actually constitute two distinct privileges. Moreover, it is apparent from the language of Lord Lyndhurst referred to above that
In England due to the broad scope of the privilege for the lawyer's investigations and his preparation made in connection with litigation, the fact that the communications privilege is of limited scope has no great significance. Such limited scope of the communications privilege has a far greater relative significance for the future in the American law of privilege, however, because (1) until recent years we have actually recognized no investigatory privilege as such; and (2) though the investigatory privilege is now recognized as such in this country, it is not recognized in the broad form which it has assumed in England. Hence, an understanding of the correct limitations of the communications privilege by the American courts could have far-reaching implications.

The English decisions illustrate the difficulties of consistency in close cases. Thus, the delimitation of proper boundaries and the administration of the law of attorney-client privilege present one of the most troublesome problems in the law of evidence. The same problems exist in the United States but have been somewhat mitigated by the tendency to a narrower construction of the scope of the privilege in the area of investigations and by the qualified immunity approach of the federal courts and some of the state courts in recent years. To the extent that the investigatory aspect has been expanded so as to cover all investigations in connection with a lawsuit, whether made before or after the institution of the suit. The courts have also tended to resolve doubtful cases in favor of the recognition of the privilege (whereas the communications aspect of the privilege has been construed more strictly). In addition, this privilege covers other aspects of the lawyer's preparation (e.g., his research). Thus, in England, there is obviously no need to recognize a communications privilege for reports made by the client's source agents in anticipation of litigation. Southward & Vauxhall Water Co. v. Quick, 3 Q.B.D. 315 (C.A. 1878) (notes held privileged though never actually submitted to counsel as intended); Wheeler v. Le Marchant, 17 Ch. D. 674 (C.A. 1881) (such reports will not be protected if made only for the purposes of enabling the attorney to furnish advice).

Finally, it should be pointed out that Carpmael v. Powis, supra, has not been followed and that the English digests and texts of today do not recognize a privilege (for the communications of the client to counsel) broad enough to cover communications originating with the client's agents. See note 11 supra. However, the text of Wigmore's treatise on this point is cited with approval in Cook v. Cook & Kelterbourne, [1947] Ont. 287, [1947] 2 D.L.R. 900.

See 8 Wigmore § 2319, at 622-23. "[T]he exact bearings and effect of all the different principles involved had not yet been clearly stated by any judge." Ibid.

94 Here the solution is no less difficult but is only less serious because the evidence is more readily available to the fair administration of justice through a showing of "good cause." Yet this requirement is one of the obstacles to a scientific system of evidence, no less than the rule of incompetency was in an earlier age. The communications aspect of the privilege, in the strict sense, presents no such problem of administration. The immuni-
the work product immunity is being confined more strictly in accordance with the role of the lawyer in connection with the investigation, the solution to the problem in American law is being made easier, while the qualification of the immunity renders the evidence available to the proponent when he would otherwise be severely handicapped to obtain some important item of proof. It is important that we understand that the solution to this problem must lie in an approach which will be simple, easy to apply, and yet both logical and consistent.

The experiences of English discovery development and crystallization still afford us opportunities for insight in the course of our own legal growth and development. It is a part of our enrichment from the legal techniques of a comparative common-law tradition. Therefore, we should be able to avoid the English mistakes and build a body of law that is more satisfactorily worked out in accordance with the proper weight to be given to the competing principles in the present-day context. The American courts, although moving more slowly and hesitantly than appears necessary, are making satisfactory progress in the area of discovery on the appellate level. (In the trial courts, it still too often depends upon the luck of the draw.) The hesitancy of the courts is probably the result of the lack of a clear and definite discovery tradition in America, such as existed in the English Chancery Court and which was augmented by nineteenth-century legal reforms and judicial precedents stemming therefrom.

We might draw two lessons in particular from the English decisions at this time. First, their settlement of the law of privilege in the area of the client’s communications has generally been sound. The privilege is narrowly construed and yet serves its essential purpose, probably without the loss of any substantial amount of evidence to the trier of fact. Second, their settlement of the investigatory aspect of the privilege is basically a failure—at least in the sense that it continues to cause unnecessary litigation and cuts a broad swath in the area of evidence which is otherwise discoverable and which, to judge from the vigor of the contests, must be dearly prized as of pivotal importance in the particular

zation of the attorney’s investigations presents no great problem. Such a restricted immunity does not interfere unduly with the presentation of the evidence necessary to a fair evaluation of the case by the triers of fact. The writer submits that “work product” is therefore and by its very nature can be sound only when confined within the narrowest possible boundaries consistent with the furnishing of adequate incentives for proper trial preparation.
litigation. A reading of the English cases generally fails to convince one
that the boundaries of the English quasi-professional privilege have been
drawn no more broadly than is necessary to protect the professional
aspects of the lawyer's preparation.

A third point might also be noted. Not only has this broad construction
of the preparatory aspect of the privilege created a category which is
broader in area than that which is essential to achieve the protection
justified by the rationale thereof, but the general failure of the English
courts to differentiate the two aspects of the privilege has resulted in
the unnecessary expansion of the investigatory aspect of the privilege
timewise. Consequently, the privilege continues to exist after the reason
for its recognition, the protection of the lawyer from interference in the
course of his preparation for trial of the particular litigation, has
ceased to exist. Thus, the English courts have treated the concept of
privilege as a whole as absolute, in the sense that the evidence which
falls in either the category of the client's communications or that of
the lawyer's preparation is held to be permanently immune from compul-
sory disclosure. This is a rather paradoxical position to reach, since it
is obvious that the freedom from disclosure of the lawyer's preparation
cannot be justified after the particular litigation has ended, whereas
there is substantial justification for making the immunity of the client's
communications to counsel permanent in duration.\(^9^5\) That the English
courts have reached this position is even more unusual when it is re-
lected that the distinction between the privilege for the client's com-
munications and the privilege for the lawyer's preparations,\(^9^6\) though
not generally articulated, has obviously been kept in mind to a consid-

95 The need for making the client's communications privileged in the "absolute" sense
is discussed in Gardner, A Re-Evaluation of the Attorney-Client Privilege (pts. 1 & 2),
8 VILL. L. Rev. 279, 447 (1963); see especially id. at 337-38. It is especially in connection
with the client's innermost secrets and the lawyer's role as a counsellor that the need for
making the privilege permanent in duration in general tends to be justified, on the basis
of the interest in personality, and even here there are exceptions. Of course, it is necessary
in order to give permanent protection to this area of close personal relations (the hard
core area in the strictest sense of the term) that the actual area of permanent protection
is made broader (covering the client's communications generally). It is only for the efec-
tuation of this purpose that the permanency of the communications privilege can be
justified. The permanency of the investigatory privilege simply cannot be justified. On this

96 The same fault is not so obvious in the case of the expanded communications privilege
as it has come to exist in the state court jurisdictions of the United States, since in theory
only the client's communications are protected.
erable extent, since each is broader in one sense and narrower in another. 97

**The American Decisions**

Discovery problems did not become acute in the United States until the adoption of the Federal Rules of Civil Procedure. There were a number of state court cases, decided under the limited discovery procedures formerly in existence in all of the states, but the federal decisions were almost nonexistent. This was due to the very limited federal discovery procedures. The decisions of both the English courts and the state courts in this country have been given little consideration by the federal courts dealing with the problems of discovery under the new Federal Rules. 98

The state courts had denied discovery on a number of grounds, the two main ones being (1) that the statements or other materials sought would not be admissible in evidence; and (2) that a party would be entitled to discovery only of matters pertaining to his own case and would not be entitled to pry into the opponent's case. 99 The larger number of state court cases denying discovery, however, relied upon the ground of attorney-client privilege. In this context, there was no problem concerning the strict communications aspect of the privilege as it developed in England. However, the preparatory privilege of the attorney was mistakenly included under the aegis of the client's communications privilege, with resultant confusion in two areas: (1) the communications originating with the client's agents were recognized as being no less privileged than were the communications which originated with the client personally; and (2) since no preparatory privilege was recognized for the lawyer's work product, the communications privilege was expanded in a somewhat awry and confused fashion to include some of the lawyer's preparation and some of the client's investigations. In this connection, the American courts, not being cognizant of the English quasi-professional privilege, tended to bring communications (e.g., reports) of agents of the client and agents of the attorney within the purview of the communications privilege, and to exclude reports and com-

97 The former extends to communications for advice as well as to those made to assist in preparation for litigation but covers only the client's communications. The latter covers not only the preparation (including investigations) of the lawyer but also his agents (and in some instances the client's agents) as well. Yet, it remains confined to those activities which are undertaken in anticipation of litigation.

98 4 Moore ¶ 26.23[3], at 1329.

99 Id. ¶ 26.23[3], at 1330-32.
munications of third parties, even when obtained by the attorney himself. In thus expanding the communications privilege, the courts mistakenly applied the English test as to whether the particular item was obtained in anticipation of litigation or was created in the ordinary course of business.\textsuperscript{100} If the former, it was privileged, but if the latter, it was not. The courts failed to note that an item might well fall within both the category of business documents and the category of documents prepared in anticipation of litigation.

The first line of cases is exemplified by \textit{Schmitt v. Emery}.\textsuperscript{101} Here, the employee, a bus driver for defendant company, was involved in an accident. His written statement was taken by one Quinn, an employee of defendant insurance company's claims department. The statement was taken by direction of the corporate attorney and was immediately turned over to him. At the trial, plaintiff sought to have the statement produced but this request was denied and the ruling was affirmed on appeal. The document, having been prepared by an employee for the purpose of obtaining professional advice for use in litigation, was held privileged. Relying on both English and American authority, the court justified the expansion of the area of privilege in the following terms:

Because it is so often necessary for clients to communicate with their attorneys with the assistance or through the agency of others, as well as by their own personal action, the privilege extends to a communication prepared by an agent or employee, whether it is transmitted directly to the attorney by the client or his agent or employee. Of course the privilege is limited to the necessities of the situation. Where a document is prepared by an agent or employee by the direction of

\textsuperscript{100} \textit{Id.} § 26.23[3], at 1333. It must of course be noted that the communications aspect of the privilege in England was originally limited to the particular litigation and did not extend to the client's communications to counsel made only for the purpose of receiving advice and before litigation was anticipated. Arguably, this could have influenced the American development, because the American lawyers of the nineteenth century were familiar with the English limitation. But this would seem not to have been the case, since the American lawyers were also familiar with the fact that the English courts extended the privilege to cover communications for the purpose of obtaining advice as well. In fact, the American courts did the same thing. Thus, the American cases retained an inconsistency which seems not to have been noted and which did not exist in England.

\textit{Quaere:} In the United States, is the "anticipation of litigation" test an actual limitation on the scope of the privilege or merely an evidentiary test used to determine whether the particular evidence originated as a "communication to counsel" or not? The courts have never articulated this point. It would make a difference in some cases. In England, it is a limitation on the scope of the privilege itself. This writer believes that in the American law, however, the treatment of this concept as merely an evidentiary test would be preferable under the circumstances that exist here.

\textsuperscript{101} 211 Minn. 547, 2 N.W.2d 413 (1942).
the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client. The client is entitled to the same privilege with respect to such a communication as one prepared by himself. The agent or employee as well as the attorney is prohibited from testifying with respect thereto without the client's consent.102

The second line of cases is represented by Robertson v. Commonwealth.103 In this case, the report of a motorman concerning an accident was made to his employer immediately after the accident, and was supplemented two days later by a written statement of the adjuster. These items were later transmitted to counsel. When production of the statements was sought at the trial of the case, the claim of privilege was overruled by the trial court. The defense counsel refused to produce and was adjudged in contempt of court. This action was affirmed on appeal. The court held that the burden of proof of privilege was on the proponent, and there was nothing in the circumstances to show that the two items were intended to be confidential communications between the client and his attorney. Recognizing the dichotomy with respect to ordinary business documents and confidential reports made in anticipation of litigation to be laid before counsel, the decision placed the particular document in the former category. The rule was stated as follows:

A statement made by an employee to his employer, in the course of his ordinary duty, concerning a recent accident, and before litigation has been brought or threatened, is not privileged either in the hands of the employer or in the hands of the latter's attorney to whom it has been transmitted.104

Generally, the American jurisdictions which have not adopted open discovery procedures have tended to reach the same ultimate position as to the scope of discovery that the English courts have reached. In view of this fact and in view of the multiplicity of jurisdictions, no purpose would be served by reviewing in detail the holdings of the various state courts.105 The decisions seem to have mainly occupied themselves with

102 Id. at 552, 2 N.W.2d at 416.
103 181 Va. 520, 25 S.E.2d 352 (1943).
104 Id. at 539, 25 S.E.2d at 360. It is noteworthy that neither Schmitt nor Robertson arose out of a pretrial discovery situation.
105 The best discussion of the state court decisions thus far written is contained in 4 Moore ¶ 26.23[3], at 1329-39. Also valuable are McCormick, Evidence § 100 (1954) [hereinafter cited as McCormick]; 8 Wigmore §§ 2317-20; Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 474-79 (1962); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1027-45 (1961); Annot., 73 A.L.R.2d 12 (1960) (statements of parties or witnesses as subject to pretrial or other disclosure, pro-
the extent of the privilege in relation to the communications and reports of agents to counsel.\textsuperscript{106} They reached the position that confidential communications of the client's agents to the client for transmission to counsel for purposes of advice or litigation are privileged.\textsuperscript{107} Likewise, when such communications are made by the agent directly to the lawyer, the privilege attaches.\textsuperscript{108} Some of the courts have held that a document may fall within the classification of a communication to counsel though the parties also had in mind some purpose other than its transmission to counsel for

\textsuperscript{106} Whereas, the English decisions have relied on the status of the fact gatherers as agents of the solicitor.

\textsuperscript{107} \textit{Ex parte} Schoepf, 74 Ohio St. 1, 77 N.E. 276 (1906); Davenport Co. v. Pennsylvania Ry., 166 Pa. 480, 31 Atl. 245 (1895). The English cases seem to reason that if the item transmitted is for purposes of litigation, the client and his agents ipso facto become the attorney's agents for investigation retroactively. If the item was not obtained for purposes of litigation, it cannot be privileged as a part of the solicitor's investigations. Under the American expansion of the communications privilege, however, it could be privileged as a "communication" of the client (or his agents) to the solicitor for purposes of advice. The American courts seem never to have noted the inconsistency, however. See note 100 \textit{supra}.

legal purposes or used it for some other purpose.109 The courts have generally refused to go beyond the client’s agents in defining the category of persons whose communications would be held privileged. Thus, they have held in general that information acquired by counsel (or by the client for counsel) from sources other than the client and his agents is not privileged. This includes the statements of third parties.110 There is a split of authority, however, as to whether statements of a party to the other party’s claims agent or investigator are privileged.111 The reports of experts prepared for purposes of litigation are held to be privileged.112


110 In re Ruos, 159 Fed. 252 (E.D. Pa. 1908); King v. Ashley, 176 N.Y. 281, 72 N.E. 106 (1904). Authority is scanty, but the bulk of the cases deal with the communications and reports of agents and employees. See Greyhound Corp. v. Superior Court, supra note 109, explaining Holm v. Superior Court, supra note 109, as being limited in the scope of its holding to the client’s agent situation. Wigmore, considering only the client’s communications element of the privilege, would exclude third party nonagents. 8 Wigmore §§ 2317-20, especially at 616.

Some states have provided immunity for all trial preparation by statute or rule of court. Thus, Rule 19-5 of the Illinois Supreme Court Rules provides that disclosures of “memoranda, reports or documents made by or for a party in preparation for trial . . . shall not be required through any discovery procedure.” Ill. Rev. Stat. ch. 110, § 101.19-5 (1963); see Hayes v. Chicago Transit Authority, 340 Ill. App. 375, 92 N.E.2d 174 (1950) (statement of investigator obtained several months before action commenced held to be preparation for trial within meaning of rule). Reports of experts also fall within the rule. Kemeny v. Skorch, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959) (medical report not privileged but not subject to discovery). The same rule prohibits discovery of privileged matter.

New Jersey has exempted from discovery statements taken by a party’s agent or insurer. N.J. Rules 3:26-2 provides that a party shall not be required to produce or submit for inspection “any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation and in preparation for trial,” unless the court otherwise orders on grounds of hardship. See Crisafulli v. Public Serv. Coordinated Transp., 7 N.J. Super. 521, 72 A.2d 429 (1950). Louisiana has a similar provision for criminal cases. La. Code Crim. P., art. 475. Texas exempts written statements of witnesses in possession of a party from discovery. Tex. R. Civ. P. 167.

111 The following cases hold such statements are not privileged: Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954); Walsh v. Northland Greyhound Lines, 244 Wis. 281, 12 N.W.2d 20 (1943). Contra, Thompson v. Harris, 355 Mo. 176, 195 S.W.2d 649 (1946).

and corporations have been accorded the privilege, though they act only through agents. Until recently, the wisdom of this extension was barely questioned. In fact, it was generally assumed without question. A few cases have gone so far as to recognize that the government itself may claim the privilege. The cases have refused to follow English precedent in the case of a trustee and his counsel; they accordingly recognize the privilege here at all times. Some courts have held that documents which come into existence prior to the time when counsel is retained cannot be treated as privileged by reason of being communications to counsel. Some cases have relaxed the doctrine of confidentiality, and there is a line of cases which has confused privilege with incompetency.


117 The cases are collected in Gardner, supra note 113, at 352 n.148.

118 Cote v. Knickerbocker Ice Co., 160 Misc. 658, 290 N.Y. Supp. 483 (1936); see People v. Rittenhouse, 56 Cal. App. 541, 206 Pac. 86 (1922) (privilege denied as to document merely intended to be transmitted to counsel).

119 Jessup v. Superior Court, 151 Cal. App. 2d 102, 311 P.2d 177 (1957) (multi-purpose rule liberally construed); Schmitt v. Emery, 211 Minn. 547, 2 N.W.2d 413 (1942) (exchange of reports with attorney for party having common interest held no waiver of privilege); see Simon, supra note 113, at 956, 978-85.

The general rule is that a communication must be made in confidence originally, McCormick § 95; 8 Wigmore § 2311, but this is qualified by necessity and convenience. Thus, an interpreter is permitted when the client and his counsel do not speak a common tongue. Maas v. Block, 7 Ind. 202 (1855). A mother is permitted to accompany the prosecuting witness, a girl of tender years, in a paternity suit. Bowers v. State, 29 Ohio St. 542 (1876). And a private detective is allowed to be present at a conference between a wife and her counsel in a domestic relations case. Foley v. Poschke, 137 Ohio St. 593, 31 N.E.2d 845 (1941). But mere friendship is not sufficient. People v. Buchanan, 145 N.Y. 1, 39 N.E. 846 (1895).

120 Atlantic Coast Line Ry. v. Williams, 21 Ga. App. 453, 94 S.E. 584 (1917) (conductor's report held privileged, but opinion confuses privilege and admissions); Cully v. Northern Pac. Ry., 35 Wash. 241, 77 Pac. 202 (1904) (discovery of report of unspecified...
The insurance cases have gone further in recognizing the privilege than is generally necessary, since these cases require either a finding that the insured was the client and the carrier's claims department his agents, or a finding that the insured and the insurer were joint clients of the regular insurance counsel.121 The courts seem to have had no difficulty in reaching one of these results, though it has been said that the law is still in the making in this important area.122 In at least one state, ordinary accident reports have been held privileged when transmitted to counsel for use in litigation which subsequently arises.123

Some recent cases, probably influenced by the dictum in Hickman v. Taylor,124 have held that a party may not refuse to furnish information during pretrial examination on the ground that he has no personal knowledge of the facts if such knowledge is in the possession of his counsel or other agents.125 A matter which the courts seem generally to have ignored

persons denied, confusing limits of discovery and privilege); Lehan v. Chicago & N.W. Ry., 169 Wis. 327, 172 N.W. 787 (1919) (discovery of documents denied without deciding question of privilege). When such reports are sought for introduction into evidence, there is a hearsay problem (generally one of admission). See Mccormick § 78.

121 Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (1949) (report by insured to carrier held privileged; carrier was agent for transmission); Travelers Indem. Co. v. Cochrane, 155 Ohio St. 305, 98 N.E.2d 840 (1951) (same; carrier was intermediate agent); In re Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936) (insurance report from insured to carrier; report becomes property of latter when transmitted to counsel). See generally Annot., 22 A.L.R.2d 659 (1952).

122 Mccormick § 100, at 205. New Jersey has exempted from discovery statements taken by an insurer in anticipation of litigation. N.J. Rules 3:26-2; see note 110 supra. 

Quaere: Does this merely codify the anticipation of litigation theory or cover all evidence obtained in the course of investigating insurance cases?

123 In re Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936).

124 329 U.S. 495, 504 (1947).

125 Dupree v. Better Way, Inc., 86 So. 2d 425 (Fla. 1956), where, since the attorney could be compelled to give the names of witnesses, they were held discoverable through the attorney's client even though the client learned of them through the attorney. Mutual Life Ins. Co. v. Tailored Woman, 276 App. Div. 144, 93 N.Y.S.2d 241 (1949) (same); Lundin v. Stratmoen, 250 Minn. 555, 85 N.W.2d 828 (1957) (same); Mutual Life Ins. Co. v. Tailored Woman, 194 Misc. 192, 91 N.Y.S.2d 140 (1949), rev'd on other grounds, 276 App. Div. 144, 93 N.Y.S.2d 241 (1949) (corporation cannot refuse to make disclosure because the particular witness is without personal knowledge); Clark v. Superior Court, 177 Cal. App. 2d 577, 2 Cal. Rptr. 375 (1960) (carrier's attorneys are defendant's attorneys for discovery purposes, and material in their possession can be reached); Unger v. Los Angeles Transit Lines, 180 Cal. App. 2d 172, 4 Cal. Rptr. 370 (1960) (to the same effect); Filipoff v. Superior Court, 56 Cal. 2d 443, 364 P.2d 315, 15 Cal. Rptr. 132 (1961) (same); Wise v. Western Union Tel. Co., 36 Del. 456, 178 Atl. 640, 644 (Super. Ct. 1935) (recognizing rule that corporate officer must answer as to all corporate knowledge); see 6 Wigm...
is the distinction between evidence gathered by the client in the form of
written reports and statements transmitted to counsel for use in the trial
if necessary, and mere communications made by the client to counsel as
information upon which advice is to be given or litigation undertaken.126
The client’s intimate personal statement to counsel is entitled to more
sympathetic treatment by the court, when deciding close questions of
immunity, than his voluminous written reports. In general, the state
courts seem to have ignored the possibility of protecting the trial prepa-
ration materials under the aegis of an investigatory privilege which has
been so popular in England.127 Therefore, they have sometimes strained
to bring the particular facts within the ambit of agents’ communications
to counsel,128 whereas the English courts have tended129 to bring the
client’s activities under the solicitor’s agency as legal preparation.130 Since
the Supreme Court, in Hickman v. Taylor, formulated the work-product
rule, which is in the area of the lawyer’s investigatory privilege,131 there
is a question as to whether agents’ communications to the client and
agents’ communications to counsel in the client’s behalf are embraced

§ 1856a(4), at 431 n.9. Wigmore explains who is a party opponent for the purpose of dis-
covery, including what persons are examinable for the purpose of ascertaining corporate
knowledge.

126 This distinction seems to be implicitly recognized in England. See notes 106 & 107
supra. Wigmore would allow the privilege only for the client’s communications. He failed
to consider the other aspect of the problem, i.e., the lawyer’s investigations. 8 WIGMORE §§
2317-19. Of course, the client’s evidence-gathering would not be privileged, even in
England, except insofar as the client is impliedly the agent of the solicitor.

127 The numerous cases involving investigations on behalf of the solicitor must proceed
on this view of the matter.

(communications between attorney and scientific expert); Holm v. Superior Court, 42 Cal.
2d 500, 267 P.2d 1025 (1954) (photographs, report); San Francisco v. Superior Court,
37 Cal. 2d 227, 231 P.2d 26 (1951) (physician’s report in connection with psychiatric
examination); In re Klemann, 132 Ohio St. 187, 5 N.E.2d 492 (1936) (report of insured
to carrier).

129 This tendency to expand the area of privilege can be seen from a reading of the
leading English cases. It has been noted on occasion. E.g., Seabrook v. British Transp.

130 The courts hardly notice whether they are proceeding under the solicitor’s privilege
for investigations or the client’s privilege for his communications to counsel. Yet, the fourth
category of Jessel, M.R., which includes the client’s agents, is broader than the first cate-
gory, which does not. See text accompanying notes 18 & 21 supra.

131 The investigatory privilege is the equivalent of the English quasi-privilege and the
federal “work product of the lawyer.” It includes not merely factual investigation but also
legal research and analysis.
within the general spirit of the decision.\textsuperscript{132} Logically, they should not be, because clients’ communications are clearly distinct from attorneys’ investigations.\textsuperscript{133} The policy reasons behind the two aspects of privilege are likewise radically different.\textsuperscript{134} Yet, if the state jurisdictions did recognize an investigatory privilege, would they be consistent in refusing to extend the protection to reports of independent third parties to counsel?\textsuperscript{135} Since 	extit{Hickman v. Taylor} does recognize the lawyer’s investigatory privilege, though under a different name than that sometimes used by the English courts, does this new “work product” concept extend to reports of third parties not otherwise agents of the client? The better position is that once the immunity for preparation is permitted to extend beyond the

\textsuperscript{132} See 4 Moore § 26.23[8], especially at 1391. There are two aspects of this question: First, whether agents’ communications are included within the scope of the client’s communications to counsel and hence within the scope of the attorney-client privilege; and, second, if not, whether they are to be included within the sweep of the work-product rule, as constituting a part of the preparation of the lawyer. See generally Gardner, 	extit{Agency Problems in the Attorney-Client Privilege}, 42 U. Det. L.J. Nos. 2 & 3 (1964-1965).

\textsuperscript{133} Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961), clearly recognizes this but in dictum explains and by implication affirms the rule of Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954), which tortured the statements of source agents of the client into communications to counsel.

Wigmore recognized a privilege only for the communications of the client but expanded this privilege to include communications originating with the client’s agents. Yet in the citation of authority, he included decisions which properly pertain only to the investigatory aspect of the English privilege. 8 Wigmore §§ 2317-20.

\textsuperscript{134} The policy behind the former is freedom of communication between the client and his lawyer, to promote justice in our courts. This writer, however, has reached the conclusion that this is only a facet of the policy which supports man’s right to privacy here and in other aspects of his relationships with society. The broader concept has been described as that of human dignity and inviolate personality. The communications privilege has accordingly been classified by some writers as a substantive right. See generally Gardner, 	extit{A Re-Evaluation of the Attorney-Client Privilege} (pts. 1 & 2), 8 Vill. L. Rev. 279, 447 (1963). The policy behind the investigatory privilege is one based upon the promotion of adequate incentives to trial preparation in an adversary system of litigation. It is clearly a peripheral matter of judicial administration, procedural in nature. Compare Gardner, 	extit{A Re-Evaluation of the Attorney-Client Privilege}, supra, with Gardner, 	extit{Agency Problems in the Law of Attorney-Client Privilege}, 42 U. Det. L.J. Nos. 2 & 3 (1964-1965).

\textsuperscript{135} Would it be logically consistent to infringe upon the principle of freedom from interruption of trial preparation (largely a fiction, not observed in relation to other matters, see 8 Wigmore §§ 2296-97) and yet maintain it in part (e.g., in the case of agents of the client as contrasted with third parties)? This is a question of degree, and to draw the line here might be reasonable as a practical matter. This writer, however, would comprehend all of the lawyer’s preparations (including, for example, witness-statements taken from third parties by the attorney) within the purview of the investigatory privilege.
attorney's legal research and analysis, we cannot thereafter logically draw the line so as to exclude any particular class of source material which the attorney has gathered.\footnote{That is, if we recognize the lawyer's privilege as including investigation, such as interviewing witnesses, we must logically include therein all fact-gathering done by the lawyer \textit{qua} lawyer in the preparation of his case for trial.} Here, the question of an agency relationship is simply not material, as the English courts were quick to perceive. The American courts have failed to perceive it, however, because of their confusion in the course of the expansion of the communications privilege on the basis of English precedent in the area of the quasi-privilege (or to use the technical English term, the "quasi-professional privilege"). Herein lies the basic cause of the subsequent confusion. The attorney-client immunity per se should now be confined to the area of the clients' communications, as in England. It appears that \textit{Hickman v. Taylor} was the beginning of a purifying process which should not only result in the establishment of sound decisional law in the area where federal precedents control, but to a substantial extent it should also result in the reexamination of the heretofore established law of the state court jurisdictions. This is rapidly taking place at the present time.

It is now apparent that the state court jurisdictions have never fully understood or carefully evaluated the subject of the attorney-client privilege. They were obviously influenced in their decisions to some extent by the English precedents, but it is not certain how far this influence reached. Certainly, no careful study was ever made of the English precedents in context, for the American decisions fail to demonstrate an understanding of the basic difference in the English and the American systems which resulted from the solicitor-barrister division of the profession in England and the absence of such a division of the legal profession in the United States. The American decisions seem to have failed to perceive the existence of the two distinct aspects of the privilege or that there is in fact a privilege for the client's communications to counsel and another privilege for the lawyer's investigations and preparation for trial and that there are many legal problems in connection with the proper delineation of the latter area.

While discovery in the federal courts remained dormant, the state courts expanded the communications privilege to cover investigations by the client's agents when made in anticipation of litigation. Until recent years, discovery does not generally appear to have been sought in the case of the attorney's investigations. Hence, under the more limited
systems of discovery which have existed in our courts, the problems peculiar to the English system should never have arisen. For a number of reasons, however, as has been shown, they did arise. Since discovery of the actual work of the attorneys in the cases seems never to have been sought, legal issues arose only as to the reports of investigations made by others, for which immunity was claimed on the theory that they were the agents of the attorney or the client. The American courts would generally refuse to follow English precedent wholeheartedly, with the result that these items were protected from discovery only when the particular court was able to view the item sought as a "communication" originating with the client's agent for transmission to counsel. In summary, it can be said that the American privilege was, until the decision in *Hickman v. Taylor*, a communications privilege only, which had been somewhat illogically expanded to cover more than the client's actual communications to counsel. It cannot be said to what extent Dean Wigmore's failure to discuss the two distinct aspects of the English privilege and his indiscriminate treatment of both aspects under the heading of the communications privilege influenced the special development of the American law of privileged communications. That this aspect of the American law developed later than the English law cannot be disputed; nor can it be disputed that the American development was influenced by English precedents that were cited and partially harmonized but obviously not clearly understood. As has been shown previously,137 Wigmore's statement that communications originating with the client's agents are within the purview of the communications privilege is not a technically accurate representation of the English law on the subject. The same thing cannot be said of this statement with respect to the American law, however. Here, the consensus of the state court decisions would now support the statement, though the authorities which Wigmore originally cited were not directly in point.138 That the expanded communications privilege together with the limitations on pretrial discovery immunized almost as much of the trial preparatory materials in the United States as the quasi-professional privilege immunized in England is indicative of what was felt to be the need at the

137 See p. 601 *supra*.

138 The American cases cited in 8 *Wigmore* § 2317, at 617 n.4 are not generally in point. The first cited case arose under a Georgia statute that would not necessarily be followed elsewhere; the other cases can be explained as not being inconsistent with the limitation of the communications privilege to communications originating with the client. *Holm v. Superior Court*, 42 Cal. 2d 500, 267 P.2d 1025 (1954), cited in 8 *Wigmore* § 2317, at 617 n.4 (Supp. 1959), is one of the leading cases which supports the proposition, however.
time.\textsuperscript{139} The greater convenience of the English discovery procedures actually made the nonprivileged materials more readily available, though the two aspects of the English privilege when combined probably immunized a somewhat greater quantity of evidence from discovery. This was to some degree offset by the development of the facile use of interrogatories to discover the client's knowledge of the case under the English practice. The American and the English courts reached roughly the same results, however, though by somewhat diverse routes. Moreover, it appears that the English barristers, being trial specialists, made greater use of their discovery procedures, thus actually rendering their trial preparations more thorough. Hence, the need for further reform of the discovery process has not been so pressing in England as it has been in the United States. This may account in part for the fact that we are making further reforms, while they are not.

At this point, it seems that the failure of the American courts to reason more explicitly in the course of their expansion of the communications privilege while at the same time ignoring the investigatory aspect of the English privilege must now render the scope of the communications privilege at best uncertain and the precedents of questionable authority. Since the English quasi-professional privilege is \textit{ex hypothesi} procedural in nature, the English precedents would be entitled to little weight in the context of the different organization of our bar and our different discovery procedures. At best, the English precedents can only serve as catalysts in the course of judicial analysis, according to our established common-law techniques for the deciding of difficult cases. The American precedents should now be reexamined in the light of the clearer notions of the controlling distinction which exists between the client's communications privilege and the lawyer's preparatory privilege.

Wigmore himself, after noting the "confusion of precedents" which exists in connection with the application of the expanded communications privilege,\textsuperscript{140} went on to say:

\begin{quote}
In applying the \textit{privilege} for communications of \textit{clients and their agents} or their attorneys' agents . . . the more clearly the communicator is a stranger to the parties, the more plainly he falls without the \textit{privilege}; while the more markedly the relation of agent for the litigation appears, the clearer the privilege is. On the other hand, in applying the rule of discovery exempting \textit{prospective witnesses}’ statements . . . , the more clearly the person is an indifferent witness, the more plain is the exemption from discovery; while the more marked his capacity
\end{quote}

\textsuperscript{139} Professor McCormick notes the similarity of the solution worked out by the English courts and some of the American courts, but he fails to note the different route by which they reach this similar result. McCormick \textsection{} 78, at 161.

\textsuperscript{140} 8 Wigmore \textsection{} 2319, at 618, text accompanying n.1.
as a mere agent of the party, the plainer the liability to disclose. The two principles thus pull in opposite directions. What helps to apply the one exemption will tend to disfavor the other. Whether the judicial intention is to invoke the one or the other is not always plain to see. A ruling which is sound enough from the one point of view would be unsound from the other; and it becomes difficult to determine whether the ruling harmonizes or conflicts with either principle.141

With our present hindsight, this passage is illuminating in several respects, perhaps the most important of which is that it tends to cast doubt on the precedential value of the decisions laid down prior to the establishment of our open discovery procedures in recent years. These older decisions are not only out of harmony with modern discovery; often it cannot be ascertained with reasonable exactitude just what the older decisions held. This will naturally have an important bearing on any study of the history of privilege and discovery which is undertaken to determine what the former law was and the weight to which it is entitled in determining what the law now is and what it ought to be hereafter.

Reflection on the above-quoted passage also indicates that to conceive of the relationship between privilege and discovery in terms of a variable only tends to confuse the matter. The relationship between privilege and discovery now is such that these two areas no longer vary in inverse proportion to each other, and the fact that formerly they did was only the result of the courts' difficulty in drawing lines as to (1) the scope of the privilege in relation to agents' "communications" and (2) the limitation on the scope of discovery in relation to parties other than the client and his agents.142 While in most jurisdictions until recently, and in some jurisdictions until the present time, one may be required to show special circumstances in order to take the deposition of a prospective witness who is not a party to the proceeding or in some way connected therewith (e.g., as agent for a party), this should have no effect on the right of the party to assert a claim of privilege.143 It is a factor to be considered only because the older decisions sometimes reflected a tendency to deny discovery without indicating whether the denial was based on the applicability of the attorney-client privilege, or on the recognition of a privilege of potential witnesses who have no personal connection with

141 Id. § 2319, at 618-22.
142 That is, the testimony of third parties fell without the scope of the privilege, but pretrial discovery of their testimony could not generally be had, because the law did not permit their being subpoenaed except for good cause, such as anticipated unavailability at the trial. This limitation continues to exist in England and in some of the state court jurisdictions.
143 Which, however, would not exist in the case of a stranger.
the litigation, *i.e.*, as clients or their agents, not to testify in advance of the trial.\(^{144}\) Yet, the principles on which privilege and discovery are based should work together, but without actual effect of the one on the other, in this manner: (1) *All relevant evidence is subject to discovery.*\(^ {145}\) (2) *The claim of privilege when applicable constitutes a defense to the discovery of evidence.* Whether or not the communicator is the client would be determinative as to the recognition or nonrecognition of the communications privilege.\(^ {146}\) Whether or not the source agent (communicator) is the client's agent or a third party would have no relevance in the case of the investigatory privilege, since this privilege is limited to the investigations of the lawyer and his agents. The fact that one is an agent of the client should have no bearing on the scope of the client's communication privilege except in those jurisdictions where it is held to include the communications of clients' agents to counsel, *i.e.*, communications not originating with the client in person. The privilege does not vary in relation to the degree of availability of pretrial discovery or the relationship of the parties. While Wigmore understood this, the above-quoted passage might lead someone not familiar with the former practice to think that the scope of the privilege and discovery varied in some causal way with each other. This however is not the case and has never been the case, and probably no purpose was served in putting it in the manner in which the learned author did in the above-quoted passage.

The privilege is governed by the rules pertaining to privilege. Discovery is governed by the rules which control discovery. The two areas only cross when discovery is sought and the opponent invokes the claim of privilege. In such cases, all that is necessary for the court to decide is (1) whether discovery is proper, and (2) whether the claim of privilege should be granted or denied. The claim of privilege involves no problem of discovery. If a problem as to the right to discovery of evidence arises in the area of pretrial discovery (as contrasted with the area of privilege),\(^ {147}\) the only issue for the court to resolve is whether the

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\(^{144}\) *E.g.*, because the witness was a party and the matter pertained to the party's own case; or because the witness was not a party or otherwise connected with the litigation.

\(^{145}\) Whether the witness is a stranger is no longer material. Formerly, however, special circumstances had to be shown to take the deposition of a witness who was not connected with the litigation as a client or his agent.

\(^{146}\) Whether an intermediate party is an agent of the client or a stranger should have no bearing on the matter, since the communications of the client only are entitled to protection under the privilege.

\(^{147}\) Pretrial discovery is no longer of limited availability in the case of witnesses un-
party is entitled to have his order for discovery. The objection to discovery involves no problem of privilege. Only in connection with the confusion of privilege with other immunities from testimonial compulsion (or production of documents) has either one had any bearing on the other.

The American courts have been reeducating themselves since the decision of Hickman v. Taylor, generally as the legislatures have revised the discovery procedures of their respective jurisdictions to provide for broader pretrial discovery, and there is a growing tendency to recognize the client’s communications privilege and the lawyer’s investigatory and preparatory privilege as distinct categories.148 This is a step forward, because it enables the courts to work out the subject on the basis of logical reasoning, with less resort to artificial precedent. The next step should be to confine the two privileges strictly within the areas defined by their respective rationales.

Since the states are gradually following the federal lead in adopting rules of discovery,149 it is difficult to tell just how influential these past precedents will be in the future. While they remain in the books, they will certainly bear understanding and explanation. Once a state has adopted open discovery, there must necessarily be substantial travail before it is ready to steer a clear course with the new instruments.150 However, related to the litigation as parties or their agents. Hence, it is not necessary to discuss the second part of the above-quoted passage from Wigmore, which pertains to such former practice.


149 Friedenthal, supra note 105, at 474 & nn.92-95 sets out states which have adopted federal rules and other provisions of open or improved discovery. This section of the article then proceeds to discuss the special developments in these states.

The term “liberal discovery” has been used to cover the methods of discovery in use in England during the latter part of the nineteenth century and in this country concurrently and continuing in England and in some of the state court jurisdictions down to the present time. See Gardner, supra note 134, at 302 nn.6 & 7. The term “open discovery” is used to mean a system such as has existed in the federal jurisdiction since 1938, in which all evidence relevant to the subject matter is discoverable unless privileged. By virtue of the interpretation of Fed. R. Civ. P. 34, however, discovery in the federal system is not completely open within the meaning of this term. It approaches “open discovery,” however.

150 The best illustration is the history of open discovery in California, culminating in the recent leading case of Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961), and the companion cases of Steele v. Superior Court, 56 Cal. 2d 402, 364 P.2d 292, 15 Cal. Rptr. 116 (1961); West Pico Furniture Co. v. Superior Court, 56 Cal. 2d 407, 364 P.2d 295, 15 Cal. Rptr. 119 (1961); Cembrook v. Superior Court, 56 Cal. 2d 423, 364 P.2d 303, 15 Cal. Rptr. 127 (1961); Carlson v. Superior Court, 56
with the trail now blazed by the federal judiciary and the results readily available in the reference books, the future task should be less difficult. There seems to be a strong tendency to follow federal precedents, once the particular jurisdiction has adopted open discovery procedures. But despite the progress already made, there remain numerous unsolved problems in this area which will take much patience, time and effort to resolve. Yet their understanding will require only the understanding and application of the basic principles on which open discovery is now based.

Each jurisdiction will have to resolve its particular problems in the light of the local setting in which they arise. At present there are numerous local statutes and precedents which constitute minor impediments to the complete realization of open discovery. Nevertheless, the area is one in which the courts which have open discovery procedures will generally be more free to follow those basic principles which tend toward the making of a maximum amount of evidence available for the trier of fact compatible with the preservation of the client's and the lawyer's respective privileges. Hence, with only limited exceptions, the area of discovery is one in which the sound precedents of any jurisdiction can be safely followed. Those who would master the subject of discovery must develop a philosophy of discovery based on an understanding of the general principles. The local law is important but to a lesser degree. Its application


The Greyhound case, by rejection of a broad construction of the "good cause" requirement, by confining the sound discretion of the trial court to its proper place, and by rejecting the expanded concept of work product, has placed California in the front ranks of open discovery jurisdictions today. It has left the door open for protection of the Freedman work product. (Abraham E. Freedman, in the Brief for Petitioner, Hickman v. Taylor, 339 U.S. 495 (1947), argued that the attorney acting as fact finder has stepped outside his role as attorney and the facts that the attorney thus obtained should stand on no better footing than information gained by an investigator. The Freedman work product is discussed in Gardner, Agency Problems in the Law of Attorney-Client Privilege, 42 U. Det. L.J. No. 3 (1965)). And perhaps other work of the lawyer when the circumstances appear to be such that disclosure would be burdensome or oppressive are also protected. The Greyhound case has continued the rule protecting the statements of original source agents taken by investigators as privileged communications to counsel, even when such source agents served only in nonmanagerial capacities. See Gardner, supra. In rejecting the work product concept and affirming the Holm rule as to the scope of the privileged communications principle, however, the court deemed itself bound by the language in the discovery act. Cal. Code Civ. Proc. § 2016(b). As to the court's interpretation of the language of the act on this point, see Greyhound Corp. v. Superior Court, supra at 401, 364 P.2d at 291, 15 Cal. Rptr. at 115.

151 See cases cited note 149 supra.
The Georgetown Law Journal does not sound in the same key. Above all, slavish adherence to form and mechanical application of precedent should be avoided, even in the case of the decisions which have been pronounced since the advent of open discovery. This is not an area where we should await a time-consuming development but rather an area where the litigants are entitled to present availability of the discovery remedies which public policy now declares to be available, and with a minimum amount of judicial supervision. Thus, our ultimate goal is not in dispute but rather is clearly in view and must always be kept in mind. Moreover, the basic principles are now clearly established, and the direction to be followed has been generally indicated. Occasionally, some yarn must be unwound and rewound, but the course of development is mostly straight forward. It is hoped that this article will be of help in the understanding of the philosophy of open discovery and in the execution of this forward march.
THE CASE FOR AN IMPLIED WARRANTY OF QUALITY IN SALES OF REAL PROPERTY

Paul G. Haskell*

Contrasting the implied warranty protection that the law affords a purchaser of goods with the protection extended to the purchaser of real property, the author surveys the case law and concludes that the difference in treatment “does not make good sense.” Professor Haskell proceeds to propose a reform in the law of real property conveyancing which would extend implied warranty protection to the buyer.

As far as assurances of quality are concerned, our law offers greater protection to the purchaser of a seventy-nine cent dog leash than it does to the purchaser of a 40,000-dollar house. If the dog leash is defective, the purchaser can get his money back and he may be able to recover damages if he loses his dog because of the defective leash.1 If the purchaser of the house is required to replace the heating unit two months after the purchase, he probably has no recourse against the seller; quality is generally at the risk of the buyer of real property, absent an express warranty or fraud. The purchaser of a chattel from a merchant has the protection of the warranty of merchantable quality, which is implied in every sale by a merchant.2 Except in Louisiana, and, with respect to new construction, Colorado and probably New Jersey, no comparable implied warranty is recognized in the sale of real property. The implied warranty of merchantable quality may be avoided or limited by an express disclaimer,3 or may be supplemented by an express warranty which represents or promises quality beyond the standard of merchantability;4 there may, of course, be express warranties of quality in sales of real property.5

* Associate Professor of Law, Georgetown University Law Center.

1 Uniform Commercial Code §§ 2-711, -714, -715; Uniform Sales Act § 69 (election of remedies may be required under the Uniform Sales Act).

2 Uniform Commercial Code § 2-315; Uniform Sales Act § 15(2). Goods must be bought “by description” under the Uniform Sales Act. See note 20 infra and accompanying text.


What accounts for the difference in protection afforded the purchaser of a chattel and the purchaser of real property? Does the difference make good sense, or is it merely the fortuitous byproduct of the separate historical development of the law of sales of chattels and the law of real property conveyancing? The purpose of this article is to offer reasons why this difference does not make good sense, to point out how the courts have been chipping away at caveat emptor in real estate sales, and to propose changes in the law to afford greater protection to the purchaser of improved real property with respect to structural quality. This article does not deal with the problems of defects in title.\(^6\)

In considering the extension of quality protection to the purchaser of real property, the first step is to attempt to define what is meant by merchantability in the law of sales of goods. Section 2-314 of the Uniform Commercial Code attempts a detailed definition;\(^7\) the Uniform Sales Act contains no definition of merchantability. It should be noted that the warranty arises only in the sale by a merchant; the sale by a consumer of his used automobile carries no such implied warranty. The warranty of merchantable quality does not require the highest quality, nor is it satisfied by the lowest quality of goods, but rather requires average or medium quality. Merchantable quality requires that the goods must be such as to pass without objection in the trade. An additional criterion employed is that the goods must be fit for the general purposes for which such goods are used.\(^8\) It seems that these criteria are different expressions of the same idea; an automobile with a defective steering apparatus,\(^9\) a


\(^6\) There is an implied warranty of title in the sale of goods. \textit{Uniform Commercial Code} § 2-312; \textit{Uniform Sales Act} § 13. In the field of real property, an implied covenant of marketable title exists in the contract of sale, but no implied covenant of title is recognized in the deed. \textit{American Law of Property} §§ 11.47, 12.124 (Casner ed. 1952).

\(^7\) (2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.

\(^8\) For a discussion of the several definitions of merchantability, see Prosser, \textit{The Implied Warranty of Merchantable Quality}, 27 Minn. L. Rev. 117, 125-39 (1943).

frankfurter with glass in it, and an airplane with a defective altimeter, are of less-than-average quality, cannot pass without objection in the trade, and are not fit for the general purposes for which they are used.

It is clear that merchantability, as so defined, is what the parties intended to contract for; that such level of quality is anticipated is so obvious from the words used to describe the product being sold that the parties do not bother to set it forth in the contract. Obviously the car was supposed to have adequate steering, the hot dog was supposed to be free from glass, and the airplane was supposed to have an accurate altimeter. If the buyer is aware of the defect, or would have been aware of it had he inspected the product for which an opportunity was afforded by the seller, then the warranty does not include any such discovered or discoverable defect. In such event, it is reasonable to conclude that the parties did not intend to contract as to quality insofar as such known or apparent defect is concerned.

On the basis of this reasoning, it seems that merchantable quality should be implied in the sale by one consumer to another of a 1,500-dollar second-hand automobile, since the parties really intend that the car should perform as a 1,500-dollar second-hand automobile is expected to perform, but neither the Uniform Sales Act nor the Uniform Commercial Code extends the implied warranty of merchantability beyond the commercial sale. Many courts have refused to recognize the implied warranty even in the case of the commercial sale of second-hand goods, although there is no justification for this distinction in the wording of the uniform acts. It may be understood in some commercial dealings in second-hand goods that caveat emptor is applicable, but this is not necessarily the case.

The statutory limitation to the commercial sale reflects the historical development of the warranty of merchantable quality. Prior to the nine-

12 Uniform Commercial Code § 2-313, comment 1; Kessler, The Protection of the Consumer Under Modern Sales Law, 74 Yale L.J. 262, 278 (1964); Prosser, supra note 8, at 133-25; see Honnold, Cases on Sales and Sales Financing 74-75 (2d ed. 1962).
13 Uniform Commercial Code § 2-316(3) (b); Uniform Sales Act § 15(3); Vold, Sales § 89 (2d ed. 1959); 1 Williston, Sales § 234 (rev. ed. 1948).
14 Id. § 232; Annot., 151 A.L.R. 446 (1944). In the sale of used goods the courts have more readily recognized an implied warranty of fitness for a particular purpose than a warranty of merchantability.
15 See Uniform Commercial Code § 2-314, comment 3; 1 Williston, op. cit. supra note 13, § 232.
teenth century, there was no implied warranty of merchantable quality in the sale of goods. There is some indication, however, that the seller may have incurred liability if he knew of a latent defect and did not disclose it to the buyer, assuming, of course, that the buyer was not aware of it. Liability in such case rested on a theory of fraud rather than upon a contractual theory. Our modern warranty of merchantability originated in the early years of the nineteenth century. If the seller was one who manufactured the goods in question, or was one who customarily dealt in goods of that kind, an implied warranty of merchantable quality would arise, provided the buyer had no opportunity to inspect the goods before contracting for their purchase. If, on the other hand, the buyer had an opportunity to inspect the goods before contracting for their purchase, there was no implied warranty of merchantability and caveat emptor was applicable; this was so even if the defect was latent. The rationale seemed to be that if the buyer could examine the goods for quality, then he implicitly assumed all risks as to quality, and if he desired protection against latent defects, he could obtain an express warranty. Conversely, if the buyer did not have an opportunity to inspect, then it seemed that the parties were contracting for goods which fairly answered the description in the contract. It should be noted that the Uniform Sales Act provides for the implied warranty of merchantability only in the event the sale is one "by description," but some courts have recognized such warranty in cases in which the goods were available for inspection but contained a latent defect. It should also be noted that the Uniform Sales Act limits the warranty to sales by those who deal in goods of that kind, and then parenthetically provides that this includes dealers other than manufacturers and growers; the reason for the parenthetical clause is that prior to the legislation many jurisdictions limited the warranty to sales by manufacturers and growers, those directly responsible for the condition of the goods, and excluded those who served only as conduits for the marketing of the goods. The Uniform Commercial Code does not limit the warranty

16 Id. § 228.
17 Ibid.
19 See Jones v. Just, [1868] 3 Q.B. 197; 1 WILLISTON, op. cit. supra note 13, §§ 228-29.
20 Uniform Sales Act § 15(2).
22 Prosser, supra note 8, at 146-47.
to sales by description, but, as noted above, does limit the coverage to sales by merchants; the buyer is not protected against known or discoverable defects, but of course is protected against latent defects. Comment 3 to section 2-314 of the Uniform Commercial Code makes it clear that second-hand commercial sales are not excluded from the coverage of that section.

On strict analogy to the law of sales it seems that merchantability would be implied in the sale of realty only in the case of the contract for the construction of a house or the sale of a new house by the builder or housing merchant, and that merchantability would not be implied in the sale of a used house by the nonmerchant owner. However, it is questionable that a strict analogy is appropriate. The vast majority of sales of goods are by merchants, whereas most sales of improved real property are by nonmerchants. If merchantability is what the parties to the contract necessarily intend, then it seems that it should be applicable to all sales as an implied term.

There was no development in the law of real property conveyancing comparable to the development of the warranty of merchantability in the law of sales of goods. Although implied warranties have been recognized in connection with a contract to construct a new house, the common-law rule that quality is at the risk of the purchaser in the sale of real property is still the law except in Louisiana, and, with respect to new houses, Colorado and probably New Jersey. Strangely, the law places the entire risk as to quality upon the party to the transaction with less knowledge or opportunity for knowledge of the condition of the premises. Of course, inaccurate representations as to quality will render the seller liable, and

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23 Uniform Commercial Code § 2-316(3)(b).
24 "A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods for that is their contract description."

25 The law of sales recognizes an additional implied warranty of quality, that of fitness for a particular purpose. Uniform Commercial Code § 2-315; Uniform Sales Act § 15(1). The special or particular purpose for which the goods are to be used, such as a motor powerful enough to propel a boat of a certain size at a certain speed, must be known to the seller, and the buyer must rely on the seller's skill or judgment in the selection of the motor. For example, the motor with seventy-five horsepower may be perfectly good and sound, from the standpoint of merchantability, as a seventy-five horsepower motor, but if it does not do the job specified, there is a breach of the warranty of fitness for a particular purpose. For an excellent discussion of this warranty, see Corman, Implied Sales Warranty of Fitness for Particular Purpose, 1958 Wis. L. Rev. 219 (1958). The focus of the present article is upon the question of responsibility for general habitability; consequently, the warranty of fitness for a particular purpose, other than the general purpose of habitation, is not germane.
in some jurisdictions, failure to disclose latent material defects will render the seller liable.\(^\text{26}\)

**Present State of the Law**

Although an implied warranty of quality is not generally recognized in this country, the purchaser has received protection in the limited situations involving the contract to purchase a house which has not been completed at the date of the contract, and fraudulent nondisclosure. There has been substantial litigation involving defective home construction in recent years, and a brief review of some of the cases will demonstrate the rigidity and illogic of the law.

It is now apparent that the exception to the principle of caveat emptor in the sale of real property to the effect that there is an implied warranty of fitness for habitation in the contract for the sale of a house which is to be constructed or is under construction at the time the contract is entered into, is receiving increasing, but not unanimous, acceptance in this country. In a recent Illinois case,\(^\text{27}\) the plaintiff entered into a contract for the purchase of a house from the vendor-builder which was about seventy-five per cent completed. After completion of the house, and occupancy by the plaintiff, it appeared that the plumbing in the bathroom leaked, the basement and roof leaked, the bedroom plaster cracked and the back door was not usable. The plaintiff sued for damages; the court held that under the circumstances the contract did not merge in the deed and it carried an implied warranty of habitability.\(^\text{28}\)

The purchaser in the recent case of *Voight v. Ott*\(^\text{29}\) had the misfortune of contracting for his new house after construction was completed. Shortly after the purchaser took possession, it became apparent that the heating-refrigeration system did not work properly and the purchaser replaced the

\(^{26}\) For discussion of caveat emptor in real property sales see 7 WILISTON, CONTRACTS § 926A (3d ed. 1963); Bearman, *Caveat Emptor in Sales of Realty*, 14 VAND. L. REV. 541 (1961); Dunham, *Vendor's Obligation as to Fitness of Land for a Particular Purpose*, 37 MINN. L. REV. 108 (1953); Comment, 5 DE PAUL L. REV. 263 (1956); Note, 4 W. RES. L. REV. 357 (1953). Generally, the same principles apply in the case of the leasing of real property. The lease is still viewed in the law for many purposes as a sale of a piece of the total property interest, and the "seller" is not impliedly responsible for the condition of the premises absent fraud, nondisclosure, nuisance, or express covenant. The caveat emptor principle has been modified somewhat by expansion of the "constructive eviction" principle and by statutes which impose responsibility for the physical condition of premises upon the lessor of the multiple dwelling. See 1 AMERICAN LAW OF PROPERTY §§ 3.50-.51, 3.45 (Caser ed. 1952); Note, 78 HARV. L. REV. 801 (1965).


\(^{28}\) *Id.* at 396, 184 N.E.2d at 734.

defective unit furnished by the vendor-builder. The Supreme Court of Arizona declared the solemn principle of caveat emptor in real estate sales and held for the vendor. An interesting aspect of the case is that the purchaser argued the theory that the defective unit was personalty rather than realty and that implied warranties of quality attach to such sales, but the court disagreed with this characterization of the property.30

In the case of Hoye v. Century Builders, Inc.,31 the Supreme Court of Washington held that the purchaser who contracted for a house which was to be constructed in accordance with plans prepared by the developer-vendor, was entitled to recover on account of defective plumbing and drainage which resulted in the discharge of raw sewage on the premises. The rationale employed by the court was the implied warranty of fitness for habitation; the court stated that although the warranty applied in the circumstances of this case, it would not be applicable had the contract for the house been made after completion of construction.32 But in the case of Druid Homes, Inc. v. Cooper,33 the unfortunate purchaser made this very mistake of signing his contract after the house was completed and was not granted recovery, under facts otherwise similar to those in the Hoye case.

What happens to the purchaser of a completed new house which turns out to have been built on "soft" land, with consequent defective settling which substantially impairs the value of the house? The Supreme Court of Oregon, faced with these facts, held that the purchaser had no cause of action since there is no implied warranty of quality in the sale of a new house.34 Where, however, the purchaser signs his contract before the construction is completed, and similar settling problems develop, the purchaser has been granted recovery.35 It seems almost magical.

The "unfinished house" exception has been recognized by courts in several other jurisdictions,36 but there have also been several recent contrary holdings.37

30 Id. at 135, 341 P.2d at 928.
32 Id. at 832, 329 P.2d at 476.
33 272 Ala. 415, 131 So. 2d 884 (1961).
37 Narup v. Higgins, 51 Ill. App. 2d 102, 200 N.E.2d 922 (1964); Coutrakon v. Adams,
What reasoning have the courts employed to distinguish the "unfinished
house" situation from the normal sale of improved real property? One
theory is that the purchaser of the house under construction does not have
an opportunity to protect himself by inspection. But this would seem to
have application only with respect to components not yet installed. How-
ever, the courts which adopt this exception to caveat emptor have not
delineated this distinction carefully. In any event, when justified on the
basis that a purchaser should inspect, caveat emptor does not make much
sense with respect to latent defects, or those defects not discoverable as a
practical matter until the house is occupied and used.

The courts also support the "unfinished house" exception on the basis
that one who purports to be expert in certain areas of engineering or con-
struction, and contracts to perform in accordance with certain plans pre-
pared by him, impliedly warrants the fitness of his product or his work
for the intended use. For example, in the case of the house which is
seventy-five per cent complete when the contract is made, clearly the
plans and specifications are those of the seller, and the risk of defect
should rest upon him. This is the factual postulate of some of the cases
in which the implied warranty of fitness for habitation has been recog-
nized. If, as in Hoye, the contract is entered into prior to the commence-
ment of construction, and the plans are those of the developer as repre-
sented by a "model" house, then it seems that risk of defect also should
be on the seller.

Where, however, the purchaser obtains an architect to prepare plans,
and the seller contracts to build in accordance therewith, then it may be
argued that the seller contracts merely to build in accordance with the
plans and does not warrant that the structure will be fit for the purpose
for which it is intended, and it has been so held. The seller's liability is
limited to his express contractual obligation to build in accordance with
the plans. Yet the mere fact that the buyer and the seller have contracted

38 Ill. App. 2d 290, 188 N.E.2d 780 (1963); see Gilbert Constr. Co. v. Gross, 212 Md. 402,
129 A.2d 518 (1957).
39 Jose-Balz Co. v. De Witt, 93 Ind. App. 672, 176 N.E. 864 (1931); Minement Realty
Co. v. Ballentine, 111 N.J. Eq. 398, 162 Atl. 594 (Ct. Err. & App. 1932); Hill v. Polar
659, 178 Pac. 823 (1919).
41 Fuchs v. Parsons Constr. Co., 166 Neb. 188, 88 N.W.2d 648 (1958); Russ v. Lakeview
42 Fuchs v. Parsons Constr. Co., supra note 40, at 194, 88 N.W.2d at 652; Russ v.
Lakeview Dev., Inc., supra note 40, at 644.
that a house be built in accordance with certain specific plans would not necessarily negative the existence of an implied warranty of fitness; the real issue is who is responsible for the plans. If the plans are those of the builder-vendor, then he impliedly warrants fitness for habitation.

A further question concerns failure of the seller to comply with the local building code. The traditional view is that violation of a municipal law or regulation does not ordinarily give the private citizen a cause of action unless the violation causes peculiar injury to the private citizen. A Georgia court recently held that failure of the builder-vendor to construct in accordance with the applicable building code did not furnish a ground for recovery in the case of the purchase of a newly completed house. In contrast, it was held in the Colorado case of Carpenter v. Donohoe, that there was an implied warranty in the sale of a newly completed house that it was constructed in accordance with the local building code. It seems that there is no clearer case of peculiar injury than that of the purchaser of a new house which has been constructed in violation of the applicable building code. Violation of the building code could offer the purchaser of new construction a theory for breaking through the caveat emptor barrier, but there exists a paucity of litigation in which this point has been argued. It is clear, however, that in a contract for the construction of a house, the builder impliedly agrees to build in accordance with the applicable law, including the local building code.

The doctrine that there is no implied warranty of quality in the sale of real estate, subject to the qualification discussed above, is firmly entrenched in our law, except for the Louisiana, Colorado and New Jersey jurisdictions, and it is applicable to both new housing sold by the builder and to used housing sold by the nonmerchant. The reasoning which is

44 388 P.2d 399 (Colo. 1964). This case is the first outside Louisiana to establish an implied warranty of fitness for habitation in the sale of a newly constructed house.
supposed to justify this rule of law tends to fall into these categories: (a) the buyer should conduct a thorough inspection before he makes his purchase; (b) the buyer should obtain an express warranty if he wishes protection against defects; and (c) recognition of an implied warranty would result in a rash of litigation.

The first argument in defense of caveat emptor is untenable, since the doctrine applies to latent and undiscoverable defects. No one has contended that the purchaser be protected against patent defects.

That the buyer should obtain an express warranty for his protection assumes a degree of sophistication on the buyer’s part which frequently does not exist. It may be argued that every buyer should retain an attorney, but it is not the practice to do so in many communities, particularly in the case of the sale of the development house. Clearly, there are means available to the buyer under present law to protect himself, but in the absence of an effective disclaimer by the seller, the issue is whether the law ought to protect the buyer, the one who necessarily knows less about the house. Would it not be more sensible to require that the seller make an express disclaimer if he wishes to be protected from liability for defects?

As for the question of the quantity of litigation which would result if an implied warranty of fitness for habitation were recognized in sales of real property—it seems that if the claims are just, that is what the courts are for. It should be noted that if caveat emptor were applicable to sales of chattels, and if driving on the public highway constituted assumption of risk, litigation would also be substantially reduced, but obviously there are values which take precedence over minimization of litigation.

Caveat emptor has yielded to some degree to the pressure of fraudulent nondisclosure.47 Frequently courts have allowed the purchaser to recover


The Federal Housing Administration and the Veterans Administration mortgage insurance offer limited protection to the purchaser of housing so financed. In the case of insurance procured prior to construction, the FHA or the VA must approve the plans and specifications; the seller must give a written warranty to the buyer that the building will be constructed in accordance therewith, and the buyer must give written notice of any non-compliance within one year after the conveyance of title, or occupancy, whichever occurs first. For the FHA provisions, see 72 Stat. 1266 (1958), 12 U.S.C. § 1701(j)(1)(a) (1958). For the VA provisions, see 38 U.S.C. § 1805(a) (1958). See also New Home Constr. Corp. v. O’Neill, 373 S.W.2d 798 (Tex. Civ. App. 1963) (warranty extends only to literal compliance with the plans but does not go to quality of materials and workmanship and fitness for habitation).

47 See generally Goldfarb, Fraud and Nondisclosure in the Vendor-Purchaser Relation, 8 W. RES. L. REV. 5 (1956).
when the seller knows of a material latent defect which he does not disclose to the buyer and of which the buyer is ignorant. Recovery has been allowed both in cases of sales of new construction and used construction. The defects which have been considered material and sufficient to support an action for fraud due to silence have involved, for example, termite infestation, improper drainage and waste disposal, filled land resulting in improper settling, noncompliance with building codes and structural weakness.

Although it appears that the majority of courts which have considered the question in recent years favors the view that an action lies for failure to disclose a material defect, nevertheless there is a significant body of law to the contrary. The leading case in support of the position that there is no duty upon a vendor of real property to disclose a defect in an arm's length transaction is Swinton v. Whitinsville Sav. Bank, in which the Supreme Judicial Court of Massachusetts commented as follows:

If this defendant is liable on this declaration every seller is liable who fails to disclose any nonapparent defect known to him in the subject of the sale which materially reduces its value and which the buyer fails to discover. Similarly it would seem that every buyer would be liable who fails to disclose any nonapparent virtue known to him in the subject of the purchase which materially enhances its value and of which the seller is ignorant. The law has not yet, we believe, reached the point of imposing upon the frailties of human nature a standard so idealistic as this. That the particular case here stated by the plaintiff possesses a certain appeal to the moral sense is scarcely to be denied. Probably the reason is to be found in the facts that the infestation of buildings by termites has not been common in Massachusetts and constitutes a concealed risk against which buyers are off their guard. But the law cannot provide special rules for termites and can hardly attempt to determine liability according to the varying probabilities

49 See cases cited notes 50 & 54 infra.
51 Kaze v. Compton, 283 S.W.2d 204 (Ky. 1955).
of the existence and discovery of different possible defects in the subjects of trade.\textsuperscript{57}

This fervent defense of the vendor of real property who withholds information concerning a serious defect in the condition of the house to be sold is quite inconsistent with the liability imposed in the same jurisdiction upon the vendor of a chattel which does not conform to the standard of merchantability, regardless of whether the vendor had any part in the manufacture of the chattel, and regardless of whether the vendor of the chattel had any knowledge of the existence of the defect.\textsuperscript{58}

An action for fraud based upon nondisclosure is quite different from an action based upon an implied warranty of quality inasmuch as the buyer must establish in the former that the defect was known to the seller. The implied warranty arises regardless of knowledge by the seller. In both cases, however, knowledge of the defect by the buyer, or discoverability upon reasonable inspection, is fatal to the buyer’s cause of action.\textsuperscript{59}

A New Jersey court\textsuperscript{60} has summarized the current state of the law, and the justification therefor, as follows:

Ultimately, then, plaintiffs must justify a recovery on the basis of an implied warranty. Defendant contends that the acceptance of the deed by the purchaser from the vendor terminates the contractual relationship between the parties, and their respective rights and liabilities are thereafter determined solely by the deed and not by the contract of sale. This argument fairly summarizes prevailing law throughout the country. . . . Although the doctrine of \textit{caveat emptor}, so far as personal property is concerned, is very nearly abolished, it still remains as a viable doctrine in full force in the law of real estate. Absent any covenant binding defendant to sell a well constructed house, plaintiffs cannot sue on an implied warranty. That the rule of \textit{caveat emptor} applies, and that there are no implied warranties in the sale of real estate, has been criticized, especially when applied to the sale of new housing . . . .

A builder who sells a completed house is thereafter not liable to the purchaser for damages resulting from latent defects in the absence of express warranties in the deed or fraud or concealment. Neither fraud nor concealment is present here. . . .

The authorities cited by plaintiffs to avoid the established doctrine fall into two groups. In the first are cases of contracts for construction, all of which rest on the proposition that a party to such a contract is obligated to perform it properly. These authorities have no application to the facts of this case because the building

\textsuperscript{57} \textit{Id.} at 678-79, 42 N.E.2d at 808-09.

\textsuperscript{58} Massachusetts enacted the Uniform Sales Act in 1909.

\textsuperscript{59} See note 13 \textit{supra}.

was erected and the work completed before the transfer of ownership on June 3, 1952. The second group of cases deals with the concealment of known defects. These authorities are of no aid to plaintiffs since, even if we assume there was a defect (a matter which the record leaves in substantial doubt), there is nothing whatever in the statement of evidence and proceedings to indicate that such a defect in the sewer line was known to defendant, so that neither fraud nor concealment, as we have already stated, was present here.

As defendant notes, the policy reasons underlying the rule that the acceptance of a deed without covenants as to construction is the cut-off point so far as the vendor's liability is concerned, are rather obvious. Were plaintiffs successful under the facts presented to us, an element of uncertainty would pervade the entire real estate field. Real estate transactions would become chaotic if vendors were subjected to liability after they had parted with ownership and control of the premises. They could never be certain as to the limits or termination of their liability. The rule which we impose in the circumstances of the present action works no harshness on purchasers of real estate. Plaintiffs had an opportunity to protect themselves by extracting warranties or guaranties from defendant in the contract of sale and by reserving them in the deed. This is not an uncommon practice, and when pursued allows both vendor and purchaser to know the nature and extent of their rights and liabilities and to order their affairs accordingly.61

The principle of caveat emptor has not dominated the law of real property conveyancing in all American jurisdictions. Louisiana adopted from the French Civil Code the doctrine of redhibition which, in effect, established an implied warranty of quality in sales of real property as well as in sales of chattels. And this warranty applies to sales of the used house by the nonmerchant as well as to the commercial sale of new housing. The defect, to be actionable, must be latent, unknown to the buyer, and such that the buyer would not have purchased had he known of the defect, or at least not at that price.62 Termite infestation,63 defective roofing,64 improper settling,65 malfunctioning heating system66 and defective plumbing67 have constituted actionable defects.

Colorado has held that an implied warranty of quality applies in the

61 Id. at 296-98, 134 A.2d at 719-20.
65 Tuminello v. Mawby, 220 La. 733, 57 So. 2d 666 (1952).
sale of newly completed construction. In 1964, in the case of Carpenter v. Donohoe, the Supreme Court of Colorado stated as follows:

In 1931 a departure from the rule of caveat emptor in the purchase of a house was announced by a dictum in the case of Miller v. Cannon Hill Estates, Ltd., [1931] 2 K.B. 113. It was said in that case that warranties would be implied in a house, purchased in the course of construction, that it was built in an efficient and workmanlike manner and of proper materials and when finished would be fit for habitation.

Difficulty with such implied warranty rule was experienced later in the case of Perry v. Sharon Dev. Co., Ltd., (1937) 4 All.E.R. 390 (C.A.), involving a substantially completed house. The court finally concluded that the house was unfinished, for purposes of applying the Miller dictum, and consequently applied the implied warranty doctrine to a house substantially finished.

That a different rule should apply to the purchaser of a house which is near completion than would apply to one who purchases a new house seems incongruous. To say that the former may rely on an implied warranty and the latter cannot is recognizing a distinction without a reasonable basis for it.

We hold that the implied warranty doctrine is extended to include agreements between builder-vendors and purchasers for the sale of newly constructed buildings, completed at the time of contracting. There is an implied warranty that builder-vendors have complied with the building code of the area in which the structure is located. Where, as here, a home is the subject of sale, there are implied warranties that the home was built in workmanlike manner and is suitable for habitation.

A very recent opinion of the Supreme Court of New Jersey indicates that that jurisdiction is adopting the view of the Colorado court in Carpenter. In Schipper v. Levitt & Sons, Inc., the defendant builder-vendor contracted with the vendee prior to completion of construction of the home. In 1958, the vendee moved in and lived in the house until 1960, when the vendee leased the house to one of the plaintiffs for one year. Shortly after the lessee moved in, the other plaintiff, a sixteen-month old son of the lessee, was severely scalded by hot water from the bathroom faucet. The cause of the injury was alleged to have been the faulty design of the hot water system, and particularly the absence of a mixing valve, which resulted in abnormally hot water suddenly flowing from the faucet without notice or warning. The theories of the plaintiffs' case were negligence and breach of an implied warranty of habitability. After the plaintiffs presented their case, the trial court granted the defendant's motion to dismiss. The Supreme Court of New Jersey reversed.

68 388 P.2d 399 (Colo. 1964).
69 Id. at 402.
70 207 A.2d 314 (N.J. 1965).
and remanded for trial, holding that the theories of negligence and breach of implied warranty were both applicable.

In discussing the issue of implied warranty, the court stated:

The law should be based on current concepts of what is right and just and the judiciary should be alert to the never-ending need for keeping its common law principles abreast of the times. Ancient distinctions which make no sense in today's principles and tend to discredit the law should be readily rejected . . . . We consider that there are no meaningful distinctions between Levitt's mass production and sale of homes and the mass production and sale of automobiles and that the pertinent overriding policy considerations are the same. That being so, the warranty or strict liability principles . . . should be carried over into the realty field, at least in the aspect dealt with here. . . .

When a vendee buys a development house from an advertised model . . . he clearly relies on the skill of the developer and on its implied representation that the house will be erected in reasonably workmanlike manner and will be reasonably fit for habitation. He has no architect or other professional adviser of his own, he has no real competency to inspect on his own, his actual examination is, in the nature of things, largely superficial, and his opportunity for obtaining meaningful protective changes in the conveyancing documents prepared by the builder vendor is negligible. If there is improper construction such as a defective heating system or a defective ceiling, stairway and the like, the well-being of the vendee and others is seriously endangered and serious injury is foreseeable. The public interest dictates that if such injury does result from the defective construction, its cost should be borne by the responsible developer who created the danger and who is in the better economic position to bear the loss rather than by the injured party who justifiably relied on the developer's skill and implied representation.

The arguments advanced by Levitt in opposition to the application of warranty or strict liability principles appear to us to lack substantial merit. Thus its contention that *caveat emptor* should be applied and the deed viewed as embodying all the rights and responsibilities of the parties disregards the realities of the situation. *Caveat emptor* developed when the buyer and the seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not on an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale. Levitt expresses the fear of "uncertainty and chaos" if responsibility for defective construction is continued after the builder vendor's delivery of the deed and its loss of control of the premises, but we fail to see why this should be anticipated or why it should materialize any more than in the products liability field where there has been no such result.71

The contract in *Schipper* was entered into prior to completion of construction, but the court clearly did not consider this to be of significance;

71 *Id.* at 325-26.
the court was imposing an implied warranty of habitability in the sale of new houses by builder-vendors. If recovery is allowed for bodily injury, it seems that recovery would be granted in the case of economic loss, such as the cost of repairing a defect.

The holding in Schipper on the negligence theory is not novel, nor is the casting aside of the privity requirement in this context. In recent years there have been a number of cases holding builder-vendors liable for bodily injury to vendees or third persons on the theory of negligence in construction.\(^\text{72}\)

It is interesting to note that the Supreme Court of Wisconsin recently held that a builder-vendor was liable to the vendee of a newly constructed house for the expense of repair of certain structural defects on the basis of negligence in its construction.\(^\text{73}\) The house was completed when the contract for sale was made. This appears to be another inroad upon caveat emptor; the Wisconsin case is unusual in its imposition upon the builder-vendor of liability for economic loss on negligence theory.

Concerning the emerging liability of the builder-vendor, the law has developed certain curious patterns. With respect to bodily injury, the theory of recovery has generally been negligence; with respect to economic loss, the theory has generally been implied warranty. The recent New Jersey and Wisconsin cases are an indication that these patterns may be merging.

**Proposed Revision of the Law**

It is submitted that a measure of protection with respect to quality be given the purchaser of improved real property similar to the protection given the purchaser of a chattel by the implied warranty of merchantable quality. In the analysis of the protection to be afforded the purchaser of improved real property, the following must be considered: (a) the nature of the seller, merchant or nonmerchant; (b) the nature of the property, new or used; and (c) the knowledgeability of the buyer as to defects.

The first question is whether an implied warranty of quality should be limited to sales by merchants, that is to say, builders and developers, by way of analogy to common-law and statutory requirements concerning sales of goods which limit the applicability of the warranty of merchantability to merchants. It is my opinion that this limitation is questionable.

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\(^{73}\) Fisher v. Simon, 15 Wis. 2d 207, 112 N.W.2d 705 (1961).
with respect to sales of goods, and that it should have no place in the law of real property sales.

Today the implied warranty of merchantability has nothing to do with the special knowledge or responsibility of the seller of goods. When the local grocer sells a loaf of packaged bread, he may be described as a merchant with respect to that bread, but he has no more control over the contents or quality of that bread and no more knowledge about how bread should be made or packaged than the plumber’s wife who buys it. The same is true of the neighborhood druggist with respect to his sale of nationally-advertised cosmetics. The argument that the grocer or the druggist selects his supplier is also specious in this day of mass advertising and trade-name selling; in fact, the retailer may not have any idea who the producer of the particular article is. Frequently, the wholesaler or distributor is in a very similar position to the retailer; he will be liable for defective quality to his immediate vendee, and where privity requirements have collapsed he may be liable to the ultimate consumer directly. So any notion that liability without demonstrated fault should only be imposed upon those who are knowledgeable about the commodity in which they are dealing or are responsible for its production does not have any significance in our sales law today, although it seems that such was the origin of the “merchant” requirement which still exists.\(^7\)

Whether the seller is an amateur or a professional should not be relevant to the question of the existence of an implied warranty of quality in the real estate sale, because expertise is not the true issue with respect to liability for quality. The issue should be whether the buyer got what he bargained for. There is a further reason why the “merchant” requirement should not be applied to real property sales. Practically all sales of chattels are made by merchants; the large majority of sales of improved real property is made by nonmerchants—the owners of used private homes. If there is need for protection for the purchaser of a house, then the exclusion of the sale by the nonmerchant from the coverage would limit the applicability of the warranty to a small percentage of the sales of improved real property. There is no reason why the purchaser from the nonmerchant has any less need for protection than the purchaser of new construction from the merchant.

It seems that the implied warranty of merchantability, whether with respect to personalty or realty, has nothing to do with the characteristics of the seller; it is rather the implicit understanding of the parties when a

\(^7\) See 1 WILLISTON, SALES §§ 228-29 (rev. ed. 1948).
fair price is paid that the goods are reasonably fit for the general purposes for which they are normally used, or that the building is reasonably fit for habitation. The buyer is purchasing a car whose steering apparatus works; the buyer is purchasing a house in which the heating system operates. These requirements are too obvious to put down in writing, since one does not give money in exchange for illusionary value; consequently the law should read this term into the contract as one which is implied in fact. 75

Dean Prosser has described the warranty of merchantability as follows:

From the beginning, [the merchantability] warranty has not required reliance upon any skill or judgment or information of the seller. It has not rested upon misrepresentation, with its tort theories, but upon contract. The question is one of what the buyer has ordered and the seller has undertaken to deliver. The seller's knowledge of the qualities of the goods is not assumed; he may never have seen them. Any "reliance" that may enter the warranty is reliance merely upon his undertaking, and does not differ from the reliance to be found in any other contract. 76

The next issue is whether the fact that the property is new or used is relevant to the question of the existence of an implied warranty of quality. Neither the Uniform Sales Act nor the Uniform Commercial Code excepts the sale of the second-hand chattel from the implied warranty of merchantability, although both limit the warranty to sales by merchants. 77 There have been decisions which have excluded the warranty in the case of the second-hand sale. 78 The reasoning has been that the purchaser of second-hand goods is on notice that the goods may be defective; consequently the implied warranty of merchantability is not justified. However, the purchaser pays a fair second-hand price which indicates that the expectation of the parties is that the goods have a value roughly equivalent to the price paid. Obviously, merchantability of second-hand goods is different from merchantability of new goods, and certainly it will vary with the age and condition of the goods and the price paid, but there clearly is an expectation of quality as there is in the case of the purchase of new goods. Comment 3 to section 2-314 of the Uniform Commercial Code states that second-hand sales are covered by the section.

Most sales of personal property involve new goods. Most sales of real property involve used construction. If the implied warranty is recognized

75 See Prosser, The Implied Warranty of Merchantable Quality, 27 Minn. L. Rev. 117, 125 (1943).
76 Id. at 149.
77 Uniform Commercial Code § 2-314; Uniform Sales Act § 15(2).
78 See note 14 supra and accompanying text.
only in the sale of new construction, then the law offers only occasional protection to the purchaser. The typical sale of improved real estate involves a good deal of money; in the case of the home purchase, it usually is the largest single investment the purchaser makes in his lifetime. To conclude that there are no implicit assumptions as to quality when the breadwinner earning 13,500 dollars invests 30,000 dollars in a house is absurd. Any distinction between the purchase of the new house and the purchase of the used house with respect to assumptions as to quality is wholly unrealistic; the only difference is in the degree of expectation.

The next question is the relevance of the buyer’s knowledge, or opportunity to know, about defects. Clearly, if the purchaser knows of the defect, he is not entitled to the protection of the law; this is recognized at common law and under uniform legislation with respect to sales of goods. If there is an opportunity to inspect, and the defect is discoverable upon inspection, then it is inappropriate to imply as a term of the contract a promise or representation against the existence of the defect. This is consistent with conventional sales law, and would be appropriately applied to the real estate sale. The real problem here is the character of the inspection which is to be the standard. Is the purchaser to be held to the standard of inspection by the construction expert, or by the typical relatively uninformed home buyer whose observation and perception is limited to the externals? Certainly the buyer should be held at least to the standard of competence and skill which he in fact possesses; otherwise, it seems appropriate to hold the purchaser only to that knowledge which an inspection by the proverbial reasonable nonexpert would disclose. It is wholly impractical for the typical middle-class homebuyer to employ a series of experts in various aspects of construction to examine his prospective purchase.

I propose, therefore, that in all sales of new construction, whether the seller is a merchant or a nonmerchant, there should be an implied warranty of merchantable quality comparable to the warranty provided by section 2-314 of the Uniform Commercial Code, subject to the exclusion of known or discoverable defects. What defects would constitute a breach of this warranty cannot be designated with specificity; this must be left to developing case law as in the field of sales of goods. The time period within which the cause of action must be commenced poses a difficult problem. The Uniform Commercial Code has a four-year statute of limitations for

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79 Uniform Commercial Code § 2-316(3)(b); Uniform Sales Act § 15(3); Prosser, supra note 75, at 153-54.
actions based on breach of contract for the sale of goods, including breach
of warranty. The Louisiana Civil Code has a one-year statute of limita-
tions for an action based on breach of implied warranty, except that if the
seller knows of the defect at the time of the sale, the action may be com-
menced within one year after the buyer discovers the defect. Some
defects in new construction might be considered to constitute breaches
of merchantability although they may not appear until a number of
years after the sale; nevertheless there is good reason for limiting
the period within which an action on this ground may be commenced to
perhaps five years from the date of the sale, regardless of when the defect
is discovered by the buyer. This is an arbitrary limit, as are all statutes
of limitations, but under all the circumstances, probably a workable one.
A contingent liability extending over a longer period may be unduly
onerous upon the vendor.

I propose also that there should be an implied warranty of merchant-
ability in every sale of used construction, whether the seller be a merchant
in the field of real estate or a nonmerchant, subject to the exclusion of
known or discoverable defects. The determination of what constitutes
merchantability here also must be left to the judgment of individual courts
and juries. It is clear that the problem of merchantability is more complex
in the case of used construction than it is in the case of new construction.
The purchaser’s justifiable expectations are quite different in each in-
stance. In view of the fact that this concerns the contingent liability of
the nonmerchant, and the rather uncertain nature of merchantability in
the case of used construction, a short period of exposure to potential
liability is called for. I would propose that an action for breach of the
implied warranty of quality in the sale of used construction must be
commenced within one year after the conveyance, regardless of when
the buyer discovers the defect.

It is proposed that the cause of action for breach of the implied war-
ranty of quality be in addition to any cause of action for fraudulent non-
disclosure.

The argument may be made that the creation of an implied warranty
of quality would result in the harassment of the seller for all sorts of
minor shortcomings in the house that is sold. Certainly, the defect must be
substantial if it is to be considered a breach of the warranty. Merchant-
ability is not perfection; it is a relative concept, depending upon price

80 Uniform Commercial Code § 2-725.
and age. The danger of harassment of the seller is of course present in the sale of chattels, but the merchant, the consumer, the insurance industry and the courts have managed to resolve the problem in that area; no reason exists why the same cannot be accomplished with respect to real estate sales. The extraordinary solicitude of the law for the seller of real property seems to be misplaced; the seller is in the superior position to be familiar with the existence of the defect, great or small. The law should also focus its concern upon the buyer, who, in the absence of an implied warranty of quality, may be subjected to harassment by the existence of defects, large or small.

Lawyers have a tendency to consider problems in terms of clearly defined alternative situations; we are disposed to think of a seller who either knows of a latent defect or is ignorant of the defect. The question is not always that easy of definition. The seller may have had recurrent repairs performed on the plumbing system, or on the heating system; these repairs may have corrected the problems, or they may be the prelude to a complete breakdown. Is this knowledge of a latent defect? Certainly the seller knows more about the problem than the buyer does. If the seller does not disclose his experiences with the plumbing or the heating, is he an “innocent” seller? Should the seller or the buyer bear the loss in such a situation?

This proposed change in the law may seem rather harsh on the amateur homeowner seller who sells with a latent defect in good faith. On the other hand, the existing law seems rather harsh on the amateur homebuyer who buys in good faith with no knowledge of the latent defect. Why does a rational legal system place the entire risk upon the party least likely to have knowledge or the opportunity to know of the defect? It is not easy to understand. But if there is some hesitation about placing the entire burden upon the innocent amateur seller, why not at least split the burden between the parties? Why must the law always require that the full brunt of the loss fall on one of two innocent parties? It does not seem unreasonable that the purchaser’s remedy should be one-half the normal damages, in view of the good faith of the nonmerchant seller. This may be novel to the common law, but it certainly is at least as reasonable as punitive damages which have been imposed in certain situations in other areas of the law.82

The argument may be made that the consequence of such a change in the law would be merely an additional clause in the contract of sale

82 See generally McCormick, Damages § 81 (1935).
which disclaims any implied warranties. Recourse to this is, of course, available to the seller of goods, but the complete disclaimer is seldom employed, although the partial disclaimer is not unusual. Complete disclaimers are not conducive to the sale of goods; the same may be true of the sale of real property. Any contractual disclaimer of an implied warranty of quality in the sale of real property should be required to be in writing and should be conspicuous and should be so phrased to convey clearly the significance of the absence of the warranty; section 2-316 of the Uniform Commercial Code sets forth similar standards for disclaimers.

A forceful argument can be made for the proposition that a disclaimer of an implied warranty should be effective only insofar as it refers to specific components of the subject of the sale. That is to say, a statement in the contract that the sale carries no implied warranties of quality should be ineffective as a disclaimer. For example, in order to disclaim any warranty with respect to plumbing, the statement must refer specifically to the absence of any assurances regarding the plumbing. Since any disclaimer of merchantability normally defeats the expectations of the purchaser, it is reasonable that the seller be required to call the purchaser's attention to precisely what is being disclaimed. In view of the fact that there is no implied warranty with respect to defects known to the purchaser, or defects which would be discoverable upon a reasonable inspection, strict requirements for disclaimers of quality as to latent defects appear appropriate.

A forceful argument can also be made for the proposition that any disclaimer of fitness for habitation in the sale of new construction is unconscionable and against public policy. Should a merchant be permitted to build and receive money for a structure which appears to be a house or an office building, and avoid liability in the event the structure has a material defect? Is it consistent with sound social policy to permit exculpation for defective residential or commercial construction?

Possibly the seller's greatest exposure for a breach of an implied warranty of quality is liability for bodily injury. Extensive liability for bodily injury may result from a defect which can be corrected without great expense. It may be harsh to impose such liability upon the innocent nonmerchant seller who has no knowledge of the latent defect, although such liability for bodily injury has been imposed on the builder-vendor.84

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83 Cf. Uniform Commercial Code §§ 2-302, -719(3) which establish unconscionability as a ground for nonenforcement of a term in a contract for the sale of goods.
The obligation of the nonmerchant seller to make good on what he promised to transfer should not be barred because of the possibility of certain causally-related injuries; it is not essential in this instance that consequential or tort damages be recognized. There is no reason why a court may not recognize an implied warranty of quality in the sale of real property by the nonmerchant seller and limit the remedies to damages equal to the expense of correcting the defect or to the difference between the value of the house with the defect and the value of the house as impliedly warranted.

CONCLUSION

The trend is in the direction of further protection for the purchaser of real property, but caveat emptor still dominates the field. It is time that the gamble be taken out of real estate transactions, as it has been from commerce in goods. Instead of chipping away at the doctrine of another era, caveat emptor, by fine distinctions and inadequate tort theories, it is suggested that more courts and legislatures directly confront the problem by establishing rules of law to implement the principle that a fair price demands a sound product.
INSTITUTIONAL DECISION-MAKING AND THE PROBLEM OF FAIRNESS IN FTC ANTITRUST ENFORCEMENT

BERNIE R. BURRUS* AND RALPH J. SAVARESE**

The authors address themselves to current problems in FTC antitrust litigation. After treating the present controversy over the use of rulemaking by the FTC, Professor Burrus and Mr. Savarese turn to the problem of delegation and institutionalization of the decision-making process within that agency. Noting the danger of unfairness lurking throughout any such institutionalization, whether in rulemaking or adjudicative proceedings, the authors survey the current decision-making scheme of the FTC and conclude with proposals for reform.

INTRODUCTION

Since its inception in this country, the administrative tribunal has been the subject of critical comment and evaluation by both practitioner and academician.1 Despite the early assaults on its constitutional position in our limited, tripartite government of laws and not of men,2 this "headless fourth branch"3 has finally become recognized as a co-ordinate instrumentality of justice.4 The limitations of the traditional mechanisms of government in achieving the desideratum have compelled this acknowledgment.5 Indeed, few serious commentators today would advocate the elimination of administrative agencies and the return of their functions

* Associate Professor of Law, Georgetown University Law Center. S.J.D., University of Michigan Law School.

** Member of the Bars of the District of Columbia and the State of New York.


3 LANDIS, op. cit. supra note 2, at 47, quoting and commenting on The President's Committee on Administrative Management, Administrative Management in the Government of the United States 30 (1937).


to court or legislature. Problems and injustices may occur within any institutional structure affecting private rights and obligations. The solution lies not in the excision of the necessary organ but in the cure of its infirmities.

The alleged maladies of the administrative process, real or unreal, are too numerous and complex to catalogue and analyze in an article of this nature. At the heart of the current criticism and appraisal, however, looms a problem which is both capable and deserving of serious reflective study. In its decision-making aspect the administrative agency not only affects directly the rights and obligations of the parties before it, for policy formulation, the very essence of "law making," is achieved as well. This is true whether the decision be by rule or adjudication. In its broadest aspect the problem is thus posed: Are the two objectives, justice in the particular case and general policy formulation in the public interest, incompatible of simultaneous accomplishment under current practice?

Although evaluation of the administrative process has most often been approached from the standpoint of all agencies as a group, this article will study the decision-making process of a single agency, the Federal Trade Commission, in its administration and enforcement of the antitrust

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6 The organized bar has opposed attempts to reduce the jurisdiction of administrative agencies. The ABA Section of Administrative Law, for example, summarily rejected the proposal presented to Congress in 1954 to transfer jurisdiction over unfair labor practice cases from the NLRB to the federal district courts. 80 A.B.A. Rep. 399 (1955).
9 These functions have been variously differentiated in both judicial decisions and academic writing. Perhaps the best distinction is found in U.S. Dep't of Justice, Attorney General's Manual on the Administrative Procedure Act 14-15 (1947):

Rule making is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it is primarily concerned with policy considerations. The object of the rule making proceeding is the implementation or prescription of law or policy for the future, rather than the evaluation of a respondent's past conduct. Typically, the issues relate not to the evidentiary facts, as to which the veracity and demeanor of witnesses would often be important, but rather to the policy-making conclusions to be drawn from the facts. . . . Conversely, adjudication is concerned with the determination of past and present rights and liabilities. Normally, there is involved a decision as to whether past conduct was unlawful, so that the proceeding is characterized by an accusatory flavor and may result in disciplinary action. Or, it may involve the determination of a person's right to benefits under existing law so that the issues relate to whether he is within the established category of persons entitled to such benefits. In such proceedings, the issues of fact are often sharply controverted.
laws, *i.e.*, the Federal Trade Commission Act10 and the Clayton Act,11 as amended by the Robinson-Patman Act.12 The FTC has been selected for reasons of personal interest and in the belief that the problems of the administrative process must be approached primarily on an individual basis. It is decision-making, not the specific nature of the matter being decided, which is common to all administrative agencies; thus, decisional problems vary among ratemaking and licensing agencies, claims agencies, the NLRB and the FTC.13 Furthermore, the problem may differ within a particular agency which is concerned with several types of cases. In the FTC, for example, decision-making presents different problems in an antitrust proceeding than in a false advertising or other deceptive act or practice case. The issues in antitrust cases are more complex, are less susceptible to precise proof and frequently demand economic expertise. The volume of testimony in antitrust litigation is much greater, making personal mastery of the record on appeal more difficult,14 and the demeanor of witnesses is generally less important. The scope of this study is limited in recognition of such diversity.

**Decision by Rule or Adjudication?**

The FTC has the initial and primary responsibility for interpretation and implementation of congressional policy as expressed in the broad prohibitions of the Federal Trade Commission Act and the Clayton Act, as amended by the Robinson-Patman Act. In the antitrust area, the Commission has to date used only the adjudicative process to perform these policymaking and lawmaking functions, choosing not to utilize rulemaking to promulgate binding substantive antitrust rules.15

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14 United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), provides a vivid example of a complex antitrust case. "Many thousands of pages of testimony and many hundreds of proposed findings of fact ... [were] submitted to the Court. . . . [United Shoe involved] more than [a] 14,000 page record, and . . . more than 5,000 exhibits, representing the diligent seven year search made by Government counsel . . . ." *Id.* at 329, 345 (opinion of Wyzanski, J.).
15 For justification of this FTC practice, see Kintner, *supra* note 13, at 970. As practiced by administrative agencies in general, however, such abstention has been criticized. See
Some critics of the administrative process have recommended the use of rulemaking to effectuate policy, favoring the promulgation of general legal principles in legislative proceedings which operate prospectively. Furthermore, although the details of their positions are not entirely clear, FTC Chairman Paul Rand Dixon and Commissioners Everette MacIntyre and Philip Elman are each on record as favoring the use of rulemaking to establish law and implement policy of the Commission.

To the extent that these critics and commissioners contemplate the formulation of antitrust standards or principles of legality, their rulemaking proposals must be rejected. The task of policymaking and lawmaking cannot and should not be accomplished by the formulation of rules of general application outside the context of a specific case or by ex parte enunciation of principles. Antitrust law operates in the constantly changing, dynamic area of economics and business. Its function is to regulate the economy and the business community, not to stifle them. As business proceedings, supra note 1, at 867 passim; Hector, supra note 1, passim. In the area of unfair trade practice, as distinguished from monopoly and restraint of trade, the Commission has authority to promulgate substantive rules which have the force and effect of law. Wool Products Labeling Act § 6(a), 54 Stat. 1131 (1940), 15 U.S.C. § 68d(a) (1958); Fur Products Labeling Act § 8(a)(2)(b), 65 Stat. 180 (1951), 15 U.S.C. § 69f(a)(1) (1958); Textile Fiber Products Identification Act § 7(c), 72 Stat. 1721, 15 U.S.C. § 70e(a) (1958); Flammable Fabrics Act § 5(c), 67 Stat. 113 (1954), 15 U.S.C. § 1194 (1958). Under Robinson-Patman Act § 1, 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13 (1958), as amended, 15 U.S.C. § 13 (Supp. V, 1964), the Commission has the power to limit by rule the granting of quantity discounts above a certain amount of purchases, regardless of whether or not the discounts can be cost-justified. These rules of quantity limitation have the force and effect of law. Also promulgated by the FTC are trade conference rules which serve as a guide for complying with the laws enforced by the Commission but do not have the force and effect of law. See FTC Act § 6(g), 38 Stat. 722 (1914), 15 U.S.C. § 46(g) (1958).

E.g., Friendly, supra note 1, at 877-78, which also suggests the codification of all well-established precedents.


See generally KINZER, AN ANTITRUST PRIMER 1-15, 223-32 (1964); Oppenheim, Small
ness needs and practices change in accord with the requisites of contemporary society, so must the laws which regulate them. Only case-by-case adjudication permits this indispensable flexibility.  

The retroactive nature of the decision-making process may have worked undue hardship in the early days of the FTC. But now there is considerable precedent to aid the businessman in the planning of his future conduct. Should the Commission in an individual case decide to depart substantially from existing law or to formulate principles of law in an area where none existed before, unfairness need not be the result. The decision can and should be made prospective in effect.

The conclusion that rulemaking would be unwise is further supported by the fact that the Department of Justice and the federal district courts have concurrent jurisdiction with the FTC in the formulation and enforcement of antitrust standards of legality. The harmonization of the legal standards developed by the FTC with those created by the courts is a difficult problem. While in applying to specific fields and cases the broad standards of the Federal Trade Commission Act and the Clayton Act the Commission has been recognized as a body of experts whose determinations are to be accorded great weight by the courts, ultimate authority and responsibility for determining antitrust standards of legality and harmonizing FTC standards with judicial standards is lodged with the courts of appeals and the Supreme Court through judicial review.


19 Kintner, supra note 13, at 971.
20 The Sherman Act, passed in 1890, has been in existence for more than seventy years, while the Clayton Act and the Federal Trade Commission Act, both enacted in 1914, are now more than fifty years old.
25 Mr. Justice Frankfurter judicially noted this responsibility in FTC v. Motion Pic-
If such judicial review is to continue to constitute a meaningful limitation on FTC action, and if the Department of Justice is to continue to have concurrent antitrust jurisdiction, then ultimate authority for the fashioning and harmonizing of antitrust standards of legality must remain with the judiciary. If this is to be the case, however, the FTC must continue to develop antitrust principles and policy through adjudication, for only in this method has the reviewing court the necessary power of discretion. Legislative rules, like legislation in general, are binding on the court if reasonable; the judiciary has no more authority to substitute its judgment as to the content of such rules than it would have to question the wisdom of statutory laws.  

To the extent that the previously named FTC commissioners contemplate, rather than the formulation of antitrust standards or principles of legality, the finding of basic industry facts through rulemaking, e.g., the number and size distribution of firms, methods of distribution, and the importance of freight costs and perishability, the above-noted objections are removed. What probably is the most insidious of all aspects of agency decision-making, however, still persists: the danger of unfairness to private parties flowing from the institutionalization of the factfinding process. The problem is augmented by the fact that adequate norms have yet to be developed by which this unfairness may be assessed and prevented. Traditional standards of substantive and procedural due process, including the right to notice and hearing, the right to representation by counsel and the right to a full and true disclosure of the facts, recognized and protected by the Administrative Procedure Act, afford no solution to the problem. The remainder of this article will discuss the dangers of institutional unfairness in the FTC antitrust decisionmaking process, whether through rulemaking or adjudication, postulate standards to preserve institutional fairness, and recommend procedures for the implementation of these standards.

ture Advertising Serv. Co., 344 U.S. 392, 405 (1953) (dissenting opinion), stressing the judicial review obligation of the Court to avoid rubber-stamping the FTC either in leaving it "at large" on questions of fact or in determinations of law which are ultimately for the courts to decide. "It is also incumbent upon us to seek to rationalize the four statutes directed toward a common end and make of them, to the extent that what Congress has written permits, a harmonious body of law." Id. at 406.


The Institutional Problem of the Decision-Making Process

The FTC has attempted over the years to retain great personal control over the decision-making process. It cannot, however, personally conduct every stage of decision-making; time will simply not permit.\(^28\) Delegation is an ineluctable necessity, and this is what generates the institutional problem.\(^29\) The principal point of inquiry must always be: What aspects of the decisional process, whether in an adjudicative or rulemaking proceeding, should be delegated, and to whom should they be delegated? More specifically, should the receiving of evidence or data be delegated, or should the Commission or one of the commissioners preside at the hearings to gather the facts?\(^30\) If the function of receiving the evidence and data is so delegated to the hearing officer, the question arises as to other powers and duties incidental to such function: (1) the power to conduct prehearing conferences to simplify the issues and generally expedite the proceedings; (2) the power to rule on interlocutory motions (with the attendant problem of the finality to be attached to such rulings); and (3) the power to make findings of fact and conclusions of law, and in a rulemaking proceeding to issue rules (with the attendant problem of the weight to be accorded such findings, conclusions and rules).\(^31\) Upon agency review, should the task of reviewing the findings, conclusions and rules of the hearing officer be delegated, or should the commissioners themselves personally consider the record and to what extent? Should the task of drafting an opinion in support of the decision or rule be delegated, or should this be the personal task of the Commission?

The need for delegation, and thus the problems involved in the institutionalization of the decision-making process, would be greater with respect to a rulemaking proceeding than with adjudication. All interested parties would presumably have an opportunity to present written data, views and arguments. The antitrust rulemaking proceeding would also


\(^29\) See Morgan v. United States, 298 U.S. 468, 478 passim (1936).

\(^30\) See id. at 479, 481.

\(^31\) See Universal Camera Corp. v. NLRB, 340 U.S. 474, 491-97 (1951); NLRB v. Universal Camera Corp., 190 F.2d 429 (2d Cir. 1951), where Judge L. Hand, after posing the same question, held that no general test is applicable, each case being decided on its own facts, with at least some weight accorded the findings of the hearing examiner. Judge Frank would distinguish between testimonial and secondary inferences. Id. at 431 (concurring opinion).
presumably inquire into all competitive aspects of the industry involved, including market behavior and performance as well as market structure. The "Rule of Reason," with an extended inquiry into competitive realities, would be the guiding spirit of the proceeding. With multiple parties, numbering as many as one hundred in some cases, and with multiple documentary filings on each issue, this type of rule-making proceeding would undoubtedly produce enormous records, overshadowing even those in adversary-adjudicative proceedings. Because this tremendous volume of data would have to be analyzed and evaluated, the gravitation toward greater institutionalization of the factfinding process would be ineluctable. It is, therefore, recommended that a final judgment on the advisability and formulation of rulemaking procedures fully weigh the danger of unfairness which inevitably lurks in such institutionalization.

Although from the viewpoint of institutionalization, adjudication is more acceptable than rulemaking in FTC antitrust enforcement, this is not to say that no problems exist under the former system. The deficiencies of agency adjudicative practices, which flow from the problems of delegation above suggested, were well stated by Chairman Acheson of the Attorney General's Committee on Administrative Procedure:

[T]he agency is one great obscure organization with which the citizen has to deal. It is absolutely amorphous. He pokes it in one place and it comes out another. No one seems to have specific authority. There is someone called the commission, the authority; a metaphysical omniscient brooding thing which sort of floats around in the air and is not a human being. This is what is baffling.

....

There is [an] ... idea that Mr. A heard the case and then it goes into this great building and mills around and comes out with a commissioner's name on it but what happens in between is a mystery. That is what bothers people.

....

I myself have felt baffled in presenting cases because I knew that the man who was listening to me argue was not the man who was going to decide the case and what I wanted to do was to get my hooks into the fellow who was going to decide the case.33

**CURRENT FTC PRACTICE**

The decision-making process in the FTC involves the allocation of functions among three bodies: (1) the agency members, (2) the hearing

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33 Hearings Before a Subcommittee on S. 674, 675, 918 of the Senate Committee on the Judiciary, 77th Cong., 1st Sess. 807, 816 (1941).
examiners, and (3) the staff. The FTC's new rules of practice and procedure, the relevant provisions of the Administrative Procedure Act, and the informal practices of the FTC will be considered below in an effort to piece together the complete picture of current FTC practice.

THE HEARING EXAMINER: POWERS INCIDENTAL TO FUNCTION AS PRESIDING OFFICER AT HEARING

The FTC rules of practice and procedure confer upon duly qualified hearing examiners the power to preside over and conduct all hearings in adjudicative proceedings. Incidental thereto, section 7(b) of the APA, and the Commission's rules in accordance with the act, grant directly to hearing officers the power to administer oaths and affirmations, to issue subpoenas and orders authorized by law, to rule upon offers of proof and receive relevant evidence, to take or cause to be taken depositions, to regulate the course of the hearing, to hold conferences for the settlement or simplification of the issues, and to dispose of procedural requests or similar matters. This direct authority is in sharp contrast to the pre-APA period, when the hearing examiner's powers in conducting hearings depended solely upon delegation by the members of the agency.

Interlocutory Ruling Power

The present FTC rules substantially restrict agency review of examiners' interlocutory rulings. Thus, a party may only request permission to appeal a ruling; such permission will be granted only "in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest." Furthermore, where a hearing examiner has ruled on a motion to limit or quash a subpoena or order of access, appeal to the Commission will not be entertained unless the ruling "involves substantial rights and will materially affect the final decision and...a determination of its correctness before conclusion of the hearing will better serve the interests of

36 FTC Rules, 16 C.F.R. § 3.15(a) (1963).
38 FTC Rules, 16 C.F.R. § 3.15(c) (1963).
justice."\(^{41}\) Where a hearing examiner has barred or suspended an attorney, however, appeal to the Commission is a matter of right.\(^{42}\)

**Prehearing Conference Powers**

Previous rules of practice and procedure provided only that the hearing examiner might, in his discretion, direct counsel for all parties to meet with him and discuss simplification of the issues, amendment of the pleadings, stipulations, limitation of the number of expert witnesses, and other matters that might aid in the disposition of the proceedings.\(^{43}\) The present rules provide that a prehearing conference is mandatory upon motion of any party or if it appears probable that the case will extend for more than five days of hearing. In shorter cases the examiner may order such conferences sua sponte.\(^{44}\) During the conference either party may be compelled to disclose the names of contemplated witnesses and to make available for copying and inspection nonprivileged documents, papers, books, and other physical exhibits.\(^{45}\) At the close of the conference, the hearing examiner is to enter in the record an order reciting the action taken, which order controls the subsequent course of proceedings, unless modified at the hearing to prevent manifest injustice.\(^{46}\) Failure or refusal to make the required prehearing disclosure as to witnesses or documents "may be considered a contempt of the Commission"\(^{47}\) or may result in the suspension or barring of the attorney involved from further participation in the proceeding.\(^{48}\)

**THE HEARING EXAMINER AND THE COMMISSION**

The APA employs the language of "initial" and "recommended" decisions of examiners.\(^{49}\) In spite of the distinction drawn in the statutory language, each type is in fact only a recommendation. This conclusion clearly flows from section 8(a) of the APA: "On appeal from or review of the initial decisions of such officers the agency shall, except as it may

\(^{41}\) FTC Rules, 16 C.F.R. § 3.17(f) (1963).

\(^{42}\) FTC Rules, 16 C.F.R. § 3.15(d) (1963).


\(^{44}\) FTC Rules, 16 C.F.R. § 3.8 (1963).

\(^{45}\) FTC Rules, 16 C.F.R. § 3.8(a)(6) (1963).

\(^{46}\) FTC Rules, 16 C.F.R. § 3.8(c) (1963).

\(^{47}\) FTC Rules, 16 C.F.R. § 3.12 (1963).

\(^{48}\) FTC Rules, 16 C.F.R. § 3.15(d) (1963).

limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision.\textsuperscript{50} The agency is thus clearly free to substitute its own judgment for that of the examiner on any determination of policy, law or fact. The provision of section 8(a) that an initial decision of an examiner becomes the decision of the agency "in the absence of either an appeal to the agency or review upon motion of the agency" is of little consequence. Even in the few cases in which no party appeals, the provision does not prevent the agency from reviewing to whatever extent it chooses.

Prior to the APA, an agency was free to adopt an examiner's report whenever it saw fit. The only change under the APA is that when neither party appeals the agency must take affirmative action within a specified period if it wishes to review. Nevertheless, the agency always has the power, in the words of section 8(a), to "require (in specific cases or by general rule) the entire record to be certified to it for initial decision."\textsuperscript{51}

The present Commission rules of practice and procedure can be said only to have reaffirmed what the APA has already established, \textit{i.e.}, the examiner's power of recommendation. The Commission on review may "exercise all the power which it could have exercised if it had made the initial decision."\textsuperscript{52} This is substantially identical to the APA's provision in section 8(a). The current rules, just as section 8(a), require the Commission, if neither party appeals, to take affirmative action if it wishes to review.

\begin{quote}
[T]he hearing examiner shall file an initial decision which shall become the decision of the Commission thirty (30) days after service thereof upon the parties unless prior thereto (1) an appeal is perfected under \S\ 3.22 [governing procedures for appealing from initial decision]; (2) the Commission by order stays the effective date of the decision; or (3) the Commission issues an order placing the case on its own docket for review . . .\textsuperscript{53}
\end{quote}

Thus, both the FTC rules and the APA leave the hearing examiner with only the power of recommendation. The Commission may place a case on its own docket for review if neither party appeals and has the power to review de novo once the case is before it.

The 1961 rules of practice indicated a disposition on the part of the Commission to exercise its powers of review of the initial decision sparingly and, thereby, to invest the hearing examiner with substantial deci-

\begin{itemize}
\item \textsuperscript{50} 60 Stat. 242 (1946), 5 U.S.C. \S\ 1007(a) (1958).
\item \textsuperscript{51} APA \S\ 8(a), 60 Stat. 242 (1946), 5 U.S.C. \S\ 1007(a) (1958).
\item \textsuperscript{52} FTC Rules, 16 C.F.R. \S\ 3.24(a) (1963).
\item \textsuperscript{53} FTC Rules, 16 C.F.R. \S\ 3.21(a) (1963).
\end{itemize}
sion-making power. Appeals from the initial decision as a matter of right under the 1955 rules\textsuperscript{54} were restricted in 1961 by the requirement that a party seeking review submit a petition therefor, review being granted only if two or more commissioners believed that substantial questions were presented.\textsuperscript{55} The 1963 rules, however, have returned to the 1955 scheme of agency review as a matter of right.\textsuperscript{56}

One commentator believes that the Commission, by using its powers of certification and of de novo review sparingly, has in effect transferred actual decisional power to the hearing examiner.\textsuperscript{57} Taking issue with Professor Davis’ statement that the hearing examiner does not have “significant power” but only “one of recommending,”\textsuperscript{58} this leading FTC practitioner has asserted that “this may be true in theory but to any practitioner who has tried FTC cases it is completely unrealistic.”\textsuperscript{59} Furthermore,

in the historical development of the relationship of Hearing Examiners to the full Commission, it has become increasingly apparent that irrespective of the power and authority of the Commission itself, it has generally acted in adjudicatory matters as a court of appeals. Review by the full Commission is on the basis of an appeal brief, the length of which is limited and upon limited oral argument—forty-five minutes in most cases. Commissioners may, as a court of appeals, consider portions of the record specifically pointed out to them on specific contested issues but no one, I dare say, within or outside the Commission, would represent that any Commissioner, to say nothing about five Commissioners, reads the entire evidentiary record in reviewing cases—or even in any particularly significant case.

The net result is to repose in Hearing Examiners tremendous power, and especially in those Examiners who formulate well reasoned opinions based upon detailed, careful findings of fact and resting upon controlling legal precedents.\textsuperscript{60}

Reasoning that “the Hearing Examiner is in a true sense a nisi prius judge whose findings of fact are usually decisive,”\textsuperscript{61} this critic has concluded that

commentators may talk about institutional decisions but when a practicing lawyer

\textsuperscript{56} FTC Rules, 16 C.F.R. § 3.22 (a) (1963).
\textsuperscript{58} 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 10.06, at 34 (1958).
\textsuperscript{59} Baker, supra note 57, at 268.
\textsuperscript{60} Id. at 268-70.
\textsuperscript{61} Id. at 267.
tries a case before a Hearing Examiner of the Federal Trade Commission, the furthest thing from his mind is the concept of an institutional group decision. He knows well the great impact that the decision of one man, the Hearing Examiner, will have upon his client. In the trial of the case he is primarily interested in one man, the Judge who sits before him, and his every move from answer through decision is directed to convincing that one man, through cross-examination, direct evidence, argument and briefs, of the validity of his position and that he should prevail. To this end, he is interested in building a solid record against the contingency of an adverse decision.

THE STAFF AND THE COMMISSION

On appeal to the agency, the case is assigned to one commissioner, who may or may not review the record prior to oral argument. In any event, immediately after oral argument, a tentative vote is rendered by the Commission. If the individual commissioner to whom the case has been assigned votes with the majority, he proceeds with the drafting of an opinion; otherwise, the writing of the opinion is assigned to one of the commissioners in the majority. In writing their opinions, the individual commissioners utilize the assistance of two or three personal advisors who are generally the equivalent of judges’ clerks. The extent to which these assistants are relied upon, if at all, varies with the individual commissioner, as well as with the type and policy importance of the case.

EVALUATION AND CONCLUSIONS

STANDARDS OF INSTITUTIONAL FAIRNESS

FTC decision-making, whether through adjudicative or rulemaking hearings, must, of course, be constructed so as to facilitate the implementation of antitrust objectives. Equally imperative, decision-making must be imbued with fundamental notions of fairness. This article has been principally concerned with the preservation of fundamental fairness as jeopardized by the institutionalization of the decisional process. Set

62 Id. at 284.
64 The Office of Special Legal Assistants was formerly also available to aid the commissioners in the research and preparation of opinions. See Auerbach, supra note 63, at 484-90; Berger, Removal of Judicial Functions From Federal Trade Commission to a Trade Court: A Reply to Mr. Kintner, 59 Mich. L. Rev. 199, 217 n.84 (1960). It was recently abolished in favor of the present system.
out below are the norms believed to be necessary to preserve this institutional fairness.

First, the officers who decide the issues of basic fact must personally study the record in order to understand sufficiently the issues and the relevant evidence; without a close knowledge of the evidence fair findings of fact cannot be rendered.\textsuperscript{65} Assistants may be used to sift, synthesize and evaluate the evidence for the deciding officers, but this in itself will not convey the requisite knowledge of the evidence. Mastery of the record, especially the voluminous record of an antitrust case, is not something that can be transferred or imparted from one to another by summaries of the evidence alone. The deciding officers should read all or at least substantial portions of the transcript of the evidence, in addition to personally hearing the testimony and watching the demeanor of witnesses where credibility of the testimony is critical.\textsuperscript{66}

Second, counsel for the parties should be afforded an opportunity by oral argument to persuade the deciding officers of the validity of their position on the facts as well as the law. This includes an opportunity to debate the particular points of argument which concern the officers. Mr. Cooper, both professor and practitioner, summed it up in the following statement:

As every trial lawyer knows, the opportunity to cross verbal swords with the person who will ultimately write the decision—to learn by oral argument what issues principally concern him, to direct his attention to counsel's contentions respecting those issues, and to correct any misapprehensions which he may have formed—are all of crucial importance to effective advocacy.\textsuperscript{67}

Oral argument is ordinarily not considered a prerequisite to fairness, for the Supreme Court itself denies it on occasion. Classically illustrative is its decision in \textit{Santa Clara County v. Southern Pac. R.R.},\textsuperscript{68} where the Court decided one of its most significant constitutional questions without oral argument. Mr. Chief Justice Waite stated:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.\textsuperscript{69}


\textsuperscript{67} Cooper, \textit{supra} note 63, at 706.

\textsuperscript{68} 118 U.S. 394 (1886).

\textsuperscript{69} \textit{Id.} at 396.
Professor Davis has thus concluded that "when the Supreme Court itself denies oral argument on such a crucial issue, one can hardly suppose that due process requires an administrative agency to allow oral argument."\(^\text{70}\)

Although no comment is made here about administrative agencies in general, Professor Davis' position, in its application to antitrust decisions of the FTC, is not well taken. The pressures toward delegation and the resultant institutionalization of antitrust decisions are especially great because of the massive records involved. At the same time, however, the need for careful and well-reasoned decision-making is great because the antitrust proceeding may have potentially far-reaching consequences, not only for the private parties concerned but also for an entire industry. Oral argument before the actual decision-makers, in these circumstances, is necessary to help ensure that those with the authority to decide, and who are presumably most capable of deciding, actually rationalize and do not delegate their decision.\(^\text{71}\)

Third, the deciding officers, or one of them, should personally draft the opinion in support of the decision. The danger of separating decision-making from opinion writing was incisively isolated by Mr. Landis:

Any judge can testify to the experience of working on opinions that won't write with the result that his conclusions are changed because of his inability to state to his satisfaction the reasons upon which they depend. Delegation of opinion writing has the danger of forcing a cavalier treatment of a record in order to support a conclusion reached only upon a superficial examination of that record. General impressions rather than that tightness that derives from the articulation of reasons may thus govern the trend of administrative adjudication.\(^\text{72}\)

**RECOMMENDATIONS FOR INSTITUTIONAL FAIRNESS**

In organizing an institutionally fair decision-making process, it must first be recognized that the commissioners cannot be all things to all men. They cannot personally master the entire record of every proceeding, whether rulemaking or adjudication. Nor can they entertain meaningful oral argument on every issue, factual and legal, in every proceeding. The time for oral argument must be limited if the Commission is to discharge its sundry tasks. But when the time is so limited, counsel can only acquaint the Commission with the broad outlines of his position. The oppor-

\(^{70}\) 1 Davis, *op. cit.* supra note 58, § 7.07, at 434.

\(^{71}\) See Cooper, *supra* note 63, at 706.

tunity to address himself to the particular points of his argument which concern the Commission, crucial from the standpoint of both effectiveness and fairness, is never afforded.

Decision-making power must, therefore, be delegated so that only a limited number of issues in a limited number of proceedings come before the Commission for its consideration. Only when the issues and the cases are restricted, will the Commission be in a position (1) to master personally the portions of the record embraced by the issues; (2) to afford oral argument on every important issue that comes before it for decision; and (3) to rationalize personally the final decision and, at the same time, effectively and responsibly to make law and announce policy.

The obvious person to whom decision-making power should be delegated is the hearing officer, whether in a rulemaking or adjudicative proceeding. He is the one who hears the evidence and lives with the case from start to finish. The transcript will have greater meaning to him than to someone not present at the hearing. That the staff is more capable is not an argument in favor of delegation to that body; those persons with the better qualifications should, of course, be made the hearing officers and be given the assistance necessary to do an effective job. Furthermore, vesting decisional power in the hearing examiner would be more efficient, for it would save a step in the decision-making process. If decisional power were to be vested in the staff, a separate opportunity, aside from the hearing itself, to present oral argument to the staff would have to be afforded in accordance with the second postulated requirement of fairness set out above.

In many agencies, the report and recommendations of the staff control the decision, and the decisional power is thereby effectively transferred to the staff. This in itself is not unfair. The first requirement of fairness is satisfied since through personal study of the transcript of evidence and the briefs of counsel, the staff frequently comes to understand the issues and relevant evidence. The practice is, however, usually unfair because of a breach of the second requirement. Counsel is not afforded the opportunity to confront the staff in person and to persuade its members by oral argument of the validity of his position.

The hearing examiner should not, of course, be delegated total decision-making power. To provide the greatest latitude for carrying out its objectives, the Commission must retain carte blanche to reverse the hearing examiner on law and policy. As in the case of court of appeals review of a district court’s decision, however, the hearing examiner should be empowered to make findings of basic fact which may not be set aside by
the Commission unless clearly erroneous on the whole record.

A certiorari procedure with only a limited right of appeal to the Commission from the initial findings of the hearing examiner should be adopted. When permission to file an appeal is denied by the Commission, the decision of the examiner should be deemed final.73 Regardless of appeal by either party, the Commission should have the power to certify to itself certain types of cases. This power of certification would ensure the implementation of policy objectives through case-by-case adjudication. Consideration should be given to investing the agency with this power of certification in the following types of initial decisions: (1) decisions of first impression; (2) decisions which extend existing law into new fields; (3) decisions which could give the Commission the opportunity to clarify previously obscure court or FTC decisions; and (4) decisions which the Commission intends to use as a means of reexamining and modifying prior decisions of policy.

These procedures would permit the hearing examiner to master personally the entire record and the Commission on review to master that portion of the record embraced within the exceptions to the hearing examiner’s initial findings. They would also afford counsel an opportunity to persuade the hearing examiner by oral argument on all issues, factual and legal, and to so persuade the Commission on the limited issues raised on appeal.

In 1961 the Commission appeared to recognize fully the necessity for greater delegation of non-policymaking tasks and for a limitation of the number of issues and proceedings coming before it for review. Its 1961 rules of practice restricted agency review of both final and interlocutory rulings of hearing examiners.74 In 1963, however, the Commission withdrew partially from its 1961 position by reinstating appeal from initial decisions as a matter of right.75 A return to its apparent 1961 philosophy of greater delegation is necessary. Meanwhile, the restriction on agency review of interlocutory rulings of the hearing examiner76 should be applauded.

There is some strong evidence that the Commission has in the past

75 FTC Rules, 16 C.F.R. § 3.22(a) (1963).
76 FTC Rules, 16 C.F.R. § 3.20 (1963). The test of “extraordinary circumstances” and clear necessity “to prevent detriment to the public interest” should take into account, however, that the respondent as a party to the proceeding is clothed with the public interest.
generally acted as an appellate court on review of initial decisions, notwithstanding its formal power to review de novo.\textsuperscript{77} The present rules, however, still permit the Commission to find basic facts. As indicated above, this power, although seldom exercised, nevertheless contains the potentiality for unfairness and should be terminated. The findings of basic fact of the hearing examiner, as has been suggested, should not be set aside unless clearly erroneous on the whole record.

The Commission itself, under present rules, has the power to place any case on its own docket for review.\textsuperscript{78} This is essential if the FTC is to be given maximum flexibility in implementing policy objectives. But lest this power be exercised too frequently and thereby defeat the purpose of the certiorari procedure, certain standards, perhaps along the lines suggested in the preceding section of this article, should be established to curb its exercise.

Apparently, the Commission has been giving personal attention to the record, for reliance on the staff is kept to an acceptable minimum. Perhaps this has been so because it has given greater consideration to those portions of the record embraced within the exceptions to the initial decision. In any event, personal mastery of the record, \textit{i.e.}, those portions of the record embraced within the exceptions to the initial decision, should continue to be the rule.

With the first two elements of institutional fairness secured, there remains only the problem of the personal rationalization of decisions. Professor Davis has stated that "the objection to the separation of deciding from opinion writing may be unanswerable except in terms of inevitability."\textsuperscript{79} But as Professor Jaffee has observed, "the inevitability is a consequence of the choice to load up the 'members' of the agency with ultimate responsibility for a great variety of tasks. . . . The vice of the argument, if any, proceeds from the . . . assumption that all the related tasks in an area, \textit{e.g.}, 'policy making' and adjudication, must be under a common direction."\textsuperscript{80}

Although they are aided by two or three personal advisors, individual FTC commissioners presently assume full responsibility for opinions, and indications are that at least in important policy cases the use of these assistants has not infringed upon personal rationalization of opinions. To suggest that the commissioners should personally master the record and

\textsuperscript{77} See Baker, \textit{supra} note 57, at 268.

\textsuperscript{78} FTC Rules, 16 C.F.R. § 3.21(a) (1963).

\textsuperscript{79} 2 \textsc{Davis}, \textit{op. cit. supra} note 58, § 11.11, at 90.

\textsuperscript{80} Jaffee, Book Review, 73 \textsc{Harv. L. Rev.} 1638, 1641 (1960).
should personally write the opinion in support of the decision does not mean, of course, that agency members should work alone. They should have the assistance of a few capable men. But there is a vast difference between opinion writing and record analysis by an anonymous staff, and assistance rendered to a commissioner by his personal staff. The latter group should develop a close knowledge of the commissioner's views and should be responsible to the individual commissioner alone, not to the shifting institution that is the entire agency.

President Kennedy's Reorganization Plan Number 481 is a step in the direction of enabling the commissioners to comply with the three requirements of fairness set out above, while at the same time rendering important policy decisions. The plan permits the Commission to delegate to individual commissioners or to responsible staff members administrative tasks which it now performs. The full value of this authority, however, has yet to be exploited.

Although steps have thus been taken in the direction of accomplishing the means by which the dual objectives of individualized justice and policymaking in the public interest may be achieved, much remains to be done. FTC decision-making in the field of antitrust may, however, without basic structural change accomplish the desideratum. This article has attempted to describe one view as to how this may be done.

Preface

Basic to our system of criminal justice is the concept of the defendant’s pretrial freedom to assist in the preparation of his defense. Thus, in the District of Columbia, as elsewhere in the federal and most state systems, a defendant arrested for an offense not punishable by death must, as a matter of right, be admitted to bail subject only to such security as is required to assure his presence in court.

This can at best be considered a shallow right, however, when substantial numbers of accused persons—approaching the majority in some jurisdictions—remain incarcerated during the pretrial period. Our continued reliance on the somewhat anachronistic system of financial motivation and surety to the virtual exclusion of any other feasible method of guaranteeing the right of the public to have an accused answer charges has brought with it abuses, both official and judicial, which have resulted in repeated criticism.

The primary, unsolved dilemma of the American bail system, despite its theoretically unique liberality and its lip service to the presumption

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* Director, District of Columbia Bail Project. Adjunct Professor of Law, Georgetown University Law Center. A.B., Fairfield University; LL.B., LL.M., Georgetown University Law Center.


1 Stack v. Boyle, 342 U.S. 1, 4 (1951); see Bandy v. United States, 81 Sup. Ct. 197 (1960).

2 Freed & Wald, Bail in the United States: 1964, at 2 n.8 (1964) [hereinafter cited as Freed].

3 Fed. R. CRIM. P. 46(a)(1), (c); Stack v. Boyle, 342 U.S. 1 (1951). In capital cases and in cases in which appeals from convictions are pending, admission to bail is discretionary. Fed. R. CRIM. P. 46(a)(1)-(2).

4 See Freed 9-21.

that an accused is innocent until proven guilty, continues to be that the rate of pretrial detention resulting from its application approaches that of systems where the obtaining of release is much more stringently controlled and much more a matter of discretion.\(^6\)

One may logically ask why this is so. The easiest answer is that a large number of persons spend the entire pretrial period in detention because they cannot afford the price of their freedom, or because sureties—usually professional bail bondsmen—do not wish for one reason or another to serve their interests.\(^7\) The traditional, financial-motivation system does, of course, uphold the community's right to have the accused stand trial or to have witnesses available. The price of this effectiveness is that many, even the majority in some jurisdictions, remain in pretrial custody. Indeed, the community pays dearly, not only in the monetary costs of detention, the attendant welfare and representation costs, and the loss of derivative revenue, but also—and more importantly—in the dilution of two fundamental principles of our society: equality under the law, and the presumption of innocence. The individual also pays dearly in his inability to assist in his own defense, in the psychological result of entering the courtroom from jail, in his inability to gain or maintain employment, in family disruption, and, of course, in the incarceration itself. How much more dear is the price when the accused is in fact innocent!\(^8\)

While other "conditional release" systems require security in some cases to insure that the accused will comply with the terms of his pretrial release, "the United States and the Philippines are the only countries to allot a significant role to professional bail bondsmen in their systems of criminal justice."\(^9\) Much is to be said for this distinguishing factor in determining the cause of the abuses which appear unique to the American bail system. However, the courts, which have abdicated the responsibility for what can and should only be a judicial determination, and the law which has in

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9 Freed 22.
part fostered this abdication must bear a substantial part of the blame. The bail bondsman, in “granting or denying” pretrial freedom to an accused, is, in the main, exercising a judgment based on economic factors or business sense which generally cannot be criticized in that sphere. No one would seriously contend, however, that the matter of pretrial freedom is one for business rather than judicial determination.

Nevertheless, until recently the American bail system has remained wedded to this outmoded and discriminatory method, frustrating the very ends which the law seems intended to achieve when it states that an accused in a noncapital case must be admitted to bail. The issue here is not whether the law should provide an absolute right to bail in noncapital cases. Rather, it is whether virtually exclusive reliance on financial factors renders ineffective a law which does provide such a right. It is submitted that our jurisprudence envisions pretrial freedom and leaves to the administration of the law the task of reconciling any conflict between society’s right to the trial and the accused’s right to his freedom before that trial.

Even in our past efforts to define what is meant by “admission to bail,” we have not been held merely to the formal act of setting a financial amount (which must be given as security either in collateral or by bond before release can be obtained) without regard to the results of that act.

The Supreme Court in Stack v. Boyle spoke of “this traditional right to freedom before conviction.” Moreover, the Court affirmed that a defendant charged with a noncapital offense must be admitted to bail and that the Constitution precludes requiring unreasonable security.

To be sure, a judge has the authority, as an incident of his inherent powers to manage the conduct of proceedings before him, to revoke bail during the course of a criminal trial or after conviction when such action is appropriate to the orderly progress of a trial, or a retrial, and to the fair administration of justice. But, Stack and the federal rule make clear that a judge does not have the power to deny bail as a method of precluding the possibility of further criminal conduct. Indeed, a fair reading

11 342 U.S. 1 (1951).
12 Id. at 4.
13 Id. at 4-5.
15 Fed. R. Crim. P. 46(a)(1). A person arrested for an offense not punishable by death must be admitted to bail. Ibid.
of Rule 46(c)\(^{16}\) and Stack lend support to the proposition that the amount of security to be required is relevant only to the purpose of assuring the presence of the particular defendant, and may not envision the prevention of pretrial release so as to protect society from the possibility of the commission of crime by the accused during that release.\(^{17}\)

The Stack Court speaks of "amount,"\(^{18}\) as does Rule 46(c). Indeed, Mr. Justice Jackson, concurring with the Stack majority, stated:

Thus, the amount is said to have been fixed not as a reasonable assurance of [the defendants'] presence at the trial, but also as an assurance they would remain in jail. There seems reason to believe that this may have been the spirit to which the courts below have yielded, and it is contrary to the whole policy and philosophy of bail. This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount.\(^{19}\)

This preoccupation with "a reasonable amount" is the crux of our problem.\(^{20}\) Historically, pretrial release encompassed the oath of a surety to guarantee the presence of the defendant together with a financial incentive to insure the surety's personal involvement.\(^{21}\) Historically as well, both the English Bill of Rights\(^{22}\) and the American Constitution\(^{23}\) prohibited excessive bail. Accordingly, the Stack Court held:

The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty....

Like the ancient practice of securing the oaths of responsible persons to stand

\(^{16}\) **Fed. R. Crim. P. 46(c):**

If the defendant is admitted to bail the amount thereof shall be such as in the judgment of the commissioner or court or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of defendant.

\(^{17}\) See Williamson v. United States, 184 F.2d 280 (2d Cir. 1950).

\(^{18}\) 342 U.S. at 5.

\(^{19}\) *Id.* at 10. (Emphasis added.)


\(^{22}\) 1 W. & M. 2, c. 2, §§ 1, 2(10) (1688).

\(^{23}\) U.S. Const. amend. VIII. This does not necessarily mean that admission to bail is a constitutional right. See Carlson v. Landon, 342 U.S. 524, 545-46 (1952).
as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.24

The issue before the Court was the amount, not the necessity, of the security required. In view of that issue, the Court, while placing a constitutional ceiling of unreasonableness upon the amount of security to be required, expressed no opinion as to minimum security. Moreover, the pertinent federal rule similarly sets forth no minimum.25 In fact, while requiring the personal bond of the defendant, subsection (d) of Rule 46 nonetheless indicates that "in proper cases no security need be required."

Does "in proper cases" refer to those cases involving indigents whose future court appearances can reasonably be assured? The vast majority of our criminal defendants are indigent by any reasonable definition26 and bail bonds are a costly business. In the District of Columbia the premium on any bond with a face amount of up to 1,000 dollars is limited to eight per cent of that face amount; every amount in excess of 1,000 dollars is limited to a five per cent premium.27 Premiums in other jurisdictions range from three to twelve per cent of the face amount of the bond.28 It must be remembered that premium payments are not refunded, are paid in addition to service charges in some jurisdictions and may be accompanied by agreements by the accused or his relatives to indemnify the bondsman in the event of forfeiture. Often, too, an accused's relatives must demonstrate their good faith by posting collateral with the bondsman, thereby guaranteeing their agreement to indemnify. The latter is generally unregulated as to nature or amount.

24 342 U.S. at 4-5. Stack also reflects the tradition that financial security is the customary adjunct to release on bail, i.e., that the financial motivation or assurances deemed advisable in the days when the virgin territories of a young America offered tempting refuge for the defendant who was not optimistic about his chances for eventual freedom remain necessary in this age of instant communication and effective police work.

25 See note 16 supra.


28 Freed 23-24.
In sum, if the only valid purpose for the requirement of security is the assurance of the defendant's appearance, might there not exist a means of assurance capable of substituting for money? It is clear that for indigents, traditional reasonable security may mean the difference between freedom or detention. Mr. Justice Douglas was troubled by just such a problem:

It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release.

But this theory is based on the assumption that a defendant has property. To continue to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law. We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. . . . Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom? . . .

For there may be other deterrents to jumping bail: long residence in a locality, the ties of friends and family, the efficiency of modern police. All these in a given case may offer a deterrent at least equal to that of the threat of forfeiture.

This then is an hypothesis permitting of empirical evaluation. The high rate of detention and other abuses make clear that we cannot be satisfied with the traditional, financially oriented bail system. Surely, it cannot be the only method. We must experiment; we must search for solutions to the costly and pressing detention problem.

Such experimentation has begun, first in New York City, then in Washington, D.C., and now in several communities throughout the nation. Using as a working hypothesis the proposition that community ties will, as Mr. Justice Douglas speculated, deter flight to avoid trial, the experiments seek to foster the use of release on personal recognizance in cases where the accused's ties to the community reasonably assure his presence for trial. The purpose of such experimentation is to determine whether such a theory can provide a partial answer to the pretrial detention problem, and if so, to promote its utility.

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30 Bandy v. United States, 81 Sup. Ct. 197-98 (1960). Mr. Justice Douglas concluded that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on "personal recognizance" where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.
31 It should be noted that the judges of the United States District Court for the
The District of Columbia Bail Project is such an experiment. It originated in response to a pretrial detention problem such as that referred to above. The following data may serve as an illustration of the scope of that problem and, as well, of the workings of the bail system in the District of Columbia.

THE BAIL SYSTEM OF THE DISTRICT OF COLUMBIA 1963

The following information with respect to the bail system of the District of Columbia as applied to felony cases was drawn from 2,052 cases. The sample includes felony cases bound over to the grand jury and designated by 1963 docket numbers. In addition, it includes 1963 cases originating with the grand jury without prior preliminary hearings ("Grand Jury Originals"). The sample does not include 1963 cases which had not reached final, nonappellate disposition by January 1, 1965; nor does it include those which had been placed on the inactive calendar or those which were removed for further proceedings in other jurisdictions.

At the outset, it should be emphasized that many variable factors may play a part in the amount of the surety bond required by the committing magistrate before a defendant can obtain his freedom. Among these are the alleged facts of the offense, a representation by the prosecutor that the grand jury will be asked to include charges in its indictment additional to that on which the defendant is presented at the moment, any information with respect to the defendant himself, and the defendant’s prior criminal record. Accordingly, the data which follows does not tell the whole story. It is, however, based upon the one nonvariable factor, the offense category. And it has been reported that in the District of Columbia great weight in the fixing of bail is given to the prosecutor’s recommendation and to the traditional or customary amounts previously set in the particular type of case.

SETTING BAIL

Table I, below, indicates whether or not and at what amounts bail was set in the 2,052 cases. The table refers to the initial opportunity to set bail in each case and the amounts thus refer to the initial offense charged in each case.

In 174, or 8 per cent, of all cases, no bail was set at the initial appearance of the defendants. As noted previously, bail need not be set in capital

Eastern District of Michigan have for many years relied successfully on a policy of extensive personal recognizance release.

32 D.C. BAIL SYSTEM 20-21.
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<th>Bail</th>
<th>Charges</th>
<th>All Cases</th>
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</tr>
<tr>
<td>$10,000 and over</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>30</td>
<td>74</td>
</tr>
</tbody>
</table>

33 All charges are felonies: felony homicide, other homicides, assault with intent to kill, assault with a dangerous weapon, robbery, assault with intent to rob and attempted robbery, rape, assault with intent to rape, other sex crimes, housebreaking, grand larceny, unauthorized use of a motor vehicle and Dyer Act violations, forgery and uttering, larceny after trust and false pretenses, lottery and gambling, narcotics, other D.C. and federal felony offenses.
cases. However, 78, or 44 per cent, of the no-bail cases did not involve capital offenses. A number of reasons influence this apparent oversight. For example, bail may have been fixed for the defendant in a companion charge and deemed sufficient to cover both situations (either in fact or by implication). Bail may not have been set because the defendant was then serving a sentence on another charge, or because he was removed to a mental institution for observation as to competency to stand trial or criminal responsibility.

In the cases in which bail was fixed, 50 per cent involved amounts of $1,000 or less. For 543 defendants or 29 per cent of the bail cases, bail was fixed between $1,500 and $2,500. An additional 14 per cent of the bail cases involved amounts of $5,000 or more.

One thousand dollars constituted the most commonly used bond figure (42 per cent of all bail cases). This amount was most often set in cases involving alleged crimes against property. It was virtually the only amount fixed in lottery and other gambling offense cases.

The largest offense categories, housebreaking and robbery, are notable for the wide range of bond amounts and the prevalence of high bail. For example, 14 per cent of the bail amounts in robbery cases were set between $3,000 and $4,500 and 31 per cent were set at $5,000 or more. Compare these figures with the fact that in the majority of cases involving assault with a dangerous weapon, bail was set at $1,000 or less. Robbery and housebreaking are the offenses wherein variable factors play a strong role. For example, robbery may include armed robbery, yoke robbery or purse snatching. Similarly, a housebreaking may involve an occupied or an unoccupied dwelling, a business establishment or a residence, and may occur at night or in broad daylight.

The instability element often considered in connection with narcotics offenders may perhaps combine with the expectation of increasingly severe sentences to result in high bail. Thus, $2,500 was the most common bail amount set in narcotics cases.

As noted above, Table I pertains to the initial setting of bail. In approximately 15 per cent of the 2,052 cases, however—including the no-bail cases—later adjustment of the situation was made. In some of the no-bail cases, bail was eventually set, sometimes upon a reduction of the original charge. In some of the bail cases, the court, sua sponte, or upon motion of the parties reduced the amount originally set. In others, a new, lower amount was set after the case had been ignored by the grand jury and referred by the prosecuting authority for misdemeanor action. All but two of the defendants involved in these cases were then able to post bond.
Perhaps the most striking fact indicated by Table I is that release of the defendant on personal recognizance was directed in only 15, or .7 per cent, of the cases.

**POSTING BOND**

Table II demonstrates the decreasing ability of defendants to post bond as bail amounts increase. While 57 per cent of those defendants whose bonds were set at $1,000 or less were able to post bond, only 12 per cent of those whose bonds were set at $5,000 or more were similarly able to obtain release. Table III, the ability to post bond by offense category, is presented as a further illustration of this point.

**Table II**

<table>
<thead>
<tr>
<th>Bail Amounts</th>
<th>Number of Cases</th>
<th>Percentage Posting Bail</th>
</tr>
</thead>
<tbody>
<tr>
<td>$500 and under</td>
<td>130</td>
<td>74%</td>
</tr>
<tr>
<td>$600-$1,000</td>
<td>796</td>
<td>54%</td>
</tr>
<tr>
<td>$1,500</td>
<td>143</td>
<td>43%</td>
</tr>
<tr>
<td>$2,000</td>
<td>188</td>
<td>34%</td>
</tr>
<tr>
<td>$2,500</td>
<td>212</td>
<td>35%</td>
</tr>
<tr>
<td>$3,000</td>
<td>78</td>
<td>21%</td>
</tr>
<tr>
<td>$3,500-$4,500</td>
<td>49</td>
<td>22%</td>
</tr>
<tr>
<td>$5,000</td>
<td>186</td>
<td>16%</td>
</tr>
<tr>
<td>$7,500</td>
<td>23</td>
<td>4%</td>
</tr>
<tr>
<td>$10,000 &amp; over</td>
<td>58</td>
<td>3%</td>
</tr>
<tr>
<td>Total</td>
<td>1,863</td>
<td>42%</td>
</tr>
</tbody>
</table>

The defendants in the two largest offense categories, housebreaking and robbery (the offenses which indicated the highest percentage of high bail), were generally least able to post bond. Only 30 per cent of the defendants charged with robbery and 38 per cent of those charged with housebreaking were able to obtain their release. While a comparably higher percentage was indicated as able to make bail on similarly serious charges, such as assault with intent to kill, homicides, and the like, the number of defendants in these offense categories was very low by comparison. On the other hand, all defendants charged with lottery and other gambling offenses, involving the "nominal" $1,000 bond amounts, were released on bond.

It appears that the defendants charged with low-bail offenses are
more able to post bond than defendants charged with high-bail offenses, and that the majority of the defendants are in the latter category. In fact, 52 per cent of all defendants in whose cases money bail was set in the District of Columbia were never able to post bail and remained in detention until disposition of their cases.

While the court records in some cases indicate the forfeiture of bail bonds, the incidence of bail-jumping unfortunately cannot be accurately measured. For example, after a bond forfeiture had occurred, the defendant’s absence may have been satisfactorily explained and the bond reinstated. On the other hand, remission of the forfeiture may occur because the bondsman has borne the costs of recovering the fugitive,\(^3\) or

\(^3\) As indicated in Table II, 42\% of the defendants were able to post the bond amount originally set on their charges. An additional 6\% were able to post bond only after a reduction in the original amount or, in some few cases, after bond had been set in what were originally “no-bail” cases.


<table>
<thead>
<tr>
<th>Charge</th>
<th>Cases in Which Bail was Set—Exclusive of Personal Recog.</th>
<th>Per Cent Who Post Bail</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assault with intent to rape</td>
<td>7</td>
<td>—</td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td>42</td>
<td>29%</td>
</tr>
<tr>
<td>Robbery</td>
<td>382</td>
<td>30%</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>281</td>
<td>38%</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle and Dyer Act</td>
<td>237</td>
<td>39%</td>
</tr>
<tr>
<td>Forgery and uttering</td>
<td>79</td>
<td>39%</td>
</tr>
<tr>
<td>Other sex crimes</td>
<td>19</td>
<td>42%</td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td>11</td>
<td>45%</td>
</tr>
<tr>
<td>Rape</td>
<td>63</td>
<td>51%</td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>154</td>
<td>53%</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>78</td>
<td>54%</td>
</tr>
<tr>
<td>Narcotics</td>
<td>189</td>
<td>58%</td>
</tr>
<tr>
<td>Larceny after trust and false pretenses</td>
<td>20</td>
<td>60%</td>
</tr>
<tr>
<td>Felony murder</td>
<td>5</td>
<td>60%</td>
</tr>
<tr>
<td>Other D. C. and federal felonies</td>
<td>185</td>
<td>69%</td>
</tr>
<tr>
<td>Other homicides</td>
<td>56</td>
<td>70%</td>
</tr>
<tr>
<td>Lottery and gambling</td>
<td>97</td>
<td>100%</td>
</tr>
</tbody>
</table>

Total | 1,905 | 48%\(^3\)
because he returned the defendant a few days after forfeiture. Indeed, such subtleties as the difference between flight from the jurisdiction and failure to appear (which may or may not result in forfeiture) cannot be discerned from the dockets.

**INCARCERATION BETWEEN ARREST AND FINAL DISPOSITION**

Table IV reveals that 1,640 defendants, 80 per cent of all defendants charged with felonies, spent some time in detention between arrest and final disposition of their cases. The median time spent in jail was 75 days, or 2½ months. Two hundred and ninety defendants were detained from 4 to 6 months, while 110 defendants spent 6 months or more in jail. Three defendants were in jail for over a year awaiting disposition of their cases. Four hundred and twelve defendants spent no time in detention.

**Table IV**

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Number of Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10 days</td>
<td>187</td>
</tr>
<tr>
<td>10-19 days</td>
<td>129</td>
</tr>
<tr>
<td>20-29 days</td>
<td>124</td>
</tr>
<tr>
<td>30-39 days</td>
<td>128</td>
</tr>
<tr>
<td>40-49 days</td>
<td>81</td>
</tr>
<tr>
<td>50-59 days</td>
<td>90</td>
</tr>
<tr>
<td>60-69 days</td>
<td>74</td>
</tr>
<tr>
<td>70-79 days</td>
<td>70</td>
</tr>
<tr>
<td>80-89 days</td>
<td>83</td>
</tr>
<tr>
<td>90-99 days</td>
<td>81</td>
</tr>
<tr>
<td>100-109 days</td>
<td>122</td>
</tr>
<tr>
<td>110-119 days</td>
<td>71</td>
</tr>
<tr>
<td>120-129 days</td>
<td>77</td>
</tr>
<tr>
<td>130-139 days</td>
<td>57</td>
</tr>
<tr>
<td>140-149 days</td>
<td>57</td>
</tr>
<tr>
<td>150-159 days</td>
<td>33</td>
</tr>
<tr>
<td>160-169 days</td>
<td>47</td>
</tr>
<tr>
<td>170-179 days</td>
<td>19</td>
</tr>
<tr>
<td>180-189 days</td>
<td>20</td>
</tr>
<tr>
<td>190-199 days</td>
<td>23</td>
</tr>
<tr>
<td>200-259 days</td>
<td>48</td>
</tr>
<tr>
<td>260-319 days</td>
<td>12</td>
</tr>
<tr>
<td>320-420 days</td>
<td>7</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,640</strong></td>
</tr>
</tbody>
</table>
It is important to note that Tables IV through IX refer only to time actually spent by the defendant in the District of Columbia Jail. The designation "days in jail" does not, for example, include any time the defendant may have spent undergoing observation at a hospital or mental institution. Moreover, many defendants who spent some time in detention were ultimately able to post bond. Therefore, the time spent in jail should not be interpreted as representing the actual time span between arrest and final disposition of the particular case. Nor does it necessarily indicate that all defendants were so detained immediately after arrest. Such detention could have resulted from surrender by a bondsman, arrest on a subsequent charge, revocation by the court between plea or trial and sentencing, and the like.

**Table V**

TIME SPENT IN JAIL BETWEEN ARREST AND FINAL DISPOSITION BY DEFENDANTS WHOSE CASES DID NOT GO TO TRIAL

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Cases Dismissed, &quot;Nolled&quot; or Ignored</th>
<th>Pleas of Guilt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10 days</td>
<td>88</td>
<td>67</td>
</tr>
<tr>
<td>10-19 days</td>
<td>65</td>
<td>33</td>
</tr>
<tr>
<td>20-29 days</td>
<td>68</td>
<td>18</td>
</tr>
<tr>
<td>30-39 days</td>
<td>67</td>
<td>36</td>
</tr>
<tr>
<td>40-49 days</td>
<td>35</td>
<td>25</td>
</tr>
<tr>
<td>50-59 days</td>
<td>38</td>
<td>24</td>
</tr>
<tr>
<td>60-69 days</td>
<td>24</td>
<td>31</td>
</tr>
<tr>
<td>70-79 days</td>
<td>25</td>
<td>31</td>
</tr>
<tr>
<td>80-89 days</td>
<td>20</td>
<td>42</td>
</tr>
<tr>
<td>90-99 days</td>
<td>15</td>
<td>43</td>
</tr>
<tr>
<td>100-109 days</td>
<td>22</td>
<td>69</td>
</tr>
<tr>
<td>110-119 days</td>
<td>8</td>
<td>48</td>
</tr>
<tr>
<td>120-129 days</td>
<td>12</td>
<td>45</td>
</tr>
<tr>
<td>130-139 days</td>
<td>6</td>
<td>37</td>
</tr>
<tr>
<td>140-149 days</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td>150-159 days</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>160-169 days</td>
<td>3</td>
<td>22</td>
</tr>
<tr>
<td>170-179 days</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>180-189 days</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>190-199 days</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>200-259 days</td>
<td>6</td>
<td>27</td>
</tr>
<tr>
<td>260-319 days</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>320-420 days</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>521</td>
<td>679</td>
</tr>
</tbody>
</table>
Prolonged detention is not necessarily due to crowded court calendars, but may result from delays attendant the making and execution of defendants' motions for continuance, severance and the like.

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Convicted</th>
<th>Acquitted</th>
<th>Acquitted by Reason of Insanity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10 days</td>
<td>22</td>
<td>9</td>
<td>1</td>
</tr>
<tr>
<td>10-19 days</td>
<td>23</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>20-29 days</td>
<td>31</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>30-39 days</td>
<td>23</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>40-49 days</td>
<td>16</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>50-59 days</td>
<td>21</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>60-69 days</td>
<td>17</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>70-79 days</td>
<td>10</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>80-89 days</td>
<td>14</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>90-99 days</td>
<td>17</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>100-109 days</td>
<td>22</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>110-119 days</td>
<td>14</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>120-129 days</td>
<td>17</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>130-139 days</td>
<td>13</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>140-149 days</td>
<td>20</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>150-159 days</td>
<td>14</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>160-169 days</td>
<td>21</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>170-179 days</td>
<td>8</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>180-189 days</td>
<td>7</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>190-199 days</td>
<td>6</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>200-259 days</td>
<td>14</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>260-319 days</td>
<td>6</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>320-420 days</td>
<td>5</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>361</td>
<td>61</td>
<td>18</td>
</tr>
</tbody>
</table>

Table VI shows that 440 defendants, 26 per cent of those defendants who spent time in detention between arrest and final disposition of their cases, chose to go to trial. Of this number, 89 per cent were convicted. The median time spent in jail by the tried and convicted defendants was 95 days, while the median time for the tried and acquitted defendants was 55 days. The greater amount of time spent in jail by convicted defendants as compared to those defendants who were ultimately acquitted may be due to the fact that while a small proportion of convicted defendants
were sentenced within several days after determination of guilt, the majority of cases involved a five week time lapse between that determination and sentencing.

It is noteworthy, however, that a nontabulated comparison of acquittal and conviction cases indicated that a larger percentage of defendants in the former spent some time on bond prior to final disposition.

A comparison of nonconviction cases in Tables V and VI shows that of 61 defendants acquitted after trial, 17, or 27 per cent, had spent 3 months or more of their pretrial period in jail by the time of adjudication. Of the 521 defendants whose cases were ultimately dismissed or ignored, 91, or 17 per cent, had spent 3 months or more in jail before disposition. Fourteen per cent of the defendants whose cases were dismissed or ignored spent more than 6 months in jail. The median detention period in dismissed or ignored cases was 35 days.

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10 days</td>
<td>21</td>
</tr>
<tr>
<td>10-19 days</td>
<td>47</td>
</tr>
<tr>
<td>20-29 days</td>
<td>73</td>
</tr>
<tr>
<td>30-39 days</td>
<td>89</td>
</tr>
<tr>
<td>40-49 days</td>
<td>52</td>
</tr>
<tr>
<td>50-59 days</td>
<td>58</td>
</tr>
<tr>
<td>60-69 days</td>
<td>54</td>
</tr>
<tr>
<td>70-79 days</td>
<td>48</td>
</tr>
<tr>
<td>80-89 days</td>
<td>76</td>
</tr>
<tr>
<td>90-99 days</td>
<td>61</td>
</tr>
<tr>
<td>100-109 days</td>
<td>109</td>
</tr>
<tr>
<td>110-119 days</td>
<td>61</td>
</tr>
<tr>
<td>120-129 days</td>
<td>72</td>
</tr>
<tr>
<td>130-139 days</td>
<td>51</td>
</tr>
<tr>
<td>140-149 days</td>
<td>52</td>
</tr>
<tr>
<td>150-159 days</td>
<td>31</td>
</tr>
<tr>
<td>160-169 days</td>
<td>43</td>
</tr>
<tr>
<td>170-179 days</td>
<td>17</td>
</tr>
<tr>
<td>180-189 days</td>
<td>19</td>
</tr>
<tr>
<td>190-199 days</td>
<td>20</td>
</tr>
<tr>
<td>200-259 days</td>
<td>44</td>
</tr>
<tr>
<td>260-319 days</td>
<td>11</td>
</tr>
<tr>
<td>320-420 days</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>1,116</td>
</tr>
</tbody>
</table>

Table VII

TIME SPENT IN JAIL BETWEEN ARREST AND FINAL DISPOSITION BY ALL DEFENDANTS WHO DID NOT MAKE BOND (INCLUDES REFERRED CASES)
Tables VII, VIII and IX set forth information similar to that in Tables IV, V and VI, but focus particularly on those defendants who never were able to post bond either because no bond was ever set or because they could not meet the amount required.

**Table VIII**

**TIME SPENT IN JAIL BETWEEN ARREST AND FINAL DISPOSITION BY DEFENDANTS WHO DID NOT MAKE BOND AND WHOSE CASES DID NOT GO TO TRIAL**

*(INCLUDES REFERRED CASES)*

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Cases Dismissed, &quot;Nolled&quot; or Ignored</th>
<th>Pleas of Guilt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10</td>
<td>18</td>
<td>2</td>
</tr>
<tr>
<td>10-19</td>
<td>37</td>
<td>2</td>
</tr>
<tr>
<td>20-29</td>
<td>55</td>
<td>3</td>
</tr>
<tr>
<td>30-39</td>
<td>59</td>
<td>14</td>
</tr>
<tr>
<td>40-49</td>
<td>36</td>
<td>9</td>
</tr>
<tr>
<td>50-59</td>
<td>30</td>
<td>11</td>
</tr>
<tr>
<td>60-69</td>
<td>23</td>
<td>21</td>
</tr>
<tr>
<td>70-79</td>
<td>23</td>
<td>17</td>
</tr>
<tr>
<td>80-89</td>
<td>24</td>
<td>37</td>
</tr>
<tr>
<td>90-99</td>
<td>9</td>
<td>36</td>
</tr>
<tr>
<td>100-109</td>
<td>22</td>
<td>64</td>
</tr>
<tr>
<td>110-119</td>
<td>8</td>
<td>41</td>
</tr>
<tr>
<td>120-129</td>
<td>9</td>
<td>45</td>
</tr>
<tr>
<td>130-139</td>
<td>4</td>
<td>33</td>
</tr>
<tr>
<td>140-149</td>
<td>6</td>
<td>28</td>
</tr>
<tr>
<td>150-159</td>
<td>2</td>
<td>14</td>
</tr>
<tr>
<td>160-169</td>
<td>3</td>
<td>19</td>
</tr>
<tr>
<td>170-179</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>180-189</td>
<td>3</td>
<td>10</td>
</tr>
<tr>
<td>190-199</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>200-259</td>
<td>5</td>
<td>24</td>
</tr>
<tr>
<td>260-319</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>320-420</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>382</strong></td>
<td><strong>455</strong></td>
</tr>
</tbody>
</table>
In all, 1,122 of the 2,052 defendants included in this sample were never able to obtain their pretrial release. The 6 cases not tabulated in Table VII consist of 5 defendants who were committed to a mental hospital and 1 who died. The 6 spent 5, 10, 37, 37, 57 and 355 days, respectively, in pretrial detention.

Table VII demonstrates that the median time in jail for the defendants who were never released on bond was 96 days. Thus, 558 defendants spent more than 3 months in detention between arrest and final non-appellate disposition of their cases. Indeed, 101, or almost 10 per cent, of the defendants spent from 6 months to a year in predisposition incarceration. These figures are significant when the nature of this detention is con-

<table>
<thead>
<tr>
<th>Days in Jail</th>
<th>Convicted</th>
<th>Acquitted</th>
<th>Acquitted by Reason of Insanity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Less than 10</td>
<td>1</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>10-19</td>
<td>7</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>20-29</td>
<td>14</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>30-39</td>
<td>15</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>40-49</td>
<td>5</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>50-59</td>
<td>13</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>60-69</td>
<td>8</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>70-79</td>
<td>5</td>
<td>3</td>
<td>—</td>
</tr>
<tr>
<td>80-89</td>
<td>8</td>
<td>5</td>
<td>2</td>
</tr>
<tr>
<td>90-99</td>
<td>10</td>
<td>4</td>
<td>2</td>
</tr>
<tr>
<td>100-109</td>
<td>14</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>110-119</td>
<td>11</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>120-129</td>
<td>15</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>130-139</td>
<td>13</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>140-149</td>
<td>16</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>150-159</td>
<td>13</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>160-169</td>
<td>20</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>170-179</td>
<td>6</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>180-189</td>
<td>6</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>190-199</td>
<td>5</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>200-259</td>
<td>14</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>260-319</td>
<td>7</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>320-420</td>
<td>5</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>231</td>
<td>32</td>
<td>16</td>
</tr>
</tbody>
</table>
sidered. Unlike convicted prisoners, persons awaiting trial do not as a general rule participate in regular prisoner-training or recreational programs. For all practical purposes, they are merely stored in confinement. Such detention conditions have in fact been characterized as pretrial punishment.

In Tables VIII and IX, the time spent in jail by the defendants who never obtained pretrial release is set forth according to the manner of final, nonappellate disposition of their cases.

The tables indicate that 41 per cent of the detained defendants eventually entered pleas of guilt. The median time spent in jail by these defendants was 115 days, almost 4 months. One hundred ninety-eight, or 44 per cent, spent more than 4 months in jail. Fifty defendants were detained for 6 months or more.

Twenty-one per cent of the defendants (231) were convicted after court or jury trial, while 3 per cent (32) were acquitted. Sixteen defendants were acquitted by reason of insanity. The median time in jail of convicted defendants was 123 days, while the median of those acquitted was 90 days and that of those acquitted by reason of insanity was 99 days. The longer median in conviction cases probably results, as noted with respect to Table VI, from the period of detention between the finding of guilt and sentencing.

Three hundred eighty-two (34 per cent) cases were dismissed, not prosecuted or ignored by the grand jury. The median detention time in such cases was 42 days. Twenty per cent of the defendants (77) spent 3 months or more in jail, and of these, 12 were detained for 6 months or more prior to the favorable disposition of their cases.

It is indeed significant that of the 32 defendants who were ultimately acquitted, 16 per cent spent 4 months or more in jail and 1 defendant was detained for more than 5 months.

It is apparent from Tables IV through IX that a substantial number of the defendants are convicted. These tables and those that follow indicate that, by far, more defendants eventually choose to plead guilty than to go to trial. What part the fact of detention may play in the making of this decision cannot be deduced from the tables.

One fact should be emphasized, however. In the District of Columbia, criminal cases pass through a series of informal and formal evaluations

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36 See D.C. Bail System 32-33.

prior to the indictment stage. As a result, it is reasonable to assume that the indictment cases are the most substantial ones, the cases in which conviction is the most likely result. It is, in light of this fact, also reasonable to assume that what might appear from the following tables to be a slight disparity of result favorable to nondetained defendants is instead a difference of some significance.

**BOND: EFFECT ON FINAL DISPOSITION OF FELONY CASES**

The relationship between type of disposition (in terms of jury and court conviction or acquittal) and bond status by charge\(^38\) is set forth in Tables X and XI.

One of the frequently voiced arguments against the practice of detaining large numbers of defendants in jail for want of bail is that the detained defendant is unable to obtain his own counsel or to assist in the preparation of his defense. As a result, the chances of a favorable disposition of his case are said to be materially prejudiced.

Table X shows that even if the definition of "favorable disposition" be limited to acquittals, those defendants who are freed on bond were apparently less likely to be convicted than defendants detained throughout the pretrial period.\(^39\) The conviction rate for detained defendants was 84 per cent whereas the rate for defendants who were freed on bond was 79 per cent. The overall proportion of convictions by charge is very similar for the two groups except in the offense categories of robbery and unauthorized use of a motor vehicle. Defendants who were charged with these offenses and who had made bond were less likely to be convicted than detained defendants facing the same charges. The small (5 per cent) differential and the fact that the conviction rate for detained and freed defendants did not vary significantly in the other offense categories suggest that in cases which are tried before a jury, bond status is not a strong factor in relation to conviction rate. Nevertheless, the fact of its existence in light of the preindictment evaluation noted previously cannot be disregarded.

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38 In the case of acquitted defendants, "charge" refers to the charge at the time of indictment. In the case of convicted defendants, "charge" refers to the charge on which guilt was determined.

39 Court records available to the staff of the Bail Project did not always indicate whether the defendant was still free on bond at the time of trial and adjudication. A survey of cases involving release on bond, however, showed that in the majority, the defendants spent a substantial number of days at liberty (thus theoretically able to aid in the preparation of their defense) whether or not they were in jail at the time of trial.
<table>
<thead>
<tr>
<th>Charge</th>
<th>Defendants Who Made Bond</th>
<th>Defendants Who Were Never Released on Bond</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Acquit.—</td>
<td>Acquit.—</td>
</tr>
<tr>
<td></td>
<td>Total</td>
<td>Total</td>
</tr>
<tr>
<td>Felony murder</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Other homicides</td>
<td>8</td>
<td>3</td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>15</td>
<td>2</td>
</tr>
<tr>
<td>Robbery</td>
<td>12</td>
<td>8</td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td>8</td>
<td>—</td>
</tr>
<tr>
<td>Rape</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Assault with intent to rape</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Other sex crimes</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>17</td>
<td>—</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle and Dyer Act violations</td>
<td>7</td>
<td>6</td>
</tr>
<tr>
<td>Forgery and uttering</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Larceny after trust and false pretenses</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>Lottery &amp; gambling</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>Narcotics</td>
<td>17</td>
<td>2</td>
</tr>
<tr>
<td>Other D.C. and federal felonies</td>
<td>17</td>
<td>3</td>
</tr>
<tr>
<td>Simple assault</td>
<td>7</td>
<td>—</td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Taking property without right</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>Uniform Narcotics</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Act violations</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Possession of numbers slips</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Attempts</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>Other D.C. Code misdemeanors</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>All Cases</td>
<td>128</td>
<td>32</td>
</tr>
</tbody>
</table>
Of the 53 cases tried by the court, 29 defendants posted pretrial bond and 24 defendants remained in jail throughout the pretrial period. The conviction rate for detained defendants was 46 per cent, whereas the conviction rate for defendants freed on bond was 86 per cent. It should be noted, however, that half of the detained defendants were acquitted by reason of insanity.
### Table XII

**SENTENCE BY JAIL STATUS AND CHARGE (REFERRED CASES NOT INCLUDED)**

<table>
<thead>
<tr>
<th>Charge on Which Guilt Determined</th>
<th>Defendants Who Made Bond</th>
<th>Defendants Who Were Not Released on Bond</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Suspended Sentence &amp; Probation</td>
<td>Imprisonment (^{40}) Total</td>
</tr>
<tr>
<td>Felony murder</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Other homicides</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>Robbery</td>
<td>2</td>
<td>6</td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Rape</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Assault with intent to rape</td>
<td>-</td>
<td>4</td>
</tr>
<tr>
<td>Other sex crimes</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>6</td>
<td>15</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle &amp; Dyer Act violations</td>
<td>10</td>
<td>19</td>
</tr>
<tr>
<td>Forgery &amp; uttering</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Larceny after trust &amp; false pretenses</td>
<td>3</td>
<td>-</td>
</tr>
<tr>
<td>Lottery &amp; gambling</td>
<td>38</td>
<td>19</td>
</tr>
<tr>
<td>Narcotics</td>
<td>4</td>
<td>41</td>
</tr>
<tr>
<td>Other D.C. and federal felonies</td>
<td>33</td>
<td>16</td>
</tr>
<tr>
<td>Simple assault</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Taking property without right</td>
<td>-</td>
<td>7</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Uniform Narcotics Act violations</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Possession of numbers slips</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Attempts</td>
<td>5</td>
<td>13</td>
</tr>
<tr>
<td>Other D.C. Code misdemeanors</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>Total Cases</td>
<td>144</td>
<td>210</td>
</tr>
</tbody>
</table>

\(^{40}\) “Imprisonment” includes defendants sentenced under the Federal Youth Corrections Act, those who received a term of imprisonment to be followed by probation, and those defendants who received a term of imprisonment in addition to or in lieu of payment of a fine.
### Table XIII

**Sentence by Jail Status and Charge (Referred Cases Not Included)**

<table>
<thead>
<tr>
<th>Charge on Which Guilt Determined</th>
<th>Defendants Who Made Bond</th>
<th>Defendants Who Were Not Released on Bond</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Suspended Sentence &amp; Probation</td>
<td>Imprisonment</td>
</tr>
<tr>
<td>Felony murder</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Other homicides</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td>—</td>
<td>2</td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Robbery</td>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td>Rape</td>
<td>—</td>
<td>1</td>
</tr>
<tr>
<td>Assault with intent to rape</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Other sex crimes</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>3</td>
<td>14</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>—</td>
<td>5</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle &amp; Dyer Act violations</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>Forgery &amp; uttering</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Larceny after trust &amp; false pretenses</td>
<td>—</td>
<td>2</td>
</tr>
<tr>
<td>Lottery &amp; gambling</td>
<td>2</td>
<td>—</td>
</tr>
<tr>
<td>Narcotics</td>
<td>—</td>
<td>17</td>
</tr>
<tr>
<td>Other D.C. and federal felonies</td>
<td>1</td>
<td>16</td>
</tr>
<tr>
<td>Simple assault</td>
<td>6</td>
<td>1</td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Taking property without right</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>Uniform Narcotics</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Act violations</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Possession of numbers slips</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Attempts</td>
<td>1</td>
<td>—</td>
</tr>
<tr>
<td>Other D.C. Code misdemeanors</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total Cases</strong></td>
<td><strong>29</strong></td>
<td><strong>99</strong></td>
</tr>
</tbody>
</table>

41 The total includes 2 death sentences.
<table>
<thead>
<tr>
<th>Charge on Which Guilt Determined</th>
<th>Defendants Who Made Bond</th>
<th>Defendants Who Were Not Released on Bond</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Suspended Sentence &amp; Probation</td>
<td>Suspended Sentence &amp; Imprisonment</td>
</tr>
<tr>
<td>Felony murder</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other homicides</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to rape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other sex crimes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housebreaking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grand larceny</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle &amp; Dyer Act violations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Forgery &amp; uttering</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Larceny after trust &amp; false pretenses</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lottery &amp; gambling</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Narcotics</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other D.C. and federal felonies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Simple assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taking property without right</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Petit larceny</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unlawful entry</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uniform Narcotics Act violations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possession of numbers slips</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attempts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other D.C. Code misdemeanors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>11</td>
<td>14</td>
</tr>
</tbody>
</table>

TABLE XIV

SENTENCE BY JAIL STATUS AND CHARGE (REFERRED CASES NOT INCLUDED)

Court Trials

<table>
<thead>
<tr>
<th>Charge on Which Guilt Determined</th>
<th>Defendants Who Made Bond</th>
<th>Defendants Who Were Not Released on Bond</th>
</tr>
</thead>
<tbody>
<tr>
<td>Felony murder</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Other homicides</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to rob and attempted robbery</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assault with intent to rape</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other sex crimes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Housebreaking</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Grand larceny</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle &amp; Dyer Act violations</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Forgery &amp; uttering</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Larceny after trust &amp; false pretenses</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Lottery &amp; gambling</td>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>Narcotics</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Other D.C. and federal felonies</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Simple assault</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taking property without right</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Petit larceny</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Uniform Narcotics Act violations</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possession of numbers slips</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attempts</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other D.C. Code misdemeanors</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total Cases</td>
<td>11</td>
<td>14</td>
</tr>
</tbody>
</table>
Implications which may possibly be drawn from the jury-trial table cannot be drawn from the tabulation of trials by the court. However, the latter are few in number and cannot be accorded comparative weight. Indeed, the obvious prevalence of insanity acquittals in court trials tends to distort the results.

RELATIONSHIP BETWEEN BOND AND SENTENCE IN FELONY CASES

The relationship between type of sentence (in terms of probation and imprisonment) and bond status by charge is shown in Tables XII, XIII and XIV.

The defendant who was freed on pretrial bond appeared less likely to receive a term of imprisonment than the defendant who was detained throughout. In Table XIII, the imprisonment rate for detained defendants was 95 per cent, while the rate for freed defendants was 77 per cent. The difference between sentences is especially pronounced with respect to the offenses of assault with a dangerous weapon and simple assault.

Table XII similarly indicates a higher imprisonment rate for detained defendants (85 per cent), and a lower rate for defendants freed on bond (59 per cent).

Table XIV shows that after trial by the court, all detained defendants were sentenced to terms of imprisonment while 14 (56 per cent) of those who had been free on bond were so sentenced.

The difference between the resultant sentences imposed upon defendants who had been free on bond and those who had not, apparent in Tables XII and XIII, is important in evaluating the effect, if any, of an accused's bond status. The mode of disposition, e.g., plea or trial by jury, of felony cases in the District of Columbia has been demonstrated to be a significant factor influencing the severity of sentence.\(^{42}\) Acknowledging the probability of other variables, the results set forth in this study seem to support that conclusion. The tables indicate the imprisonment rate of defendants convicted by a jury to have been higher (87 per cent) than that of defendants who entered pleas of guilt (74 per cent).

Nevertheless, the fact that a difference between the imprisonment rates of freed and detained defendants consistently appeared even while the mode of disposition was held constant, indicates the possibility that a relationship did exist between bond status and the fact of imprisonment.

or probation. This statement is admittedly subject to the qualification that the defendant who would be considered a good probation prospect might also be the defendant whose bond would be set at a comparatively low figure. In addition, the fact that less severe felony offenses are often the categories having the highest prevalence of low bond amounts must be considered.

Another qualification often raised is that perhaps the defendants who would be considered the most likely subjects for probation are in turn those most likely to be considered good risks by bondsmen. Suffice it to say that the results of this and other bail experiments appear to be a refutation of this point.43

REFERRRED CASES

One hundred ninety-one cases were ignored by the grand jury and were then referred for misdemeanor trial by the prosecuting authority. In these cases, the comparative figures are set forth in Table XV:

<table>
<thead>
<tr>
<th>Disposition of Offense</th>
<th>Number of Defendants Who Made Bond</th>
<th>Number of Defendants Who Remained in Detention</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convicted</td>
<td>43</td>
<td>86</td>
</tr>
<tr>
<td>Acquitted</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>Otherwise not convicted</td>
<td>5</td>
<td>48</td>
</tr>
<tr>
<td>Total</td>
<td>51</td>
<td>140</td>
</tr>
</tbody>
</table>

The conviction rate44 for all referred cases is 68 per cent. The conviction rate for all defendants who made bond is 84 per cent, while the rate of conviction for detained defendants is 61 per cent.

Since referred cases are originally presented as felony charges and proceed through the evaluation steps to the grand jury level, sufficient evidence for misdemeanor convictions is likely to exist to such an extent as to explain the high conviction rate.

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43 See pp. 712-14, 718-20 infra; Hearings on S. 2838, S. 2839 and S. 2840, supra note 8, at 107-08 (testimony of Herbert Sturz).

44 This conviction rate is based on a comparison of convicted cases with both acquitted and dismissed cases and is unlike the felony conviction rate which is based on a comparison of convictions and acquittals only.
Data comparable to what has been presented with respect to 1963 felony cases has not been tabulated by the Bail Project for misdemeanor cases in the District of Columbia. A survey was made, however, in preparation for the expansion of the operations of the project to include certain misdemeanor cases. The records for the months of January through July, 1964, were examined. Original felony charges reduced to misdemeanors at initial appearance were included. Defendants who posted bond prior to their initial appearance before a committing magistrate were not included.

The results of the survey are as follows:

(a) 33.5 per cent of the surveyed misdemeanor defendants were generally unlikely to be admitted to bail because their cases were dismissed upon initial appearance, or because they pleaded guilty or were tried and convicted or acquitted on the day of their initial appearance. Few of the convicted misdemeanants incurred delay prior to sentencing for probation reports.

(b) 66.5 per cent of the cases involved continuances or jury-trial requests which resulted in delays averaging an estimated 30 to 42 days. Forty-one per cent of the defendants in these cases obtained their pretrial release at or immediately after initial appearance.

(c) The most common surety-bond amounts set in the cases were $300 and $500. A small number of bonds were set at $1,000 or $1,500. In addition, several bonds were set at such amounts as $100, $200, $400 or $600. Release on personal recognizance was not unusual, although its use could not be considered substantial.

It should be noted that the case-disposition data and sentence data are not tabulated for these cases, and that the data for the referred cases set forth earlier should not be considered illustrative of other misdemeanor results.

Figures made available to the project for the calendar year 1963 do indicate that in cases wherein jury trial was originally requested the results (in terms of charges, not defendants) are:

- Pleas of guilt .................. 332
- Nolle prosequi .................. 914
- Dismissed without prejudice ...... 252
- Convicted by jury ............... 201
- Acquitted by jury ............... 65
In some cases, demand for jury trial was withdrawn and the cases certified to the court for trial. Dispositions of these charges are:

- Pleas of guilt .................. 47
- Nolle prosequi ................... 28
- Dismissed without prejudice ...... 5
- Convicted by the court ............ 145
- Acquitted by the court ............. 34

THE DISTRICT OF COLUMBIA BAIL PROJECT

Judicial Conference and Bar committees studying the administration of bail in the District of Columbia became aware of the problems mentioned and illustrated above and reported their existence to the District of Columbia Circuit's Judicial Conference in 1963, proposing remedial efforts. Among the proposals was one calling for the conducting of a pilot experiment to the effect that

In cases where the bail applicant appears to have such a stable connection with the community and appears to be of such character that he will be present for trial even in the absence of the posting of security by a bondsman, the relevant facts would be summarized, and that information together with the recommendation of release on personal recognizance made available to the committing magistrate.45

Concurring in the suggestion, the Circuit Conference of 1963 proposed the institution of a project similar to that being conducted in New York City by the Vera Foundation.46 Subsequently, a grant of funds by the Ford Foundation to Georgetown University made possible the institution and operation of a three-year experimental program.

This experiment, the District of Columbia Bail Project, initially covered only felony cases, as was originally proposed. In August, 1964, the coverage was extended to misdemeanor cases. In addition, the experiment's operations were expanded during 1964 to include fact-investigation in cases involving bail pending appeal. The data which is set forth hereafter includes the results of almost one year of actual court operations in felony

45 D.C. BAIL SYSTEM 7; see COMMITTEE ON BAIL PROBLEMS, REPORT TO THE CIRCUIT JUDICIAL CONFERENCE 7 (1963).
46 The Vera Foundation's "Manhattan Bail Project" had successfully begun an experiment with greater use of personal-recognizance release based on the community-tie hypothesis. Verified information concerning the accused's family, residence, employment and other ties was presented to committing magistrates in conjunction with a recommendation for release. See generally Ares, Rankin & Sturz, supra note 37.

PROCEDURES UTILIZED BY THE PROJECT

Basic to an understanding of the data here presented is an insight into the procedures utilized by the project and the criteria which govern recommendations for personal-recognizance release. Both the procedures and the criteria have been modified during 1964 in order to achieve more efficiency and flexibility.47

On some occasions, recommendations accompanied by supporting verified information are presented to the committing magistrate prior to the initial setting of bail. This was the procedure utilized effectively by the Manhattan Bail Project. In the great majority of cases, however, the District of Columbia program uses what is called a "re-evaluation procedure." Accused persons are interviewed by staff members immediately after the former are initially brought before a committing magistrate. The arresting officers are also interviewed at this time.

Thereafter, independent verification of the information is sought from the accused's relatives, friends, employers, unions, welfare officials, clergy and the like, whom he has given the staff member permission to contact. The accused's criminal record, if any, including juvenile charges, is obtained. Finally, a brief staff conference evaluates the case to determine whether a recommendation should be made that he be released on personal recognizance. The decision is based on the community ties of the accused and not on the alleged facts of the offense. The latter are usually not known by the staff unless they were brought out at initial presentation. Neither the accused nor any other contact are asked matters pertaining to the facts of the alleged offense.

Recommendations for release on personal recognizance48 are then submitted to the appropriate court or United States Commissioner.49 The en-

47 The original and modified criteria are discussed infra at 704-07. The criteria presently in use are set forth in some detail in the Appendix infra at 742-45. The Appendix, infra at 735-48, enumerates the basic organizational steps and describes the appeal-bail and other phases of the program.
48 The release actually utilized in most recognizance cases in the District of Columbia and in all Bail Project cases is a release on personal bond. No surety is required; no money is paid. The releasee promises to pay a nominal amount in the event of default. Personal bond differs from personal recognizance only in this respect.
49 The committing magistrates who are authorized to set bail or to modify it in such circumstances are the United States District Court, the United States Commissioner, and the United States Branch, District of Columbia Court of General Sessions. Both
tire procedure is concluded in periods of time ranging from the same day on which the accused appeared initially to a few days after his initial appearance, depending upon the difficulties encountered in obtaining necessary information from both private and official sources.

Upon release, each defendant talks to a member of the staff, who indicates that the defendant is a participant in a special, experimental program, advises him to stay out of trouble and informs him of the penalties for failure to appear.50

Efficient operation of the experiment, of course, encompasses not only the release of the accused, but certain follow-up procedures aimed at the return of the accused for required court appearances. For example, felony defendants are asked to telephone the office weekly.51 In addition, the released defendants and relatives and friends who agree during the course of verification to accept notification are notified in advance of required court appearances and reminded of the penalties for failure to appear.52 At each subsequent appearance, the project's personal information regarding the accused is brought up to date and the result of the appearance is recorded.53

CRITERIA FOR RELEASE ON PERSONAL RECOGNIZANCE

In order to be recommended for release on personal recognizance, an accused must meet certain criteria. The requirements include strong community roots (family ties, residence, employment, welfare, medical care, student status, and the like) relied upon in part by bondsmen. These ties

the Court of General Sessions and the Commissioner act as committing magistrates in felony cases. Misdemeanors are tried in the Court of General Sessions; felonies in the United States District Court. Thus, if the Court of General Sessions or the Commissioner has bound the case over for consideration by the grand jury, thereby relinquishing jurisdiction, applications for release on personal bond must be made to the district court.


51 Adherence to this request is not strictly enforced. It serves not as a check but as an additional means of notifying the defendant of required court appearances, official notice of which may be given only three days prior to the appearance date. Such a system has not been found necessary in the Court of General Sessions.

52 See note 50 supra.

53 For detailed information as to project procedures and reproductions of the more significant forms used, see Appendix, infra at 740-48.
formed the basis of the working hypothesis of the Vera Foundation's experiment and have been refined according to the experience of that program and its District of Columbia counterpart.

The community factors are weighted according to degrees of indicated stability and a point system is employed. For example, an accused who has had an established residence in the District of Columbia or the metropolitan area for more than two years will receive a higher "point rating" than a person having six months' residence. In addition, the presence and seriousness of a prior criminal record can operate to the defendant's point detriment. This factor permits an assessment of the defendant's motivation to flee according to the severity of the sentence to be expected. Similar weighting permits evaluation of additional aspects of the accused's character, such as negligent conduct in prior bail circumstances, alcoholism or narcotics addiction.

This point system is applied to all factors involved and a minimum standard of point achievement must generally be met before consideration is given to the possibility of recommending release.

The weighted-factor system is, of course, not inflexible. A certain amount of discretion and judgment must be exercised in its application. For example, there are occasions when, in the discretion of the project director, recommendations are not made, even though under the application of the point system, the accused has appeared to qualify for the recommendation. The discretion would be so exercised because factors appeared in the case indicating that the accused would nonetheless be a poor or dangerous risk.

While the point system in many cases may be applied with little difficulty, situations often arise wherein judgment is called for and the points serve only as guidelines. A not atypical situation may illustrate:

John Doe, age twenty, was arrested and charged with robbery. A project interview and subsequent verification disclosed that Mr. Doe was living at address A at the time of his arrest, but that he had not resided at address A consistently for more than one month. Instead, he had for a period of five years alternated between address A, where his mother and three brothers lived, and address B, where his aunt and uncle and another brother resided. Further checking disclosed that there was not enough room to accommodate the entire Doe family at address A and that this alternating between family addresses was the result. The mother and the aunt and uncle appeared concerned with John's welfare and agreed to assist the project in reminding John of required court appearances.
John's employment provided yet another problem. Questioned independently, each of his relatives and a friend corroborated John's statement that he obtained daily construction work by waiting at a "drop-stop," a major street corner in the city where laborers are selected by firms seeking to fill day-to-day employment needs. John's friend obtained employment in a similar fashion. Such a system is in fact customary in the city, and while the verification on the point might be suspect, since the relatives' source of information could also have been John, there was no reasonable ground for disbelief. All other data received at interview proved to be true.

Doe had little else to assist his case. He had dropped out of school after completing the ninth grade. He had been charged with several offenses as a juvenile, some of which were serious. Whether or not he was in fact implicated in the offenses cannot, of course, be determined, since the law does not treat juvenile cases as criminal convictions and preserves the confidential character of juvenile records. Doe had been convicted as an adult of petit larceny for which he served six months in jail. He had also forfeited collateral on three charges of disorderly conduct. In none of these situations had he been released on bail.

Another matter was worthy of note, however. Doe voluntarily contributed to the support of his mother and of a child for whom he was responsible.

Considering, then, the question whether Doe's future court appearances could reasonably be assured, the conclusion would be affirmative. His family ties were strong, as was indicated not only by his residence but also by his support of his mother and by his relatives' concern for him. While his residence at a particular location was unstable, he was a lifetime resident of the city and had always lived with his family.

Doe's employment record was spotty. But some weight should be given to his "drop-stop" employment in that it indicates some responsibility and a tie to a locality where economic need requires a familiarity with labor market opportunities.

To be sure, Doe had no previous bail experience and this was his first adult felony charge. However, his juvenile and adult misdemeanor record indicated a familiarity with the courts, and his voluntary support of his child demonstrated his acceptance of some degree of responsibility. In addition, his record would not markedly increase the sentence which he might expect if he were convicted on the robbery charge.

In sum, all signs indicated that Doe's only course of conduct upon
release would be to remain in the city with his family. He qualified for a recommendation that he be released on his own recognizance.

As a result of the August, 1964, modification of project criteria governing recommendations for personal-recognizance releases, similar exercise of judgment is possible with respect to cases that are called "exclusions." No cases are excluded from project coverage by virtue of the nature of the offense charged. However, no recommendations for release on personal recognizance are made (often interviews are not taken) where the defendants' criminal records disclose prior convictions of certain felony offenses, violation of probation or parole, escape from prison or from a mental institution, bail jumping, or other factors which demonstrate a lack of responsibility in situations analogous to the recognizance release, or which are required by the public safety or the effective operation of the experiment.

Initially, these "exclusionary factors" were applied inflexibly. Certain of them, however, have been modified so as to permit consideration of, and a release recommendation in, the case if other facts so warrant. In addition, the community-tie criteria have been reweighted and redefined. The intended results are to permit more flexibility in the "exclusion" area and to give more emphasis to community ties. While standards have been somewhat liberalized, the liberalization has not appeared to translate itself into a large increase in the number of defendants qualifying for personal-recognizance recommendations, although it has decreased the number of certain outright exclusions.

**SCOPE OF THE PROJECT**

As previously noted, the pretrial release experiment is intended to cover, if at all possible, the following cases: (a) all cases involving felony charges bound over to the grand jury by the United States Branch, District of Columbia Court of General Sessions; (b) all cases bound over to the grand jury by the Coroner; (c) all cases entering the United States Commissioner's Office; (d) misdemeanor cases in which delay and possible detention are indicated, viz. misdemeanor cases in which continuances have been permitted or in which jury trials have been demanded; and (e) certain cases in which the grand jury originally indicts defendants who have not had preliminary hearings on the charges involved.55

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54 See pp. 708-11 infra.
55 With respect to the various "Grand Jury Originals," the following is pertinent:
In 32 "Grand Jury Original" cases, the defendants were indicted and arraigned, or were arrested prior to the onset date of project operations. Fifteen cases involved removals
From January 20, 1964, through December 31, 1964, the project's operations covered 2,254 felony cases. From August 3, 1964, through December 31, 1964, the operations covered 1,216 misdemeanor cases. With respect to the felony cases, some defendants were involved in more than one case. Where a defendant had not qualified for a recommendation by virtue of insufficient community ties or of factors present in his prior record when he first appeared, he accordingly was not deemed qualified for recommendation in subsequent cases (absent a change in circumstances). Where, however, a defendant was not interviewed because he had made bond, this fact did not serve to preclude investigation of him in subsequent cases. Accordingly, defendants in felony cases were eligible for project coverage a total of 2,178 times. This situation has not yet developed to any extent with respect to the misdemeanor cases, there being only one such case.

Out of the total of 2,178 felony possibilities and the 1,215 misdemeanor possibilities, a total of 995 (46 per cent) of the felony defendants and a total of 722 (59 per cent) of the misdemeanor defendants otherwise possibly eligible for project consideration were not subjects of project recommendation for release on personal recognizance. The reasons for exclusion are shown in Table XVI.

As to the remaining 1,183 (felony) and 493 (misdemeanor) eligible defendants, the figures are as indicated in Table XVII. This table demonstrates that of those eligible for project recommendation for release on personal recognizance, a little fewer than one half of the felony defendants and one quarter of the misdemeanor defendants were not recommended for reasons other than insufficient community ties. The absence of recommendations in such cases in which bail was set is attributable to factors existing in the defendant's prior record which, because of public policy (designations 4 and 6) or because of such elements as recidivism or failure to act responsibly in situations analogous to release on personal bond (designations 7 through 10), have out of the jurisdiction. One hundred twenty-seven defendants obtained their releases on surety or personal bond prior to project coverage. In 39 cases, the defendants pleaded guilty to informations. At least one defendant was serving a sentence. In 8 cases, no bond was set. Three accused persons were referred to a mental hospital. Sixty-four defendants had been investigated by the project in connection with other cases and had not qualified for personal-recognizance recommendations. Fifty-eight accused remained at large upon indictment and those who have since been arrested form a part of the statistics set forth hereafter. Twelve "originals" are known to have been missed by the project. The remainder of the "originals" were investigated by the staff and form a part of the figures set forth in the text that follows.
### Table XVI

<table>
<thead>
<tr>
<th>Reason</th>
<th>Felonies</th>
<th>Misdemeanors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number</td>
<td>Number</td>
</tr>
<tr>
<td></td>
<td>(Percentage)</td>
<td>(Percentage)</td>
</tr>
<tr>
<td>1. Posted surety or personal bond prior to a possible recommendation for release on personal recognizance</td>
<td>801(^{68}) (36.77)</td>
<td>656 (53.99)</td>
</tr>
<tr>
<td>2. Excluded by project because serving another sentence at time of interview</td>
<td>45 (2.06)</td>
<td>2 (.16)</td>
</tr>
<tr>
<td>3. Female defendants charged prior to time when project expanded operations to cover females(^{57})</td>
<td>15 (.69)</td>
<td>—</td>
</tr>
<tr>
<td>4. Committed to hospital for mental examination, dismissed, ignored, or otherwise disposed of prior to completion of project procedures</td>
<td>27 (1.25)</td>
<td>51 (4.21)</td>
</tr>
<tr>
<td>5. Charged as fugitives for purposes of extradition or removal or otherwise under detainer</td>
<td>88 (4.04)</td>
<td>3 (.25)(^{68})</td>
</tr>
<tr>
<td>6. Refused to be interviewed</td>
<td>15 (.69)</td>
<td>8 (.65)</td>
</tr>
<tr>
<td>7. Interviews known to have been missed through project error</td>
<td>4 (.18)</td>
<td>2 (.16)</td>
</tr>
</tbody>
</table>

---

\(^{68}\) It is significant to note that at least 338 of the felony defendants making bond were charged with gambling offenses.

\(^{57}\) Initially, project operations were limited to males accused of felonies. However, experience indicated that it was feasible to include women who, while segregated from male accuseds, were detained in such proximity as to be able to be interviewed without significantly delaying project time schedules. Such coverage began on February 14, 1964.

\(^{58}\) The 3 misdemeanors are the result of detainers. There is a greater number of cases in the Court of General Sessions, United States Branch, which might properly be denoted fugitive cases. These cases do not become "continued" or "jury-demand" misdemeanors and hence are not here recorded. It is possible, in addition, that a few cases which were dismissed upon initial presentation in the United States Commissioner's Office, or which involved removals out of the District of Columbia may not be included in the above figures.
been denominated by the project as exclusionary factors, subject to the August 3, 1964, modification. In addition, designations 4, 6, 9 and 10 are also relevant to an assessment of motivation to flee since they would play a part in the determination of the severity of the sentence to be expected.

### Table XVII

**Defendants Considered by the Project**

<table>
<thead>
<tr>
<th>Designation</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Defendants recommended for release on personal bond</td>
</tr>
<tr>
<td>2. Defendants not recommended because of insufficient community ties, lack of a presently verifiable Washington area address or evidence of an intent to leave the jurisdiction</td>
</tr>
<tr>
<td>3. Defendants qualified under the weighted point system but whom the Project Director in the exercise of his discretion declined to recommend because of facts indicating poor or dangerous risks</td>
</tr>
<tr>
<td>4. Defendants on bond on a prior charge at the time the present charge originated (flexible after August 3, 1964)</td>
</tr>
<tr>
<td>5. Defendants for whom no bond was ever set (following the evidenced intent of the committing magistrate that the defendant not be released)</td>
</tr>
<tr>
<td>6. Defendants previously convicted one or more times of the same felony or of two or more other felonies</td>
</tr>
<tr>
<td>7. Defendants who are known to have previously willfully failed to appear when required while on surety or personal bond</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Designation</th>
<th>Felonies Number (Percentage)</th>
<th>Misdemeanors Number (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>279 (23.58)</td>
<td>181 (36.71)</td>
</tr>
<tr>
<td>2.</td>
<td>315 (26.62)</td>
<td>178 (36.10)</td>
</tr>
<tr>
<td>3.</td>
<td>33 (2.78)</td>
<td>8 (1.62)</td>
</tr>
<tr>
<td>4.</td>
<td>115 (9.72)</td>
<td>44 (8.93)</td>
</tr>
<tr>
<td>5.</td>
<td>49 (4.14)</td>
<td>1 (.20)</td>
</tr>
<tr>
<td>6.</td>
<td>165 (13.94)</td>
<td>17 (3.45)</td>
</tr>
<tr>
<td>7.</td>
<td>7 (.59)</td>
<td>—</td>
</tr>
</tbody>
</table>

---

59 As of August 3, 1964, this category has been modified to result in the exclusion of a defendant who has been previously convicted of the same felony or of two or
<table>
<thead>
<tr>
<th>Designation</th>
<th>Felonies Number (Percentage)</th>
<th>Misdemeanors Number (Percentage)</th>
</tr>
</thead>
<tbody>
<tr>
<td>8. Defendants whose records indicated escapes from prison or other detention facilities or from mental institutions (if juvenile, flexible after August 3, 1964)</td>
<td>41 (3.46)</td>
<td>—</td>
</tr>
<tr>
<td>9. Defendants who had violated parole or probation (flexible after August 3, 1964)</td>
<td>89 (7.51)</td>
<td>7 (1.42)</td>
</tr>
<tr>
<td>10. Defendants who would face revocation of a felony parole or probation as a result of the offense presently charged</td>
<td>78 (6.59)</td>
<td>36 (7.30)</td>
</tr>
</tbody>
</table>

There remain three exclusionary categories. The first includes the demonstration of symptoms of severe mental or physical illness or incapacity at interview. There were 9 felony and 7 misdemeanor cases of this nature. The second category includes 13 misdemeanor cases wherein short continuances precluded effective release on personal bond. Finally, 3 felony cases and 1 misdemeanor case were not considered because the defendants were on conditional release from a mental hospital.

Of the 279 felony and 181 misdemeanor recommendations which have been made from the end of January through December 31, 1964, 74.55 per cent and 90 per cent, respectively, have been fully or partially accepted by the participating judges and the United States Commissioner. The figures are as follows:

<table>
<thead>
<tr>
<th>Felony</th>
<th>Misdemeanor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recommendations made..................</td>
<td>279</td>
</tr>
<tr>
<td>Number of defendants released on personal bond</td>
<td>190</td>
</tr>
<tr>
<td>Number of defendants whose bonds have been lowered as a result of project recommendations</td>
<td>18</td>
</tr>
<tr>
<td>Number of motions for release on personal bond based on project recommendations denied . . . .</td>
<td>71</td>
</tr>
</tbody>
</table>

more other felonies if such felonies consisted of crimes against the person or narcotics violations. A list of such offenses may be found in the Appendix, infra at 744.
In sum, 279 felony defendants and 181 misdemeanor defendants have been recommended for release on personal bond. This constitutes 23.6 per cent and 36.7 per cent, respectively, of the eligible cases. Moreover, it constitutes virtually 38 per cent and 46 per cent of those defendants interviewed. Although the total of 460 recommendations and 350 releases on personal bond represents a sizable increase in the use of personal bond in the District of Columbia, no significance can be attached to this increase without a proper examination of the subsequent history of the release cases.

The Released Defendants

As demonstrated earlier, project recommendations for release on personal recognizance are made without regard to the type of offense involved and, with few exceptions, without regard to the nature of the offense. This procedure tends to isolate the community-tie status of the accused and to permit a more objective determination of his qualifications.

The committing magistrate, however, is directed by law to take into account the nature of the offense. Thus, the Assistant United States Attorney is present at every Bail Project recommendation to state the alleged facts of the crime. The cooperation of all parties, however, together with the presentation of a personal picture of the accused, in addition to the customary description of the offense, has made possible the release of many defendants charged with very serious offenses. Table XVIII contains a list of the charges against defendants who have been released under the program. It is representative as well of those cases wherein such release was denied. The list, of course, reflects neither the alleged facts of the offenses nor the degrees of community ties possessed by the defendants, and thus does not indicate the basis for their release.

Defaulting Defendants

As of this writing, thirteen of the 350 defendants (190 felony and 160 misdemeanor) released on personal recognizance during the program's 1964 operations failed to appear in court when required to do so, although, as indicated in Table XIX, some had made required court appearances prior to default. Analysis of the information in the possession of the project fails to isolate any discernible causative factor. Two facts appear significant, however: (1) nine of the thirteen defaulting defendants were charged with misdemeanors while the other four were charged with felonies, but three of these felony charges were subsequently reduced

60 Fed. R. Crim. P. 46(c).
<table>
<thead>
<tr>
<th>Charge</th>
<th>Number of Releases</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonies</strong></td>
<td></td>
</tr>
<tr>
<td>Homicide</td>
<td>16</td>
</tr>
<tr>
<td>Assault with intent to kill</td>
<td>1</td>
</tr>
<tr>
<td>Assault with a dangerous weapon</td>
<td>12</td>
</tr>
<tr>
<td>Assault on a police officer</td>
<td>1</td>
</tr>
<tr>
<td>Robbery</td>
<td>42</td>
</tr>
<tr>
<td>Attempted robbery</td>
<td>3</td>
</tr>
<tr>
<td>Assault with intent to rob</td>
<td>5</td>
</tr>
<tr>
<td>Rape</td>
<td>4</td>
</tr>
<tr>
<td>Carnal knowledge</td>
<td>2</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>38</td>
</tr>
<tr>
<td>Housebreaking and grand larceny and/or assault</td>
<td>2</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>6</td>
</tr>
<tr>
<td>Grand larceny of an auto</td>
<td>1</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>37</td>
</tr>
<tr>
<td>Forgery</td>
<td>5</td>
</tr>
<tr>
<td>Theft from the mails</td>
<td>5</td>
</tr>
<tr>
<td>Lottery</td>
<td>1</td>
</tr>
<tr>
<td>Carrying a dangerous weapon after conviction of a felony</td>
<td>1</td>
</tr>
<tr>
<td>Harrison narcotics</td>
<td>4</td>
</tr>
<tr>
<td>Bigamy</td>
<td>1</td>
</tr>
<tr>
<td>Cruelty to children</td>
<td>1</td>
</tr>
<tr>
<td>Bringing stolen property into D.C.</td>
<td>1</td>
</tr>
<tr>
<td>Interference with a federal marshal</td>
<td>1</td>
</tr>
<tr>
<td><strong>Misdemeanors</strong></td>
<td></td>
</tr>
<tr>
<td>Simple assault</td>
<td>29</td>
</tr>
<tr>
<td>Threats</td>
<td>5</td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td>13</td>
</tr>
<tr>
<td>Attempted unauthorized use of a motor vehicle</td>
<td>9</td>
</tr>
<tr>
<td>Attempted housebreaking</td>
<td>4</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>4</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>18</td>
</tr>
<tr>
<td>Attempted petit larceny</td>
<td>2</td>
</tr>
<tr>
<td>Receiving stolen property</td>
<td>1</td>
</tr>
<tr>
<td>Destruction of public/private property</td>
<td>5</td>
</tr>
<tr>
<td>Destroying movable property</td>
<td>1</td>
</tr>
<tr>
<td>False pretenses</td>
<td>1</td>
</tr>
<tr>
<td>Soliciting prostitution</td>
<td>1</td>
</tr>
<tr>
<td>Possession and vagrancy, Uniform Narcotic Drug Act</td>
<td>3</td>
</tr>
<tr>
<td>Illegal wearing of uniform</td>
<td>1</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>1</td>
</tr>
<tr>
<td>Bad checks</td>
<td>1</td>
</tr>
<tr>
<td>Unemployment compensation fraud</td>
<td>1</td>
</tr>
<tr>
<td>Combinations of two or more of the above</td>
<td>60</td>
</tr>
</tbody>
</table>
so that at the point of default twelve of the thirteen faced misdemeanor charges; and (2) seven of the defaulters were rearrested in the District of Columbia, at least three of them at home, and only two of the thirteen are definitely known to have fled the city.

One of the defendants who failed to appear was known to be a narcotics addict. This fact in and of itself is not significant, though, in view of the good results in other addiction cases.

### Table XIX

<table>
<thead>
<tr>
<th>Defaulters</th>
<th>Charges on Which Released</th>
<th>Charges Faced at Default</th>
<th>Court Appearances Prior to Default</th>
<th>Point of Default</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Taking property without right</td>
<td>Three</td>
<td>Sentencing</td>
<td></td>
</tr>
<tr>
<td>Grand larceny</td>
<td>Petit larceny</td>
<td>None</td>
<td>To plead to information</td>
<td></td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Same, and interstate transportation of a motor vehicle</td>
<td>None</td>
<td>Arraignment</td>
<td></td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Unlawful entry</td>
<td>One</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Taking property without right</td>
<td>One</td>
<td>Sentencing (he left the courtroom)</td>
<td></td>
</tr>
<tr>
<td>Destroying public property</td>
<td>Same</td>
<td>None</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Carrying a dangerous weapon</td>
<td>Same</td>
<td>None</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Assault</td>
<td>Same</td>
<td>One</td>
<td>Sentencing</td>
<td></td>
</tr>
<tr>
<td>Threats and unlawful entry</td>
<td>Same</td>
<td>One</td>
<td>Sentencing</td>
<td></td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Same</td>
<td>Failed once; voluntary reappearance and rereleased upon explanation; appeared once thereafter</td>
<td>Sentencing</td>
<td></td>
</tr>
<tr>
<td>Possession and vagrancy, Uniform Narcotic Drug Act</td>
<td>Same</td>
<td>Three</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Same</td>
<td>None</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>Threats</td>
<td>Same</td>
<td>One</td>
<td>Sentencing</td>
<td></td>
</tr>
</tbody>
</table>
CONDUCT OF DEFENDANTS RELEASED ON PERSONAL RECOGNIZANCE

As was stated earlier in this article, the purpose of bail is to ensure that the accused will appear in court to answer to the charges, not to prevent the commission of crime. Nevertheless, official and community concern over rising crime rates has focused upon the conduct of defendants who have been released on bail. This is especially true when the pretrial release is one on personal recognizance under an experimental program. Accordingly, the project has attempted to record pertinent data in this area.

Of the 190 defendants charged with felonies and released on personal recognizance under project operations in 1964, 28 have been rearrested and charged with offenses allegedly committed during the period of pretrial release. Many of the subsequent charges have been misdemeanors. The majority, however, have been felonies.

Sixteen of the 160 misdemeanor releasees have similarly been subsequently charged with offenses allegedly committed while on personal bond. Six of the subsequent charges have been felonies.

Many explanations for this phenomenon have been suggested, such as recidivism, addiction, the time lag between arrest and trial, police harassment, and the like. Only one of the “subsequent offenders” was known to be a narcotics addict, however. Police harassment, while a possibility, is highly unlikely. It is more likely that arrests are made in light of the individual’s criminal record and proclivities. Nevertheless, not all of the charges resulted in convictions. Table XX contains information pertinent to the suggested explanations.

<table>
<thead>
<tr>
<th>Release Charge</th>
<th>Subsequent Charge</th>
<th>Disposition of Subsequent Charge</th>
<th>Time Lapse Between Release and Subsequent Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Dismissed</td>
<td>29 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Dropped in light of first charge's disposition</td>
<td>40 days</td>
</tr>
</tbody>
</table>

### Table XX (continued)

<table>
<thead>
<tr>
<th>Release Charge</th>
<th>Subsequent Charge</th>
<th>Disposition of Subsequent Charge</th>
<th>Time Lapse Between Release and Subsequent Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>(1) Robbery</td>
<td>(1) None as yet</td>
<td>48 days</td>
</tr>
<tr>
<td></td>
<td>(2) Unauthorized use of a motor vehicle&lt;sup&gt;62&lt;/sup&gt;</td>
<td>(2) None as yet</td>
<td>195 days</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Traffic (permit)</td>
<td>90 day sentence</td>
<td>16 days</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Tampering</td>
<td>Partially suspended sentence</td>
<td>15 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Petit larceny</td>
<td>45 day sentence</td>
<td>45 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Intoxication</td>
<td>20 day sentence</td>
<td>35 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Attempted petit larceny</td>
<td>180 day sentence</td>
<td>60 days</td>
</tr>
<tr>
<td>Forgery</td>
<td>Robbery</td>
<td>18—60 months concurrent with first charge</td>
<td>63 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Dismissed</td>
<td>22 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Plea of guilty</td>
<td>47 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Assault with a dangerous weapon</td>
<td>Acquitted</td>
<td>2 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Ignored and referred</td>
<td>44 days</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>Petit larceny</td>
<td>Nolle pros.</td>
<td>54 days</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>(1) Housebreaking</td>
<td>(1) Dismissed</td>
<td>(1) 26 days</td>
</tr>
<tr>
<td></td>
<td>(2) Unauthorized use of a motor vehicle</td>
<td>(2) One year imprisonment</td>
<td>(2) 67 days</td>
</tr>
<tr>
<td></td>
<td>(3) Unauthorized use of a motor vehicle&lt;sup&gt;63&lt;/sup&gt;</td>
<td>(3) One to three year imprisonment concurrent with (2)</td>
<td>(3) 101 days</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Attempted unauthorized use of a motor vehicle</td>
<td>No papers</td>
<td>12 days</td>
</tr>
</tbody>
</table>

<sup>62</sup> The defendant was released on surety bond in connection with his first subsequent charge, and was thereafter arrested on yet another charge.

<sup>63</sup> With respect to the second and third subsequent charges, arrests were made after the defendant obtained his release on surety bond.
<table>
<thead>
<tr>
<th>Release Charge</th>
<th>Subsequent Charge</th>
<th>Disposition of Subsequent Charge</th>
<th>Time Lapse Between Release and Subsequent Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>(1) Intoxication</td>
<td>(1) $25/10 days</td>
<td>(1) 69 days</td>
</tr>
<tr>
<td></td>
<td>(2) Petit larceny, destroying property, disorderly conduct</td>
<td>(2) Dismissed</td>
<td>(2) 169 days</td>
</tr>
<tr>
<td></td>
<td>(3) Homicide</td>
<td>(3) None as yet</td>
<td>(3) 196 days</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Robbery</td>
<td>None as yet</td>
<td>52 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Housebreaking</td>
<td>None as yet</td>
<td>12 days</td>
</tr>
<tr>
<td>Housebreaking and larceny</td>
<td>Disorderly</td>
<td>30 day sentence</td>
<td>45 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Unauthorized use of a motor vehicle</td>
<td>None as yet</td>
<td>27 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Housebreaking</td>
<td>None as yet</td>
<td>35 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Robbery</td>
<td>None as yet</td>
<td>32 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Robbery</td>
<td>None as yet</td>
<td>20 days</td>
</tr>
<tr>
<td>Housebreaking</td>
<td>Housebreaking</td>
<td>None as yet</td>
<td>51 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Bribery</td>
<td>None as yet</td>
<td>4 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Homicide</td>
<td>Dismissed</td>
<td>65 days</td>
</tr>
<tr>
<td>Grand larceny</td>
<td>Bringing stolen property into D.C. (misdemeanor)</td>
<td>None as yet</td>
<td>86 days</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Unauthorized use of a motor vehicle</td>
<td>Federal Youth Corrections Act</td>
<td>5 days</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Petit larceny</td>
<td>120 day sentence</td>
<td>39 days</td>
</tr>
<tr>
<td>Assault, petit larceny, attempted larceny</td>
<td>Robbery</td>
<td>None as yet</td>
<td>31 days</td>
</tr>
<tr>
<td>Assault, petit larceny, attempted larceny</td>
<td>Robbery</td>
<td>None as yet</td>
<td>31 days</td>
</tr>
<tr>
<td>Possession of prohibited weapon</td>
<td>Carrying a dangerous weapon</td>
<td>180 day sentence</td>
<td>3 days</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>Intoxication</td>
<td>60 day sentence</td>
<td>33 days</td>
</tr>
<tr>
<td>Assault, possession of prohibited weapon</td>
<td>Unauthorized use of a motor vehicle</td>
<td>None as yet</td>
<td>70 days</td>
</tr>
<tr>
<td>Assault</td>
<td>Assault</td>
<td>None as yet</td>
<td>97 days</td>
</tr>
</tbody>
</table>
### Table XX (continued)

<table>
<thead>
<tr>
<th>Release Charge</th>
<th>Subsequent Charge</th>
<th>Disposition of Subsequent Charge</th>
<th>Time Lapse Between Release and Subsequent Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possession, Uniform Narcotic Drug Act, attempted larceny by trick, attempted procuring</td>
<td>Attempted Robbery</td>
<td>None as yet</td>
<td>17 days</td>
</tr>
<tr>
<td>Unlawful entry</td>
<td>Assault, possession of prohibited weapon</td>
<td>None as yet</td>
<td>6 days</td>
</tr>
<tr>
<td>Destroying private property, petit larceny, unlawful entry</td>
<td>Robbery</td>
<td>None as yet</td>
<td>44 days</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>Intoxication</td>
<td>$25/10 days</td>
<td>28 days</td>
</tr>
<tr>
<td>Assault, possession of a prohibited weapon, destroying movable property</td>
<td>Destroying movable property</td>
<td>Nolle prosequi</td>
<td>6 days</td>
</tr>
<tr>
<td>Assault</td>
<td>Unlawful entry, assault (originally housebreaking)</td>
<td>60 day sentence on each</td>
<td>6 days</td>
</tr>
<tr>
<td>Assault, petit larceny</td>
<td>Traffic violations</td>
<td>$100/30 days and $10/5 days</td>
<td>118 days</td>
</tr>
<tr>
<td>Petit larceny</td>
<td>Assault</td>
<td>None as yet</td>
<td>36 days</td>
</tr>
</tbody>
</table>

As has been previously noted, the project customarily does not make recommendations for release of defendants who were on a prior bail bond at the time of arrest. Thus, as a general rule defendants who are rearrested while on personal-recognizance are not recommended again. This policy is flexible, however, and several subsequent recommendations have been made, some of which were accepted.

**FINAL DISPOSITION OF THE RELEASE CHARGE**

One of the most interesting aspects of the 1964 experience is that concerning the dispositions of the cases in which the defendants have been released on personal bond. Reference to the chart set forth below will indicate that 66 per cent of the defendants whose cases have reached final dis-
position never were returned to jail on the release charge. Whether the basis for this record is the defendant's enhanced ability to assist in his defense, or the similarity between project criteria and probation requirements is as yet a matter of speculation.

**Felony Releases (190):**

I. No final disposition ........................................... 24
II. Pre-indictment dismissals, ignorals, etc. .................. 17
III. Pre-indictment death ........................................ 1
IV. Cases ignored and referred for misdemeanor action .......... 44
   A. Referred, nolle pros. or dismissed ....................... 8
   B. Referred, death prior to disposition ................... 1
   C. Referred, acquitted ....................................... 2
   D. Referred, committed to mental hospital ................ 1
   E. Referred, convicted ...................................... 23
      (1) Referred, convicted, probation ....................... 4
      (2) Referred, convicted, suspended sentence ........... 2
      (3) Referred, convicted, imprisonment ................. 17
   F. Referred, no disposition as yet .......................... 9
V. Case referred to Juvenile Court (age discrepancy) .......... 1
   A. Juvenile Court, probation ................................ 1
VI. Indictments .................................................. 103
   A. Post-indictment dismissals ............................... 10
   B. Acquittals ................................................ 7
   C. Convictions ............................................... 46
      (1) Conviction, probation .................................. 16
      (2) Conviction, Federal Youth Corrections Act .............. 5
      (3) Conviction, imprisonment .............................. 15
      (4) Conviction, imprisonment and probation ................ 2
      (5) Conviction, not yet sentenced ......................... 8
   D. Indicted, not yet tried ................................... 40

64 Some of the released defendants have been remanded to custody upon court appearance, at arraignment, trial, or before sentencing. Most, however, have been permitted to remain on personal bond until sentencing. It should be indicated that the remanded defendants, coincidentally, received sentences of imprisonment.
Misdemeanor Releases (160):

I. No final disposition ........................................ 53
II. Dismissals, nolle pros. ...................................... 52
III. Acquittals ................................................... 9
IV. Convictions .................................................. 46
   A. Convicted, imprisonment ................................. 27
   B. Convicted, suspended sentence ......................... 3
   C. Convicted, probation ................................... 10
   D. Convicted, imprisonment and fine ...................... 6

CONDUCT SUBSEQUENT TO FAVORABLE DISPOSITION
OF THE RELEASE CHARGE

Finally, there remains to be considered the conduct after favorable disposition of the release charge of those defendants who were released under the program. This data, while not yet a significant facet of the project ex-

<table>
<thead>
<tr>
<th>Original (Release) Charge</th>
<th>Disposition of Original Charge</th>
<th>Post-Disposition Charge</th>
<th>Disposition of 2nd Charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>Housebreaking</td>
<td>Nolle pros.</td>
<td>Harrison narcotics</td>
<td>None as yet</td>
</tr>
<tr>
<td>Carnal knowledge</td>
<td>(juvenile)</td>
<td>Robbery</td>
<td>None as yet</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Dismissed</td>
<td>Robbery</td>
<td>None as yet</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Probation</td>
<td>Petit larceny</td>
<td>90 days</td>
</tr>
<tr>
<td>Robbery</td>
<td>Ignored, referred and nolle pros.</td>
<td>Robbery</td>
<td>None as yet</td>
</tr>
<tr>
<td>Unauthorized use of a motor vehicle</td>
<td>Dismissed</td>
<td>(1) Disorderly conduct</td>
<td>(1) Nolle pros.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attempted robbery</td>
<td>Dismissed</td>
<td>Robbery</td>
<td>None as yet</td>
</tr>
<tr>
<td>Bringing stolen property into D.C.</td>
<td>Ignored</td>
<td>Assault with intent to rob</td>
<td>None as yet</td>
</tr>
<tr>
<td>Robbery</td>
<td>Ignored</td>
<td>Attempted robbery</td>
<td>None as yet</td>
</tr>
<tr>
<td>Taking property without right, petit larceny</td>
<td>Ignored</td>
<td>Petit larceny</td>
<td>15 days</td>
</tr>
<tr>
<td>Destroying private property</td>
<td>Dismissed</td>
<td>Attempted housebreaking</td>
<td>None as yet</td>
</tr>
</tbody>
</table>
perience, forms a necessary corollary to the data with respect to the dispositions of release cases.

To our knowledge at this time, 11 persons originally released on personal bond have been subsequently charged with offenses after disposition of the original charges.

**Costs of Detention**

One of the less publicized results of the increased use of various methods of pretrial release is the considerable savings in public expenditures. Under the present bail system, the court by setting bond generally envisions the pretrial release of defendants. But, as noted earlier, if the bond premium is too costly for the defendant or if the bondsman does not consider the prisoner a reliable candidate for his services, the defendant must await his trial in jail. In the case of accused felons, the period of incarceration may entail several months, and in some cases, a year.

**Costs of Confinement**

The most obvious cost to the community in keeping a man in jail before his trial is that of the detention itself. In some communities the average daily per-prisoner cost may be as high as $7.00 for men and $11.00 for women. These figures include both fixed and variable costs. Operational costs such as custodial salaries, building maintenance and utilities which exist regardless of the number of prisoners detained, generally remain fixed, absent a sizeable decrease in inmate population which would permit a closing down of an entire unit of the holding facility. However, variable costs, those which refer to the personal maintenance of the prisoner—his food, clothing, medical care, and the like—could be reduced by the extensive use of pretrial release.

The cost of transporting the prisoner between the holding facility and the courts is another cost related directly to confinement. In those communities in which the courts are several miles from the jail an accused felon who remains incarcerated from arrest through sentencing may be transported this distance from five to seven times. In addition to the operational cost of the vehicles used for transportation, there are the salaries of drivers and necessary guards. Further, although not a cost item per se, there is the possibility that smaller communities may be deprived of more adequate police protection where marshals or sheriffs' deputies are taken from their regular patrol duties and assigned to "transportation."
WELFARE COSTS

Eligible defendants who do not make bond because they lack funds to pay the bond premium are often unemployed or in low-paying, unstable employment at the time of the arrest. When the defendant is the wage earner of a household, his incarceration, resulting from the inability to post bond, deprives his family of their means of subsistence, whether it be earned income or unemployment insurance. In most jurisdictions, the dependents are immediately eligible for public assistance if they have no other income or resources. Welfare departments, however, require an investigation of new cases to determine eligibility. During this period of investigation, which may take more than a month, the defendant’s family must either look to private welfare agencies or to friends for support. In some jurisdictions, dependents are not eligible for public assistance until after the previously supporting member of the family has been actually sentenced. The cessation of income may also mean a loss of necessary household items through repossession and the accumulation of debts that can severely handicap the defendant’s family.

Another possible welfare expense is the cost of housing and rearing children rendered homeless by the detention of their parents. This element is illustrated in a subsequent discussion of the District of Columbia’s Junior Village.

COST TO DEFENDANTS AND OTHER MISCELLANEOUS COSTS

Not only is loss of income a personal cost to the defendant, but it also results in loss of spending power in the community and the accompanying loss of potential tax revenue to that community. Should the defendant be employed at the time of arrest, his employer not only loses his services but must also pay the cost of replacement. In addition, whatever tax revenue is derived from the defendant’s employment income is no longer available. Finally, the derivative revenue from firms whose products or services defendant’s income purchases is proportionately decreased. To be sure, some overlapping may exist in these items. For example, jail expenditures may offset to a minimal extent the loss of individual expenditures.

COST OF COUNSEL

The community, or members thereof, bears a substantial expense attributable to the public defender system or to the system of appointed counsel. Pretrial release may not end the need for such expense, especially in view of the low income of a major portion of those detained.
However, use of pretrial release methods would lighten this cost burden to some extent. Those released defendants who retained counsel of their choice would, to that extent, decrease the case load of the public defender offices, and would permit public defenders to give more time, effort and attention to individual cases than present case loads allow. In any event, the released defendant could assist his appointed counsel in pretrial investigation, a time-consuming effort.  

SPECIFIC COSTS OF DETENTION IN THE DISTRICT OF COLUMBIA

The following facts and figures, applicable to the District of Columbia, are set forth as a means of illustrating the cost of pretrial detention.

Confinement

The total cost of maintaining and operating the District of Columbia Jail in fiscal 1963 was $1,652,629.67. Of the total number of persons housed in the jail in 1962, 31.7 per cent were eligible for release on bond, though not all were in the pretrial period. Since this percentage has remained almost constant over the preceding three-year period, it may be assumed that there has been no radical change in the proportion of inmates eligible for bond presently being detained at the jail. Therefore, almost 32 per cent of the total expenditure, or $528,841, was allocated for their maintenance in fiscal 1963. This figure, however, includes both fixed and variable costs and does not accurately represent potential cost savings to the community. Pretrial release of defendants would result only in elimination of variable costs—those items which pertain to the personal maintenance of the defendant—unless a substantial number of prisoners were removed from the present jail population so as to require the closing of an entire unit of the facility. While release may possibly result in reduction of some fixed costs, such reduction cannot be estimated.

The average daily per capita cost of detaining a prisoner in the District of Columbia Jail in 1963 was $3.61, of which $2.88 were fixed costs and

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65 An illustration of some of the costs attendant upon representation of indigents may be seen in Criminal Justice Act of 1964, §§ 2(d)-(e), 78 Stat. 552, 18 U.S.C.A. §§ 3006A(d)-(e) (Supp. 1964). An attorney appointed under that statute may receive $15 per court hour and $10 per hour for out-of-court time to maximums of $500 in a felony case and $300 in a misdemeanor case. In addition, the attorney is to be reimbursed for expenses reasonably incurred. Finally, the attorney may also be permitted to obtain investigative, expert or other services at compensation not to exceed $300 exclusive of reimbursement for expenses reasonably incurred.

$.73 were variable costs. Variable costs, therefore, were 20 per cent of the total cost of maintaining each prisoner. Twenty per cent of the $528,841 allocated for the maintenance of defendants eligible for bond is $105,768, or the amount that might be saved yearly by the release of all bond-eligible defendants.

As for transportation costs, in the month of February, 1964, the U. S. Marshals transported 2,516 prisoners in the course of 354 trips between the District of Columbia Jail and the courts. The total cost of transportation including marshals’ salaries, gasoline, and upkeep of the vehicles was $4,742.89. The cost of transporting each prisoner was, therefore, $1.90. In the normal course of events, an accused felon would make at least five such trips between jail and the courts.

Welfare

In the District of Columbia, a family is immediately eligible for public assistance upon the incarceration of its earning member if the family has no other income, no savings or other resources, and if it is not receiving other welfare benefits. Immediate eligibility is not immediate receipt, however, and during the period of investigation to determine eligibility, the defendant’s family would most likely have to rely upon private welfare agencies or church organizations for subsistence.

The District of Columbia Jail does not gather information pertaining to average family size of prisoners detained awaiting trial. It has been the experience of the Bail Project that the majority of defendants with families support one or two small children. A family of one mother and one child would receive a welfare allotment from the Aid to Dependent Children program of $118 per month. A family of one mother and two children would be eligible to receive $141 per month. It is the opinion of the Classification Officer at the jail, however, that the majority of families of defendants have between three and five children. Should this be the case, welfare payments to dependents could cost the District on the average of $193 per month (a family of one mother and four children).

Should the incarcerated defendant be the sole responsible parent, dependent children are committed to the Child Welfare Division of the Department of Public Welfare. The children are housed at Junior Village, a home for orphans and unwanted children of the District, at a per capita cost of $8 per day until they can be placed in foster homes.67

67 This figure includes fixed costs and has not been further broken down.
**Cost to Defendant: Loss of Wages**

For Washington, D.C., Maryland and Virginia, the U.S. Department of Labor reports the following information with respect to wages surveyed in particular categories of employment:

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Weekly or Hourly Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Custodial &amp; Material Movement&lt;sup&gt;68&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Janitor, porter, cleaner or gardener</td>
<td>$61.20</td>
</tr>
<tr>
<td>Laborer, material handling (exclusive of</td>
<td>$84.80</td>
</tr>
<tr>
<td>construction work)</td>
<td></td>
</tr>
<tr>
<td>Order filler</td>
<td>$81.60</td>
</tr>
<tr>
<td>Shipping or receiving clerk</td>
<td>$85.00</td>
</tr>
<tr>
<td>Truckdriver</td>
<td>$95.60</td>
</tr>
<tr>
<td>Construction&lt;sup&gt;69&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Cement finisher</td>
<td>$4.02</td>
</tr>
<tr>
<td>Mason</td>
<td>$4.75</td>
</tr>
<tr>
<td>Brick cleaner</td>
<td>not reported</td>
</tr>
<tr>
<td>Air compressor</td>
<td>$3.74</td>
</tr>
<tr>
<td>Sheet metal installer</td>
<td>$4.68</td>
</tr>
<tr>
<td>Laborer (commercial)</td>
<td>$2.75</td>
</tr>
<tr>
<td>Laborer (residential)</td>
<td>$2.02</td>
</tr>
<tr>
<td>Maintenance&lt;sup&gt;70&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Electrician</td>
<td>$118.40</td>
</tr>
<tr>
<td>Helpers (help workers in skilled maintenance</td>
<td></td>
</tr>
<tr>
<td>trades, such as electricians, machinists,</td>
<td>$93.60</td>
</tr>
<tr>
<td>mechanics, painters)</td>
<td></td>
</tr>
<tr>
<td>Machinist</td>
<td>$124.40</td>
</tr>
<tr>
<td>Mechanic</td>
<td>$128.00</td>
</tr>
<tr>
<td>Painter</td>
<td>$102.00</td>
</tr>
<tr>
<td>Sheet metal worker</td>
<td>not reported</td>
</tr>
<tr>
<td>Office&lt;sup&gt;71&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Office boys</td>
<td>$63.50</td>
</tr>
</tbody>
</table>


<sup>69</sup> U.S. Bureau of Labor Statistics, Dept. of Labor, Union Scales of Wages and Hours in the Building Trades, 1963. All wages reported are union scale inasmuch as the Department of Labor does not compile information on nonunion wages in the construction industry.


<sup>71</sup> Id. at 4.
With respect to the defendants released on personal recognizance upon recommendation of the project, Table XXIII is indicative of the wage information given to staff members during the course of an interview.75

Table XXIII

WAGE INFORMATION OBTAINED DURING INTERVIEW

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Weekly or Hourly Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Custodial and Material Movement</strong></td>
<td></td>
</tr>
<tr>
<td>Janitor, porter, cleaner or gardener</td>
<td>$48.25</td>
</tr>
<tr>
<td>Laborer, material handling (exclusive of construction work)</td>
<td>$58.40</td>
</tr>
<tr>
<td>Order filler</td>
<td>$100.00</td>
</tr>
<tr>
<td>Shipping and receiving clerk</td>
<td>$52.50</td>
</tr>
<tr>
<td>Truckdriver</td>
<td>$70.00</td>
</tr>
</tbody>
</table>

75 This project data utilizes the categories indicated in the Labor Department surveys for sake of simplicity. However, the occupations contained within these categories are not necessarily comparable, although they involve similar functions.
### Table XXIII (Continued)

<table>
<thead>
<tr>
<th>Occupation</th>
<th>Weekly or Hourly Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Construction</strong></td>
<td></td>
</tr>
<tr>
<td>Cement finisher</td>
<td>$ 2.63</td>
</tr>
<tr>
<td>Mason</td>
<td>$ 3.50</td>
</tr>
<tr>
<td>Brick cleaner</td>
<td>$ 2.18</td>
</tr>
<tr>
<td>Air compressor</td>
<td>$ 2.00</td>
</tr>
<tr>
<td>Sheet metal installer</td>
<td>$ 2.75</td>
</tr>
<tr>
<td>Laborer</td>
<td>$ 1.75</td>
</tr>
<tr>
<td><strong>Maintenance</strong></td>
<td></td>
</tr>
<tr>
<td>Electrician</td>
<td>$130.00</td>
</tr>
<tr>
<td>Helper (helps in skilled maintenance trades such as electricians, machinists, mechanics, painters)</td>
<td>$ 71.00</td>
</tr>
<tr>
<td><strong>Office</strong></td>
<td></td>
</tr>
<tr>
<td>Office boys</td>
<td>$ 58.00</td>
</tr>
<tr>
<td><strong>Eating and Drinking Places</strong></td>
<td></td>
</tr>
<tr>
<td>Cook</td>
<td>$ 60.00</td>
</tr>
<tr>
<td>Dishwasher</td>
<td>$ 51.00</td>
</tr>
<tr>
<td>Waitress</td>
<td>$ 25.00 plus tips</td>
</tr>
<tr>
<td>Porter (busboy)</td>
<td>$ 47.00</td>
</tr>
<tr>
<td><strong>Laundry</strong></td>
<td></td>
</tr>
<tr>
<td>Inside worker</td>
<td>$ 55.00</td>
</tr>
<tr>
<td><strong>Hotel</strong></td>
<td></td>
</tr>
<tr>
<td>Bellhop</td>
<td>$ 25.00 plus tips</td>
</tr>
<tr>
<td><strong>Other</strong></td>
<td></td>
</tr>
<tr>
<td>Orderly</td>
<td>$ 64.00</td>
</tr>
<tr>
<td>Printer's assistant</td>
<td>$ 59.40</td>
</tr>
<tr>
<td>Shoe repair</td>
<td>$ 75.00</td>
</tr>
<tr>
<td>Parking and car wash</td>
<td>$ 65.00</td>
</tr>
<tr>
<td>Kennel man</td>
<td>$ 75.00</td>
</tr>
</tbody>
</table>

Due to the various types of employment and the variable periods of incarceration, no attempt is made to estimate the total money loss to the defendants who, but for detention, may have been gainfully employed.

**Savings Effected by the Bail Project**

**Savings to the Community**

It is difficult, if not impossible, to compute the savings effected by the Bail Project’s 1964 operations. The difficulty can be illustrated, for ex-
ample, by the following facts. The District of Columbia courts as a matter of policy attempt to hear the cases of defendants detained for want of bail in advance of those involving persons released on surety or personal bond. Thus the defendants released under the program will await court action for a longer time than they would if detained. In addition, the problems of common-law marriage and children born out of wedlock complicate the public-assistance factor almost beyond computation. Finally, the difficulties of estimating losses of derivative revenue speak for themselves.

However, assuming for the purpose of illustration the median felony detention figure of 96 days, an average misdemeanor detention figure of 42 days, and the District of Columbia Jail’s variable cost figure of $.73 a day, the estimated savings to the community as to that cost alone would be (subject to adjustment for those defendants remanded to custody on subsequent charges and the like):

\[
\begin{align*}
\text{Days (felony)} & \quad 18,240 \\
& \quad \text{at } $.73 \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad \quad 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can easily be seen that the resultant savings to the community would be substantial.

**SAVINGS TO THE ACCUSED**

This report cannot be concluded without a consideration of the "savings" to the defendants. The original bond amounts set in the 350 release cases are as follows:

**Table XXIV**

**BOND AMOUNTS SET IN RELEASE CASES**

<table>
<thead>
<tr>
<th>Amount</th>
<th>Number of Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Felonies</strong></td>
<td></td>
</tr>
<tr>
<td>$10,000</td>
<td>1</td>
</tr>
<tr>
<td>$ 5,000</td>
<td>14</td>
</tr>
<tr>
<td>$ 3,500</td>
<td>3</td>
</tr>
<tr>
<td>$ 3,000</td>
<td>5</td>
</tr>
<tr>
<td>$ 2,500</td>
<td>13</td>
</tr>
<tr>
<td>$ 2,000</td>
<td>18</td>
</tr>
<tr>
<td>$ 1,500</td>
<td>18</td>
</tr>
<tr>
<td>$ 1,000</td>
<td>90</td>
</tr>
<tr>
<td>$ 500</td>
<td>17</td>
</tr>
<tr>
<td>$ 300</td>
<td>3</td>
</tr>
<tr>
<td>Original bond was project-recommended personal bond</td>
<td>8</td>
</tr>
</tbody>
</table>

| **Misdemeanors** | |
| $ 1,500 | 1 |
| $ 1,000 | 11 |
| $ 600  | 1 |
| $ 500  | 60 |
| $ 400  | 1 |
| $ 300  | 79 |
| $ 200  | 4 |
| $ 100  | 1 |
| Original bond was project-recommended personal bond | 2 |

Assuming, *arguedo*, that each of the released defendants could have posted surety bond, and assuming that each would have had to pay the maximum, permissible premium for that bond, the result, apart from any consideration of collateral, would be: for $237,400 worth of surety bonds, the felony defendants would have paid premiums totalling $19,962; for $68,100 worth of surety bonds, the misdemeanor defendants would have paid $5,433 in premiums.

The traditional bail system would thus have asked from these people the expenditure of $25,395 to provide $305,500 in assurances that they
would appear in court before their freedom could be obtained. Yet the record set forth in this report demonstrates that virtually all of such a fantastic expenditure would have been utterly unnecessary.

CONCLUSION

The District of Columbia Bail Project is presently scheduled to reach completion in September, 1966. Thus, at this time it is premature to offer conclusions, since there is not, as yet, sufficient data to warrant them. The results to date do, however, indicate certain trends and the development of some interesting patterns.

The tables substantiate the proposition noted at the beginning of this article, viz. that the primary detriment attributable to the financial emphasis of the present American bail system is the high rate of pretrial detention of accused persons for want of bail. Again, it is difficult to square the existence and magnitude of such a problem with our jurisprudential principles of equal justice and preconviction innocence.

Indeed, applying the various direct and indirect costs of such detention to the 52 per cent of 1963 defendants unable to post the bond necessary to obtain their release, and accordingly detained for a substantial period the median of which was 96 days, it can be estimated that the District of Columbia paid dearly for the bail system in 1963. The supposition would not seem unreasonable that a fact-finding agency which could assist the courts in providing pretrial releases not financially oriented would more than pay for itself in savings to the community.

Such an agency is not a novel concept. There are two points in the prosecutorial process at which the question of long periods of incarceration arises: the fixing of bail and sentencing. At sentencing in felony and many misdemeanor cases, the judge has the benefit of the efforts of the Probation Office, through which the judge obtains relevant personal data concerning the defendant. It is demonstrable from our experience that a fact-reporting entity can be of similarly significant assistance with respect to pretrial release determinations.

The 1963 data demonstrates that in felony cases the use of personal recognizance was extremely limited. In misdemeanor cases its use, while not insignificant, was nevertheless comparatively minimal. It would appear from the 1964 project results that much greater use of release on personal recognizance may successfully be made. The 1964 results do not, of

76 It is interesting to note one apparent side effect of the experiment. Comparison of the percentage of cases in which surety bonds had been posted at or immediately after the initial presentment of the defendants during project misdemeanor operations in
course, indicate the limitations, if any, upon personal recognizance as a solution to the pretrial-detention problem. The manifold increase in its use in 1964 has not been attended with undesirable concomitants not already existent in the present system.

The two areas in which perfection has not been present are the rate of return and the apparent conduct of released defendants.

The rate of return, while not perfect, has been more than satisfactory. Indeed, it has been amazing with respect to felony cases. There seems to be but one virtually consistent factor present in the cases of those who failed to appear: the misdemeanor status of the charge. A theory has often been voiced to the effect that when the charge is comparatively not serious, the accused will tend not to take it seriously. If any pattern is indicated in the 1964 results, it is one corroborative of that theory. It should be noted, nonetheless, that the rate of return is reputed to be equal, if not superior, to that of defendants on surety bond in the District of Columbia.

Another fact is noteworthy: failure to appear cannot yet be equated with flight from the jurisdiction. Repeatedly, the defaulting defendants have been located in the District of Columbia, often in their customary neighborhoods, and, on at least three occasions, at home.

The apparent conduct of the defendants during the period of pretrial release certainly leaves something to be desired. The word "apparent" should be emphasized, however, since not all defendants have been involved in the subsequent charges brought against them. Nevertheless, the existence of subsequent offenses, while not unexpected, cannot be ignored.

Two thoughts are pertinent here. First, the American system of pretrial release was not devised, and in theory has not been intended, for the prevention of crime. The emphasis in admission to bail, absent a drastic revision of underlying concepts, is directed to the value judgment of preconviction innocence. The fact that the concept of pretrial release as an absolute right in noncapital cases and the use of total pretrial detention to prevent crime are mutually exclusive does not mean that other remedies cannot be devised to meet the problem. Such remedies have not been sufficiently explored. For example, the suggestion has been made that efforts directed to reducing the pretrial period by expediting trial would assist in solving the problem. In that connection, it is interesting to note...
that had the release cases been brought to trial within 30 days, almost 60 per cent of the subsequent charges would not have arisen (without allowance for probation and conduct during that period, of course).

Second, it is important to note that the problem of subsequent offenses is a traditional one, not limited to personal-recognizance programs. Indeed, the short answer to any criticism of the increased use of personal recognizance on the grounds of subsequent crime is that had the defendants involved had the money to pay the premiums, they would have similarly been free to engage in the same activities. The issue validly presented by such criticism is not whether a man should be permitted his pretrial release under conditions other than the payment of money which he does not have, but rather whether admission to bail should be denied where (and if) future human conduct can be accurately predicted to be detrimental to society. Such an issue would appear to be foreclosed by the absolute right to admission to bail.

There appears to be a trend indicated with respect to both the rate of return and subsequent conduct. The experience thus far indicates that unreliability from a risk point of view did not increase proportionately with the gravity of the charge. In fact, the converse appears to be true. The most serious charges often require longer than average trial preparation periods, and thus longer potential, pretrial detention periods. The 1963 data indicates that such offenses have often involved the highest bail amounts. Nevertheless, released defendants facing the most serious charges, such as homicide, have most regularly complied with the requirements of their releases and cooperated with the sponsoring Bail Project. The 1964 results indicate that failures to appear, subsequent trouble and the like have not been the result of the release on personal recognizance of defendants charged with the most grave offenses.

The 1964 data does offer some enlightening assistance to the opinion that a man who is at liberty prior to trial will be better able to assist in his own defense than one who is detained. When compared with the 1963 tables, the high incidence in the 1964 personal-recognizance cases of dismissals, ignorals, acquittals and probation cannot be ignored. But to say that the fact that 66 per cent of the 1964 personal-recognizance defendants have never been returned to custody on the release charge proves ability to assist in the preparation of a defense would be to prejudge the data

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78 See, e.g., Editorial, "Out on Bail," Washington Post, Jan. 23, 1964, p. A12, col. 1. A young man who had been charged on four separate occasions with knife or gun assaults on at least seven men in a nine-month period was repeatedly released on surety bond and had not been brought to trial on any of the charges.
not yet compiled and the results not yet achieved, and to ignore the existence of such variables as the similarity between the requirements for probation and personal-recognition.

Whether or not the present trend develops to a point of proof, the fact remains that to have detained the 66 per cent for want of money would have been a consummate waste of human talent, an unwarranted punishment, and an unjustifiable disruption of the defendants' family, employment and community relationships.

It is a truism that judges want facts. It follows that a judicial decision on the question of pretrial release based on facts concerning the nature of the charge and the defendant himself is preferable to a decision required in the absence of such facts. Thus, any observation as to the utility of personal-recognition release to decrease unnecessary pretrial detention must be coupled with an observation as to the value of the presentation of verified factual information concerning the defendant.

It is with this in mind that the ultimate goals of the District of Columbia bail experiment envision congressional legislation providing not only for the increased use of personal recognition whenever possible, but also for the existence and support of the necessary, accompanying fact-finding entity. Whether or not this entity should be a new one, an existing one such as the present bail project, or a division of an existing agency such as a probation office will depend upon many factors yet to be determined. The City of New York, for example, has lodged the functions formerly performed during the experimental period by Vera Foundation's Manhattan Bail Project in a special section of its probation office with provision for the hiring of interviewers who will not be probation officers. The proper system for the District of Columbia has yet to be defined.

It should be noted that legislative and rulemaking efforts to de-emphasize the financial aspects of pretrial release and to increase the use of personal recognizance have already begun. In March, 1965, a proposed Bail Reform Act of 1965, having bipartisan support, was introduced in Congress.79 As drafted, the bill would provide that

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accused persons, convicted defendants awaiting sentencing, convicted and sentenced defendants pursuing nonfrivolous and nondilatory appeals or petitions for certiorari, and material witnesses "shall be released on one or more of the following conditions": personal recognizance; personal bond; ten per cent cash deposit;\textsuperscript{80} supervision by a probation officer; return to custody after daylight hours under judicially specified conditions; custody of a third person; reasonable restrictions as to associations and movement; any other condition which the judge may reasonably impose to insure appearance as required. The judge or judicial officer must issue an order containing a statement of the evidence supporting the imposition of any condition other than personal recognizance. A similar statement must accompany any amendment of the original order, permissible at any time. Evidence in this record is explicitly excepted from the rules of admissibility in a court of law.

The proposed legislation authorizes an appeal to the district court from the conditions of release imposed by any judge or judicial officer other than a federal district or circuit judge or Supreme Court justice, and requires a decision within ten days after the appeal is filed.

In addition, the bill would provide penal sanctions for failure of the defendant to comply with the terms and conditions of his release, thus expanding the present provision\textsuperscript{81} beyond the confines of "bail jumping."

Finally, the proposal would provide that the Attorney General shall credit toward service of a defendant's sentence all time spent in custody in connection with the offense for which that sentence was imposed. If the sentence is a fine, there shall be deducted from it an amount equal to the cost of detention multiplied by the number of days spent in custody prior to the conviction, appeal or certiorari procedure. This provision expands the concept of sentence crediting now applied\textsuperscript{82} to time spent in custody for want of bail prior to sentencing for an offense as to which the law stipulates a mandatory minimum sentence.\textsuperscript{83}

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in its proposed amendments to the Federal Rules of Criminal Procedure, has suggested the modification

\textsuperscript{80} This provision would permit a deposit with the court of 10\% of the face amount of the bail bond and provide for return of the deposit upon compliance with the conditions of release. Compare Ill. Rev. Stat. ch. 38, § 110-7 (1963).


\textsuperscript{83} The release provisions and, possibly, the penal sanctions apply to misdemeanors tried in the District of Columbia Court of General Sessions. The sentence-crediting provision does not so apply, however.
of Federal Rule of Criminal Procedure 46(c), (d), and the addition of a new subdivision 46(h) and a new Rule 46.1. The changes thus suggested would: (1) deemphasize the “amount” of bail, replacing the term “amount” in Rule 46(c) with “terms,” and adding an additional consideration, “the policy against unnecessary detention of defendants pending trial”; (2) amend 46(d) to provide that sureties may be required, that cash or notes may be accepted, that a partial cash deposit may be accepted, or that release without security under such conditions as may be prescribed to insure appearance may be permitted; (3) add subdivision (h) requiring court supervision of pretrial detention of defendants and witnesses and periodic reports by the attorney for the Government justifying (witnesses) or explaining such detention; and (4) add Rule 46.1 permitting release on personal recognizance.

In sum, effective interview and verification procedures appear to be a feasible adjunct to the fixing of bail by committing magistrates. By utilizing the information obtained through these procedures to foster increased release on personal recognizance, it is a predictable result of this bail experiment that the pretrial detention problem will be remedied to some extent and, at the same time, benefits will be reaped by both the defendants and the community. To be sure, problems do exist with respect to the relationship of interviewers to defense counsel, the prosecution and to the court, and, while assured by mutual cooperation during the experimental period, cannot be overlooked in developing the end product of that period. But, indications from the vantage point of 1964 are that at least one answer to pretrial detention resulting from traditional reliance on financial factors is available and can be put into successful operation.

APPENDIX

PROJECT BACKGROUND INFORMATION

Organizational Steps

The following organizational steps have been abstracted from the experience of the District of Columbia Bail Project as suggestions to guide any who wish to follow the course of the District of Columbia in this area:

1. Upon recognition of the possible existence of a pretrial detention problem in the area of the administration of bail, a survey should be made by official, quasi-official, or private agencies as to the existence and magnitude of the

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84 PROPOSED AMENDMENTS TO FED. R. CRIM. P. 51-54 (Second Preliminary Draft, 1964).
85 By date of publication, 628 defendants (290 felony, 338 misdemeanor) had been released under the program; 17 had failed to appear. Approximately 3.5% had been charged with serious offenses and an additional 7% with less serious offenses during release.
problem in the particular locality. The nature of that problem should be made explicit in writing in advance of any other activity. A solution to the problem should be formulated as an operational hypothesis. To illustrate, the problem would be, of course, one of a high rate of pretrial detention. The solution would be the increased use of release on personal recognizance through the cooperation of committing magistrates with an agency presenting those magistrates with verified factual information. The operational hypothesis may be illustrated by that utilized by both the Vera Foundation and the District of Columbia Bail Project, viz. that community ties give sufficient assurance in selected cases that defendants will remain within the jurisdiction for required court appearances.

2. Immediately after identification of the problem and formulation of a possible solution, the support of an official agency should be obtained. Such support should be solicited in conjunction with the request that the official body maintain advisory or supervisory authority over the operation of the project for a specified period of time.

3. Through the influence of the official body and of other interested members of the community, some form of private or public financial support should be obtained in order to provide for the operation of the above described bail project.

4. The proposal seeking the necessary supervisory and financial support should contain a structural definition of authority in relation to the sponsoring organization or in agreement with its terms. At this point also, a determination should be made as to the nature of the staff of the project, i.e., whether its members will be drawn from law students, graduate students, or other segments of the community. Once this determination has been made and the above support obtained, the hiring of the staff should be the first order of business. It is advisable that at least one member of the staff, or an advisor who will work closely with the staff on a day-to-day basis, be very familiar with the legal principles involved and, if at all possible, with the structure of the court and penal system of the community.

5. When the staff has been selected the functions which the agency is to perform should be established. For example, is the agency merely to provide information for the courts, or is the information to be accompanied by recommendations for release on recognizance? Are the recommendations to be the sole information presented to the court, or should information be presented in cases wherein no recommendation is made? Should the organization engage in research activities dealing with court records or with costs of detention or with the various results of the bail project? Some preliminary determinations along this line will have been made prior to the selection of the staff so that the staff is selected accordingly. Its organization should now proceed along the lines of the functions which the agency is going to perform. It is, of course, assumed that during the
period described above the physical location of the project, the offices and the furnishings have been secured.

6. The preparatory period prior to actual operations of any such project should be as extensive as the following requires. The staff should be oriented as to the structure, organization, and functioning of the court and penal systems of the community. This orientation should include familiarization with related agencies, such as the office of the United States Attorney or prosecutor, the public defender or legal aid office, clerks' offices, police and other law-enforcement officials, detention facilities, and other pertinent departments of the local government. It is also advisable during this period to educate the staff with respect to the problems of the bail system on a national scale and to the workings of other bail projects throughout the country. If possible, the staff members, after initial orientation, should observe other bail projects in action.

7. The orientation above described will logically lead to the development of possible project procedures in the appropriate courts and agencies and an investigation as to their feasibility. The director of the project should enlist the cooperation of officials whose offices are directly involved in the operations of the bail project inasmuch as there will be many occasions which require special cooperation on their part. The success of the project, however, depends especially upon the day-to-day working relationship between the project's staff and the staffs of these related agencies.

8. The preparatory period should also encompass orientation of the staff as to the community in which the defendants will be found, their residential, familial, and employment environment, and general circumstances. In addition, the requirements which will have to be met by defendants in order to be recommended should be developed either independently or be based upon those already in use in other bail experiments. The latter is, of course, preferable. However, during the orientation of the staff, the criteria thus selected should be scrutinized to determine if they are indeed suitable indicators of community ties in this locality. If it is at all possible, certain test interviews should be set up in advance of project operations whereby staff members may interview defendants detained locally seeking the information which will be necessary for recommendations. This procedure will assist the development of interview techniques and will serve as a further check with respect to the suitability of such criteria in the particular locality. The test interviews of detained defendants in advance of project operations will also serve to familiarize the interviewers with jail routine and the routine of the cell blocks in which the interviews take place. The orientation period should additionally develop familiarity with such valuable reference sources as street atlases, street address telephone directories, lists of community agencies, and the like, which are necessary for efficient verification procedures.

9. It is at this juncture advisable to decide upon the existence and purpose
of the research phase of the experiment. It is similarly advisable to determine
the timing of the gathering of the data which the research phase seeks to use.
The steps which would ordinarily be followed in making this determination in-
clude discussion of the substance of the data to be gathered and choice of the
method to be utilized in gathering this data. Clearly, information to be drawn
from the running of the project encompasses questionnaires devised to that
end. On the other hand, the gathering of data from court records of past years
for comparison purposes entails the important question of timing. To illustrate,
the data could be gathered by the staff after its initial training stage is com-
pleted, during the early phases of the project when time is available. On the
other hand, the data could be gathered by a more knowledgeable and more
experienced staff during a later phase of the operation, at a time when the work
of the project is more demanding. One can see that there are reasons for choos-
ing either alternative.

10. Upon completion of step 9, the project staff is ready to develop the
format for its interview-verification questionnaires, data collection forms, and
other forms necessary to obtain the pertinent information both from past
court records and from the developing project.

11. It is necessary at the initial stages of the project and throughout its
operative phase to establish and maintain a good relationship with the press.
This does not mean that there should be in any way a breach of confidence, nor
does it mean that there should be disclosures to the press of staff or project
opinions with respect to the cooperation of other official agencies. This obviously
should be avoided at all costs.

12. While the following suggestions do not apply to the initial, organiza-
tional stages of a bail project, they are advisable in light of the experiences of
the bail projects now operating. Throughout the operative life of the project,
there should be a constant reevaluation of the procedures, techniques, and
forms utilized. For example, judges often state the reasons for denial of project
recommendations or express dissatisfaction with omissions in project present-
tions. Utilization of the suggestions thus made or implied by committing magis-
trates to perfect the project presentation is an obvious means of increasing the
amount of cooperation given to the project by those magistrates. This should
not be taken to mean that if a committing magistrate refuses to grant release
on recognizance because he feels that a particular offense does not entitle the
defendant to release, the project should thereafter refrain from recommending
defendants charged with that offense. The reevaluation of project operations
should also include discussion as to possible areas of expansion of the project’s
coverage and to areas of flexibility in the project’s criteria. What might have
seemed necessary upon initial operation might not be necessary after a period
of experience on the part of both the project and the committing magistrates.
In addition, such reevaluation steps should include the record-keeping and data-
gathering forms.
The staff of the District of Columbia Bail Project consists of a director who is an attorney, a research assistant who is a criminologist, six law students who work full time for the project while pursuing their law studies at night, and a legal secretary. Each member of the staff participates where necessary in all staff activities.

**Project Operations**

1. The pretrial release phase of the operations of the District of Columbia Bail Project is described in the text of the foregoing article.

2. At the request of judges of the Court of Appeals for the District of Columbia Circuit, the District of Columbia Bail Project has entered into participation in matters concerning bond on appeal. Recommendations for release are not made by the Bail Project in appeal cases, since it does not feel qualified to assess the risk factor inherent in a present conviction. Participation in bond on appeal matters is limited to the following:

In cases wherein appellants are unrepresented or are represented by court-appointed counsel, appellants or their attorneys are notified, upon their indication of a desire to be released on appeal bond, of the possibility that the District of Columbia Bail Project may be of assistance to them. An order of the Court of Appeals has further delineated the nature of the desired showing in a motion for bond on appeal, thus augmenting the court’s rule on the subject. Much of the information required by that showing is factual, and, if requested by the appellant or his counsel to do so, the District of Columbia Bail Project utilizes its verification procedures to determine the facts as required by the court. Copies of the factual report will then be sent to appellants or appellants’ counsel and to the United States Attorney.

3. The research phase of the project’s operations encompasses the daily record-checking procedures, the recording of the subsequent history of release cases, case analyses and the gathering of data relating to the cost of detention. In addition, a survey and analysis of the workings of the bail system in the District of Columbia based on data gathered from the 1963 District Court records has been completed and is included in the foregoing text.

4. The final phase of the project’s operations involves activities directed toward community and law student education and publicity dealing both with project results and with public relations. The District of Columbia experiment has been featured in newspaper and magazine articles and on radio and television. In addition, certain activities have been deemed to fall within the educational concepts of the Ford Foundation grant and consequently within the purview of the Bail Project. Such activities serve to inform others of the problems in the area, of possible solutions to those problems, and of experimental procedures which may be utilized. These activities have included, and it is hoped, will continue to include:

A seminar, entitled “Poverty, Bail and the Administration of Criminal
Justice," taught by the director in the spring semester, 1965, at Georgetown University Law Center, and open to law and graduate students throughout the Washington area;

Substantial explanatory documents prepared at the request of law student groups, city, state, and federal officials;

Addresses to and meetings with interested groups in this and other localities and testimony before legislative bodies;

Preparation of articles for certain publications;

Participation in regional and national conferences such as the National Institute on Crime and Delinquency and the National Conference on Bail and Criminal Justice.

**Project Procedures**

1. Determination upon initial presentment or earlier, if the case has been brought to its attention, that the defendant falls within the coverage of the project.

2. Interview of the defendant.

**INTERVIEW FORM**

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<tr>
<th>R1</th>
<th>N</th>
<th>Interviewer</th>
<th>Date</th>
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<tbody>
<tr>
<td>R3</td>
<td>N</td>
<td>Charge(s)</td>
<td>Crim. No.</td>
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<tr>
<td>CT</td>
<td>A NA L</td>
<td>Reason for final action</td>
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I agree to allow this interview solely upon the condition that the information resulting from the interview and the circumstances surrounding the interview be kept in strict confidence except for use in connection with motions to reduce my bond.

1. Name  
   Aliases  
   PA AA LA LI  
   Co-Def Y N  
   Names  
   Ages  

2. Age  
   Date of Birth  
   N W O/M F Ht... Wt... Literate Y N  

3. Health?  
   Ever hosp'd for phys or ment disorder Y N  
   From  
   To  
   Where  
   Why  
   Recovered? Y N  
   Are you on drugs Y N  
   Ever Y N  
   When last Y N  
   Alcoholic Y N  

4. Presently living at  
   No. Street  
   Sect  
   City  
   County  
   State  
   Apt  
   Flr  
   For  
   From  
   On and off Y N  
   Phone  
   With (Name & Relation)  
   Remarks  

5. Previously lived at  
   For  
   From  
   To  
   With  
   Remarks  

6. Washington, D.C., or area resident for  

7. Birthplace: City .................................. State or Country ................................

8. Relatives in Washington area that you keep close contact with and whom we may call: (Interviewer, here fill in box in Question 19.)


11. How supported UI W Sav Spouse Other 


13. School ................................................. When last ................. Grade ..........

14. Belong to a union Y N Name .......... Local ..........

15. Support anyone? ..........

16. (Optional) Have you ever been convicted of an offense outside the District of Columbia? ..........


18. Where will you go if released on bond .......... Remarks ..........

19. Is there anyone we can call or speak to as a reference, someone who knows where you live, etc. (relative, employer, friend, landlord, neighbor, religious leader, teacher, credit reference)?

RELATIVES

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<thead>
<tr>
<th>Name</th>
<th>Relation</th>
<th>Address</th>
<th>Phone</th>
<th>How Often</th>
<th>In Ct</th>
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I agree to allow the D.C. Bail Project to call the people listed above if the Project wishes to check my references. I also agree to allow my attorney or Legal Aid Counsel or an attorney for the Project to make a motion in my absence seeking my release on personal bond.

3. Interview of the arresting officer and determination as to the prior criminal record, if any, of the defendant. The sources from which this record is obtained include the arresting officer, the records of the District of Columbia jail, police headquarters, and the police Juvenile Bureau. The above mentioned interview on certain occasions may take place at the District of Columbia Jail. As a customary matter, it takes place in the detention cells adjacent to the committing magistrate before whom the defendant is brought.

4. Verification by telephone or in person of the information gathered from the defendant at interview. This step involves talking to the defendants' relatives, friends, employers, teachers, clergy, and the like. Initially, when information of an exclusionary character comes to the staff's attention, no interview is held. Such information is that described in the foregoing text. If the defendant is not excluded in such a fashion by virtue of factors in his prior record which come to project attention prior to interview, the defendant is interviewed by a staff member, as noted above. If the information received at interview on its face qualifies for a recommendation for release on personal recognizance, the verification step herein described then takes place.

5. Following the verification step, the staff member then assesses the information which he has received to determine whether the defendant qualifies for a recommendation for release on personal recognizance. His evaluation is guided by the criteria and weights set forth on the sheet which is illustrated below. He is also guided by the explanations of those criteria which accompany the illustration below.

"Green Sheet"

To be recommended a defendant needs:
1. A Washington area address where he can be reached, AND
2. A total of four points from the following:
RESIDENCE (In Washington area; NOT on and off)

1 3 Present residence 1 year OR present and prior 13 years
2 2 Present residence 6 months OR present and prior 1 year
1 1 Present residence 4 months OR present and prior 6 months

TIME IN WASHINGTON AREA
1 1 5 years or more

FAMILY TIES (In Washington area)
4 4 Lives with family AND has contact with other family member(s)
3 3 Lives with family
2 2 Lives with nonfamily friend whom he gives as a reference AND has contact with family member(s)
1 1 Lives with nonfamily friend whom he gives as a reference OR has contact with family member(s)

EMPLOYMENT OR SUBSTITUTES
4 4 Present job 1 year or more where employer will take back
3 3 Present job 1 year or more
2 2 Present job 4 months where employer will take back OR present and prior job 6 months where employer will take back
1 1 (a) Present job 4 mos. OR present and prior job 6 months
    OR (b) Current job where employer will take back
    OR (c) Unemployed 3 mos. or less with 9 mos. or more single prior job from which not fired for disciplinary reasons
    OR (d) Receiving unemployment compensation, welfare, etc.
    OR (e) Full-time student
    OR (f) In poor health

CHARACTER
-1 -1 Prior negligent no show
-2 -2 Definite knowledge of drug addiction or alcoholism

PRIOR RECORD
0 0 Note: Use chart below for single offenses and for combination of offenses. For reasoning and offense weights, see Explanatory Memo.
-1 -1
-2 -2
-3 -3
-4 -4

Code: Assume that one adult felony = 7 units
       one adult misdemeanor = 2 units
       one juvenile substantial "felony" charge = 4 units
       Circle total record units. No more than 8 units may be given for a juvenile record not combined with an adult record.

| Units | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 | 18 | 19 | 20 | 21+ |
| Points | 0 | -1 | -2 | -3 | -4 |

TOTAL INTERVIEW POINTS

EXCLUSIONS
Made bond
Fugitives, extraditions, removals
Escape as an adult
Prior willful no show
Escape from mental institution
Extreme mental disturbance to point of inability to continue interview
Severe inebriation at time of interview
Facing revocation of felony probation or parole
Two or more adult prior felony convictions of crimes against the person or narcotics offenses
One or more adult prior felony convictions of the same offense if the offense is a crime
against the person or narcotics offense
Note: One who is serving time will be temporarily excluded until the expiration of the
sentence being served.

PREMISED NONRECOMMENDABLE, A REBUTTABLE PRESUMPTION
Revocation of probation or parole for reason of violation thereof
Escape as a juvenile
On bond for another offense
NONRECOMMENDABLE
No presently verifiable Washington area address where he can be reached
Inability to make 4 points on the "green sheet"
Definite intent to leave Washington area

DEFINITIONS

1. Crimes Against Person
   Felony murder
   Other homicides
   Felonious assault
   A.D.W.
   Robbery
   Attempted robbery
   Assault with intent to rob
   Rape (also carnal knowledge)
   Assault with intent to rape
   Other sex crimes against persons
   (sodomy, incest, etc.)
   Housebreaking into business or unoccupied dwelling
   Narcotics

2. Contact means a combination of each and all of the following:
   (a) contact at least once a week, either seeing or by telephone
   (b) "contact" must live in the Washington area
   (c) "contact" must be given as a reference
   (d) "contact" must be willing to accept notification
   (e) relationship must be evaluated as reasonably intense
   Interviewer credits contact when (a), (b), and (c) are present.
   Verifier may give points only if all five are present.

3. On and off means defendant is in the "on" phase at time of interview (i.e., on and off
   job = current job).

4. Common Law Spouse is considered to be such only if the two have lived together at
   least two years; then this status is "living with family," if the two still live together.

5. Washington area means Washington, D.C., and those parts of the surrounding counties
   which are sociologically contiguous to the District of Columbia. With respect to
   geographic locations outside the District of Columbia, one of the following factors must
   be present:
   a. the defendant or his contacts must have a telephone where they can be
      reached any day; or
   b. the defendant or one or more of his contacts must possess such ties to
      Washington, D.C., that they can be reached in Washington, D.C., any day.
In cases in the Court of General Sessions, the above-described suburban areas are not
to exceed the reach of the process of the Court of General Sessions.
**NOTE ON STUDENTS:**
If his main task is that of a student and his employment is incidental to his student status, he gets a point as a student.
If his primary factor is employment and his status as a student is incidental to his employment, give his points for employment and *not* as a student.

**NOTE ON POOR HEALTH:**
The point for poor health may be illustrated as follows:
Therefore, unable to work or therefore unable or unlikely to flee the jurisdiction, *e.g.*, hospital out-patient, long-time tie with single doctor, and the like.

**NOTE ON PRIOR RECORD:**

*Adult:*
Traffic convictions and drunk and disorderly convictions are not weighted against the defendant. However, all convictions will be presented to the court. Prior pretrial show will not be weighted, but will be indicated to the court. The convictions indicated in an accused's prior record will receive the following weights:

- 0 No convictions
- 1 misdemeanor conviction as an adult
- 2 — 3 misdemeanor convictions as an adult
- 4 — 6 misdemeanor convictions or 1 felony conviction
- 7 — 10 misdemeanor convictions as an adult or 2 adult felony convictions
- 11 or more misdemeanor convictions or 3 or more felony convictions

*Juvenile:*
A list of the juvenile charges occurring after age 14 will be presented to the court together with an indication as to which appear from the allegations of fact to have been substantial. Dispositions are not available. The weight to be given a juvenile record is as follows:

- 0 No juvenile record or one that contains no substantial charges or contains only misdemeanors
- 1 One substantial juvenile "felony" charge
- 2 2 or more juvenile substantial "felony" charges

Juvenile records will not be sought for defendants over age 21.

**Combinations:**
Combinations of adult felonies and adult misdemeanors will be treated as indicated on the "green sheet." The weight principle is explained as follows:
That factor in the combination resulting in the lowest negative weight is to be adopted with the following modifications:
If the misdemeanor weight factor and the felony weight factor are the same, add one negative point. If the combination of misdemeanor and felony weights in any manner is a combination of —2 and —3, the weight to be given to the total combination is —4.

6. Generally, a brief staff conference will be held to make a final decision as to recommendation or not. If the case is indeed to be a recommendation case, the following court recommendation form will be prepared.

**D. C. BAIL PROJECT**
**GEORGETOWN UNIVERSITY LAW CENTER**
433 Sixth Street, N.W.
Washington, D. C. 20001

Recommends release on personal bond in the case of .................
On the basis of the following VERIFIED INFORMATION:
Residence—Family

Presently living at .............................................................. for.............................................................. with..............................................................
Previously lived at .............................................................. for.............................................................. with..............................................................
Wash. D.C. resident for .................................................................................................................................
Wash. area resident for .................................................................................................................................

Employment—Support—Health

Presently employed by .............................................................. for.............................................................. as a ..............................................................
Presently ............................................................................................................................................................
Previous employment by .............................................................. for.............................................................. as a ..............................................................

Notification

Should the defendant be released on personal bond, the D.C. Bail Project will notify him by mail of all future court appearances in this case. In addition, .............................................................. will also help to see that the defendant appears when required.

Previous record: ..............................................................................................................................................
Current charge: ............................................................................................................................................... 

LA; ...... AA; ...... PA; ...... DA; ...... DA REC.; ......
Court Action ........................................................................... Judge..............................................................

The preceding form is submitted to all committing magistrates to whom recommendations are presented. Any information which may be requested which is not on this form is, of course, delivered orally. In the case of a juvenile record, the record is set forth without ultimate dispositions, of course, on a separate sheet of paper. With respect to felony recommendations, the procedure that is followed is a more formal one, including not only the presentation of this form, but also the presentation and arguing of a motion for release on personal bond.
There follow the motion for release on personal bond and the draft order directing that release.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

__________________________,

Defendant.

__________________________

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and Points and Authorities in support thereof were served this ______ day of ______________________, 196—, by delivering a copy thereof to ______________________, Esquire, Assistant United States Attorney, United States Court House, Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

__________________________,

Defendant.

__________________________

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and Points and Authorities in support thereof were served this ______ day of ______________________, 196—, by delivering a copy thereof to ______________________, Esquire, Assistant United States Attorney, United States Court House, Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

__________________________,

Defendant.

__________________________

Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion and Points and Authorities in support thereof were served this ______ day of ______________________, 196—, by delivering a copy thereof to ______________________, Esquire, Assistant United States Attorney, United States Court House, Washington, D.C.
Upon motion of the above-named defendant for release on his personal bond and oral argument thereon, it appearing that the above-named defendant may properly be granted the requested relief, it is hereby ORDERED that the above-named defendant be and he hereby is released upon execution of his personal bond in the amount of $[amount], pending the conclusion of his trial or until further order of this Court.

United States District Judge

Dated: ________________________ , 196—.

7. If the defendant is released, he is brought to the project’s office, where he is told of his position as part of an experiment, of the penalties for failure to appear, and of any other conditions which the project staff may wish him to fulfill.

8. Approximately one week before a required court appearance, a letter is sent to the defendant notifying him with respect to time and place of the appearance. In addition, those relatives and friends who have so agreed during the verification step are sent letters requesting them to remind the defendant of the specified court appearances.

9. When the defendant comes to court as required, he also upon request presents himself at the office of the Bail Project. At this point information is requested as to his address and employment and the like so as to keep project files up to date.

10. The results of each court appearance and the ultimate dispositions of each of the release cases are recorded so that the project data on each case is complete.
NOTES

FEDERAL WATER RIGHTS LEGISLATION AND THE RESERVED LANDS CONTROVERSY

INTRODUCTION

AMERICA IS A COUNTRY richly endowed with natural resources: fertile land, extensive and varied forests, an abundance of mineral wealth beneath the soil. All these things are gifts of nature, which our people have used to build a civilization unmatched in human history for its material productivity. From the products of our land, our forests, our mines and oil fields, we have raised great cities and spanned a continent with railroads and automobile highways. But without one key resource, water, none of these miracles of human achievement would have been possible.¹

The authority and responsibility for the planning, development and control of the water resources of the United States has, under our constitutional form of government, been shared by our state and national governments. The jurisdiction of the federal government in water resource activities derives from several provisions of the Constitution.² This jurisdiction is limited to those powers expressly delegated and such as may reasonably be implied from those granted.³ All remaining jurisdiction, with respect to water resources activities, is reserved to the states or to the people.⁴ While the respective sources of jurisdictional authority are clear, the day-to-day exercise of that authority has remained anything but clear. This cloudy relationship has been the subject of increasing political and administrative controversy since World War II.⁵ With the potential demand for water far exceeding increases in present sources of supply, “conflicts between the States and the Federal Government over the control and use of water are growing sharper and more serious.”⁶ The

¹ 1 REPORT OF THE PRESIDENT’S WATER RESOURCES POLICY COMMISSION 1 (1950) [hereinafter cited as PRESIDENT’S WATER COMM.]. (Emphasis added.)
² The commerce clause, U.S. CONST. art. I, § 8, cl. 3; the property clause, U.S. CONST. art. IV, § 3, cl. 2; the war powers, U.S. CONST. art. I, § 8, cl. 1 & 11; the treaty-making powers, U.S. CONST. art. II, § 2, cl. 2 & art. VI, cl. 2; the general-welfare powers, U.S. CONST. art. I, § 8, cl. 1. For an analysis of these constitutional provisions with respect to water resources see 3 PRESIDENT’S WATER COMM. 5–72.
³ United States v. Butler, 297 U.S. 1, 63 (1936).

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broadening federal activity in all facets of water resources development has further increased the friction between state and national governments. Engelbert, writing in 1957, observed:

The federal government now dominates in the fields of navigation, flood control, hydroelectric power development, irrigation, and river basin planning. The states dominate in the fields of water rights, urban water supplies, drainage, and fish and wildlife management. The responsibilities are more shared in the fields of power regulation, recreational planning, pollution control, and small watershed development.

The federal “share” of responsibility has continued to expand, with, as a necessary corollary, a constant reduction in the role of the states in water resources development.

One of the principal—and presently the most controversial—federal-state conflicts in the field of water resources concerns the delicate balance between the constitutional power of Congress “to dispose of and make all needful Rules and Regulations respecting . . . Property belonging to the United States”—the property clause—and the authority of the states with respect to the control, appropriation, use and distribution of water within their boundaries. The power of Congress over federally owned lands is clear where the traditional concepts of “ownership” are present; however, “when the realm of public domain with its streams, rivers, and tidewaters is entered, a fog enshrouds the congressional dispositive


8 Engelbert, supra note 5, at 330.

9 A typical example of the increasing federal domination in water resources activities is the growth of the federal water pollution control program administered by the Department of Health, Education, and Welfare. An experimental federal program was initiated by the enactment of the Water Pollution Control Act of 1948, 62 Stat. 1155. This law was initially limited in duration to five years. This period was extended for an additional three years in 1953. 66 Stat. 755. Permanent water pollution control legislation was passed in 1956. The Federal Water Pollution Control Act, 70 Stat. 498 (1956), designated the Surgeon General of the Public Health Service to administer the act, limited federal jurisdiction to interstate streams, and provided $50 million annually for federal matching grants. In 1961, the Federal Water Pollution Control Act was amended, designating the Secretary of Health, Education, and Welfare administrator of the act, extending federal jurisdiction to include navigable streams, and increasing the federal matching grants to $100 million annually for the period from 1964 to 1967. 70 Stat. 498 (1956), 33 U.S.C. §§ 466-66k (1958), as amended, 33 U.S.C. §§ 466-66j (Supp. V, 1963).
power.”10 The question is, basically, who shall control the unappropriated waters which originate upon, flow through, seep beneath or percolate into the public lands of the United States—the federal government or the state within which the public lands and the appurtenant unappropriated waters are located? The question—and thus the conflict—is limited to those states in which public lands exist and which apply some form of prior appropriation system for the determination of respective water rights. Congress has recognized the conflict and its consequences:

The problem is a national one, but its threat is especially grave in the public land States of the semiarid West, where not only is water even more scarce than elsewhere in our country but where Federal ownership of millions upon millions of acres of land give the Federal Government an asserted basis for claiming proprietorship, “paramount rights,” or title in fee simple absolute to all unappropriated waters in many of our States.11

In 1935 the Supreme Court clarified greatly the “public lands” question in California Ore. Power Co. v. Beaver Portland Cement Co.12 But only two decades later the same body precipitated an even greater water-rights controversy than it had earlier settled. In the now infamous Pelton Dam case, FPC v. Oregon13 the Court restricted its holding in Beaver Portland by excluding “reserved lands”—lands owned by the United States which are withdrawn from the operation of public land laws—from the definition of “public lands,” thereby introducing great uncertainty into the federal-state relationship with respect to waters appurtenant to such “reserved lands.”

Pelton, an anomaly to water rights law since no water rights were involved in the litigation, brought to the fore the “reservation” theory which in essence provides that “the United States remains the owner of all the unappropriated water rights appurtenant to such reservations and such water rights are no longer subject to appropriation by private persons.”14 The reservation theory has been labeled a “spurious offshoot” of the riparian doctrine,15 and thus a doctrine diametrically opposed to the

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11 S. REP. No. 29, op. cit. supra note 6, at 65.
12 295 U.S. 142 (1935).
14 Hearings on S. 1275 Before a Subcommittee of the Senate Committee on Interior and Insular Affairs, 88th Cong., 2d Sess. 72 (1964) (testimony of Charles Goodwin, Assistant to the General Counsel, Department of the Navy) [hereinafter cited as 1964 Senate Hearings].
15 Id. at 94 (statement of Stanley Mosk, Attorney General of California). See also Munro, The Pelton Decision: A New Riparianism?, 36 ORE. L. REV. 221 (1957).
doctrine of prior appropriation. Pelton signified the start of much speculation and controversy, raising doubts as to the security of state-created water rights.16 Subsequent litigation has confirmed many of the fears raised by Pelton.17

In an effort to tranquilize "the hue and cry" of the proponents of states' rights and to reestablish the proper balance of power between the state and national sovereigns, legislators from the appropriation states have shifted the battleground from the courts to Congress. In every Congress since the 84th, legislation has been introduced in either or both houses aimed essentially at reversing the Pelton decision. The purpose of this Note is to trace the evolution of the "reservation doctrine," to analyze the legislation proposed to remedy the defects in the doctrine, and to suggest a possible solution to the legislative impasse now existing.

**The Evolution of the Reservation Doctrine**

**Water Rights Doctrines in the United States**

Running water at one instant is in one place in the river, then it is gone and some other water has succeeded it, without anyone having been able to tag it as his own; a thing of continual motion and ceaseless change, incapable of possession or ownership in that condition. The water right of an individual is the intangible right of flow and use, a "usufruct." A specific portion severed from the stream and reduced to possession in works that confine it under control, as in a tank, then becomes private property, but only while possession is so held; when it escapes from the tank or is discharged from possession it is again the property of no one.18

The common law of water rights in the United States and England has been derived from the civil law concept of the "negative community"—those things which cannot be owned while in their natural state.19 This concept of the "negative community," as it relates to water rights, is recognized today as the riparian doctrine.20 Riparian water rights law has

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17 See notes 93-110 infra and accompanying text.


19 See Wiel, *Running Water*, 22 *HARV. L. REV.* 190, 191-92 (1908). The civil law concept dates to ancient Rome. "By natural law these things are common to all, viz.: air, running water, the sea and as a consequence the shores of the sea." 2 *Institutes of Justinian* tit. 1, § 1; see 6A *American Law of Real Property* § 28.55 (Casner ed. 1954).

20 Mr. Justice Story's opinion in Tyler v. Wilkinson, 24 Fed. Cas. 472 (No. 14312) (C.C.D.R.I. 1827), has generally been credited not only with introducing the civil law doctrine of water rights into the United States, but also for introducing the word "riparian" into our jurisprudence. See Wiel, *supra* note 18, at 248-49; Busby, *American Water Rights*
developed along two distinct theories—that of natural flow and that of reasonable use. In some Eastern States the fundamental right of a riparian proprietor is to have the stream flow naturally, unimpaired in quality and undiminished in quantity. In most American states, however, the fundamental right of the occupant of riparian land is to enjoy the reasonable use of the water free from unreasonable interferences. Riparian rights are normally restricted to riparian lands; however, in some instances nonriparian owners have been allowed to divert waters not required for a beneficial purpose on riparian lands. When the riparian doctrine was introduced into our common law in 1827, it was well suited to the land which at that time comprised the United States for these lands had abundant rainfall—the primary natural asset was land—and the run-off from streams or rivers was incidental thereto. Today, many of the Eastern States continue under some form of riparian water rights law. The eastern part of the United States has seldom been faced with the problem of insufficient quantities of water. The pressing water problems have arisen not because of insufficient quantities of water, but rather because of too much water, or because the waters available are of an insufficient quality.

The doctrine of prior appropriation dates at least to late eighteenth and early nineteenth century England. The law of water rights at that time 


21 Trelease, Coordination of Riparian and Appropriative Rights to the Use of Water, 33 Texas L. Rev. 24, 36 (1954). See also United States v. Gerlach Live Stock Co., 339 U.S. 725, 745 (1950); 6A American Law of Real Property § 28.55 (Casner ed. 1954). In those jurisdictions which recognize some form of riparian rights and where water shortages are becoming apparent, there is a marked trend toward the displacement of the natural flow doctrine by the rule of reasonable use. See Busby, supra note 20, at 122. See also Trelease, supra at 40-41; Cal. Const. art. XIV, § 3. See generally 6A American Law of Real Property § 28.56 (Casner ed. 1954).

22 See, e.g., Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886); Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).


24 See note 20 supra.

25 Note, 5 Utah L. Rev. 495, 496 (1956).


27 See Senate Select Comm. (Comm. Print No. 15, Floods and Flood Control); Note, 32 Ind. L.J. 39 (1956).

28 See Senate Select Comm. (Comm. Print No. 9, Pollution Abatement); Hearings Before a Subcommittee of the House Committee on Government Operations, 88th Cong., 1st Sess., pts. 1A & 1B (1963) (water pollution control and abatement).
time was considerably the doctrine of Blackstone:29 "If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current."

The doctrine of prior appropriation in the United States has been said to have originated from the customs and usages of miners in the Pacific States and Territories.31 The rule generally recognized throughout this arid region was that the acquisition of water by prior appropriation for a beneficial purpose was entitled to protection—a rule "evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well."32 The appropriation of water was said to consist in the taking or diversion of it from some natural stream or other source of water supply, in accordance with law, with the intent to apply it to some beneficial use or purpose, and consummated, within a reasonable time, by the actual application of all of the water to the use designed, or to some other useful purposes.33

The appropriation doctrine rests on the proposition that the beneficial use of water is the basis, measure and limit of the appropriative right.34 The first in time establishes the prior right.35 This right may be lost by abandonment,36 and, in some states, by statute, the right may be forfeited by a failure to utilize the water for a beneficial purpose during a specified period of time.37 The appropriative right is a property interest independent of the land and thus does not depend upon possession or ownership of riparian lands for its existence.38

29 Wiel, supra note 18, at 246.
30 2 BLACKSTONE, COMMENTARIES *403. (Emphasis added.) As late as 1831, England still followed the doctrine of prior appropriation. "By the law of England, the person who first appropriates any part of the water flowing through his own land to his own use has the right to the use of so much as he thus appropriates against any other." Liggins v. Inge, 7 Bing. 682, 131 Eng. Rep. 263 (Ex. 1831).
31 Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 510 (1874); Busby, supra note 20, at 117; 3 PRESIDENT'S WATER COMM. 34.
33 2 KINNEY, IRRIGATION AND WATER RIGHTS 1216 (2d ed. 1912).
34 Ide v. United States, 263 U.S. 497, 505 (1924).
35 Arizona v. California, 298 U.S. 558, 566 (1936); Arizona Copper Co. v. Gillespie, 12 Ariz. 190, 202, 100 Pac. 465, 469 (1909).
36 1 WIEL, WATER RIGHTS IN THE WESTERN STATES 603-07 (3d ed. 1911).
37 See, e.g., N.M. STAT. ANN. § 75-5-26 (Supp. 1963), which provides for a forfeiture of an appropriative right to utilize water (except for storage reservoirs) upon failure to exercise the right for four years, unless caused by conditions beyond control of the owner of the right.
The appropriation doctrine has been adopted in varying degrees in seventeen of the arid or semiarid Western States. But while all seventeen of these states have adopted some form of the doctrine of prior appropriation, not all of them have completely divorced themselves from some facets of the common-law riparian doctrine.

The adoption of the doctrine of prior appropriation has not, however, been limited to these seventeen Western States. "[E]very State is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise." Eight states east of the Mississippi River and the State of Alaska have adopted, in varying degrees, the doctrine of prior appropriation. The

See 3 President's Water Comm. App. B, for a summary of the water law doctrines of the seventeen Western States. Nine of these states have provided in their constitutions for state ownership and control of the waters within their state: California (1850), Colorado (1876), Idaho (1890), Nebraska (1867), New Mexico (1912), North Dakota (1889), Texas (1845), Washington (1889) and Wyoming (1890). Hearings on S. 863 Before the Subcommittee on Irrigation and Reclamation of the Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess. 394 (1956) [hereinafter cited as 1956 Senate Hearings]. Eight of these states have so provided by statute: Arizona (1912), Kansas (1816), Montana (1889), Nevada (1864), Oklahoma (1906), Oregon (1859), South Dakota (1889), Utah (1896). Ibid.

The riparian doctrine is recognized in varying degrees in seven of these states: California, Kansas, Nebraska, North Dakota, South Dakota, Texas and Washington, but has been specifically rejected in eight of them: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming. The situation is less clear in Oklahoma and Oregon. "In Oklahoma it has been assumed that the riparian doctrine is in effect, but the right of a riparian owner against an appropriator of the water of the same stream has not yet been defined by the Supreme Court. It is theoretically recognized in Oregon, but statutes and court decisions in that state are such that it has been practically discarded." 3 President's Water Comm. 156 n.24, quoting National Resources Planning Board, State Water Law in the Development of the West 5 (1943). See also Trelease, supra note 21. Most commentators have considered Oklahoma and Oregon as states still recognizing some form of riparian rights. See note 64 infra.


The Alaska Constitution provides that the waters of the state "are reserved to the people for common use," Alaska Const. art. VIII, § 3, and that "all surface and subsurface waters reserved to the people for common use . . . are subject to appropriation," Alaska Const. art. VIII, § 13. Maryland legislation declares that the surface and underground waters of the state are subject to state control, but the use of water for domestic or farming purposes is exempt from the operation of the statute. Prior riparian or other vested rights are also protected. Md. Ann. Code art. 66C, §§ 718-34 (1957). The Pennsylvania and Minnesota statutes declare certain waters to be "public waters" and subject to the control of the state. These statutes are, however, limited in effect by many exemption clauses. Pa. Stat. Ann. tit. 32, §§ 631-41 (1949); Minn. Stat. §§ 105.37-.55 (1964). See also The Law of Water Allocation in the Eastern United States 87-94 (Haber & Bergen ed. 1958).
limitations that the riparian doctrine places upon full beneficial use of water and the increasing demands for water, unquestionably have accounted for this shift of Eastern States—especially since 1955—away from the riparian doctrine, toward some recognition of the prior appropriation principle.\footnote{\parnote{43} Cf. Trelease, supra note 21, at 25.}

THE "PUBLIC LANDS" QUESTION IN THE APPROPRIATION STATES

One question which has frequently arisen in those states which follow some form of the prior appropriation principle—and thus have some established regulatory agency to administer the water resources within the state—is to what extent, if any, the federal government, in its administration of the property clause, is required to follow the water rights regulatory measures of the states. May the federal government utilize the waters of a stream on the public lands, free of state law, while a private water user on the same stream is bound by such law?

The United States today owns in excess of 750 million acres of public lands,\footnote{\parnote{44} As of June 30, 1962, the federal government owned 770,796,843.1 acres of land. Of this acreage, 719,373,123.5 acres constituted "public domain" lands and 51,423,719.6 acres constituted "acquired lands." U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS 36-37 (1963) [hereinafter cited as 1963 PUBLIC LAND STATISTICS]. The distinction has been made between "original public domain" and "public domain," the former being originally applied to all lands acquired by the United States by treaty or purchase from foreign countries, by cession from the original thirteen states and by annexation of Texas. As that part of the public domain was gradually divided into land management categories such as National Forests or national parks, the term "public domain" came to mean the unreserved and unappropriated parts and the term "original public domain" came to be applied to the areas acquired by the United States from other countries. Clawson & Held, The Federal Lands: Their Use and Management 22 (1957). For the purposes of this Note, the following definitions are adopted: Acquired land: Lands in Federal ownership which are not public lands as defined below, acquired

The Indiana statutes retain the riparian doctrine with respect to waters used for domestic purposes, but declare surface waters in general to be “public waters” and subject to regulation by the Indiana General Assembly. IND. ANN. STAT. §§ 27-1401-08 (Burns 1960); see Note, 37 Ind. L.J. 467 (1962). In 1956, Mississippi enacted comprehensive legislation which adopted the principle of prior appropriation with respect to surface waters, but subterranean waters were exempted from the statute's operation. MISS. CODE ANN. §§ 5956-01 to -30 (Supp. 1960). In 1957, Iowa and Tennessee incorporated the appropriative principle into their laws. IOWA CODE §§ 455A.1-39 (Supp. 1964); TENN. CODE ANN. §§ 70-2001-05 (Supp. 1964). New York has been the latest eastern state to enact regulatory measures with respect to state waters. However, the statute merely reiterates the state's power to conserve and control its water resources. N.Y. CONSERV. LAW §§ 400-05 (Supp. 1963).
Huge territories were acquired by cessions from France, Spain, Mexico, Great Britain, Texas and the Indian Tribes. As an incident of this ownership, the United States has a right, unless divested, to such water as it can put to beneficial use upon the public lands. In jurisdictions following the riparian doctrine, the United States generally possesses a water right no greater than those of other riparian owners and as such does not limit private uses. But in an appropriation state, the United States possesses a water right inherent in its title to the public lands. This right antedates all other private uses and as such is paramount to and a limiting factor upon all appropriation rights.

In 1849 with the discovery of gold in California, the miners who came

lands having been obtained by the Government through purchase, condemnation or gift, or by exchange for purchased, condemned or donated lands, or for timber on such lands.

Public land or public domain lands:
Original public domain lands which have never left Federal ownership; also, lands in Federal ownership which were obtained by the Government in exchange for public lands or for timber on public lands.

Reservation:
A withdrawal, usually of a permanent nature; also, any Federal lands which have been dedicated to a specified public purpose.

Reserved land:
Federal lands which are dedicated or set aside for a specific public purpose or program, and which are, therefore, generally not subject to disposition under the operation of all of the public land laws.

Withdrawal:
An action which restricts the disposition of public lands and which holds them for specific public purposes; also, public lands which have been dedicated to public purposes.

1863 Public Land Statistics 43-45.

45 3 President's Water Comm. 33. See also Note, 60 Colum. L. Rev. 967, 968-69 (1960) (historical treatment of the United States' acquisition of western lands).

46 [I]n the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far as at least as may be necessary for the beneficial uses of government property.


47 United States v. Fallbrook Pub. Util. Dist., 108 F. Supp. 72 (S.D. Cal. 1952); 6A American Law of Real Property § 28.59, at 181 (Casner ed. 1954). But see the remarks of Mr. Goldberg indicating that the rights of the United States may not be limited as are riparian rights in California. 1964 Senate Hearings 129.

48 "When a nation takes possession of a country, with a view to settle there, it takes possession of everything included in it, as lands, lakes, rivers, etc." 3 President's Water Comm. 33, quoting 1 Vattel, The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns § 266, at 120 (Chitty's 5th Am. ed. 1839).
in search of wealth swarmed over public lands previously uninhabited. The gold was taken with the tacit permission of the true owner—the United States. Local rules were developed and customs adopted regulating the acquisition of mining claims and the waters necessary to operate mills and placer mines. In this atmosphere the Supreme Court of California, in *Irwin v. Phillips*, was faced with a suit by miners who had occupied riparian lands, against a canal owner who had previously diverted waters from the natural channel for nonriparian land use. Citing no precedent, the court held for the defendant, thereby giving judicial birth to the doctrine of prior appropriation in the United States.

At this point in time, however, the courts indicated that only the respective rights of the individual settlers were being decided and not the rights of individuals vis-à-vis the United States. These early settlers were at best tenants at will, and in all likelihood no more than mere trespassers. The United States, as owner of the entire public domain—and the sole riparian proprietor—was thus in a position to assert superior rights against all "trespassing" appropriators.

When the public lands were opened to private acquisition under the Homestead Act of 1862 and the Pacific Railway Act of 1864, the patentees acquiring riparian lands claimed to be the true successors of the United States with water rights superior to those acquired by any appropriators upon the watercourse in question. As a consequence of the questions and fears raised by these assertions, Congress passed the Act of 1866, which gave federal recognition to water rights which had been tacitly developed and customarily accepted by the states.

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50 5 Cal. 140 (1855).
52 Note, 5 Utah L. Rev. 495, 496 (1956).
57 *id.* at supra note 36, § 87.
vested and accrued and had received acknowledgment by the local customs, laws and court decisions. Congress, in the Act of 1870, made it explicit that all patents granted after that date should be subject to any water rights which had vested and accrued prior to the Act of 1866. The Supreme Court of the United States soon declared that this legislation constituted congressional recognition of the "right by prior appropriation." In 1877, Congress passed the Desert Land Act which, among other things, provided that all unappropriated waters "upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." The Court, in construing this statute, subsequently declared that: "Congress intended to establish a rule that for the future that land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."

The 1866, 1870 and 1877 legislation was not given uniform interpretation by the courts in the Western States. In the Mountain States, the law of prior appropriation was adopted as the sole basis of rights to the use of water, but in the West Coast and Great Plains States both riparian and prior appropriation principles were recognized. The application of only the appropriative principle in a state has been referred to as the "Colorado doctrine," while the dual system of water law has been labelled the "California doctrine." In 1935, the opportunity to

60 Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 513 (1874).
61 Ch. 107, § 1, 19 Stat. 377 (1877), as amended, 43 U.S.C. § 321 (1958). The Desert Land Act applied only to the states of "California, Oregon, and Nevada (to which Colorado was later added), and the then territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota . . . ." California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 156 (1935). Thus, of the Western States, Kansas, Nebraska, Oklahoma and Texas were not affected by this act. See Note, 60 Colum. L. Rev. 967, 972 n.30 (1960).
63 Trelease, supra note 21, at 24.
64 The "California doctrine" of Lux v. Haggin, 69 Cal. 255, 10 Pac. 674 (1886), is predicated on the assumption that common-law riparian rights were attached to public lands and passed to patentees as an incident of their riparian grants, and that the acts in no way limited existing riparian rights or prevented new ones from vesting in the future. California, Kansas, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington have generally followed the "California doctrine." The "Colorado doctrine" of Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882), completely rejects the riparian doctrine upon the theory that when the federal government transferred sovereignty to the states, it simula-
pass upon and interpret these acts was presented to the Supreme Court of the United States. In *California Oregon Power Co. v. Beaver Portland Cement Co.* the Court was asked to decide whether a homestead patent to riparian lands on a nonnavigable stream "carried with it as part of the granted estate the common-law rights which attach to riparian proprietorship." The Court, after an examination of all three statutes and decisions construing them, answered the question in the negative stating:

What we hold is that following the act of 1877, *if not before*, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," . . . the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its *future* grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation.

The Court thus construed the legislation as intending to sever the water from the land and vest the power to control those severed waters in the respective states.


65 295 U.S. 142 (1935).
66 Id. at 154.
68 295 U. S. at 162. While the "public lands" question has received much attention in the seventeen Western States, no reported cases have been found in the remaining priority states. This absence of litigation may be explained on four grounds: (1) the relatively short period of time that the priority principle has been applied in these states—in most instances less than ten years; (2) the presence of many exclusionary clauses in the priority statutes; (3) the relatively smaller percentage of federal public-land holdings in these states, except in Alaska; and (4) the relatively lesser demand for water in the Eastern States.
THE "RESERVATION DOCTRINE"

Notwithstanding the broad, and seemingly all inclusive, language in Beaver Portland that the Desert Land Act "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself,"69 and "that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named"70 the United States, in 1945, intervening in Nebraska v. Wyoming,71 contended that the statutes of 1866, 1870, and 1877 did not divest it of title to or control over unappropriated waters in nonnavigable streams on reserved and withdrawn federal lands. The Court, however, spoke of this contention as being "largely academic" stating:

But we do not stop to determine what rights to unappropriated water of the river the United States may have. For the water rights . . . [possessed by the United States] have been obtained in compliance with state law. Whether they might have been obtained by federal reservation is not important.72

While the contention raised by the United States in Nebraska v. Wyoming seemed to be in direct opposition to the Beaver Portland language, it was not without support in case law. In 1908 the Court, relying upon dictum in United States v. Rio Grande Dam & Irr. Co.,73 held in Winters v. United States74 that the United States, by creation of the Fort Belknap Indian Reservation,75 had the power to reserve waters of the nonnavigable Milk River in Montana.76 In Winters the appellants, who had the approval of the state of Montana to appropriate large portions of the Milk River,77 sought to overturn an order enjoining them from making further use of the waters. They contended that since the Indian uses of the water had not been made in accordance with the applicable state procedure, they were "prior users" and as such entitled to the continued

69 295 U.S. at 158.
70 Id. at 162.
71 325 U.S. 589 (1945).
72 Id. at 612. (Emphasis added.)
73 Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; as far at least as may be necessary for the beneficial uses of the government property.
74 207 U.S. 564 (1908).
75 Agreement ratified by the Act of May 1, 1888, 25 Stat. 113-33.
76 207 U.S. at 577.
77 At the time of suit by the federal government no water was reaching the Indian lands.
use of the stream under their state appropriation. The Court refused to adopt this contention, finding that the treaty creating the reservation impliedly reserved waters for use upon the reservation. The "Winters doctrine," as it has come to be called, has been relied upon with success by the Government in subsequent tests. Thus the "reserved lands" doctrine—as applied to Indian reserves—seems settled: The act creating the reservation impliedly withdraws or reserves rights to the use of the waters contiguous to the reservation.

While the Indian decisions represent the orthodox position today, they had, at least until 1955, been considered an exception to the governmental policy of recognizing the water laws of each state as controlling over nonnavigable streams. This exception was considered to be necessary in order for the federal government to fulfill its obligations to the Indians. In 1955, however, the Supreme Court decided the Pelton Dam case, FPC v. Oregon, and, without paying lip service to Winters, per-

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78 207 U.S. at 577.
79 See, e.g., Arizona v. California, 373 U.S. 546 (1963); United States v. Ahtanum Irr. Dist., 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957); United States v. Walker River Irr. Dist., 104 F.2d 334 (9th Cir. 1939); United States v. Conrad Inv. Co., 156 Fed. 123 (C.C.D. Mont. 1907); aff'd, 161 Fed. 829 (9th Cir. 1908). Most of the Indian water rights cases involved treaty provisions. See, e.g., United States v. Powers, 305 U.S. 527 (1939); Conrad Inv. Co. v. United States, 161 Fed. 829 (9th Cir. 1908). In United States v. Walker River Irr. Dist., supra at 336, it was held that "a statute or an executive order setting apart the reservation may be equally indicative of the intent" to reserve water and equally efficacious in doing so. In Arizona v. California, supra at 600, the Court, agreeing with the master, observed that "the water was intended to satisfy the future as well as the present needs of the Indian Reservations and . . . enough water was reserved to irrigate all the practically irrigable acreage on the reservations."
80 Of course the Indian lands in question must actually be owned by the federal government. The recent case of FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960), illustrates this point. In Tuscarora, the Indians challenged a license issued by the Federal Power Commission on the basis that the building of the reservoir would be inconsistent with the purpose of the reservation, i.e., a homeland. The Supreme Court upheld the license since the lands involved were owned in fee simple by the Indian Nation. This result was reached because the "reserved land" doctrine of Winters could only apply to federally owned lands withdrawn from the public domain. However this limitation must be contrasted with the statement in United States v. Walker River Irr. Dist., 104 F.2d 334, 337 (9th Cir. 1939), that "treaty provisions for the allotment of reserved lands invariably contemplate the ultimate passing of fee title to the individuals of the tribe . . . ." If this expression by the lower court is correct, then the question arises, are the Indian Nations deprived of the benefits of the "reserved land" doctrine and thus the quantum, as measured by Arizona v. California, once title passes to the Indians?
81 Note, 5 Utah L. Rev. 495, 509 (1956).
haps changed an exception into a rule. The extension in Pelton of the “reserved lands” exception has crystalized into what is today recognized as the “reservation doctrine.”

In Pelton—which did not involve any consumptive use, but rather pertained to federal rights to exclude state control of licensing of water projects—the Supreme Court upheld the authority of the Federal Power Commission to license construction of a private hydroelectric project on reserved lands in Oregon although the state authorities would not give consent to the project. Since the stream in question was not navigable,84 the state relied upon the holding of Beaver Portland to the effect that control of the nonnavigable waters was limited to the respective states. The Federal Power Commission based the issuance of the license on its authority under the Federal Power Act “to issue licenses to . . . any corporation . . . for the purpose of constructing, operating, and maintaining dams . . . or other project works . . . upon any part of reservations85 of the United States . . . .”86

The Court of Appeals for the Ninth Circuit upheld Oregon87 but was reversed by the Supreme Court. Again relying on the property power,88

83 See note 44 supra.
84 The issue of the navigability of the Deschutes River was not raised by the United States. Had the river been legally navigable, Pelton could have been decided upon the authority of First Iowa Hydro-Elec. Co-op. v. FPC, 328 U.S. 152 (1946), where the Supreme Court upheld the authority of the Federal Power Commission to license a project on a navigable stream, under the commerce power, notwithstanding the state's objections.
85 The land on the west side of Deschutes River was Indian land which had been reserved in 1855. The power sites on the reservation were created in 1910 and 1913. The land bordering the eastern shore of the river had been reserved in 1910 under the Act of 1910 authorizing the Executive to reserve lands for power purposes. 36 Stat. 847 (1910), 43 U.S.C. § 141 (1958).
86 41 Stat. 1065, as amended, 16 U.S.C. § 797(e) (1958). The Court saw no problem as to the constitutional authority of the Federal Power Commission to grant a valid license on reserved lands, provided the use did not conflict with a vested right. 349 U.S. at 444-45. It should be mentioned that the license which was granted to the Portland General Electric Company in the aftermath of Pelton did protect the rights of other appropriators. Corker, Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957, 45 Calif. L. Rev. 604, 608 (1957).
87 211 F.2d 347 (9th Cir. 1954).
88 “The authority to . . . [issue licenses] in relation to public lands and reservations of the United States springs from the Property Clause . . . .” 349 U.S. at 443. See also Note, 60 Colum. L. Rev. 967, 987 n.137 (1960). In Pelton, Mr. Justice Douglas dissented on the theory that the federal government had, in effect, acquired water rights and therefore must comply with the applicable state procedure. This view is based on the Court's reasoning in Nebraska v. Wyoming, 325 U.S. 589 (1945), modified on rehearing, 345 U.S. 981 (1953).
the Court determined that the federal government, in creating the reservation, had withdrawn the control of the nonnavigable stream (as limited by the purpose for which the reservation was created) from the state.\textsuperscript{89}

Pelton, restricted to its precise facts, is not an unwarranted encroachment of federal control into traditional state spheres, because, if so limited, the Court merely decided that the State of Oregon should not be given a veto power over federal power projects upon lands reserved for such projects when no consumptive uses are anticipated.\textsuperscript{90} However the significance of Pelton lies in the implications raised and the possible ramifications flowing from its holding. Does the federal government, by its ownership of reserved lands, (1) possess some form of riparian water right, even though the land is in an exclusively appropriation state; or (2) possess some kind of an appropriative right, and if so, what is the priority date and the quantum of that right? (3) Does the reservation doctrine extend to consumptive uses; or (4) to waters already fully appropriated under state law?\textsuperscript{91} (5) Does the federal government by purchase or condemnation of riparian lands in a state recognizing no riparian rights acquire greater water rights than the prior owner had?\textsuperscript{92}

Subsequent decisions—all favoring the federal position—have answered most of the questions raised by Pelton. In the Hawthorne case, Mr. Justice Douglas also dissented in Arizona v. California and in FPC v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

89 Since the acts which reserved the lands for power purposes (1910-1913) were subsequent to the date of the Desert Land Act (1887), the control which had been granted to the states by the Desert Land Act had to be withdrawn from the states and vested in the federal government, at least as to the purpose for which the reservation was created. See generally Note, 60 Colum. L. Rev. 967, 989-93 (1960).

90 349 U.S. at 445. See also 1964 Senate Hearings 81 (statement of John Mason, General Counsel, Federal Power Commission). In addition, the Court mentioned that basically the rationale of First Iowa Hydro-Elec. Co-op. v. FPC, 328 U.S. 152 (1946), was being applied only through the property power. 349 U.S. at 441-43.

91 As I understand the Pelton decision, any rights that are vested in accordance with and in compliance with the State laws up to the moment the United States takes any action toward its own purposes in regard to that water, are not affected in the least. It is only as to the unappropriated water where the right to the use of it has not vested that there is any effect of the Pelton decision.

Hearings Before the House Committee on Interior and Insular Affairs, 84th Cong., 2d Sess., ser. 31, at 17 (1956) [hereinafter cited as 1956 House Hearings] (testimony of J. Lee Rankin, Assistant Attorney General of the United States). (Emphasis added.)

Nevada v. United States, the consumptive use of unappropriated ground water was involved. The commanding officer of the Hawthorne Naval Ammunition Depot refused to file with the proper state authorities proofs of beneficial use of underground waters from wells drilled on the federally owned depot. The officer had been advised by his superior that the proofs were not necessary due to "a recent rule of the U.S. Supreme Court"—the Pelton case. The district court found Pelton "determinative." It is significant that the court's holding is not limited in scope to the use of unappropriated waters; the result would have been the same even had the town of Hawthorne's water supply been diminished by the present appropriations of the naval personnel.

Even Hawthorne, if confined to consumptive uses not affecting other users, is not alarming, for to decide otherwise would vest the state with a veto power over use of water on a national defense installation. Thus the use, though consumptive, was not a "taking" in derogation of the existing water rights of other appropriators.

The evolutionary development of the "reservation doctrine" sired by Winters, given birth by Pelton, and nourished by Hawthorne, has now gained full maturity in Arizona v. California and Glenn v. United States. In both cases the "reserved rights" of the federal government came into conflict with the existing water rights perfected in accordance

86 There was no evidence that the withdrawals by the Navy would, in the near future, endanger the supply of the town of Hawthorne. 1964 Senate Hearings 189 (statement of Hugh Shamberger).
87 For a discussion of the approach the federal government should take, as a practical matter, if the water supply in the Hawthorne case should prove inadequate for the needs of both the Naval depot and the town, see the discussion between Mr. Northcutt Ely and Senator Quentin Burdick in which Mr. Ely hypothesizes that the federal government would not dry up cities, without adequate compensation, by appropriating the available waters. 1964 Senate Hearings 246.
88 The land upon which the depot was situated had been ceded to the United States in 1848. Sometime prior to 1935, the land had been set aside by Executive order for national defense purposes. The district court stated: "a court should hesitate to impede the lawful and logical function of the Department of the Navy exercised in what it has been stipulated is a major installation in the program of the department for the defense of the Nation." Nevada v. United States, 165 F. Supp. at 611; see 1964 Senate Hearings 150.
with state appropriative procedures. In *Arizona v. California* the Court was confronted with claims by the Government to waters “for use on Indian Reservations, National Forests, recreational and wildlife areas and other governmental lands and works.”<sup>101</sup> The Court found that the federal government did have “prior perfected rights” which were effective as of the time the Indian reservations were created.<sup>102</sup> This withdrawal of water rights “to irrigate all the practically irrigable acreage”<sup>103</sup> necessarily meant that some present users of the waters of the Colorado River would be required to relocate or find another source of supply without financial assistance from the Government.<sup>104</sup> Thus the conclusion—that the taking of an existing state-created right to the use of waters in a nonnavigable stream need not be compensated—is inescapable.<sup>105</sup>

The present state of the “reservation doctrine” is best illustrated in *Glenn*. In contrast to the complex factual setting of *Arizona v. California*, the facts in *Glenn* were few, simple and stipulated.<sup>106</sup> The plaintiff was the holder of a state certificate of appropriation of water issued in 1933. In 1961 the United States, the owner of the Ashley National Forest—an 1897 reservation—diverted the waters which had previously flowed to plaintiff’s land. The United States’ right to divert these waters was not based upon a state-created right. At trial the plaintiff’s action was dismissed by the court subject to his right to bring a new action “based upon rights, if any, acquired by diversion and use, if any occurred, prior to February 22, 1897, the date when the Ashley National Forest was created.”<sup>107</sup>

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<sup>101</sup> 373 U.S. at 600. The primary dispute arose over how much water the states had a legal right to use under the Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. §§ 617-617t (1958). This act governed the comprehensive scheme for the apportionment of the waters from the Colorado River and its tributaries by Arizona, California, Nevada, New Mexico and Utah. The “reserved land” issue was relevant in the determination of each state’s rights since all appropriations within the borders of the state, including uses on federal reserved land, were charged against the respective state.

<sup>102</sup> Although the Court discussed only the master’s determination as to the amounts reserved for the Indian reservation, it went on to point out that “we agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasupai Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.” 373 U.S. at 601.

<sup>103</sup> Id. at 600.

<sup>104</sup> 1964 Senate Hearings 251-52, 257-59 (testimony and statement of Northcutt Ely).

<sup>105</sup> See, e.g., 1964 Senate Hearings 172-74 (statement of Harold W. Kennedy).


<sup>107</sup> The court determined that the diversions by the federal government (to supply a
The evolution is thus complete. The "reservation doctrine" extends to consumptive uses; the "reserved" right dates from the date of "reservation"; all state-created appropriative rights subsequent in time to the "reservation" are subordinate to the "reserved" right;¹⁰⁸ and the quantity of water "reserved" is "that consistent with the purposes for which the land was reserved." As one authority notes, this truly is a "magnificent water right."¹¹⁰

With the "reservation doctrine" now firmly implanted, the question becomes who, as a practical matter, is to administer the use of the waters in the appropriation states so as to obtain the maximum benefits from this precious resource?¹¹⁰

**The Reservation Doctrine in Congress**

Federal-state water rights legislation is a product of water rights litigation. It has been directed squarely at the eradication of court-declared law, at countering assertions made in the course of litigation, or at answering the questions raised by water rights decisions.¹¹¹

The modern legislative history of efforts to abolish the reservation doctrine finds its genesis in the *Pelton* decision. On February 1, 1955, just four months before *Pelton* was handed down, the famous Barrett bill¹¹² was introduced in the 84th Congress.¹¹³ Most water rights bills since the Barrett bill have been directly related to it, or have been a product of the (recreational area in the Forest) were consistent with the purpose for which the lands were reserved. See 74 Stat. 215 (1960), 16 U.S.C. §§ 528-31 (Supp. V, 1964).

¹⁰⁸ Most of the large reservations were made during the conservation era of the late nineteenth and early twentieth centuries; thus they possess very good "priority dates." CLAWSON & HEILD, THE FEDERAL LANDS: THEIR USE AND MANAGEMENT 27-29 (1957).

¹¹⁰ In discussing the reserved rights to the Colorado Indian Reservation confirmed by the decree in *Arizona v. California*, a serious infirmity in the reservation doctrine is disclosed:

The United States is in the process now of leasing out the land on that Indian reservation to non-Indians. It has a magnificent water right . . . .

It is outrageous that water should be taken from existing users on the Colorado River Basin, who will be required to destroy an existing economy, to be put to use for the advantage of large corporations . . . .

1964 Senate Hearings 251-52 (testimony of Northcutt Ely). Is this use consistent with the purpose of the reservation?

¹¹¹ See Corker, supra note 86, at 611; Munro, supra note 92, at 250-51; 1964 Senate Hearings 145 (testimony of Harvey O. Banks).

¹¹² S. 863, 84th Cong., 1st Sess. (1955). *Pelton* was decided on June 6, 1955. The bill was reported to the Senate, with amendments, by the Senate Interior and Insular Affairs Committee on July 17, 1956.

¹¹³ See Corker, supra note 86 for a discussion of the Barrett bill.
bill which was introduced to counter it—the "Agency" bill\textsuperscript{114} of the 86th Congress.\textsuperscript{115}

Water rights bills have covered the entire spectrum of water rights law. Often, specific provisions designed to obviate the reservation doctrine have appeared in legislation of much wider scope.\textsuperscript{116} The Barrett bill\textsuperscript{117} is typical in this respect, its curative provisions going far beyond the narrow effect of the \textit{Pelton} decision.\textsuperscript{118} Later bills added sections dealing with even more problem areas of water rights law.\textsuperscript{119}

\footnote{114}{See S. 851, H.R. 4567, H.R. 4604, H.R. 4607, H.R. 6140, 86th Cong., 1st Sess. (1959). These bills were almost identical to the Agency bill. See notes 192-93 infra and accompanying text.}

\footnote{115}{The water rights bills which have been introduced in the 84th-88th Congresses include the following: 84th Congress—S. 863, H.R. 741, H.R. 3404, H.R. 6147, H.R. 8325, H.R. 8347, H.R. 8560, H.R. 9489, H.R. 9505, H.R. 10873; 85th Congress—S. 863, H.R. 2211, H.R. 5871; 86th Congress—S. 851, S. 1416, S. 1592, H.R. 1234, H.R. 2363, H.R. 4567, H.R. 4604, H.R. 4607, H.R. 5555, H.R. 5587, H.R. 5618, H.R. 5718, H.R. 5748, H.R. 6140; 87th Congress—S. 211, S. 2636, H.R. 151, H.R. 5078, H.R. 5100, H.R. 5207, H.R. 5224; 88th Congress—S. 101, S. 1275, H.R. 5914, H.R. 9364. Water rights legislation has consistently been referred to the House and Senate Interior and Insular Affairs Committees. In most instances the bills have in turn been referred to the respective Subcommittees on Irrigation and Reclamation. The only bill reported thus far by the Interior and Insular Affairs Committees was the Barrett bill in the 84th Congress.}

\footnote{116}{For a description of the wide range of provisions of water rights bills see Witmer, \textit{Federal Water Rights Legislation—The Problems and Their Background}, HOUSE COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, 86TH CONG., 2D SESS. 1-2 (Comm. Print No. 19, 1960).}

\footnote{117}{S. 863, 84th Cong., 1st Sess. (1955) (as reported to the Senate on July 17, 1956).}

\footnote{118}{Senator Barrett's shotgun approach included a direct attack on the navigational servitude. See Note, 60 COLUM. L. REV. 967, 977-82 (1960). It created a right of compensation when a federal program or project interfered with a right vested under state law. S. 863, 84th Cong., 2d Sess. § 5 (1956). It reserved "all navigable and nonnavigable waters . . . for appropriation . . . pursuant to state law." \textit{Id.} § 6. (Emphasis added.) It also contained a provision narrowing the federal government's immunity to water rights suits. See Corker, \textit{supra} note 86, at 630.}

\footnote{119}{See, e.g., S. 1275, 88th Cong., 1st Sess. § 4 (1963) (abolishing the asserted right of inverse condemnation by the federal government of water rights vested under state law);
The discussion which follows is limited to only a portion of the complex water rights field, i.e., the legislative proposals designed to nullify a paramount water right in the federal government created by the mere reservation or withdrawal of public lands from the public domain. Preceding a detailed discussion of these specific bills, a summary of the political and economic arguments of the legislators and others who seek to abolish the reservation doctrine120 will be contrasted with the positions of the agencies and individuals who support the doctrine and oppose the legislation which is designed to destroy it.

THE RESERVATION DOCTRINE—PRO & CON

The States' View

The reservation doctrine has been characterized as the "sword of Damocles" hanging both over the heads of those individuals who seek water rights and over the agencies which allocate such rights in accordance with state law.121 For many years prior to Pelton, state water rights boards, engineers and others responsible for water rights allocations operated on the basis of the pre-Pelton doctrine. They theorized that under the 1866, 1870 and Desert Land Acts, the states had the right to the control, appropriation, distribution and use of waters within their respective jurisdictions.122 Assuming that they obtained vested legal rights under state law, individual appropriators made various water-based investments in reliance upon them.123 After Pelton, Hawthorne and Arizona v. California, it is clear that on withdrawn or reserved lands, no rights against the Government vested in these private citizens, irrigation districts, public water agencies or other appropriators.124 Thus when the United States, in the use of water on federal reservations, interferes with a state created "right," no rights have been taken which must


120 With rare exception water rights bills have been sponsored by Western Congressmen. These legislators represent the areas most critical of the legal conclusions developed in Pelton, Hawthorne, and Arizona v. California.

121 1959 House Hearings 133, 300 (remarks of Representative Chenoweth).

122 See 1959 House Hearings 252 (testimony of J. E. Sturrock).


124 See 1964 Senate Hearings 172 (statement of Harold W. Kennedy).
be compensated under the fifth amendment. Proponents of water rights legislation fear that

if permitted to travel along its present path, the logic of the Federal rights doctrine is that every drop of water which rises on or flows past or through Federal property is subject to claim by the Federal Government, at any time, without payment of compensation to present users and without reference to the State water laws in which such private and non-Federal public rights are based.\(^{125}\)

The potential magnitude of reserved rights on withdrawn lands is at the core of state arguments. Some proponents estimate that ninety per cent of all western waters originate on federally reserved lands\(^ {126}\) and point out that large percentages of their states are in federal ownership—in a reserved land status.\(^ {127}\) The priority of federal water rights on large portions of the federal property dates to the early twentieth century.\(^ {128}\) Few private individuals or nonfederal agencies can claim appropriations antedating these dates of reservation and withdrawal.

The tenuous position of state-created water rights under the reservation doctrine is said to nullify the efforts of state water adjudication and allocation agencies to plan, integrate and coordinate the use of water within their respective jurisdictions.\(^ {129}\) It is alleged that the doctrine is not only detrimental to state water development and planning,\(^ {130}\) but also that

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\(^{125}\) 1964 Senate Hearings 184 (statement of the Interstate Conference on Water Problems). (Emphasis added.)

\(^{126}\) E.g., 1961 Senate Hearings 63 (testimony of Lewis A. Stanley); 1956 Senate Hearings 20 (testimony of Senator Barrett).

\(^{127}\) See 1964 Senate Hearings 93 (statement of Stanley Mosk), 105 (testimony of John Raper), 115 (testimony of Duke Dunbar), 172-73 (statement of Harold W. Kennedy). For a comparison of federally owned lands with total acreage of states as of June 30, 1962, see 1963 PUBLIC LAND STATISTICS Table 7. For a breakdown of federally owned land by agency and state, see id., Table 9.


\(^{129}\) See, e.g., 1956 Senate Hearings 44 (testimony of Lewis A. Stanley).

\(^{130}\) See 1964 Senate Hearings 145 (testimony of Harvey O. Banks). But see 1964 Senate Hearings 120, 131 (testimony of Abbott Goldberg). These two statements represent two completely opposite views espoused by Californians, whose state has been noted for its progressive water plan. In the first session of the 88th Congress, California's Senator Kuchel introduced S. 1275, a water rights bill, and State Attorney General Mosk, representing the Association of Western Attorney Generals, testified in favor of it during the Senate hearings. But Abbott Goldberg, Deputy Director of the California State Water Resources Commission, representing Governor Brown, took a contrary position which he summed up by stating:

[What I find is that every time legislation of this sort comes up it is bundled about with qualifications and restrictions and dubious items which to me reflect only an intent to inhibit the United States. In our instance the State of California is a Federal licensee in operation and construction of our projects without difficulty. There is not one word in
it impedes the control by the state authorities of private water developments.\textsuperscript{131} The proponents of the legislation point out further that there is no federal machinery for allocating and administering water rights or balancing the demands for the multiple purposes for which water may be used.\textsuperscript{132}

State water planners assert that making their task even more difficult is their uncertainty regarding the quantum of water the federal government will use in carrying out the purposes of the reservations. The Supreme Court decree in \textit{Arizona v. California} delimited the amount with respect to reserved lands on the Gila National Forest to "quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes."\textsuperscript{133} But this limitation has been referred to as a "floating mortgage in the sky"\textsuperscript{134} which begs the question of quantity absent litigation.\textsuperscript{135} And since the reservation doctrine creates a federal right which is in some respects riparian\textsuperscript{136}—for example, not requiring a beneficial use to preserve the right—representatives of appropriation states point out that it is at complete odds with the appropriation doctrine common to their states.\textsuperscript{137}

The problem surrounding the uncertainty of the quantum of federal water use is aggravated further by the uncertainty as to when the Government might assert its reservation and interfere with state-created rights. These uncertainties and the lack of a compensable right under state law are declared to be major obstacles to private investment in water developments.\textsuperscript{138} In addition to discouraging initial investment, the doctrine is said to make any development that is undertaken more costly. For example, it is alleged that the insecurity of the water right on which

\textit{S. 1275 that does us anything but harm.}
1964 \textit{Senate Hearings} 131. (Emphasis added.) Perhaps one cause of these conflicting views is the close working relationship between the Department of the Interior and the State of California. See \textit{Id.} at 145 (testimony of Harvey O. Banks).

\textsuperscript{131} 1961 \textit{Senate Hearings} 63 (testimony of Lewis A. Stanley); 1956 \textit{Senate Hearings} 77 (statement of Hugh A. Shamberger).

\textsuperscript{132} 1959 \textit{House Hearings} 158 (testimony of Charles C. Butler); 1956 \textit{Senate Hearings} 291 (testimony of George Guy).

\textsuperscript{133} \textit{Arizona v. California}, 376 U.S. 340 (1964) (decree).

\textsuperscript{134} 1964 \textit{Senate Hearings} 246 (testimony of Northcutt Ely).

\textsuperscript{135} See Letter From Stanley Mosk to Senator Anderson, June 6, 1961, in 1961 \textit{Senate Hearings} 147.

\textsuperscript{136} See Munro, \textit{supra} note 92.

\textsuperscript{137} See 1964 \textit{Senate Hearings} 93 (statement of Stanley Mosk); 1961 \textit{Senate Hearings} 92 (testimony of Elmer F. Bennett).

\textsuperscript{138} See, \textit{e.g.}, 1956 \textit{Senate Hearings} 352 (testimony of Senator Barrett).
a project is based makes it more difficult to obtain financing at reasonable interest rates.\textsuperscript{139}

Finally, the contentions of those opposed to the reservation doctrine are fraught with the issue of federalism.\textsuperscript{140} One advocate of a water rights bill declared during the 1964 Senate hearings that "the real issue involved . . . is whether or not the Federal entity is to control the waters of the Western States or whether the use of water shall be allocated by the States. We are convinced that the Congress and only the Congress can settle this issue."\textsuperscript{141}

The Federal View

All federal departments and agencies affected by the federal-state water rights problem currently oppose any legislation which would abolish the reservation doctrine. However, their positions have neither been consistent nor unanimous.

When the Barrett bill was introduced in the 84th Congress, the Departments of Agriculture\textsuperscript{142} and Interior\textsuperscript{143} supported the legislation in the face of opposition from both the Department of Justice\textsuperscript{144} and the Bureau of the Budget.\textsuperscript{145} By the end of the 85th Congress, however, federal opposition under the Eisenhower Administration had given way to compromise. The result was a draft bill, submitted by the Department of the

\textsuperscript{139} Id. at 226 (testimony of Harvey O. Banks).
\textsuperscript{140} See Corker, supra note 92, at 906; Englebert, Federalism and Water Resources Development, 22 Law & Contemp. Prob. 325 (1957).
\textsuperscript{141} 1964 Senate Hearings 198 (testimony of John Taylor).
\textsuperscript{142} The Acting Secretary of Agriculture pointed out in his report that the Department of Agriculture has traditionally favored full recognition by the Federal Government of the authority of the States relating to the control, appropriation, use, or distribution of beneficially used water within their boundaries. The Department also believes that all Federal water resources activities should honor fully all concerned water rights acquired under State laws. It has required appropriate conformance with the provisions of such State laws in the administration of its various programs and activities.

Letter From Acting Secretary of Agriculture True D. Morse to Senator James E. Murray, March 21, 1956, in 1956 Senate Hearings 177-78.

\textsuperscript{143} Letter From Secretary of the Interior Douglas McKay to Senator James E. Murray, March 20, 1956, in 1956 Senate Hearings 152. This letter did not unequivocally support the Barrett bill. The department favored the "objectives" of the bill and recommended certain amendments as well as initiation of legislation to create a joint federal-state study of water rights.

\textsuperscript{144} Letter From Deputy Attorney General William P. Rogers to Senator James E. Murray, March 19, 1956, in 1956 Senate Hearings 52, 282.

\textsuperscript{145} Letter From Percy Rappaport, Assistant Director, Bureau of the Budget, to Senator James E. Murray, March 15, 1956, in 1956 Senate Hearings 4.
Interior, in response to the requests of the Senate and House Interior Committees for reports on the respective water rights bills introduced in the 85th Congress. The Departments of Agriculture, Defense and Justice, and the Bureau of the Budget concurred in the substitute bill.\textsuperscript{146} This concurrence continued generally through the 86th Congress.\textsuperscript{147} But with a change from a Republican to a Democratic administration in 1961, the federal departments did not continue to support the Agency bill in the 87th Congress.\textsuperscript{148} By the 88th Congress all departments either flatly opposed\textsuperscript{149} or failed to recommend\textsuperscript{150} the enactment of S. 1275, the 88th Congress water rights bill.

Federal officials and opponents of water rights legislation characterize

\textsuperscript{146} See Letter From Acting Secretary of the Interior Hatfield Chilson to Representative Clair Engle, May 28, 1958, in 1959 \textit{House Hearings} 7. The Agency bill is discussed below. See notes 186-96 \textit{infra} and accompanying text.


\textsuperscript{148} See 1961 \textit{Senate Hearings} 39 (testimony of Ramsey Clark), 60, 61 (testimony of Frank J. Barry). The Department of Agriculture had no representative at the 1961 Senate hearings, held on an exploratory basis and not on a specific bill. However, the Department of Agriculture's letter to the Senate Interior Committee in connection with the hearing did not mention the previous Administration bill. See note 142 \textit{infra}; Letter From Secretary of Agriculture Orville L. Freeman to Senator Clinton P. Anderson, June 14, 1961, in 1961 \textit{Senate Hearings} 31.


\textsuperscript{150} Letter From Secretary of Agriculture Orville L. Freeman to Senator Henry M. Jackson, March 6, 1964, in 1964 \textit{Senate Hearings} 8. The Department of Agriculture report stressed the present cooperative relationships between the department and the states regarding water rights. Although guarding the discretion of the Secretary of Agriculture with respect to management of the National Forests, the report was not as strong in its opposition to the legislation as those of other departments.
the controversy over federal-state water rights as displaying "much emotion and little reason," and shedding "more heat than light."\textsuperscript{151} Former Assistant Attorney General Ramsey Clark\textsuperscript{152} decries the lack of specific evidence showing federal interference with a state-created right without compensation:

\[ \text{[F]or all the hue and cry arising from the Federal-State water rights controversy, not one State, not one county, not one municipality, not one irrigation district, not one corporation, not one individual, has come forward to plead and prove that the United States, exercising alleged proprietary rights in the unappropriated water of the public domain, has destroyed any private property right or rendered ineffective any State or local government regulation. Why? Because it hasn't happened.}\textsuperscript{153}

The opponents also propound a number of substantive arguments. First, they point out that negation of the reservation doctrine would defeat the purposes for which the federal reservations were created. Two clear examples of such purposes are reservations of public lands for hydraulic power purposes,\textsuperscript{154} and reservations under the Stock-Raising Homestead Act.\textsuperscript{155} The latter are "necessary to keep desirable stock-watering sites open for common access and use by persons grazing stock on the public domain."\textsuperscript{156} These reservations are obviously "worthless without a reservation of the associated water."\textsuperscript{157}

What federal officials fear is that the waters on reserved lands will be "thrown open indiscriminately for such use, misuse, or nonuse as may be made of them"\textsuperscript{158} under state law. And they fear that when the Government does need the water currently reserved, it would be forced to \textit{buy back the very water it would give away}\textsuperscript{159} at greatly increased—possibly

\textsuperscript{151} Clark, \textit{The Federal Interest in Water Resources}, \textit{Western Water Law Symposium}, 85, 90-91 (Dickenson ed. 1963); see 1964 \textit{Senate Hearings} 37 (testimony of Senator Anderson).

\textsuperscript{152} Mr. Clark is currently Deputy Attorney General; until January 1965 he was Assistant Attorney General, Lands Division.

\textsuperscript{153} 1964 \textit{Senate Hearings} 55 (testimony of Ramsey Clark).


\textsuperscript{156} Letter From Secretary of the Interior Stewart L. Udall to Senator Henry M. Jackson, March 7, 1964, in 1964 \textit{Senate Hearings} 3.

\textsuperscript{157} Ibid.

\textsuperscript{158} 1964 \textit{Senate Hearings} 56 (testimony of Ramsey Clark).

\textsuperscript{159} 1961 \textit{Senate Hearings} 35 (testimony of Ramsey Clark).
prohibitive—costs. The Department of Defense makes a special case on this point with regard to defense installations.

The resultant inability to reserve water for future needs, should the reservation doctrine be abolished, is cited as tending "toward fragmentation in the development of coordinated programs as the Nation's water needs grow more desperate." Since the wisdom of the reservation of water is recognized by the states, the federal government questions the elimination of that principle from federal resource planning and development.

Most bills treating the reservation doctrine require compliance by the federal government, when acting in either its governmental or proprietary capacity, with state water laws. The federal departments point out that these provisions would require a knowledge of the variant and often conflicting provisions of the water laws of the fifty separate states. The effect of such a requirement before initiating, e.g., an interstate stream project, is viewed as a distinct threat to the success of such a project. The question is also raised as to whether the Government would be required to follow all of a particular state's body of water law, or, if not all, which laws would govern.

Another objection raised by the federal departments is that should the federal government be required to comply with state laws, many federal programs or projects would be thwarted because they would not qualify as beneficial uses as defined by many of the state laws. Examples of

160 See 1964 Senate Hearings 38, 39 (testimony of Senator Anderson).
161 1964 Senate Hearings 73 (testimony of Charles Goodwin).
163 Letter From Deputy Attorney General Nicholas deB. Katzenbach to Senator Henry M. Jackson, March 6, 1964, in 1964 Senate Hearings 11.
164 See note 171 infra and accompanying text.
165 Letter From Deputy Attorney General William P. Rogers to Senator James E. Murray, March 19, 1956, in 1956 Senate Hearings 52. In Arizona v. California, 373 U.S. 546, 590 (1963), Mr. Justice Black stated for the majority:
Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow.
166 Letter From Deputy Attorney General Nicholas deB. Katzenbach to Senator Henry M. Jackson, March 6, 1964, in 1964 Senate Hearings 11.
167 See Letter From Deputy Attorney General William P. Rogers to Senator James E. Murray, March 19, 1956, in 1956 Senate Hearings 52; Chairman of Senate Committee on Interior and Insular Affairs, 84th Cong., 2d Sess., Western Water Rights Settlement Act (Comm. Print 1-B, 1956); cf. Trelease, The Concept of Reasonable Beneficial Use in the
such activities are recreation development, fish and wildlife conservation, preservation of scenic values and military purposes.

To sum the view of the opponents of the legislation: at a time when there are increasing demands on a shrinking resource base, government officials foresee a need for coordinated, responsible planning and development of available resources on a national basis. They appear ready to assume a major role in resource planning and development, and are unwilling to give up the water rights which would facilitate the accomplishment of their objectives.

As the natural resources of the Nation diminish, as available lands for national parks and forests become scarce, as hydroelectric power and reservoir sites become more expensive and fewer, as the demand for water exceeds in some areas and approaches everywhere the available supply, Congress can only proceed cautiously before divesting the United States of valuable properties of all the people, for the benefit of an unknown few.

If there is to be a national policy, if the Federal Government is to exert itself in historic fields of flood control, water conservation, watershed management, land reclamation, hydroelectric power and related areas, it cannot afford to abandon now its water rights except in a definitive nature.

**WATER RIGHTS LEGISLATION**

The purpose of this section is to describe the content and development of those bills or sections of bills which have been introduced to nullify, disestablish, or modify the reservation doctrine. There are four basic elements which comprise current reservation doctrine legislation, one or more of which have appeared in all such bills. These are sections providing:

1. That the fact of a prior or future reservation or withdrawal has absolutely no effect on any right recognized or vested in accordance with state law or custom;
2. That the federal government may not take or interfere with a

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*1961 Senate Hearings 35* (testimony of Ramsey Clark).

*The last two elements of the four listed herein are not technically necessary to abolish the reservation doctrine. See note 189 infra and accompanying text. However they have been so closely associated with the consideration of the first two provisions that they are deemed to warrant concurrent discussion here.*
water right recognized under state law without first paying just compensation therefor;

(3) That the federal government shall, in the exercise of either or both its proprietary and governmental functions,\(^{171}\) comply with the provisions of state law relating to the creation of a water right or the control, distribution, use or appropriation of water;

(4) That there will be a number of limitations or exceptions to the application of a general water rights law.

The effect of the first listed element is to overrule the *Pelton* decision by indirectly including reserved or withdrawn federal lands in the definition of "public lands" under the 1866, 1870, and Desert Land Acts. The second listed element is not technically necessary to provide a compensable right, if the reservation doctrine is nullified as provided in the first, since the first provision allows the creation of a right against the Government. However, it is the occasional practice of federal agencies to take a water right without the immediate payment of compensation, leaving the claimant the right to judicial relief from the Court of Claims under the Tucker Act.\(^{172}\) This practice is referred to as "inverse condemnation."\(^{173}\) The exceptions and limitations of the fourth element include any conflicts with an existing act of Congress requiring the United States to comply with state law, or with international treaties. Also, the proposed legislation has expressly been declared as not "affecting, impairing, diminishing, subordinating or enlarging"\(^{174}\) rights under interstate compacts, rights of Indians or Indian tribes, prior nonfederal rights acquired under state or federal law, prior federal rights, or the rights of the Government to the use of water for the express or implicit purposes of congressionally authorized programs. A number of bills also prohibit discrimination against the federal government in the administration of state water law.

*The Barrett Bill*

Although it bears little resemblance to current water rights legislation, S. 863,\(^{175}\) the Barrett bill of the 84th Congress, can be credited with

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\(^{175}\) 84th Cong., 1st Sess. (1956). The popular name of the bill bears the name of its
placing the federal-state water rights issue squarely before the Congress. With its broad, far-reaching provisions, it sparked the compromise bill developed by the federal departments which now comprises the core of all water rights legislation.

S. 863 contained three of the four elements discussed above; the one omission was an express provision for compensation upon a federal taking of a water right. Less than a year later Senator Barrett introduced a substitute amended bill of greater length, containing all four elements relating to the reservation doctrine. This bill,\textsuperscript{176} and identical House companion bills,\textsuperscript{177} were the subject of House and Senate hearings held in 1956. Following a lengthy policy statement, obviously aimed at Pelton, the bill contained language which, if enacted, would have had a serious effect on all federal programs whether based on the reservation doctrine, or on other federal powers over waters.\textsuperscript{178} The total effect would have been to thoroughly erase the reservation doctrine. The only valid rights the federal government was to have on the date of enactment of the bill were those previously acquired under state law and those rights which had been acquired by express congressional authorization where just compensation had been paid. All additional federal “rights” derived before or after the date of enactment would have had to meet the same prerequisites to be valid. The Senate committee emphasized its repudiation of the reservation doctrine by adding the following section to the bill:

\begin{quote}
Sec. 9. All withdrawals and reservations of public land heretofore or hereafter made by the United States shall be deemed made without prejudice to the beneficial use of water originating on or flowing across such lands, theretofore or thereafter initiated under the laws of the States in which such lands are situated.\textsuperscript{179}
\end{quote}

\textsuperscript{176} S. 863, 84th Cong., 2d Sess. (1956) (proposed amendments).
\textsuperscript{178} The bill also contained provisions precluding its application to storage or release of water by the United States for flood prevention purposes, allowing the United States to acquire water rights by purchase, exchange, gift or condemnation, proscribing discrimination in the administration of state laws and excepting the right to store or divert waters in national parks and monuments. See Letter From Deputy Attorney General William P. Rogers to Senator James E. Murray, March 19, 1956, in 1956 Senate Hearings 52; Letter From Deputy Attorney General William P. Rogers to Senator James E. Murray, June 11, 1956, in S. Rep. No. 2587, 84th Cong., 2d Sess. 33 (1956).
\textsuperscript{179} S. 863, 84th Cong., 2d Sess. § 9 (1956) (as reported to the Senate).
A constitutional issue which still persists in even the most recent water rights legislation was raised by those provisions of S. 863 which would have required acquisition of water rights in conformance with “state laws and procedures relating to the control, appropriation, use, or distribution of such water.” The original language made such acquisition a condition precedent to federal use of waters. The Department of Justice objected to the provision because it “would in effect delegate to State control those rights to the use of water which under existing law are property rights owned by the United States of America.” The Department also believed that the constitutional requirement that Congress “make all needful Rules and Regulations respecting” federal property would be abridged by such delegation, and that vesting in state authorities control over federal water rights would be “contrary to the proposition that Congress can neither delegate its own powers nor enlarge those of a State.”

When S. 863 was reported, the committee had deleted the words requiring the Government to conform with state laws “as a condition precedent to the use of any such water.” In its report on the committee amendments, the Department of Justice found no constitutional objection resulting from the change of the compliance requirement if it was deemed directory, and not mandatory. The effect of this interpretation was that Congress could abolish the reservation doctrine, but if a federal agency appropriated water for its governmental purposes, after it paid just compensation for the prior right recognized under state law which was now valid against it, Congress could not require the agency to comply with state laws to perfect that right. The sovereign powers of the federal government would limit any such state control.

180 See p. 785 infra.


183 U.S. Const. art. IV, § 3, cl. 2.


185 Ibid. This position of the Department of Justice received much attention during the hearings on water rights legislation. See, e.g., 1956 Senate Hearings 255, 267; 1959 House Hearings 126-29. Certain issues of federal compliance with state water laws in the operation of federal projects were treated by the Supreme Court in Arizona v. California, 283 U.S. 423, 451 (1931) (not requiring, under § 8 of the Reclamation Act, submission of federal construction plans for state approval), and Ivanhoe Irr. Dist. v. McCracken, 351 U.S. 275 (1956) (prohibiting interference with the operation of the federal project where state licenses and
The "Agency" Bill

The Barrett bill was reintroduced in the first session of the 85th Congress with language identical to the bill reported by the Senate Interior Committee in the 84th Congress. On May 25, 1958, in response to requests of the House and Senate Interior Committees for reports on the bill, the Department of the Interior forwarded a "compromise draft" of a substitute bill. This Agency bill dealt exclusively with the reservation doctrine in its most restricted sense.

The Agency bill contained two sections. The first was intended to accomplish the bill's single purpose—to abolish the reservation doctrine. The second section consisted entirely of exceptions to the operation of the first. This bill contained only two elements of the four previously described basic elements generally found in water rights legislation. Thus, neither the requirements of federal compliance with state laws nor immediate payment of compensation for acquired water rights were deemed by the federal departments necessary to vitiate the legal consequences of the Pelton decision. In their view both such provisions were offshoots of a "pure" reservation doctrine bill.

permits contained provisions conflicting with federal excess land provisions of reclamation laws. For discussions of both sides of this issue see Witmer, Federal Water Rights Legislation—The Problems and Their Background, House Committee on Interior and Insular Affairs 28-30, 86th Cong., 2d Sess. (Comm. Print No. 19, 1960); Morton, Federal-State Relations in the Field of Water Rights, id. at 58-60. See also Goldberg, supra note 71, at 25-31.


188 See 1959 House Hearings 125 (testimony of Perry W. Morton).


One federal attorney, representing the Federal Power Commission but presenting his own view, later cast some doubt as to whether § 1 of the bill would accomplish its purported objective. See 1961 Senate Hearings 73 (testimony of John C. Mason). Mr. Mason suggested that the exemption in the bill with respect to withdrawal or reservation of rights "acquired pursuant to State law either before or after the establishment of such withdrawal or reservation," is limited to rights acquired pursuant to state law which are good against the United States. ibid. Further, he suggested that under Pelton, Congress never delegated to the states the right to administer water on reserved lands. Such rights were given to the states with respect to "public lands" through the 1860, 1866, and 1877 acts; but Pelton excluded reserved lands from the definition of "public lands." Thus, on reserved lands, he reasoned, state law
An important and limiting aspect of the Agency bill was the scope and effect of its exceptions. It preserved the holding of Winters by retaining the reservation doctrine as it applied to Indian reservations. By excluding from the bill's effect "any right to any quantity of water used for governmental purposes or programs at any time from January 1, 1940 to the effective date of this Act," the bill preserved to "the United States the right to continue to exercise whatever has been within this period of time the maximum quantity of its use."\textsuperscript{190}

The bill also made provision for the federal government, notwithstanding the abolishment of the reservation doctrine, to continue to initiate the use of water in the execution of its authorized projects or programs. There was no requirement in the bill for the acquisition of water rights by compliance with state laws relating to control, appropriation, distribution or use of water. This provision thus allowed the Government, so long as there was no interference with a prior right recognized by state law, merely to initiate a proper use of the water in order to acquire a paramount right to such use.

The truly significant effect of the Agency bill was its creation, on reserved or withdrawn lands, of the security of a compensable right to the use of nonnavigable waters when that right had been perfected in accordance with state law. Beyond this, there was little effect on federal use of waters. The agency compromise was for the federal government to assume the burden of the costs of acquiring the vested rights under state law in return for the conclusive preservation of all of its other constitutional prerogatives which were jeopardized by the Barrett bill. As described by the then Assistant Attorney General Perry Morton:

\begin{quote}
Let no one suppose that such legislation would not involve costs in terms of some future Federal developments. It would. It might even make some possible Federal projects fiscally infeasible. On balance, however, I believe that this particular proposal is one which deserves the prompt consideration of the Congress as
\end{quote}

(and logically, state-created "rights") would still not be applicable notwithstanding the language of the Agency bill. Cf. \textit{id.} at 65 (testimony of Lewis A. Stanley).

Even if a strict reading of the bill supported this reasoning, the legislative history of the language of § 1 gives greater weight to an interpretation which would disestablish any superior right that the federal government might obtain through reservation or withdrawal of public lands. The assumption throughout the hearings regarding such language by both Congressmen and federal officials alike was "that past and future Federal withdrawals and reservations shall not prejudice beneficial uses initiated under State laws." Letter From Acting Secretary of the Interior Hatfield Chilson to Representative Clair Engle, May 28, 1958, in 1959 \textit{House Hearings} 7.

\textsuperscript{190} 1959 \textit{House Hearings} 130 (testimony of Assistant Attorney General Perry W. Morton).
a possible means of encouraging State, local, and private development of our western water resources.\textsuperscript{191}

The Agency bill was never introduced in the 85th Congress. In the 86th Congress both houses received for consideration bills which were based on the agency recommendation.\textsuperscript{192} These bills, however, contained an addition which was opposed by all the agencies which supported the basic bill. At the end of the first section of the original Agency bill, the sponsors added to their bills a clause protecting "the right of any State to exercise jurisdiction over water rights conferred by the Act admitting such State into the Union, or such State's constitution as accepted and ratified by such Act of admission."\textsuperscript{193}

Federal opposition to this clause\textsuperscript{194} has been attributed to be the reason this particular bill did not pass in the 86th Congress.\textsuperscript{195} If this is the case, proponents of the bills would have been better advised to have agreed to its deletion, for the 1961 change in administration resulted in a stiffening of federal opposition to water rights legislation.\textsuperscript{196}

\textit{Recent Legislation}

One result of the Senate hearings held during the 87th Congress\textsuperscript{197}

\textsuperscript{191} Morton, supra note 185, at 55.


\textsuperscript{193} E.g., H.R. 4567, 86th Cong., 1st Sess. \S 1 (1959).

\textsuperscript{194} The Department of Justice, in its report on the 86th Congress bills, bypassed the legal arguments against an interpretation that a "right" was created by admission of a state or acceptance of its constitution, and presented some practical reasons why the clause should be deleted.

If the effect of a State's admission . . . has been such as that implied by the clause in question, it is fait accompli, and any new legislation . . . is superfluous. But if . . . the effect . . . was not such . . . the clause in question cannot make it so. Furthermore, the mentioned clause deals with an issue which is not germane to the rest of the bills . . . . Finally, the clause . . . could not, in any view, have effect on application in more than three, more likely only two, of the 17 so-called reclamation States.

Letter From Acting Deputy Attorney General John R. Sheneman to Representative Wayne N. Aspinall, July 16, 1959, in 1959 House Hearings 12. The two states referred to are Colorado and Wyoming whose constitutions declare waters within the respective states to be publici juris. See Note, 60 Colum. L. Rev. 967, 975 n.52 (1960); 1959 House Hearings 321, 329 (testimony of Elmer Bennett).

\textsuperscript{195} See 1964 Senate Hearings 37 (testimony of Senator Anderson).

\textsuperscript{196} See notes 148-50 supra and accompanying text.

\textsuperscript{197} The 87th Congress also saw the Barrett bill reintroduced once more. S. 211, 87th Cong., 1st Sess. (1961). An interesting addition was a bill developed between the first and second sessions of the 86th Congress, and first introduced in the 87th Congress. H.R. 5078, H.R. 5100, H.R. 5207, H.R. 5224, 87th Cong., 1st Sess. (1961). The bill, with one minor addition, was originally prepared along with a background study by the Staff Counsel to the
was S. 2636 introduced by Senator Kuchel of California.\[198\] This bill contained language identical to that recommended during the hearings by Northcutt Ely, special counsel for the State of California in the *Arizona v. California* litigation.\[199\] Its base was the Agency bill, to which a number of provisions were added. Two of these supplied the remaining elements relating to the reservation doctrine which were absent from the Agency bill.\[200\] One provided that “any right to the consumptive use of water claimed by the United States under the laws of any State shall be initiated and perfected in accordance with the procedure established by the laws of that State.”\[201\] The second required compensation for the taking of a state-recognized water right and that such rights “shall be taken by proceedings in eminent domain” if the owner did not agree to the taking.\[202\]

No action was taken on S. 2636 by the 87th Congress. After receiving the endorsement of the 1963 Western Water Law Symposium,\[203\] Senator Kuchel reintroduced the bill as S. 1275 in the first session of the 88th Congress, in substantially the same form as S. 2636.\[204\] The Senate Interior Committee held hearings on S. 1275, but no further action was taken. The arguments presented at these hearings were basically a reiteration of those propounded at earlier hearings.\[205\] The Department of Justice

House Interior and Insular Affairs Committee. Witmer, *op. cit. supra* note 185. It was partly based on the Agency bill incorporating § 1 of that bill and thus disestablishing the reservation doctrine. It also provided for a type of dual control over water resources by the federal and state governments. The jurisdictional distinction was based on those federal operations which are undertaken for the benefit and consumptive use of water by persons, who, if serving themselves, would be bound by state laws. This bill failed to survive the 87th Congress. See *1961 Senate Hearings* 164 (statement of Burnham Enersen).

\[199\] See *1961 Senate Hearings* 122, 123.
\[200\] See p. 781 *supra*.
\[201\] S. 2636, 87th Cong., 1st Sess. § 1(3) (1961).
\[203\] The Symposium constituted the 14th Annual Spring Conference of the National District Attorney’s Association, held on March 11, 1963, in Los Angeles, California. See *1964 Senate Hearings* 28.
\[204\] Identical House bills were H.R. 5914, H.R. 7376, H.R. 9364, 88th Cong., 1st Sess. (1963). S. 1275 dropped an earlier provision relating to waiver of immunity to suit. The exception in the original Agency bill, preserving maximum established federal uses of water from January 1, 1940, was broadened to exclude from the bill’s operation any federal right to “any quantity of water used for governmental purposes or programs of the United States at any time prior to the effective date of this Act.” S. 1275, 88th Cong., 1st Sess. § 2(3)(d) (1963). (Emphasis added.)
\[205\] See pp. 770-77 *supra*. 
continued its constitutional objection to the provision added to the basic Agency bill requiring federal compliance with state law when it claimed a water right under state law.\textsuperscript{206} The bill’s supporters pointed out that the provision would apply only when the federal government \textit{chose} to comply with state law in its “proprietary”\textsuperscript{207} capacity, and would not \textit{require} compliance by the Government.\textsuperscript{208} Further, they insisted that the provision would not give up “the supremacy clause or any of the powers it amplifies,” but would apply only “if the supremacy clause is not invoked.”\textsuperscript{209}

Given this limited construction, the constitutional issue is largely academic. Even assuming the reservation doctrine abolished, the federal government could merely initiate a use and pay for any prior right vested under state law with which the use interferes. If the use is one that would not be recognized by the particular state’s law, the federal government appears to be free under the above interpretation to ignore the state law. Even if it chose to comply with state law, “it can take the water if it wishes even if a State law or official should say no.”\textsuperscript{210}

At this writing, two 89th Congress water rights bills identical to S. 1275 have been introduced in the House of Representatives.\textsuperscript{211} Thus, the original Agency bill, with the additions discussed above, still survives after three Congresses and seven years in the legislative mill. It is unlikely, however, that the proponents of these bills will experience greater success than their predecessors. It appears doubtful, too, that the federal departments will be disposed to support even the more limited original agency version. Thus despite much agitation and activity, in ten years and five Congresses water rights legislation has failed even to reach the floor of the House or Senate.

\textsuperscript{206} See note 185 \textit{supra} and accompanying text.
\textsuperscript{207} See note 171 \textit{supra}.
\textsuperscript{208} The provision is aimed at the type of situation encountered in United States v. Fallbrook Pub. Util. Dist., 165 F. Supp. 806, 828-46 (S.D. Cal. 1958). Here, uses for military purposes were not recognized as beneficial under California water law. The Government’s contention was that it did not have to comply with such law although it had acquired water rights which, as perfected under state law by the prior holders, were for irrigation purposes. \textit{Cf. 1964 Senate Hearings} 127 (testimony of Abbott Goldberg).
\textsuperscript{210} Id. at 34-35.
THE PROS AND CONS REVISITED

In the decade that has elapsed since Pelton, truly more "heat than light" has been radiated from the reservation doctrine. The five congressional hearings, while presenting a convenient forum for the presentation of many persuasive arguments by both federal and nonfederal interests, have been patently devoid of evidence to support the contentions made. In addition, many statements made in the hearings, together with inferences drawn by commentators, have gone unchallenged in the face of existing facts to the contrary.212 Thus Congress has been asked to legislate on a subject—the reservation doctrine—without sufficient evidence upon which to base a rational decision as to the desirability of the legislation.

Clearly the most persuasive argument favoring the enactment of legislation divesting the federal government of its reserved water rights is that the present state of the law tends to inhibit water resources development by anyone but the federal government.213 If the federal government

212 Compare 1964 Senate Hearings 55, quoted supra at 775 (testimony of Ramsey Clark), and Goldberg, Interposition—Wild West Water Style, 17 Stan. L. Rev. 1, 5 (1964) (United States through the operation of the reservation doctrine has not destroyed "any private property rights"), with Arizona v. California, 373 U.S. 546 (1963), and Glenn v. United States, Civil No. C-153-61, D. Utah, March 16, 1963. It would seem that the above statements can be sustained if a "private property right" is construed to mean only those rights subject to fifth amendment protection. This interpretation leads to the conclusion that there could never be a destruction of a "private property right" under the reservation doctrine since all state-created water rights subsequent in time which conflict with the water rights reserved by the creation of a federal reservation are not subject to fifth amendment protection. But this circular reasoning only states the present law. If a "private property right" is construed to mean a state-created property right, the statements are refuted by the cases cited above.

213 At the core of most arguments against the reservation doctrine lie two concepts—certainty and security. It is said that if water rights are uncertain, "the incentive to develop and invest in water resources will be seriously reduced." Milliman, Water Law and Private Decision-Making: A Critique, 2 J. Law & Econ. 41, 47 (1959). Certainty of water rights is said to possess three aspects: (1) legal certainty; (2) physical certainty; and (3) tenure certainty. Ciriacy-Wantrup, Concepts Used as Economic Criteria for a System of Water Rights, 32 Land Econ. 205, 297 (1956). The reservation doctrine destroys the aspect of tenure certainty. See id. at 302-03 for an illustration of the undesired results flowing from the reservation of waters. Security, on the other hand, requires that the appropriator be assured "that all deferred revenues and costs of his development will be taken into account and fully compensated if his right is transferred to other users." Ciriacy-Wantrup, Some Economic Issues in Water Rights, 37 J. Farm Econ. 875, 880 (1955).

The general feeling among water economists is that for optimum water resources development, a water right must be certain, secure and flexible, thus enabling the sale of such right to the highest bidder in the marketplace. For an interesting discussion of this approach and also a critical appraisal of existing water laws and their trends see HIRSCHLEIFER, DE HAVEN & MILLIMAN, WATER SUPPLY, ECONOMICS, TECHNOLOGY, AND POLICY 222-54, 363-66 (1960).
were the sole, or even the primary, investor in water resources development, this argument would lose much of its strength; however, as of 1955, the federal share constituted only a little over one-sixth of all capital invested—"probably some $85 billion"—in water resources development. Thus if the present state of the law is in fact substantially impairing nonfederal investment in water resources development, it would seem that the national interest would be furthered by passage of the proposed legislation. Evidence to support this argument has not been forthcoming. To the contrary, the only evidence presented has indicated that various large irrigation districts and water agencies within the State of California, and the state itself, had not experienced higher than usual bond financing costs as a result of the Pelton decision.

Any restraint existing today on the orderly and continued development of the nation's water resources as a result of Pelton and its offspring is almost certainly one of degree. The federal government surely would not defeat a large, well-planned, state-financed water resources development such as California's Feather River Project. There is less certainty that, e.g., the federal government would not frustrate a major water development of a large irrigation district. What of the small investor as in Glenn? Is he to share any longer in the development of the nation's water resources? Where is the line to be drawn? Other equally probative questions arise: When does the "risk" become so great as to deter capital expenditures for water resources development? What investor today is to be responsible for future water resources development—the federal government, the state governments, or others? What role is each to play? These are understandably difficult questions; but it is submitted that Congress must cope with and decide them in order to make an adequate determination as to whether the reservation doctrine is to be legislatively disturbed.

214 1 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON WATER RESOURCES AND POWER 5 (1955). Of the $85 billion invested by governmental and private entities, $14.3 billion constituted the total federal investment. Ibid. It has been estimated that the "minimum total cost" for waste treatment and collection and storage facilities alone for the period 1954-2000 will be $99.6 billion. SENATE SELECT COMM. (Comm. Print No. 32, Water Supply and Demand, at 11).

215 1964 Senate Hearings 120-21. From this evidence one might conclude that the "risk" element requisite to impair water resources investment, and thus water resources development, is absent and that the present state of the law does not in fact impair water resources development. It would seem, however, that the "risk" factor generated by Pelton would, to a great extent, be dependent upon the "political strength" of the state involved. Thus, the existing water resources "investment climate" in California is, in all likelihood, much different than the "investment climate" existing in a state like Nevada.
Finally, Congress must decide whether state-created water rights and their associated state-protected property rights are to continue under the threat that the federal government might foreclose upon its "floating mortgage in the sky."

CONCLUSION

In its present form, the legislative effort to abolish the reservation doctrine appears headed for a quiet burial. Only another far-reaching decision as provoking as Pelton is likely to delay the last rites. The uncompromising extremes championed by participants in the legislative hearings have resulted in a legislative stalemate. The problems associated with the reservation doctrine remain; but, it is submitted, they are amenable to solution and must be resolved.216

Whether by default or initiative, the federal government is assuming an increasingly active role in water-based conservation and development programs. The furtherance of these congressionally authorized programs necessarily requires that sufficient waters be available to fulfill the congressional purposes and designs.

On the other hand, nonfederal entities, either by choice or compulsion, are playing a lesser role in the conservation and development of water resources; but they still have an important part to play. Those waters available for nonfederal development—waters subject to the reservation doctrine but not required for the fulfillment of the purposes of the reserva-

216 The political, social, economic, legal, administrative and other problems associated with the conservation, utilization and development of the nation's water resources are tending to become regional rather than local. The simplicity of local development has given way to the complexity of multi-state and state-federal relationships. The interstate compact has become an important tool for governmental cooperation. Today over twenty such compacts have been perfected. U.S. DEP'T OF INTERIOR, DOCUMENTS ON THE USE AND CONTROL OF THE WATERS OF INTERSTATE AND INTERNATIONAL STREAMS: COMPACTS, TREATIES, AND ADJUDICATIONS 3-256 (1956). Increased national concern for orderly resources development has prompted Congress to consider comprehensive legislation. In furtherance of the recommendations of the Senate Select Committee on Water Resources, S. REP. NO. 29, 87th Cong., 2d Sess. 17-19 (1961), the Water Resources Planning Act of 1961 was proposed in the 87th Congress as S. 2246. Similar legislation is before Congress today. See, e.g., S. 21, H.R. 1111, 89th Cong., 1st Sess. (1965). The proposed Water Resources Planning Act would establish a Water Resources Council and various river basin commissions. Such commissions would be composed of federal and state representatives whose functions would include the coordinated planning of water and related land resources within respective river basins.

The complexity involved in regional planning thus becomes apparent. And, it is submitted, unless "grass-roots," relatively noncomplex problems, such as those associated with the reservation doctrine are resolved, future regional planning vehicles, such as the Water Resources Council, will be impeded in the realization of their goals.
tion—must be allocated on a rational basis. Orderly and efficient administration of nonfederal development requires that certainty and security be restored to state-created water rights.

Perhaps the reason that previous legislative proposals have failed of enactment is the wholly one-sided position of their proponents. For example, Senator Anderson ably points out that:

Nowhere in S. 1275 does the Federal Government get anything in return for all it is giving up, and for the new burdens placed upon it. . . . [T]he states are not even called upon to recognize any Federal rights or prerogatives—except the right to pay a major portion of the costs of the projects affected by the bill.

Such "clarification"217 is reminiscent of the way the Tasmanian settlers "clarified" their problems with the bushmen. They liquidated them down to the last man.218

Additionally, the form of the proposed legislation forces Congress to make a delicate, politically loaded choice between divesting the federal government of its water rights related to and derived from the reservation doctrine or, by remaining passive, leaving nonfederal water allocators and users in their present state of uncertainty. Further, the scarcity of specific examples where state-created rights or prerogatives have been abridged, coupled with the paucity of substantiating economic data on either side, greatly impedes the normal legislative decision-making process. Thus the question in final analysis becomes: what vehicle can be used to meet overall federal water needs, provide greater security to state-created rights, and still attain congressional support and approval?

As an alternative to the Barrett bill and some of its successor measures, federal officials have proposed that the federal government, through its respective agencies, conduct an inventory of present and/or prospective amounts of water needed to further the purposes of federal activities on reserved lands in appropriation states. The results of such an inventory would then be made available to the respective state water planning agencies for their use as a guide to the allocation of unreserved and unappropriated waters.219 Such a study would be useful; however, it would

217 Senator Anderson earlier pointed out that it should be observed that although the title of S. 1275 states its purpose is to "clarify" the relationships of the States and the Federal Government, the so-called clarification seems to consist primarily of a gift of property rights, power, and authority by the Federal Government to the States.

1964 Senate Hearings 38.

218 Ibid.

219 The first federal suggestion to use the study approach was made by the Bureau of the Budget in its 1956 report to the Senate Interior and Insular Affairs Committee on the Barrett
not cure entirely the infirmities—uncertainty and insecurity—which inhere in the reservation doctrine. State-created water rights would remain subject to the cloud of the reservation doctrine and still lack fifth amendment protection.

Congress could—and, it is submitted, should—go further. Appropriate machinery could be established to (1) pass upon the reasonableness or extent of federal needs determinations, and (2) prescribe the limits of federal rights, expressed in quantum of water for particular reservations, beyond which the respective states would be free to control and administer. Any federal use of a quantity of water beyond the particularly prescribed limit would, if it interfered with a state-created right, be a taking which would entitle the individual appropriator to compensation.220

Objections to such a proposal have been voiced. One authority points out that

because of multiplicity of the Federal interests involved, such a study would take several years to complete and additional time for congressional consideration. During that period, little or no additional water development, especially by States and local interests, would or could be undertaken. The economic impact would be severe.221

bill. 1956 Senate Hearings 4. The Bureau did not suggest a federal inventory, but concurred in the conclusion of the President's Advisory Committee on Water Resources Policy that, because of the complexity of the federal-state conflict, further study was needed.

Assistant Attorney General Ramsey Clark suggested in 1961: "If necessary and proper, Congress might provide for a special study of all Federal claims to waters in streams where there is need for this knowledge. This would give the States and their citizens information of waters normally available for their use." 1961 Senate Hearings 35. In 1963, Mr. Clark went a step further, suggesting:

The [specification of federal rights and claims], coupled with authorization for the appropriation of waters on reserved lands in excess of the anticipated federal needs, would very materially further the objectives of the various proposals for legislation which can be accommodated without hindrance to the national interest in water resource development and utilization.


220 A federal determination of present and prospective water needs has already been the basis for argument in some litigation directed to the settlement of a federal-state water rights controversy. During the trial of Arizona v. California, the United States responded to interrogatories of the State of California, delineating quantities of water consumed on federal reservations. This case serves to illustrate that such a determination can be made, if the situation requires it. See 1964 Senate Hearings 101-02.

221 Banks, Management in a Vacuum, Western Water Law Symposium 101, 113 (Dickenson ed. 1963). Additionally Mr. Banks suggests that allocation of only that amount of water in excess of federal needs would "preclude any further water development by the states and local interests for economic reasons," and that "such excess water would be extremely costly and uneconomic to develop by itself." Ibid.
Such objection would seem to become less significant when weighed against the fact that nine years and some fifty bills later, the nonfederal interests stand in no better—if not worse—position than they did in 1956.

The development of an inventory of federal water rights on reserved lands would take time. It would be costly. Congressional consideration of federal needs determinations would take time and require legislative tact. But what are the alternatives? If the present legislative proposals were to become law, the federal government would be required to reacquire water rights necessary for the fulfillment of authorized programs and projects; this too would be costly. If the status quo is maintained, most state-created water rights will remain uncertain and insecure; litigation will be required to determine the quantum of water reserved for the federal reservation in question. As to costs, seven years of litigation as in Arizona v. California is not inexpensive. All factors considered, the federal inventory approach, coupled with a determination and limitation of federal water rights on federal reservations, seems to be the best approach toward the accomplishment of cooperative, efficient and coordinated national water resources development.

MARITAL DEDUCTION CLAUSES—Revenue Procedure 64-19 and the Effect of State Court Treatment of Formula Clauses on the Executor’s Dilemma

Revenue Procedure 64-19\(^1\) was designed to remedy a situation in which an executor acting under a formula marital deduction clause which provided for in-kind distribution of assets at federal estate tax valuations distributed depreciated assets to the surviving spouse and appreciated assets to the other legatees, thus reducing the total tax on the combined estates of decedent and his spouse.\(^2\) Revenue Procedure 64-19, in effect, denies the marital deduction to such distributions.\(^3\)

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2 This was done to reduce the total tax paid by the two estates. It was possible in this manner to realize a maximum marital deduction with a minimum increase in the estate of the surviving spouse. The practice of valuing assets at federal estate tax valuations, rather than date of distribution valuations, arose to avoid the Treasury ruling that estates are subject to income tax on capital gains realized if assets appreciate between valuation for federal estate tax purposes and distribution to the heirs. Rev. Rul. 56-270, 1956-1 Cum. Bull. 325; Rev. Rul. 60-87, 1960-1 Cum. Bull. 286.
3 Section 401 specifically permits the deduction in the case of cash bequests, bequests of specific assets, pecuniary bequests required to be valued at the time of distribution, and
Where the prescribed standards are not met the marital deduction will be disallowed in the case of wills executed subsequent to October 1, 1964, while the deduction will be permitted under section 3 in the case of wills executed prior to that time only if the executor and the surviving spouse agree to a fractional distribution of the sort delineated in section 4.01.4

A number of serious problems are raised by section 3,5 and one of the most perplexing is whether the executor has the authority to sign such an agreement in the first instance. It goes without saying that absent a statute to the contrary an executor may not alter by agreement the terms of a will, and yet if the construction of the marital bequest by the law of the executor’s state differs from the construction placed on the 64-19 agreement, the executor will be doing just that—changing the terms of the will without proper authority. Therefore, if the executor is to have the authority to enter into a section 3 agreement, that authority must be found in the interpretation of the terms of the will itself or in the treatment the courts have given similar clauses in the past.

Where a formula marital clause is not clearly a pecuniary bequest on one hand or a fractional share bequest on the other, the predicament of the executor is compounded. A typical marital deduction clause bequeaths to the surviving spouse “a portion of my estate equal in value to the maximum marital deduction allowable in the determination of the federal estate tax upon my estate . . . .”6 Such a clause is ambiguous, for from it one could proceed with equal logic either (1) to determine the dollar amount and keep that constant, thus providing a pecuniary deduction, or (2) to determine the proper percentage and keep that constant, thus providing a fractional bequest.7 In the absence of a sufficient

fractional bequests accurately reflecting the appreciation or depreciation of the estate. Rev. Proc. 64-19, § 4.01, 1964 INT. REV. BULL. No. 15, at 32. The marital deduction is also allowed where state law requires either that the date of distribution fair market value be no less than the amount of the bequest as finally determined for federal estate tax purposes or that the fiduciary distribute the assets in a manner fairly representative of the appreciation of the aggregate estate. Rev. Proc. 64-19, § 2.02, 1964 INT. REV. BULL. No. 15, at 31.


5 For example, a surviving spouse might refuse to sign the agreement on the ground that she dislikes her husband’s residual legatees and would rather that they bear the additional tax burden; or the surviving spouse might be unable to sign due to death or other incapacity. Golden, Rev. Proc. 64-19, 103 TRUSTS & ESTATES 536, 539 (1964).


7 If the language of the typical clause is interpreted as a pecuniary bequest bestowing a fixed sum unaffected by the appreciation or depreciation of the estate as a whole, the
body of law on which to base his conclusion, the executor may only speculate as to how the courts of his state will treat each formula marital bequest clause.

Cases dealing directly and specifically with modern formula marital deduction clauses of the type set out above, are few.

Six cases have held the clause to be a fractional bequest. In In the Matter of Estate of Nicolaisha an Oregon court found that a nonresidual bequest of this type conferred a fractional interest in the estate. In New York, four recent cases have held such clauses to be fractional bequests.b Illinois has reached a similar conclusion in one unreported case.c

In contrast with the above cases are eight which have held the pertinent clause to be a pecuniary bequest. Five of these cases are in New York.d A Pennsylvania court interpreted a formula marital deduction clause as a purely pecuniary bequest on the ground that it was not made from the residuary estate, stating that this fact bespoke testator’s “desire and intent that this marital trust was to receive exactly the amount of assets equal to the maximum marital deduction allowed by law—no

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execution of a § 3 agreement would be clearly in excess of the executor’s powers. It would constitute a drastic alteration of the terms of the will, seriously affecting the relative interests of the beneficiaries. Conversely, if the clause is held to confer a fractional share of the estate, to execute a § 3 agreement is merely to reiterate the terms of the will. A § 3 agreement in this latter instance would be entirely unobjectionable; however, in all likelihood, the agreement would be unnecessary because a will so construed would be within the scope of either § 4.01 or § 2.02. See Lauritzen, The Marital Deduction, 103 TRUSTS & ESTATES 318, 396 (1964).

b Three of these cases concerned nonresidual bequests. In re Estate of Inman, 22 Misc. 2d 573, 196 N.Y.S.2d 369 (Surr. Ct., N.Y. County 1959) (created a trust fund for testator’s widow); Matter of Bush’s Will, 2 App. Div. 2d 526, 528, 156 N.Y.S.2d 897, 900 (1959) (direct bequest to the surviving husband of as much property “as shall . . . equal one-half of my adjusted gross estate as defined by the Revenue Act of 1948”); In the Matter of Osman, 27 Misc. 2d 632, 209 N.Y.S.2d 251 (Surr. Ct., Nassau County 1960) (direct bequest to surviving husband). The other case treated a residual bequest. In re Estate of Bing, 23 Misc. 2d 326, 200 N.Y.S.2d 913 (Surr. Ct., N.Y. County 1960) (clause held to confer a fractional share of the estate).

c Estate of Kirchheimer, Ill. File No. 56 P. 8017, Cook County P. Ct., July 13, 1964.

d In the Matter of Estate of Gilmour, 18 App. Div. 2d 154, 238 N.Y.S.2d 624 (1963); In the Matter of Estate of McTarnahan, 27 Misc. 2d 13, 202 N.Y.S.2d 618 (Surr. Ct., N.Y. County 1960); In the Matter of Estate of Gauff, 27 Misc. 2d 407, 211 N.Y.S.2d 583 (Surr. Ct., N.Y. County 1960); In re Reben’s Will, 115 N.Y.S.2d 228 (Surr. Ct., N.Y. County 1952); In re Lewis’ Will, 115 N.Y.S.2d 791 (Surr. Ct., Queens County 1952).
more and no less!" Upon very similar facts, a New Jersey court has reached the same conclusion, as has a Florida court.

Because of the few cases directly in point and the apparent conflict among them the executor has no basis for knowing whether he may enter into a section 3 agreement without violating his fiduciary duty—he may well be "damned if he does and damned if he doesn't." To a large extent this dilemma can be resolved only by a clarification by the Internal Revenue Service. Some insight, however, may be acquired relative to how a given state may treat the formula marital deduction clause by examining its treatment of testamentary clauses generally with respect to whether bequests of various kinds are general or specific. The extent


15 The significant characteristic of general bequests is that they neither appreciate nor depreciate in value until they become payable, and are valued as of that date for distribution purposes. See Stanley v. Stanley, 108 Conn. 100, 142 Atl. 851 (1928); King v. Citizens & So. Nat'l Bank, 103 So. 2d 689 (Fla. App. 1958); In the Matter of Estate of Murdoch, 142 Misc. 186, 254 N.Y.S. 154 (1931); In the Matter of Estate of Harned, 140 Misc. 151, 200 N.Y.S. 380 (Surrt. Ct., Kings County 1931); In the Matter of Estate of Meyer, 140 Misc. 1, 249 N.Y.S. 451 (Surrt. Ct., Kings County 1931); In the Matter of Estate of Jackson, 138 Misc. 167, 245 N.Y.S. 155 (Surrt. Ct., Kings County 1930); In the Matter of Estate of Burroughs, 137 Misc. 844, 244 N.Y.S. 640 (Surrt. Ct., Kings County 1930); Matter of Berbling, 134 Misc. 730, 731, 236 N.Y.S. 367 (Surrt. Ct., Kings County 1929).

On the other hand, specific bequests vest at testator's death and are valued at that date. See Brown v. Routzahn, 58 F.2d 329 (N.D. Ohio 1931), rev'd on other grounds, 63 F.2d 914 (6th Cir. 1933), cert. denied, 290 U.S. 641 (1933); In the Matter of Estate of Daly, 202 Cal. 284, 260 Pac. 296 (1927); Estate of De Bernal, 165 Cal. 223, 131 Pac. 375 (1913); In the Matter of Estate of Bixby, 140 Cal. App. 2d 326, 295 P.2d 68 (1956); Griffith v. Adams, 106 Conn. 19, 137 Atl. 20 (1927); Connecticut Trust & Safe Deposit Co. v. Hollister, 74 Conn. 228, 50 Atl. 750 (1901); Union Nat'l Bank v. Wilson, 26 Del. Ch. 170, 25 A.2d 450 (Ch. 1942); Palmer v. Palmer's Estate, 106 Me. 125, 75 Atl. 130 (1909); Harrison v. Denny, 113 Md. 509, 77 Atl. 837 (1910); Dennison v. Lilley, 83 N.H. 422, 144 Atl. 523 (1928); Busch v. Plews, 12 N.J. 352, 96 A.2d 761 (1953); Allen v. Allen, 76 N.J. Eq. 245, 74 Atl. 274 (Ch. 1909); Smith v. Smith, 192 N.C. 687, 135 S.E. 855 (1926); Beatty v. Hottenstein, 380 Pa. 607, 112 A.2d 397 (1955); In re Snell's Estate, 227 Wis. 455, 279 N.W. 24 (1938); State v. Main, 87 Conn. 175, 87 Atl. 38 (1913); Equitable Guar. & Trust Co. v. McCurdy, 11 Del. Ch. 156, 98 Atl. 220 (Ch. 1916); Succession of Williams, 169 La. 696, 125 So. 858 (1930); Spinney v. Eaton, 111 Me. 1, 87 Atl. 378 (1913); Union Trust Co. v. Nelen, 283 Mass. 144, 186 N.E. 66 (1933).

While not all specific bequests are fractional, fractional bequests are nearly always specific. A fractional bequest gives a part of every individual article in the estate; such a bequest thus appreciates and depreciates in a manner accurately representative of the fluctuations in the value of the estate as a whole.
to which the courts of any jurisdiction favor one or the other of these categories in interpreting testamentary bequests may be a significant index to the interpretation which may be expected of a formula marital deduction clause.\textsuperscript{16} It is probable that those jurisdictions which interpret

The significant aspect of specific and general bequests for the present purpose is that the one fluctuates in value between the date of death and the date of distribution, and the other does not. While the construction which will be placed upon an ambiguous formula marital deduction clause can never be predicted with certainty, the single analogous area of the law with enough precedent to impart at least a degree of confidence to the uncertain executor is the construction of bequests as specific or general. The strong similarity between general and pecuniary bequests, and between specific and fractional bequests, suggests that a study of this area is essential to a proper understanding of the problems created by Revenue Procedure 64-19.

\textsuperscript{16} The courts in several states have indicated a desire to favor general pecuniary bequests over specific fractional bequests. Connecticut seems to favor general bequests, and appears likely to interpret any formula marital deduction clause as a general pecuniary bequest. See Chase Nat'l Bank \textit{v.} Schleussner, 117 Conn. 370, 167 Atl. 808 (1933) (holding the following bequest general and pecuniary: "In the event that my net estate, as hereinafter defined and determined, be equal to or exceed the sum of One Million ($1,000,000) dollars, then and in that event I direct my Executors . . . to pay one per cent (1\%) of the amount of my said net estate to each of the three persons hereinafter named . . . "); Stanley \textit{v.} Stanley, 108 Conn. 100, 142 Atl. 851 (1928) (bequest of half testator's residuary estate held general). \textit{But cf.} Griffith \textit{v.} Adams, 106 Conn. 19, 137 Atl. 20 (1927). (because of other portions of the will, a bequest of a stated number of shares of corporate stock was held specific); Connecticut Trust & Safe Deposit Co. \textit{v.} Hollister, 74 Conn. 228, 50 Atl. 750 (1901) (bequest of all testator's stock in insurance company held specific); Hotchkiss \textit{v.} Brainerd Quarry Co., 58 Conn. 120, 19 Atl. 521 (1889) (bequest of fractional shares in testator's business held to share in subsequent increase in the value thereof).

Massachusetts, despite an early case taking the specific bequest approach, Massachusetts Institute of Technology \textit{v.} Attorney General, 235 Mass. 288, 126 N.E. 521 (1920) (where sum of money left to trustees with instructions to invest in fund which was to pass to legatee when it reached $750,000, and which, by date of distribution, exceeded that amount, court held testator had made a specific bequest of a fund rather than a general bequest of $750,000), today would probably adopt the same position as Connecticut. See McGuiness \textit{v.} Bates, 345 Mass. 632, 189 N.E.2d 212 (1963) (where testator bequeathed a stated number of shares of AT&T stock he created a general legacy, and when stock subsequently split three-for-one the additional shares went into the residue of the estate).

Maine seems to lean somewhat in the same direction, but precedents there are not strong enough to draw a firm conclusion. See Palmer \textit{v.} Palmer's Estate, 106 Me. 25, 75 Atl. 130 (1909) (bequest of a stated number of corporate shares was held a general bequest). The cases in Ohio, like those of Maine, indicate no more than a tendency to favor general bequests. See Hood \textit{v.} Garrett, 53 Ohio App. 464, 5 N.E.2d 937 (1936) (bequest of stated number of shares of corporate stock held a general bequest).

New Jersey has cases on both sides, but those construing bequests as general and pecuniary seem stronger authority so far as formula marital deduction bequests may be concerned than do those construing bequests as specific. \textit{Compare In re} Vanderbilt's Estate, 90 N.J.
Eq. 254, 106 Atl. 364 (Ct. Err. & App. 1919) (bequest of “one-half of the balance of moneys, bonds and investments that I may die possessed of” was general), and In re Low's Estate, 103 N.J. Eq. 435, 143 Atl. 222 (Prer. 1928) (a gift of a fractional share of the estate was general), with Busch v. Plews, 12 N.J. 352, 96 A.2d 761 (1953) (where testator left wife $250,000 trust fund with provision that on her death $100,000 should become part of his residuary estate and $150,000 be disposed of by her will, the wife could dispose of $250,000 of the fund, regardless of value), and Rutherford Nat'l Bank v. Black, 133 N.J. Eq. 306, 32 A.2d 86 (Ct. Err. & App. 1943) (bequest of 25 shares of corporate stock passed a fractional share in the corporation), and Allen v. Allen, 76 N.J. Eq. 245, 74 Atl. 274 (Ch. 1909) (bequest of $17,000 in unnamed securities to be satisfied in kind out of securities valued at $24,000 was specific bequest).

Several states appear to lean slightly toward viewing the ambiguous formula clause bequest as specific. Two Illinois decisions take an approach similar to that of Estate of Kircheimer, supra note 10, and indicate a receptiveness to the concept of specific bequests of fluctuating values. Allen v. National Bank, 19 Ill. App. 2d 149, 153 N.E.2d 260 (1958) (where bequest was of a specified number of shares of stock which subsequently split, testatrix was held to have devised a proportionate interest in the corporation and legatees received the additional shares); Rauschkolb v. Ruediger, 325 Ill. App. 342, 60 N.E.2d 250 (1945) (where testatrix instructed that property be sold and fixed sums distributed to legatees, she was held to have bequeathed fractions of her estate which shared proportionately in property’s depreciation).

Alabama has some precedent favoring specific bequests, but cannot fairly be said to support either specific or general interpretations of formula clauses. See Maybury v. Grady, 57 Ala. 147 (1880) (provision that if a pending claim was decided in testator’s favor “one-half of the net proceeds thereof shall be paid to my beloved wife” created specific legacy, as did testator’s bequest to his wife of one-half his personal property and one-third the rents on his land). North Carolina, like Alabama, has some precedent favoring specific bequests. See Bost v. Morris, 202 N.C. 34, 161 S.E. 710 (1932) (bequest to sister of “ten thousand dollars in stocks in an unincorporated company or companies to be selected by her” was rendered specific by her exercise of the power of selection); Smith v. Smith, 192 N.C. 687, 135 S.E. 855 (1926); Starbuck v. Starbuck, 93 N.C. 183 (1883).

Nebraska’s courts have done nothing to suggest that a formula bequest—particularly when made from the residuary estate—would not be held general and pecuniary. In re Grenier’s Estate, 168 Neb. 633, 97 N.W.2d 225 (1959) (bequest of “all my personal property” was specific, but bequest of “all the rest, residue and remainder of my estate . . . in equal shares to my beloved wife” was general).

In a large number of states, the law is not sufficiently clear to be able to forecast the court’s treatment of the ambiguous formula clause. See Buchanan v. Hunter, 166 Iowa 663, 148 N.W. 881 (1914); In re Wick’s Estate, 207 Iowa 264, 222 N.W. 843 (1929); Fidelity Nat'l Bank & Trust Co. v. Hovey, 319 Mo. 192, 5 S.W.2d 437 (1928); Dennison v. Lilley, 83 N.H. 422, 144 Atl. 523 (1928); In re Snell’s Estate, 227 Wis. 455, 279 N.W. 24 (1938). Compare In the Matter of Estate of Bizby, 140 Cal. App. 2d 326, 295 P.2d 68 (1956), and In the Matter of Estate of Daly, 202 Cal. 284, 260 Pac. 296 (1927), with Abila v. Burnett, 33 Cal. 658 (1867).

In a number of states there are no cases whatsoever to indicate whether the court favors specific or general bequests, and in some what cases exist are too old to be of more than historical interest. E.g., Bailey v. Wagner, 2 Strob. Eq. 1 (S.C. 1846); Jenkins v. Hanahan, Cheves, Eq. 129 (S.C. 1840) (bequest of $1/8 of testator’s slaves to his wife and $1/8 to each of his children was general bequest).
ambiguous bequests as general will similarly construe formula marital deduction clauses as pecuniary rather than fractional, thus rendering impossible the execution of a section 3 agreement.

More revealing than whether the courts have leaned toward general or specific bequests, however, is a detailed examination of the few cases dealing directly with marital deduction formula clauses. Of particular interest are nine New York cases which, superficially, appear to create a conflict in the jurisdiction. In Matter of Bush’s Will, Matter of Ossman, In re Estate of Bing, and In re Estate of Inman the formula marital deduction clause was construed as specific and fractional. In the first seemingly inconsistent case, In the Matter of Estate of McTarnahan, a decedent left his surviving spouse “a fund either in cash or securities, or both, . . . equal in value to one-half . . . of the value of my entire gross estate for Federal estate tax purposes . . .” In the second case, In re Reben’s Will, decedent left “the maximum amount of the allowable marital deduction of which my estate may be entitled . . .” In the third case, In re Lewis’ Will, testator bequeathed “an amount equal to one-half my adjusted gross estate . . .” In the fourth case, In the Matter of Estate of Gaff, the bequest provided for “fifty (50%) per cent of the amount by which my gross estate exceeds the aggregate of my debts and funeral and administration expenses . . .” In the fifth and last case, In the Matter of Estate of Gilmour, testator left “an amount equal to . . . One-half (\(\frac{1}{2}\)) of the value of my adjusted gross estate . . . with respect to which a marital deduction is allowable . . .”

17 The double standard applied by the courts to the formula marital deduction clause is recognized and discussed in Lauritzen, Marital Deduction Bequest—Current Problems and Drafting Suggestions (Part II), 8 Tax Counselor’s Q. 247 at 254-62 (1964). The article seems to conclude that, by weight of authority, the fixed, pecuniary bequest should be favored unless the fractional share bequest is explicitly stated.


23 Id. at 14, 202 N.Y.S.2d at 619.

24 115 N.Y.S.2d 228 (Surr. Ct., N.Y. County 1952).

25 Id. at 232.

26 115 N.Y.S.2d 791 (Surr. Ct., Queens County 1952).

27 Id. at 799.


29 Id. at 408, 211 N.Y.S.2d at 585.


31 Id. at 156, 238 N.Y.S.2d at 626.
All five were held to have created general, pecuniary legacies, in contrast to Bush, Ossman, Bing and Inman.\textsuperscript{32}

In each of the nine decisions, the court justified its result as representing the intent of the testator. This, of course, merely begs the question since it remains then to determine the basis for finding such an intent. Two factors appear in each of the cited New York cases and seem to be the major elements considered in reaching the conclusion that a testator "intended" a bequest to be either specific or general: (1) which construction of the marital bequest, general or specific, will produce the most beneficial results for the surviving spouse, and (2) which construction will produce the greatest tax savings to the estate in the manner by which the testator intended to effect the tax savings.

In Bush, Ossman, Bing and Inman the estate assets increased in value between the date of valuation for federal estate tax purposes and the date of distribution. Any result other than that reached in each of these cases would have precluded the surviving spouse's sharing in the appreciation, thus providing the residual legatees with a windfall. The reasoning of the courts in finding estate tax reduction as a dominant intent of the testator is well founded. In Inman the court pointed out that we live in a tax-conscious era and that the marital bequest clause in that case explicitly mentioned the pertinent section of the Internal Revenue Code.\textsuperscript{33}

The five cases construing the formula marital clause as a general, or pecuniary, bequest also placed major emphasis on benefiting the surviving spouse and on reducing the tax to the estate.\textsuperscript{34} In In re Reben's

\textsuperscript{32} The wills in Bing and Bush were similar to that in Inman, and although the court in Inman ostensibly relied on the particular wording of the formula clause as indicating testator's intent to have the clause construed as a specific, or fractional bequest, any attempt to distinguish Bing, Bush and Inman from the cases holding the clause to be a general, pecuniary bequest on the basis of the wording of the clause would be tenuous, at best. Note the similarity in the several clauses. In the Matter of Estate of Inman, 22 Misc. 2d at 575, 196 N.Y.S.2d at 371 (Surr. Ct., N.Y. County 1959) ("an amount which shall equal one-half . . . in value"); In the Matter of Bush's Will, 2 App. Div. 2d at 528, 156 N.Y.S.2d at 900 (1959) ("as shall equal . . . one-half of my adjusted gross estate"); In re Reben's Will, 115 N.Y.S.2d at 232 (Surr. Ct., Westchester County 1952) ("the amount . . . equal in value to the maximum amount of the allowable marital deduction"); In the Matter of Estate of McTarnahan, 27 Misc. 2d at 14, 202 N.Y.S.2d at 619 (Surr. Ct., N.Y. County 1960) ("a fund . . . equal in value to one half . . . of the value of my entire gross estate").

\textsuperscript{33} 22 Misc. 2d at 576, 196 N.Y.S.2d at 372 (Surr. Ct., N.Y. County 1959).

\textsuperscript{34} In the Matter of Estate of Gilmour, 18 App. Div. 2d 154, 238 N.Y.S.2d 624 (1963); In the Matter of Estate of Gauff, 27 Misc. 2d 407, 211 N.Y.S.2d 583 (Surr. Ct., N.Y. County 1960); In the Matter of Estate of McTarnahan, 27 Misc. 2d 13, 202 N.Y.S.2d 618 (Surr. Ct., N.Y. County 1960); In re Reben's Will, 115 N.Y.S.2d 228 (Surr. Ct., Westchester County 1952); In re Lewis' Will, 115 N.Y.S.2d 791 (Surr. Ct., Queens County 1952).
there was apparently no significant change in the value of the assets during the interim between the federal estate tax evaluation date and the distribution date. The central issue there was whether or not the adjusted gross estate, on which the marital deduction was to be based, should be increased by the value of assets passing to the surviving spouse outside of the will. The court apparently felt that so increasing the adjusted gross estate, and thus the marital bequest and deduction, could be justified only by construing the marital bequest as general, or pecuniary. The court in *Reben* cited authority for the proposition that "the provisions for the benefit of a wife should be construed liberally in her favor."38

Similarly, in *In the Matter of Estate of McTarnahan*39 the assets apparently underwent no significant change in value. The court cited *Inman* for the proposition that the adjusted gross estate on which the marital deduction would be based need not be reduced by the amount of estate administration costs shifted from the estate to the estate income return for that year.40 But only by holding contra to *Inman* on the construction of the marital bequest could the court award to the widow the three per cent interest she sought on the value of the legacy.41

*In re Lewis*' *Will*42 reveals the reliance of the court on the tax and widow's benefit factors. Although no significant appreciation or depreciation of the assets had occurred, the will purported to give much more than the true value of the estate assets,43 so that the situation was similar to one in which the assets had depreciated. Not only did the court construe the formula marital deduction clause as a general, or pecuniary, bequest, based on the higher, fictional, adjusted gross estate, but it also granted the surviving spouse priority as to several obviously specifically bequeathed assets to satisfy the marital bequest.44 Its primary purpose was to insure that the marital deduction would be completely satisfied so that the estate would thereby realize the greatest tax savings.

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35 115 N.Y.S.2d 228 (Surr. Ct., Westchester County 1952).
36 Id. at 234.
37 Ibid.
40 Ibid.
41 Ibid.
42 115 N.Y.S.2d 791 (Surr. Ct., Queens County 1952).
43 Id. at 795.
44 Id. at 802.
In the Matter of Estate of Gauff\textsuperscript{45} is similar to Althouse Estate\textsuperscript{46} and In the Matter of Estate of Kantner\textsuperscript{47} in that the two factors of benefit to the widow and testator's method of achieving tax minimization are in conflict. Here the widow's interest in enjoying the estate's increased value clearly conflicted with testator's express declaration that "the value of the bequest . . . shall be as finally determined" in the federal estate tax proceeding.\textsuperscript{48} Testator's explicit directions respecting the tax saving rather clearly outweighed the widow's interests.

In the Matter of Estate of Gilmour\textsuperscript{49} again involved an effort by the court to determine and effectuate the method selected by testator to achieve a tax saving. Here, because testator used the word "amount" rather than "value" to describe the marital bequest, the court found an intention that the bequest should be general and pecuniary.\textsuperscript{50} Of perhaps even greater significance was the fact that, due in part to the inclusion in the estate of gifts made to testator's children in contemplation of death, the widow's share exceeded 500,000 dollars, while the children received a residuary trust of only 99,000 dollars.\textsuperscript{51} Clearly, the widow's interest was adequately protected without giving her the additional benefit, at the children's expense, of sharing in the appreciation of the estate.

Other states have also placed primary emphasis on benefit to the widow and on tax savings in construing the formula clause. In In the Matter of Estate of Nicolai\textsuperscript{52} and in King v. Citizens & So. Nat'l Bank\textsuperscript{53} the Oregon and Florida courts used the same rationale as that used by the New York courts, with which each agreed in result. In Nicolai the court construed the marital bequest as a fractional, specific bequest on facts and reasoning very similar to that in Inman,\textsuperscript{54} and in King, where the central issue was similar to that in Reben, the court cited and followed Reben in construing the marital bequest as pecuniary.\textsuperscript{55}

\textsuperscript{45} 27 Misc. 2d 407, 211 N.Y.S.2d 583 (Surr. Ct., N.Y. County 1960).
\textsuperscript{46} 404 Pa. 412, 172 A.2d 146 (1961).
\textsuperscript{48} In the Matter of Estate of Gauff, 27 Misc. 2d 407, 409, 211 N.Y.S.2d 583, 585 (Surr. Ct., N.Y. County 1960).
\textsuperscript{50} Id. at 159.
\textsuperscript{51} Id. at 156.
\textsuperscript{52} 232 Ore. 105, 373 P.2d 967 (1962).
\textsuperscript{53} 103 So. 2d 689 (Fla. App. 1958).
\textsuperscript{54} 232 Ore. at 109-10, 373 P.2d at 969.
\textsuperscript{55} 103 So. 2d at 691.
A New Jersey court, in Kantner,56 and a Pennsylvania court, in Althouse,57 reached conclusions substantially contrary to Inman and Nicolai on rather similar fact patterns. Ostensibly, the courts relied, inter alia, on the particular wording in the wills and on the fact that the marital bequests were not located in the residuary clauses. However, the wording employed was almost identical to that employed in the wills of the cases which held contra,58 and the location of the marital bequest in the will is not generally considered to be a critical factor.59

A more convincing ground on which Kantner and Althouse might have been decided is a strong state policy to construe a bequest as general unless the will contains specific language to the contrary.60 However, while the New Jersey courts occasionally follow such a policy, they have been quite willing to depart from it even without explicit wording in the will when they felt that the testator so intended.61

Most significant, however, in the decisions of the New Jersey and Pennsylvania courts in Kantner and Althouse, was that only with a general or pecuniary bequest could the tax advantages sought by the testator be realized.62 In this respect, Kantner and Althouse are entirely consistent with Inman and Nicolai. The difference in result is because in Inman and Nicolai the courts felt that the testators wished their sur-

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58 In the Matter of Estate of Nicolai, 232 Ore. at 106, 373 P.2d at 967 (1962) ("a portion of my estate equal in value to the maximum marital deduction"); Althouse Estate, 404 Pa. at 414-15, 172 A.2d at 147 (1961) ("so much of my estate . . . [as] shall equal the maximum marital deduction"); In the Matter of Estate of Inman, 22 Misc. 2d at 575, 196 N.Y.S.2d at 371 (Sur. Ct., N.Y. County 1959) ("an amount which shall equal one-half (½) in value"); In the Matter of Estate of Kantner, 50 N.J. Super. at 585, 143 A.2d at 244 (App. Div. 1958) ("a portion of my estate equal in value . . . to one-half the value").
59 Compare In the Matter of Estate of Kantner, 50 N.J. Super. at 590, 143 A.2d at 247 (App. Div. 1958) ("it would be inexcusable disregard of the unequivocal cast of the document to construe the gift in the Third Article of the will as a disposition of the residuary estate or a part of it", with In the Matter of Estate of Nicolai, 232 Ore. at 110, 373 P.2d at 969 (1962) ("we find no reason why a provision to set aside a fractional amount of an estate must be placed in any particular part of the will").
60 See In re Vanderbilt's Estate, 90 N.J. Eq. 254, 106 Atl. 364 (Ct. Err. & App. 1919); In re Low's Estate, 103 N.J. Eq. 435, 143 Atl. 222 (Prer. 1928).
viving spouses to have at least an amount equal to the full marital deduction and did not object to giving them more. In Kantner and Althouse, on the other hand, the courts, relying in part on an article by Professor Casner,\(^6\) saw the testator’s intent as giving the surviving spouse exactly the full marital deduction, no more and no less. This latter objective, it was felt, could be achieved only through a pecuniary bequest.\(^6\) Thus, at least on the underlying principle of tax optimization, Kantner and Althouse are consistent with Nicolai and Inman.

Thus, it appears that there are certain principles underlying the cases which have construed the marital deduction bequest. The executor may gain some insight into the construction that courts may place upon a given marital deduction by asking (1) how did the testator seek to minimize taxation of his estate, and which construction will best achieve that method of tax minimization; (2) which construction will best serve the ends of the surviving spouse, and whether a contrary construction would be inequitable; and, (3) whether the courts of the jurisdiction have a strong policy toward construing ambiguous bequests as general bequests.


The Western Hemisphere trade corporation (WHTC) is an artificial creation of the tax laws. Created by the Revenue Act of 1942,\(^1\) it appeared as section 109 of the Internal Revenue Code of 1939. It has been carried over, with one addition,\(^2\) as section 921 of the Internal Revenue Code of 1954.

Under the Internal Revenue Code of 1939,\(^3\) a special credit of a stated percentage of the taxable net income, equal to the then existing surtax liability, was allowed. Under the Internal Revenue Code of 1954,\(^4\) a special

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2 See note 18 infra and accompanying text.


deduction is allowed, computed on the basis of the WHTC's taxable income. The deduction is determined by a fraction, the numerator being fourteen per cent and the denominator being the sum of the normal tax rate and the surtax rate for the specific taxable year as prescribed by section 11 of the Internal Revenue Code of 1954. This fractional computation is the same whether the corporation's taxable income subjects it to the combined normal and surtax, or the normal tax only.6

While it is difficult to ascertain the exact congressional intent behind the enactment of section 109, it appears to have been part of a continuing pattern of exemption of foreign income from certain U.S. taxes.6 The preferential treatment apparently arose from a congressional desire to encourage investment in the Western Hemisphere,7 but subsequent judicial construction has eliminated "economic penetration" as a requirement for qualification.8 Despite some criticism that the privilege has been made available principally to exporters,9 Congress is not unaware of this development10 and its failure to change the law infers congressional acquiescence in the present use of section 921.11

5 Treas. Reg. § 1.922-1(a) (1957).
6 This pattern is indicated by the following sections of the Internal Revenue Code of 1954 (date of first enactment is indicated parenthetically): Credit for Foreign Taxes, §§ 901-05 (1919); China Trade Act Corporations, §§ 941-43 (1922); Income from United States Possessions, § 931 (1924).
7 The WHTC provisions were included in a Senate amendment to the Revenue Act of 1942. The congressional intent may therefore be expressed in the words of the Finance Committee report:

American corporations trading in foreign countries within the Western Hemisphere are placed at a considerable competitive disadvantage with foreign corporations under the [war] tax rates provided by the bill. To alleviate this competitive inequality, the committee bill relieves such corporations from surtax liability.

8 See pp. 806-08 infra.
9 Illustrative is the testimony of Professor Surrey of Harvard Law School before the House Ways and Means Committee on General Revision of the Internal Revenue Code:

The continuance of this provision beyond its World War II setting is thus again one of the accidents of tax history. Also, while its intended beneficiaries in 1942 were corporations with actual operations in Latin America, such as a mine or a railway, today its chief beneficiaries are corporations engaged in the export trade. This unintended result has occurred because of the manner in which the provision was drafted in 1942. It is simply an illustration of the dangers inherent in adopting tax preferences—they not only outlive their immediate purpose but they also turn into benefits for taxpayers never envisaged as being within the preference.

Requirements for Qualification

The four requirements for qualification as a WHTC appear in section 921 of the Internal Revenue Code of 1954. (1) The corporation must be "domestic."\(^{12}\) Two exceptions are worthy of note, one created by the Commissioner to qualify certain Canadian or Mexican corporations,\(^{13}\) the other a disqualification of a domestic corporation operating as a "possessions corporation."\(^{14}\) (2) All of the corporation's business\(^{15}\) must be done in any country or countries in North, Central or South America, or in the West Indies.\(^{16}\) An exception for "incidental purchases"\(^{17}\) was added by the Internal Revenue Code of 1954.\(^{18}\) (3) Ninety-five per cent

\(^{12}\) "The term 'domestic' . . . means created or organized in the United States or under the law of the United States or of any State or Territory." INT. REV. CODE OF 1954, § 7701(a)(4). This includes the District of Columbia. INT. REV. CODE OF 1954, § 7701(a)(9).

\(^{13}\) If organized and maintained solely for the purpose of complying with the laws of either country as to title and operation of property, and 100% of the capital stock is owned by a domestic corporation, such corporations are held to be domestic corporations for the purposes of qualifying as WHTC's under INT. REV. CODE OF 1939, § 109, 56 Stat. 838. Rev. Rul. 55-372, 1955-1 CUM. BULL. 339.

\(^{14}\) Such corporations are limited to the deductions available to resident foreign corporations. INT. REV. CODE OF 1954, § 931(d)(2); Rev. Rul. 63-224, 1963-2 CUM. BULL. 297.

\(^{15}\) Merely "incidental economic contact" with countries outside the Western Hemisphere will not disqualify a corporation. Treas. Reg. § 1.921-1(a)(1) (1957). "Incidental economic contact" is exemplified by a mining activity in South America which ships its products outside the Western Hemisphere and retains title until acceptance of the bill of lading and drafts solely as a means of insuring collection. Treas. Reg. § 1.921-1(b) Example (1); cf. G.C.M. 25131, 1947-2 CUM. BULL. 85. Merely placing marine insurance with a company outside the Western Hemisphere will not be considered engaging in business there. Rev. Rul. 61-195, 195-1 CUM. BULL. 133.

\(^{16}\) Although there is no comprehensive list of qualifying countries in which WHTC operations may be conducted, specifically included are Greenland, Rev. Rul. 60-307, 1960-2 CUM. BULL. 214, the Bahamas and islands off the coast of Venezuela, Rev. Rul. 55-105, 1955-1 CUM. BULL. 94, and the Lesser Antilles, I.T. 4067, 1951-2 CUM. BULL. 53. The Virgin Islands, ibid., and Puerto Rico, I.T. 3748, 1945 CUM. BULL. 152, although possessions of the United States, are considered countries for purposes of qualification, but, even before statehood, Alaska was not, Rev. Rul. 55-105, 1955-1 CUM. BULL. 94. Curiously, Bermuda is specifically excluded. I.T. 3990, 1950-1 CUM. BULL. 57.

\(^{17}\) This term means only purchases which are either minor in relation to the entire business or are nonrecurring or unusual in character; but even purchases of goods which form an integral part of the manufactured product may be considered incidental if aggregating less than 5% of the corporation's gross receipts for any one year. Treas. Reg. § 1.921-1(a)(1) (1957); see Rev. Rul. 59-356, 1959-2 CUM. BULL. 177. The Tax Court has sustained these regulations against an argument that the statutory language "other than incidental purchases" should be read to mean "other than purchases incident to its business." Topps of Canada, Ltd., 36 T.C. 326 (1961).

\(^{18}\) Section 109 of the 1939 Code made no provision for "incidental purchases," and the
or more of the gross income of the corporation for the three year period preceding the close of the taxable year must have been derived from sources without the United States.\textsuperscript{19} As a practical matter, for an exporting operation to derive its income from sources without the United States, it is essential that the exporting sales function be an entity distinct from a related manufacturing process.\textsuperscript{20} (4) Ninety per cent or more of the gross income of the corporation for such period must have been derived from the active conduct of a trade or business. Excluded as income from passive functions are dividends,\textsuperscript{21} interest where the corporation is not engaged in the business of lending money\textsuperscript{22} and gains from the sale of capital assets.\textsuperscript{23} Qualification is not restricted, however, to corporations developing new business after their incorporation, but can extend to a corporation formed to take over business previously done by its parent.\textsuperscript{24}


\textsuperscript{20} If personal property is \textit{manufactured} within, and sold without, the United States, part of the income is considered to be derived from sources within the United States. \textit{Int. Rev. Code of 1954}, § 863(b)(2). It is difficult to imagine a reasonable allocation whereby less than 5\% of the income, the maximum allowable, can be allocated to the manufacturing share of the income. However, if personal property is \textit{purchased} within, and sold without, the United States, all of the income is considered to be derived from sources without the United States. \textit{Int. Rev. Code of 1954}, § 862(a)(6).


Despite the apparent ease with which these four requirements for qualification can be set forth, there has been conflict as to the specific operations which were the intended beneficiaries of this tax concession. In each of those conflicts the Commissioner has argued for exclusion of export sales corporations from qualification as a WHTC, and each conflict has seen a rejection of the Commissioner's position by the courts.

The Commissioner has made three separate, though interrelated, contentions: (1) An "economic penetration" into the Western Hemisphere, outside the United States, is necessary for qualification; (2) The "place of sale" of goods entering international trade (and therefore the source of income derived from such sales) should be determined by the substance of the transaction, not the passage of title; (3) Regardless of the specific agreement as to transfer of title between the contracting parties, such agreements should not receive judicial recognition when the contractual provisions were either motivated by tax avoidance or, in the light of actual operations, were a mere sham.

The courts have denied each contention of the Commissioner, and by so doing have established a pattern for export sales operations which, if followed mechanically, will qualify an export sales corporation for the benefits of the WHTC deduction. As a result, the Commissioner has been, and, in the absence of future legislation will continue to be, virtually stripped of his argumentative tools when confronted with a carefully planned export sales operation. Furthermore, the Commissioner, by failing in his contentions, has made certain planning techniques virtually invincible.

Economic Penetration

The Internal Revenue Service consistently argued that a corporation could not qualify as a WHTC unless it was present and conducting at least some, if not all, of its business in the Western Hemisphere outside the United States.25 This interpretation, by which the Commissioner attempted to inject an implied prerequisite for qualification as a WHTC, was warranted by the vagueness of the legislative history26 and of the Code provision, which merely indicates that a WHTC is a corporation


26 See note 7 supra.
“all of whose business . . . is done in” the designated geographical territo-
ries. A definition of business done in the Western Hemisphere does
not appear in the Code. The accompanying congressional reports yielded
little more specificity, one mentioning American corporations “trading
in foreign countries,” another mentioning corporations “deriving their
income principally from the active conduct of trade or business in foreign
countries within the Western Hemisphere.” The Commissioner argued
that an “economic penetration” into the Western Hemisphere countries
outside the United States was an implied prerequisite for qualification as
a WHTC, but the courts consistently held that the statute requires no
such “economic penetration.” In the earlier cases, the courts merely
stated that the statute did not require a corporation to maintain specific
facilities, or perform specific activities, in a foreign country. In more
recent cases, the courts have held not merely that economic investment
or activity is unnecessary to qualify as a WHTC, but that the business
may be conducted in the United States since the statutes do not specify
the geographical area where the corporation’s business is to be conducted,
but specify only that all business be done in the Western Hemisphere.
Thus, the fact that the active conduct of the corporation’s business is
carried on in the United States will not disqualify it. In view of the
finality of these latter decisions, the Commissioner has announced that

28 Int. Rev. Code of 1954, §§ 861-63, which are determinative of “source of income,” do
not define the word “without” in reference to determining whether income is earned within
or without the United States. Qualification as a WHTC is expressly dependent upon the
geographical source of income, and the rules regarding source of income are expressly made
phasis added.)
phasis added.)
31 Commissioner v. Pfaufer Inter-American Corp., 330 F.2d 471, 474 (2d Cir. 1964);
Commissioner v. Hammond Organ W. Export Corp., 327 F.2d 964, 966 (7th Cir. 1964); A.
P. Green Export Co. v. United States, 151 Ct. Cl. 628, 633, 284 F.2d 383, 387 (1960); Pan
American Eutectic Welding Alloys Co., 36 T.C. 284, 291 (1961); Barber-Greene Americas,
32 See Pan American Eutectic Welding Alloys Co., supra note 31, at 291; Barber-Greene
Americas, Inc., supra note 31, at 387. See also A. P. Green Export Co. v. United States,
151 Ct. Cl. 628, 633-34, 284 F.2d 383, 386 (1960).
33 Commissioner v. Pfaufer Inter-American Corp., 330 F.2d 471, 474 (2d Cir. 1964);
Commissioner v. Hammond Organ W. Export Corp., 327 F.2d 964, 966 (7th Cir. 1964).
34 Commissioner v. Pfaufer Inter-American Corp., supra note 33, at 474.
the Service will no longer argue that a WHTC must conduct its business outside the United States.\textsuperscript{35}

\textit{Place of Sale}

For the second argument against the qualification of export sales corporations for the WHTC deduction, the Commissioner turned to the statutory requirement that ninety-five per cent or more of the gross income of the corporation be derived from sources without the United States.\textsuperscript{36} For an exporting corporation to derive its income from sources without the United States, it is necessary that the \textit{place of sale} be outside the United States.\textsuperscript{37} The Commissioner had once contended that the situs of the negotiation and execution of a contract should be determinative of the place of sale, and hence the source of income,\textsuperscript{38} but the courts consistently rejected this position, holding that the single factor determining the place of sale is the situs where title and beneficial ownership actually pass to the buyer.\textsuperscript{39} Thus, so long as title and beneficial ownership pass outside the United States, an export sales corporation can negotiate the sale,\textsuperscript{40} execute the contract,\textsuperscript{41} and collect the purchase price\textsuperscript{42} within the United States. Conceding the determinative weight to be accorded passage of title,\textsuperscript{43} the Commissioner has shifted to the question of determining when title and beneficial ownership actually pass.

When title and beneficial ownership pass from the seller to the buyer pursuant to ordinary shipping terms, there is usually no disagreement as to the place of sale, since shipping terms create certain judicially recognized presumptions.\textsuperscript{44} However, when there is a manifested intent

\textsuperscript{35} Rev. Rul. 64-198, 1964 INT. REV. BULL. No. 28, at 17.

\textsuperscript{36} INT. REV. CODE OF 1954, § 921(1).


\textsuperscript{38} \textit{E.g.}, Commissioner v. East Coast Oil Co., S.A., 85 F.2d 322, 323 (5th Cir. 1936); Ronrico Corp., 44 B.T.A. 1130, 1135 (1941); Exolon Co., 45 B.T.A. 844, 846-47 (1941), \textit{acq.}, 1947-2 CUM. BULL. 2; \textit{cf.} Compania General de Tabacos de Filipinas v. Collector, 279 U.S. 306, 308 (1929); Ardbern Co., 120 F.2d 424 (4th Cir. 1941), \textit{affirmin} 41 B.T.A. 910 (1940).

\textsuperscript{39} See cases cited note 38 \textit{supra}.

\textsuperscript{40} Ronrico Corp., 44 B.T.A. 1130, 1134 (1941).

\textsuperscript{41} Commissioner v. East Coast Oil Co., S.A., 85 F.2d 322, 323 (5th Cir. 1936).

\textsuperscript{42} \textit{Ibid.}; \textit{cf.} Piedras Negras Broadcasting Co., 43 B.T.A. 297, 304 (1941), \textit{aff'd}, 127 F.2d 260 (5th Cir. 1942).

\textsuperscript{43} G.C.M. 25131, 1947-2 CUM. BULL. 85.

\textsuperscript{44} Under either F.O.B. or C.I.F. contracts, where the seller delivers goods to a carrier and prepays the freight and insurance premium, title is presumed to pass at the point of shipment.
to pass title in a manner other than pursuant to the ordinary presumptions, the Commissioner is apt to allege that only bare legal title has been retained by the seller, so that the place of sale should be determined not by the place of passage of title, but by the place where the real beneficial ownership and risk of loss passed to the buyer.45 Despite this Service position, the courts generally respect the parties’ express or implied intent to pass title as determinative of the source of income.46

**Tax Avoidance Purpose**

Faced with the refusal of the courts to abandon the passage of title test, and the consistent judicial application of principles from the law of sales to determine when title passed, the Commissioner added an additional refinement to his “place of sale” argument: that the reservation of title in the export sales transaction served no valid business purpose—its only purpose was that of tax avoidance.47

It would appear from a reading of section 269(a) of the Internal Revenue Code of 195448 that the Commissioner did not even have to go so far as to attack the sales transaction on grounds of tax avoidance; he

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46 International Canadian Corp. v. Frank, 61-1 U.S. Tax Cas. ¶ 9405 (W.D. Wash. 1961), aff'd, 308 F.2d 520 (9th Cir. 1962); Askania Werke A.G., 33 B.T.A. 875, 878 (1936). One consequence may be noted; when goods in transit to a foreign port where title will pass are lost, the gain from insurance proceeds constitutes income from sources within the United States. I.T. 3902, 1948-1 CUM. BULL. 64; cf. Rev. Rul. 60-278, 1960-2 CUM. BULL. 214.
48 Section 269(a) reads:

**In General.—If—**

(1) any person or persons acquire, or acquired on or after October 8, 1940, directly or indirectly, control of a corporation, or

(2) any corporation acquires, or acquired on or after October 8, 1940, directly or indirectly, property of another corporation, not controlled, directly or indirectly, immediately before such acquisition, by such acquiring corporation or its stockholders, the basis of which property, in the hands of the acquiring corporation, is determined by reference to the basis in the hands of the transferor corporation, and the principal purpose for which such acquisition was made is evasion or avoidance of Federal income tax by securing the benefit of a deduction, credit, or other allowance which such person or corporation would not otherwise enjoy, then the Secretary or his delegate may disallow such deduction, credit, or other allowance. For purposes of paragraphs (1) and (2), control means the ownership of stock possessing at least 50 percent of the total combined voting power of all classes of stock entitled to vote or at least 50 percent of the total value of shares of all classes of stock of the corporation.
could have begun one step earlier and questioned the creation of a WHTC organized as a sales subsidiary by a parent corporation to qualify for the section 922 deduction, as is frequently the situation. The special deduction allowed to the WHTC would appear to come within the "deductions" or "allowances" in the purview of section 269(a). However, the Commissioner, in view of the avowed legislative purpose of eliminating the competitive disadvantage to American corporations then trading in foreign countries, ruled in I.T. 3757 that "the creation of a new domestic corporation to carry on the business . . . of an existing domestic corporation does not constitute tax avoidance within the meaning of section 129 [now section 269] . . . , even though the new corporation was created for the principle purpose of gaining the benefits [granted under the Code] . . . ."52

When the Commissioner subsequently attempted to apply the "tax avoidance" argument to sales transactions in which passage of title was arranged so that the place of the sale, and hence the source of income, would be outside the United States, the position he had taken in I.T. 3757 as to the creation of WHTC's was turned against him. It was applied not only to the actual organization of the export sales company, but also to the deliberate method of organization of the corporation's sales procedures. The Tax Court used the same rationale of legislative intent which the Commissioner had advanced in I.T. 3757. After noting that Congress had created the tax benefit "as an inducement to United States corporations to engage in foreign trade," the Tax Court concluded:

49 See note 20 supra and accompanying text. The relationship of the sales subsidiary to the parent manufacturer may result in reallocation of income or deductions between them if intercorporate transactions are not made on an arms-length basis. Int. Rev. Code of 1954, § 482; Rev. Rul. 57-542, 1957-2 Cum. Bull. 462; see International Canadian Corp. v. Frank, 61-1 U.S. Tax Cas. ¶ 9405 (W.D. Wash. 1961), aff'd, 308 F.2d 520 (9th Cir. 1962).

50 An "allowance" is defined as "anything in the internal revenue laws which has the effect of diminishing tax liability." Treas. Reg. § 1.269-1(a) (1962).

51 See note 7 supra.


53 A subsequent case has even advanced the lack of corrective congressional action in the 1962 Revenue Act as support for not changing the title passage rule. Commissioner v. Hammond Organ W. Export Corp., 327 F.2d 964, 966-67 (7th Cir. 1964).

there seems to be no good reason why the deliberate organizing of such a corporation’s business and sales procedures to meet the other conditions specified by the legislation and thereby to qualify for the tax benefits offered should be regarded as tax avoidance. Otherwise the purpose of organizing the subsidiary would be lost and the congressional objective would not be carried out.55

Aside from this “business planning” notion, long recognized in Supreme Court tax cases,56 the existence of commercially significant reasons for retention of title has made the courts reluctant to accept the Commissioner’s application of the “tax avoidance” argument to the retention of legal title. These reasons include the risks of delay, loss or damage in transit,57 as well as the ability to control the goods in transit,58 which may be desirable to divert shipments away from foreign ports during a time of trade embargo, strike or national seizure of an industry.

Nevertheless, the courts have given lip service to the notion that retention of title may be a mere “sham,”59 in which case the place of sale would be determined by the substance of the transaction. It seems unlikely a successful allegation of this type can ever be made, however, in light of the judicial recognition that the law of sales is controlling, and judicial statements to the effect that “it would be an unjustified distortion of this law for us to disregard the parties’ stated intention to pass title outside the United States because they were principally motivated by a desire to avoid a tax.”60 Thus the judicial interpretation appears to render the terms “Western Hemisphere trade corporation” and “tax avoidance” incongruous.

The argument of the Commissioner that the “substance of the transaction” should control over passage of title also suffers at the hands of

55 Ibid. (Emphasis added.)
60 A. P. Green Export Co. v. United States, supra note 59, at 63, 284 F.2d at 388; accord, Commissioner v. Pfaudler Inter-American Corp., 330 F.2d 471, 474-75 (2d Cir. 1964).
the courts because of its vagueness and uncertainty. At least the passage of title test allows corporations easily to plan their operations so as to comply with legal requirements.

Conclusion

The Commissioner's initial attack against export sales corporations attempting to qualify as WHTC's, alleging that an "economic penetration" into the Western Hemisphere, outside the United States, was necessary for qualification, was judicially rejected on the basis of an inadequately worded statute and an inconclusive legislative history. The Commissioner has since acquiesced in this result. The Commissioner's second attack against these exporting operations, that the place of sale, and therefore the source of income, should be determined by the substance of the transaction and not merely by passage of title, was rebuffed in view of the already judicially-entrenched doctrine that the law of sales is determinative. Finally, the Commissioner's allegation that a motive of tax avoidance, or the existence of a sham transaction, either altered the doctrine of passage of title or abrogated it, was defeated by the judicial application of a publicly announced Internal Revenue Service position specifically referring to the circumstances surrounding the creation of a corporation to circumstances surrounding its operational procedures. The courts have refuted each contention of the Commissioner, and by doing so have established a pattern for export sales operations which, if followed mechanically, will qualify the export sales corporation for the benefits of a WHTC.

RECENT DECISIONS


The United States Government assessed taxes against the Kurtz Supply Company on June 3, 1960. On June 20, 1960, the company was adjudicated bankrupt. Although the tax lien became perfected as of June 3,1 no notice of the lien, as required for it to be valid against mortgagees, pledgees, purchasers, or judgment creditors,2 was filed prior to bankruptcy. The trustee contended that he was a “judgment creditor” within the meaning of section 6323 of the Internal Revenue Code of 1954. The court of appeals, affirming the referee in bankruptcy and the district court, held, section 70(c) of the Bankruptcy Act3 gives a trustee in bankruptcy the rights of a judgment creditor within the meaning of section 6323(a) of the Internal Revenue Code of 1954, thus permitting him to resist the imposition of a tax lien not filed prior to bankruptcy.4

The instant ruling departs from the three previous federal circuit court decisions on the issue which held that a trustee in bankruptcy is not to be considered as having the rights of a judgment creditor against federal tax liens.5

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1 Int. Rev. Code of 1954, § 6321, provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

Int. Rev. Code of 1954, § 6322, provides:

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

2 Int. Rev. Code of 1954, § 6323(a), provides:

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate . . . .


The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.


5 Brust v. Sturr, 237 F.2d 135 (2d Cir. 1956); In the Matter of Fidelity Tube Corp., 278 F.2d 776 (3d Cir. 1960); United States v. England, 226 F.2d 205 (9th Cir. 1955).
Whereas the prior decisions stemmed from the statement of the Supreme Court in *United States v. Gilbert Associates*\(^6\) that the term "judgment creditor" in section 3672 of the Internal Revenue Code of 1939\(^7\) means judgment creditor in the usual sense of the word, namely, a creditor by reason of a judgment of a court of record, the *Kurtz* court distinguished *Gilbert* on the ground that it did not deal with section 70(c) rights of a trustee in bankruptcy, but rather with opposing federal and municipal tax liens.\(^8\) However, like the previous courts passing on this question, the instant court failed to appraise thoroughly the legislative history of sections 70(c) and 6323(a); that more careful scrutiny should be afforded the motivation of the Congress in enacting the two provisions is apparent from the lack of judicial agreement as to their scope.

The first legislative development was a 1910 amendment to section 47a(2) of the Bankruptcy Act,\(^9\) the forerunner of the present section 70(c). As amended, section 47a(2) vested trustees in bankruptcy with all the rights, remedies, and powers of a creditor with respect to all property in the bankrupt's possession, and all the rights, remedies, and powers of a judgment creditor with respect to all other property of the bankrupt.\(^10\) In 1913 Congress enacted the predecessor to section 6323,\(^11\) which invalidated the federal tax lien as against purchasers, mortgagees and judgment creditors if notice of the lien was not filed as provided by law. Section 70(c) underwent further change in 1950\(^12\) and 1952.\(^13\) As the *Kurtz* court noted, "Congress in these amendments dropped explicit mention of judgment creditors and eliminated, for purposes of the trustee's rights, the distinction between property coming into his possession and that which does not."\(^14\) Thus, the trustee was given the rights of a creditor as to all of the

\(^6\) 345 U.S. 361 (1953). The *Gilbert* Court was concerned with the uniform collection of revenues due under federal tax liens and issued its definition of "judgment creditor" to prevent inconsistent local interpretations of the term from hindering the Treasury Department in its collections. *Id.* at 364.

\(^7\) 53 Stat. 449 (now Int. Rev. Code of 1954, § 6323(a)).

\(^8\) 335 F.2d at 314. The court cited with approval *In the Matter of Fidelity Tube Corp.*, 278 F.2d 776, 782 (3d Cir. 1960) (Kalodner, J., dissenting), and *Simonson v. Granquist*, 287 F.2d 489, 490 (9th Cir. 1961) (Hamley, J., concurring). Judge Kalodner felt that section 70(c) implies the inclusion of a trustee in bankruptcy within the conventional meaning of a "judgment creditor" in section 6323(a). 278 F.2d at 783. Judge Hamley was not willing to go this far, but called for legislative clarification of the powers of a trustee in bankruptcy. 287 F.2d at 491.


\(^10\) This amendment was necessary because the Supreme Court had earlier held that a bankruptcy trustee had "no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued." *York Mfg. Co. v. Cassell*, 201 U.S. 344, 352 (1906).


\(^12\) Bankruptcy Act § 70(c), 64 Stat. 24 (1950), 11 U.S.C. § 110(c) (1958).


\(^14\) 335 F.2d at 312.
bankrupt's property. However, the exclusion of the term "judgment creditor" from the 1950 and 1952 amendments to section 70(c) has left open the possibility of more than one reasonable interpretation of the trustee's rights when that section is read together with section 6323(a).15

The Kurtz rule appears legitimately to effectuate congressional intent. The Government's lien against the Kurtz Company is the type of secret lien which Congress sought to invalidate as far back as 1910.16 Since 1913, legislation has been designed to protect certain third parties, such as the creditors in Kurtz, from the harsh application of federal tax liens.17 Furthermore, the deletion in 1950 of the term "judgment creditor" from section 70(c) was intended to strengthen the powers of the trustee;18 one who has all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, as stipulated in section 70(c), must surely include a judgment creditor.

The effect of the Kurtz decision will be to relegate the Government to a fourth priority under section 64(a) of the Bankruptcy Act.19 However, any resultant

15 Further attempts were made to clarify the position of a bankruptcy trustee in 1954, 1959, 1961 and 1963. A proposal to amend § 6323 to provide that a judgment creditor was one who has obtained a judgment of a court of record, thus excluding bankruptcy trustees, was rejected as being unnecessary since that interpretation already existed by judicial construction. S. Rep. No. 1622, 83d Cong., 2d Sess. 575 (1954). The next three attempts at clarification were aimed at amending § 70(c) to spell out explicitly the powers of the trustee so that no doubt could exist that he should be treated as a judgment creditor. H. R. Rep. No. 745, 86th Cong., 1st Sess. 10-11 (1959). The 1959 version passed both houses of Congress but was vetoed by President Eisenhower as being inimical to the sound administration of the federal tax laws. 106 Cong. Rec. 19168 (1960). The 1961 and 1963 measures, H. R. 1961, 87th Cong., 1st Sess. (1961); H. R. 394, 88th Cong., 1st Sess. (1963), passed the House, but were never reported out of the Senate Finance Committee.

16 The purpose of the 1910 amendment to the Bankruptcy Act, note 9 supra, was to give the trustee the power to prevail over prior unrecorded liens of which a subsequent creditor of the bankrupt could have no knowledge. Sampells v. Straub, 194 F. 2d 228, 231 (9th Cir. 1951); Southern Dairies v. Banks, 92 F. 2d 282, 285 (4th Cir. 1937); S. Rep. No. 691, 61st Cong., 2d Sess. 8 (1910).


18 The 1950 amendment to § 70(c), note 12 supra, was intended "to simplify, and to some extent expand, the general expression of the rights of trustees in bankruptcy." H. R. Rep. No. 1293, 81st Cong., 1st Sess. 7 (1949). (Emphasis added.) Prior to the amendment, the trustee was already given the status of an ideal judicial lien creditor. National Oats Co. v. Long, 219 F. 2d 373 (5th Cir. 1955); Constance v. Harvey, 215 F. 2d 571, 575 (2d Cir. 1954). Thus, the greater powers given by the amendment must also include the lesser powers of a judgment creditor. MacLachlan, Bankruptcy § 183 (1956); Morris, Avoiding Federal Tax Liens in Bankruptcy, 38 Tex. L. Rev. 616, 618 (1961); Seligson, Creditors' Rights, 32 N. Y. U. L. Rev. 708, 710 (1957).

19 30 Stat. 563 (1898), as amended, 11 U. S. C. § 104 (a) (1958). The order of distribution of the bankrupt estate, after satisfaction of secured liens, is (1) expenses for preserving and administering the estate; (2) certain outstanding wages and commissions, not to
loss of revenue to the Government appears counterbalanced by the benefits bestowed upon the first three priority claimants, and by the reassuring effect, in light of the increased bankruptcy filings and growing types and amounts of federal taxes, of the elimination of the secret lien upon those who may otherwise be unwilling to extend credit to a faltering business.

**ESTATE TAX—MARITAL DEDUCTION—STATE LAW—A STATE COURT JUDGMENT BASED ON A NONADVERSARY PROCEEDING INSTITUTED TO AVOID TAX LIABILITY IS COLLUSIVE AND HENCE NOT BINDING ON FEDERAL COURTS IN A DETERMINATION OF RESULTANT TAX LIABILITIES. Estate of Pierpont v. Commissioner, 336 F.2d 277 (4th Cir. 1964), cert. denied, 33 U.S.L. Week 3284 (U.S. March 2, 1965) (No. 734).**

Decedent Pierpont’s executors filed a federal estate tax return claiming as a marital deduction the value of a testamentary trust created in favor of his 

exceed $600 each, due for services rendered the bankrupt within three months prior to bankruptcy; (3) certain creditors’ expenses; (4) taxes owed.

The Treasury Department asserts that in most bankruptcy cases where a tax assessment has been made, the bankruptcy is holding only excise and withholding taxes for the federal government, and therefore this money cannot validly be distributed to the priority claimants under any circumstances. Letter From David A. Lindsay, Assistant to the Secretary of the Treasury, to Representative Celler, March 5, 1959, in H. R. Rep. No. 745, 86th Cong., 1st Sess. 14–15 (1959). On the other hand, only 10.5% of all bankruptcy proceedings in 1963 involved businesses, 1963 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 172, so that the overwhelming majority of such proceedings involve no excise or withholding taxes. In any event, timely filing by the Government of its lien would preclude any economic loss.

After satisfaction of secured liens only 15% of all bankruptcy cases involve situations where there are any assets remaining to be distributed among the first three priority claimants. Figures from 1946–1957 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REPS., compiled in 35 IND. L.J. 351 n.6 (1960).

In 1963 there were 155,493 bankruptcy cases filed in the United States—an all-time high and an increase of 5.2% over the preceding year. 1963 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ANN. REP. 167.


1 INT. REV. CODE OF 1954, § 2056.

In general, this section allows an additional deduction from the gross estate in the amount of any property other than community property, left to the surviving spouse of the decedent, up to half the value of the gross estate after allowing for debts, claims, and losses. GRISWOLD, CASES ON FEDERAL TAXATION 942 (5th ed. 1960).
wife. The Commissioner disallowed the deduction because under Maryland law the testator's power to appoint to her estate. The estate filed a petition for review in the Tax Court. Prior to the hearing the widow, executors and trustees filed suit in the Circuit Court of Baltimore under the Uniform Declaratory Judgments Act, petitioning the court to construe the decedent's will "for the purpose of determining the nature and scope of the power of appointment . . . ."

Alternative beneficiaries of a residuary trust who were to receive the unappointed corpus of the wife's trust were joined as defendants. The Circuit Court of Baltimore entered a decree pro confesso, referring the matter to an examiner for the taking of testimony. Upon recommendation of the examiner, the Circuit Court found for the petitioners declaring the widow to have a general power of appointment under Maryland law. The Tax Court, deeming itself not bound by the decree of

2 One provision of the trust instrument provided:
Upon the death of my said wife the entire remaining principal of the LALLAH R. PIERPONT TRUST, or such portion thereof as may be validly appointed shall be paid over free of this Trust in such manner and proportions as my said wife may designate and appoint in her Last Will and Testament. The power of appointment herein granted to my said wife shall be exercisable by her alone in all events.


3 The Commissioner's ninety-day letter states:
The interest passing to the surviving spouse in the trust created by Item Sixth of decedents last will and testament does not qualify for the marital deduction under the applicable section of the Internal Revenue Code.

Appendix to Brief for Respondent, p. 3.

4 The marital deduction is only allowed if the property is left to the spouse in such a way that it will be taxable in the spouse's estate if it still remains at the survivor's death. Treas. Reg. § 20.2056(b)-3 (1958) sets up five requirements which must be met if the life interest with a power of appointment is to qualify as a marital deduction. The third condition specifies: "(3) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate." For an explanation of the peculiarities of Maryland's general power of appointment see Moser, Some Aspects of Powers of Appointment in Maryland, 12 Md. L. REV. 13 (1951).

5 Md. ANN. CODE art. 31A, §§ 2, 4 (1957).

6 Brief for Petitioners, App. 40 (contained in prayer for relief).

7 Joined and summoned as defendants were decedent's son, daughter-in-law, their children and descendants, and a Masonic Fraternal Organization. The court appointed a guardian ad litem for the children and descendants. The guardian submitted his wards' rights for determination by the court. The answer of the fraternal organization agreed only that the court could grant the relief petitioned for. The son and daughter-in-law neither filed an answer nor appeared in court. Any increase in the federal estate tax would decrease the corpus of the residuary trust, since the will directed payment of estate and inheritance taxes from the residuary. 336 F.2d at 280.

the state Circuit Court, upheld the Commissioner’s assessment. On appeal the Court of Appeals affirmed the judgment of the Tax Court. Held, a state court judgment based on a nonadversary proceeding instituted to avoid tax liability is collusive and hence not binding on federal courts in a determination of resultant tax liabilities.

The confusion surrounding the question of when federal courts will refuse to recognize state court determinations of legal interests and rights in tax cases stems largely from divergent interpretations of the meaning of “collusion” as defined by the Supreme Court in Freuler v. Helvering. Although often cited


The construction of a general power of appointment is clearly dependent upon state law for the creation of taxable legal interests. See Treas. Reg. § 20.2056(b)-5(e) (1958), which provides:

(e) Application of local law. In determining whether or not the conditions set forth [one of which is the power to appoint to one’s own estate, see Treas. Reg. § 20.2056(b)-5 (1958)] ... are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes and, if the transfer is in trust, the applicable provisions of the law governing the administration of the trust.

This concept was later refined by a distinction emphasized in Morgan v. Commissioner, 309 U.S. 78 (1940) which held that “State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed.” Id. at 80. The question is, then, to what extent is the Commissioner bound by a state court adjudication? The query has been answered thusly: “An adjudication ... by a court of the state must accordingly be given effect, not because it is res judicata against the United States, but because it is conclusive of the parties’ property rights which alone are to be taxed.” Gallagher v. Smith, 223 F.2d 218, 223 (3d Cir. 1955).

12 291 U.S. 35 (1934). In the instant case Freuler was cited variously as support for the holding of the majority (supporting the proposition that nonadversary state court proceedings are not binding in federal courts), 336 F.2d at 281; as one of the grounds for the dissent (supporting the proposition that state court adjudications bind federal courts if not ex parte or a consent decree), id. at 284; by counsel for Pierpont (supporting the proposition that state court adjudications are binding on federal courts absent a finding
inaccurately as support for the position that "collusive" means that all parties join in submission of the issues, seeking a decision which would adversely affect the Government's right to additional tax.\(^{13}\) Freuler actually held that a proceeding was not "collusive" whenever the issues are regularly submitted to the state court for adjudication and are not based upon a consent decree. A reading of the full text of Freuler suggests that the Pierpont court misconstrued the holding of that case, a not uncommon occurrence.\(^{14}\) In Pierpont, the court, in upholding the position of the Commissioner,\(^ {16}\) equated nonadversary with collusive.\(^ {16}\) In so

of nonadversary proceedings which were collusive or tainted with fraud), Brief for Petitioners, pp. 12-13; and by the Commissioner (supporting the proposition that state court adjudications are not binding if all the parties sought a decision which would prevent the Government from levying additional tax), Brief for Respondent, p. 65.

\(^{13}\) In concluding that federal courts were not bound to follow state court adjudications where the proceeding was "collusive," the instant court supported its decision by quoting Freuler to the effect that federal courts are not bound when the state court proceeding is "collusive in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional . . . tax." 336 F.2d at 281, quoting 291 U.S. at 45. However, the following sentences of the Freuler decision, not quoted by the court state:

We cannot so hold, in view of the record in the state court which is made a part of the record here. The case appears to have been initiated by the filing of a trustee's account, in the usual way. Notice was given to interested parties. Objections to the account were presented, and the matter came on for hearing in due course, all parties being represented by counsel. The decree purports to decide issues regularly submitted and not to be in any sense a consent decree.

Ibid. (Emphasis added.)

\(^{14}\) See 1 MERTENS, op. cit. supra note 11, § 10.15, at 647 (1959) wherein it is stated:

In a leading Supreme Court case [Freuler], the Government contended that the state court decision therein involved be denied conclusive effect because it was collusive "in the sense that all parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax." The Court held otherwise, under the facts of that case, but the quoted language has appeared in numerous cases as a definition of collusion.

The validity of Mertens' criticism is supported by the following statement of the Commissioner contained in the brief filed in the Supreme Court in Freuler.

A consideration of the facts shown by this record makes it plain, we contend, that the order of the state court was nothing more than a friendly contest, without any real contest, and requiring the inference that the primary, if not the sole, object of the proceeding was to establish a basis for a deduction . . . for Federal income tax purposes. There was, of course, practically, such a community of interests that the [tax issue] was largely a matter of indifference except as it may affect Federal tax liability.


\(^{15}\) The reason for the Commissioner's opposition to acceptance of state court decisions is well summarized by a leading commentator:

The process of decision in the federal courts has enabled a number of taxpayers to reduce their taxes by preventing the Commissioner of Internal Revenue from arguing in court what may be the vital issue of a case. They have accomplished this by obtaining a decision of a state court on issues of local law involved in a federal tax proceeding.

Michael Cardozo, Federal Taxes and the Radiating Process of State Court Decisions, 51 YALE
doing the court ignored the fact that the issues were regularly submitted to the state court for determination, that under state law their rights were conclusively determined and that the decision was not based upon a consent decree. The instant court would require actual hostility of parties, even though by the very nature of the family relationship, adversary proceedings in the sense of hostility of parties may be virtually nonexistent. Furthermore, the Commissioner can, by his refusal to be joined in state courts, prevent such proceedings from becoming adversary within the meaning of the instant court's criterion.

The circuit courts have not adopted a uniform approach to the question of "conclusiveness" and "collusiveness" of state court decisions. All cases recognize fraudulent conduct of the parties in the state court as invalidating the conclusiveness of such a judgment. However, absent fraud, great diversity exists as to

L.J. 783 (1942). Implicit in this proposition is the contention that there is something inherently wrong with an action commenced in the state courts, which, if successful, would defeat an assessment imposed by the Commissioner. This view appears to confuse tax avoidance and tax evasion, even though, "the fact that it is avoidance and not evasion shows from the very definition of the term that it is legal and therefore proper." HARTMAN, TAX AVOIDANCE 3 (2d ed. 1932). See also Paul, Restatement of the Law of Tax Avoidance, in STUDIES IN FEDERAL TAXATION (1st Ser. 1937). See generally HARTMAN, op. cit. supra at 1-8; Coleman v. United States, 221 F. Supp. 39 (D. Kan. 1963). Many cases are decided on whether the purpose of the state action was to obtain a tax advantage. See LOWNDES & KRAMER, op. cit. supra note 11, § 4.18, at 57; 10 MERTENS, op. cit. supra note 11, § 61.03 (Zimet rev. ed. 1964).


17 Md. Ann. Code art. 31A, § 1 ("[S]uch declaration shall have the force and effect of the final judgment or decree"); see 10 MERTENS, op. cit. supra note 11, § 61.03 (Zimet rev. ed. 1964). Apparently when a taxpayer receives an assessment he should either pay the same, or allow a federal judge to determine his property rights under the applicable local law. In criticizing this administrative and judicial view, one commentator has aptly stated that actually, one suspects that quite often the question of whether federal courts feel bound to follow the state court decision may depend mainly upon whether or not the federal court agrees with the state court's view of local law or whether it feels the state court's local law views will lead to a suitable result in the federal tax matter. LOWNDES & KRAMER, op. cit. supra note 11, § 4.18, at 57. Further, in disregarding state court adjudications, federal courts "indulge in the violent assumption that all judges of state tribunals are mere puppets in the hands of litigants." 10 MERTENS, op. cit. supra note 11, § 61.03 (Zimet rev. ed. 1964).

18 To meet the "adversary proceeding" standard set by Pierpont it is necessary for all parties to employ counsel and engage in a courtroom "donnybrook," which often will only be a sham. Many well-reasoned cases have rejected this theory and have held that "it is not necessary that the adjudication be the result of a contest in which one party says yes and the other no." Estate of Darlington v. Commissioner, 302 F.2d 693, 695 (3d Cir. 1962); Beecher v. United States, 280 F.2d 202 (3d Cir. 1960); Gallagher v. Smith, 223 F.2d 218 (3d Cir. 1955); Eisenmenger v. Commissioner, 145 F.2d 103 (8th Cir. 1944).

19 The Internal Revenue Service has announced that it will not intervene in local suits affecting federal tax liability, and if made a party defendant, will move to dismiss. 10 MERTENS, op. cit. supra note 11, § 61.03 n.13 (Zimet rev. ed. 1964).
whether that question should be based upon the adversary or nonadversary character of the local proceedings, upon whether there has been an appeal in the state courts, or upon whether there was an adjudication on the merits at the state level.

There is need for uniformity among the circuits which can be achieved by accepting state court judgments as conclusively binding if the state court has, in a proceeding free of fraudulent conduct, determined on the merits the precise property right presented to the federal court. This solution would admit the validity of uncontested judgments in the nature of defaults, while necessarily excluding the binding effect of a pro forma consent decree entered by stipulation of the parties without an adjudication on the merits, and remove the troublesome standard of “adversary” or “nonadversary.”


Decedent was taken to defendant’s X-ray laboratory and died several hours after being injected with dye. In an action for wrongful death plaintiff moved, pursuant to Rule 34 of the Federal Rules of Civil Procedure, to have de-

20 See, e.g., Estate of Peyton v. Commissioner, 323 F.2d 438 (8th Cir. 1963); Merchant’s Nat’l Bank & Trust Co. v. United States, 246 F.2d 410 (7th Cir. 1957); Estate of Sweet, 234 F.2d 401 (10th Cir. 1956); Pitts v. Hamrick, 228 F.2d 486 (4th Cir. 1955); Brodrick v. Moore, 226 F.2d 105 (10th Cir. 1955); Brodrick v. Gore, 224 F.2d 892 (10th Cir. 1955); Newman v. Commissioner, 222 F.2d 131 (9th Cir. 1955); Martinson v. Wright, 181 F. Supp. 534 (D. Idaho 1959).


23 See Freuler v. Commissioner, 291 U.S. 35 (1934). “The decree purports to decide issues regularly submitted and not to be in any sense a consent decree.” Id. at 45. (Emphasis added.)
fendant produce a letter which a Doctor Coe, partner in defendant's firm, had written to its insurance company several days after making his own investigation of the incident. Although plaintiff entered only a general allegation of good cause\(^1\) defendant’s objection as to lack of good cause and claim of privilege were overruled. Upon motion by defendant, the district judge certified the order under the Interlocutory Appeals Act,\(^2\) and the United States Court of Appeals for the District of Columbia Circuit accepted the appeal. Held, a discovery order pursuant to Rule 34 of the Federal Rules of Civil Procedure is appealable under the Interlocutory Appeals Act, section 1292(b) of the Judicial Code.\(^3\)

In accepting the appeal the court echoed the district judge's certification, merely adding that the court below had "correctly discerned" the importance of the issue.\(^4\) In contrast to the majority's cursory treatment of the issue, Judge Wright, in a dissenting opinion, objected that the use of section 1292(b) in such instances was "a graphic illustration of the mischief that results when the Interlocutory Appeals Act is misused."\(^5\) He would confine the statute's application to the exceptional and expensive case.\(^6\)

The operation of section 1292(b), enacted in 1958, has substantially modified the "final judgment" rule\(^7\) as codified in section 1291\(^8\) and has enlarged the area of interlocutory appeal which is delineated in section 1292(a).\(^9\) Although these

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\(^1\) The generality of the allegation of good cause is not entirely clear, since plaintiff referred in his motion to a memorandum of points and authorities with accompanying affidavit.

\(^2\) 28 U.S.C. § 1292(b) (1958) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

\(^3\) Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (D.C. Cir. 1964). The court of appeals reversed the order and remanded the case with instructions for the district judge to investigate the adequacy of plaintiff's proof as to good cause or privilege.

\(^4\) Id. at 970.

\(^5\) Id. at 973.

\(^6\) Id. at 974.

\(^7\) See Catlin v. United States, 324 U.S. 229 (1945); Cobbledick v. United States, 309 U.S. 323 (1940); Collins v. Miller, 252 U.S. 364 (1920).

\(^8\) "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1958).

\(^9\) Appeal from interlocutory orders is limited by 28 U.S.C. § 1292(a) (1958) to cases involving injunctions, receiverships, admiralty jurisdiction or patent infringements.
results were clearly intended by the draftsmen of the statute, the legislative history gives no hint of its application to discovery orders.

Section 1292(b) establishes specific criteria which the district judge must certify are met in an individual case. The issue must involve (1) a controlling question of law (2) for which there is substantial ground for difference of opinion (3) on a matter which will materially advance the ultimate termination of the litigation, and the court of appeals must make an independent determination that the order is within the purview of the statute. This last requirement establishes the safeguard of a double hearing on the appealability of the order.

The purpose of § 1292(b) is "to expedite the ultimate purpose of the litigation and thereby save unnecessary expense and delay." H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958). It was also thought that the new law could materially affect the district courts' backlog. 104 Cong. Rec. 8862 (1958) (remarks of Representative Keating).

Although refusing to catalog the instances in which § 1292(b) could be used, the Committee listed the most necessary areas: (1) contract cases where an accounting is necessary; (2) cases involving third party defendants, to enable such parties not properly joined to avoid the burden of defending; (3) changes of venue; and (4) long and exceptional cases, e.g., antitrust, where a long trial is necessary to determine liability or damages, and a decision on a defense may determine the right to maintain the action. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 2 (1958). Interlocutory appeals are to be "limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate final decision of controlling questions encountered early in the litigation." Id. at 5. It was "not thought that the District Judges would grant the certificate in ordinary litigation which could otherwise be promptly disposed of or that mere questions as to the correctness of the ruling would prompt the granting of the certificate." Id. at 3. The Senate Report, however, does not contemplate as narrow a utilization of the statute, seemingly not confining its application to the "expensive" case. See S. Rep. No. 2434, 85th Cong., 2d Sess. 3 (1958).

"The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ." 28 U.S.C. § 1292(b) (1958). (Emphasis added.) Most courts have denied that the courts of appeals possess true discretionary power, holding that the power is limited to a determination that a particular case conforms to the statutory standards and legislative purpose. E.g., Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167 (S.D. Ill. 1959); Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A., 168 F. Supp. 236 (S.D.N.Y. 1958). A more liberal interpretation, however, has been imposed. In re Hedendorf, 263 F.2d 887 (1st Cir. 1959), held that the appellate court should at least concur with the district court in the opinion that the proposed appeal presents a difficult central question of law which is not settled by controlling authority, and that a prompt decision by the appellate court at this advanced stage would serve the cause of justice by accelerating "the ultimate termination of the litigation."

In applying these standards, the court must weigh the asserted need for the proposed interlocutory appeal with the policy in the ordinary case of discouraging "piecemeal appeals."

Id. at 889. It has also been suggested that the courts of appeals should permit interlocutory appeal when, in their discretion, it is considered that the case is "significant." 58 Colum. L. Rev. 1306, 1310 (1958). But see Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959), where it is asserted that the trial judge's certification should be given "great weight
In construing section 1292(b), the courts of appeals have generally been strict. In *Milbert v. Bison Labs., Inc.*, the court in dictum
determined that the legislative intent of the statute was to permit interlocutory appeal only in
expensive and exceptional cases. The operation of section 1292(b) has also been limited to dispositive or controlling issues of law presented in the early stages of litigation, and to cases where the issue of law is subject to substantial disagreement among the circuits.

The bases of the appeal in *LoBianco* were the issues of good cause and privilege; it is to these questions that the standards of section 1292(b) must be applied. While it does not seem that an action for wrongful death may be considered an exceptional and expensive case of the type contemplated in the general legislative purpose, it also appears rather certain that the specific statutory requirements of section 1292(b), as judicially augmented, were not satisfied in the instant case. The *LoBianco* court practically admitted that there was no substantial ground for difference of opinion on the issue of good cause, for it had no difficulty in stating the existing, uncontroverted law on that subject. The district court was directed merely to follow “the principles to be discerned

and should not be rejected unless it is apparent on the face that the considerations which prompted the trial court to issue it have no basis in law or fact.” *Id.* at 198 (Moore, J., dissenting).


14 260 F.2d 431 (3d Cir. 1958).

15 The *Milbert* court dismissed the application for interlocutory appeal because the district court had failed to make the necessary certification within the ten-day statutory period.


17 Corabi v. Auto Raceway, Inc., 264 F.2d 784 (3d Cir. 1959) (whether diversity of citizenship was collusively established).

18 Gottesman v. General Motors Corp., 268 F.2d 194 (2d Cir. 1959); United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959); United States v. View Crest Garden Apartments, Inc., 265 F.2d 205 (9th Cir. 1958).

19 See Corabi v. Auto Raceway, Inc., 264 F.2d 784 (3d Cir. 1959); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333 (1959). One district judge has gone so far as to observe that the cases commending themselves for interlocutory appeal would be “as rare as the dodo bird.” Seven-Up Co. v. O-So Grape Co., 179 F. Supp. 167, 171 (S.D. Ill. 1959).
from the cases cited." The only reasonable conclusion is that the appeal was accepted on the ground that there had been an erroneous application of a well-settled point of law. Nowhere in the statute is it intimated that interlocutory appeal should be permitted when a district court has simply committed an error of law.

Likewise, the statutory condition that an interlocutory appeal will materially advance the ultimate termination of the litigation does not appear to be met when the granting of a discovery order is accepted for appeal under section 1292(b). A distinction should be drawn between cases where the order is granted and where it is denied. If appeal is permitted in the former case the most that can be accomplished is that the proceedings will be restored to the state existing before the order was granted. But where discovery is denied, an appeal may advance the proceedings, and the necessity for a second trial can be obviated.

Discovery orders were not accepted for appeal under section 1292(b) until Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., an antitrust case, was handed down by the United States Court of Appeals for the Seventh Circuit one week before the instant case. Although the two cases appear substantially

20 336 F.2d at 972. The cases cited by the court as providing adequate guidance were Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962); Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501 (7th Cir. 1954); Allmont v. United States, 177 F.2d 971 (3d Cir. 1949); Martin v. Capital Transit Co., 83 U.S. App. D.C. 239, 170 F.2d 811 (1948).

21 "[M]ere questions as to the correctness of the ruling [by a district judge should not] . . . prompt the granting of the certificate," H.R. REP. No. 1667, 85th Cong., 2d Sess. 3 (1958). "If precedent clearly supports the position the appeal should be denied . . . ." Note, Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 YALE L.J. 333, 342 (1959). In treating the issue of privilege, the instant court held that there were insufficient facts concerning the memorandum in question to enable a finding on that issue. The law, however, seems settled with respect to communications between insurer and insured. Federal courts have rejected the assertion of privilege. Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959); Blank v. Great No. Ry., 4 F.R.D. 213 (D. Minn. 1943); Price v. Levitt, 29 F. Supp. 164 (E.D.N.Y. 1939). The use of the "work product" theory of Hickman v. Taylor, 329 U.S. 495 (1947), has been allowed in such cases. Burns v. Mulder, 20 F.R.D. 605 (E.D. Pa. 1957); Helverson v. J. J. Newberry Co., 16 F.R.D. 330, 335 (W.D. Mo. 1954). The solidarity of law in this area should negate the existence of a question of law for which there is a substantial ground for difference of opinion.


23 Furthermore, when the order grants discovery it is difficult "to demonstrate that at the pretrial stage of the litigation the order involved an issue whose resolution would control the outcome." Ibid. The petitioner's objection that the "fruit of the poison tree" could be used in a second trial after reversal of the first trial's judgment based on an error in discovery appears specious, in view of the fact that this "evil" permeates the entire discovery area.

24 Ibid.

25 335 F.2d 203 (7th Cir. 1964).
identical, they are distinguishable on several grounds. Commonwealth Edison was an antitrust case and, as such, was clearly contemplated by the draftsmen of section 1292(b) as a type of case where the statute could be fruitfully used. Further, the issue in that case was on a relatively new and unsettled point of law, while the problem of good cause is not such. Finally, in Commonwealth Edison the discovery order was denied, while in LoBianco it was granted.

The court of appeals in the instant case did not disclose its reasons for accepting the appeal. Both the statutory criteria and the general legislative purpose were not discussed by the majority, making LoBianco a poor guide for the future disposition of interlocutory appeals of discovery orders. Under proper circumstances interlocutory appeal from a discovery order may be both just and economical; the facts of LoBianco, however, do not present such a case.

GOVERNMENT CONTRACTS—MISTAKE—REFORMATION OF INSTRUMENTS—IN CASE OF MUTUAL MISTAKE OF FACT, ABSENT ALLOCATION OF RISK, WHERE DEFENDANT RECEIVED BENEFIT OF TYPE CONTEMPLATED BY CONTRACT AND WOULD HAVE BEEN WILLING TO BEAR SUBSTANTIAL PART OF ADDITIONAL COSTS OCCASIONED BY MISTAKE, CONTRACT CAN BE REFORMED TO DIVIDE SUCH UNEXPECTED COSTS. National Presto Indus., Inc. v. United States, 338 F.2d 99 (Ct. Cl. 1964), cert. denied, 33 U.S.L. Week 3330 (U.S. April 6, 1965) (No. 905).

During the Korean Conflict plaintiff entered into a contract with the Ordnance Department of the Army for the production of artillery shells. A portion of the shells was to be manufactured by a new production process which the Government hoped would eliminate the need for a turning step and thereby reduce the amount of scrap steel. By the terms of the contract the Government was to pay the cost of the equipment listed in schedules to be provided by plaintiff; but the price to be paid for the shells was fixed, even though the new production method called for was still experimental and its efficiency unproven. During the negotiations the Government had rejected plaintiff’s demand for certain turning equip-

26 See note 11 supra.

27 The question raised on appeal in Commonwealth Edison involved the defense that the plaintiffs had passed on damages to their customers, the applicability of which was in conflict among the circuits. See 335 F.2d at 207. Nonetheless, interlocutory appeal had been denied in similar cases by other circuits. Atlantic City Elec. Co. v. General Elec. Co., 337 F.2d 844 (2d Cir. 1964); Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963); Public Util. Dist. v. General Elec. Co., 230 F. Supp. 744 (W.D. Wash. 1964).

28 Professor Moore, while approving of interlocutory appeals from the denial of discovery orders, proposes that interlocutory appeals may be properly heard even where discovery has been granted, viz. where vital trade secrets are involved and there is the likelihood of irreparable injury, or where important issues of privilege are at stake. 4 Moore, op. cit. supra note 16, ¶ 25.37, at 1769.
ment which plaintiff felt should be included for efficient production in the new process. Plaintiff thereupon had submitted a revised schedule omitting the turning equipment, and the equipment was not included in the contract. However, oral assurance was given that if the turning equipment proved necessary its acquisition would be sanctioned. The necessity for such equipment finally became evident, but only after lengthy experimentation which the court concluded was not unreasonable on plaintiff's part;1 the equipment was then provided. When production was completed, the Government paid for the additional equipment and also remitted the contract price. Plaintiff suffered heavy losses, a substantial portion of which it alleged resulted from its prolonged attempt to produce the shells without turning equipment. Suit was brought to recover its excess costs on a breach of warranty theory or, in the alternative, on the basis of mutual mistake of fact.

The case was wholly tried in the Court of Claims.2 After determining there was no breach of warranty3 the court found that the parties entered into the contract under a mutual mistake of fact, not as to the need for the turning

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1 The court found that, under all the circumstances, plaintiff did not forfeit its right to relief by failing to stop during this period to seek a price adjustment. National Presto Indus., Inc. v. United States, 338 F.2d 99, 111 n.21 (Cl. Ct. 1964), cert. denied, 33 U.S.L. Week 3330 (U.S. April 6, 1965) (No. 905); accord, Ekco Prods. Co. v. United States, 312 F.2d 768, 773 (Cl. Ct. 1963).

2 338 F.2d at 103 & n.2. No objection was made by defendant to plaintiff's failure first to exhaust its administrative remedies until after the Trial Commissioner's report had been submitted and plaintiff had filed its brief and exceptions. A motion by defendant to suspend proceedings in order that plaintiff might submit any disputed questions of fact to the contracting officer and to the Armed Services Board of Contract Appeals was denied. The motion was again denied after the presentation of the case on the merits "on the ground that defendant waived any right it may have had to an administrative determination of the facts by failing to make the point until too late a stage in the proceedings." Id. at 103 n.2. Despite the holding in United States v. Carlo Bianchi & Co., 373 U.S. 709 (1963), that the Court of Claims is limited to a review of the evidence presented at a prior administrative hearing, there are situations where the Court of Claims will decide a claim even though a contractor has not exhausted his administrative remedies. National Presto Indus., Inc. v. United States, supra at 103 n.2. Any argument that the court has no authority to conduct a de novo hearing on the facts or receive new evidence must be made when evidence is introduced to the Commissioner. WPC Enterprises, Inc. v. United States, 323 F.2d 874 (Cl. Ct. 1963); Stein Bros. Mfg. Co. v. United States, 337 F.2d 861 (Cl. Ct. 1963). Bypassing the Armed Services Board of Contract Appeals, plaintiff avoided a tribunal which has recently denied relief to similar claims. See Advance Indus., Inc., A.S.B.C.A. No. 7402, CCH 1963 BCA Rep. ¶ 3774; Hol-Gar Mfg. Co., A.S.B.C.A. No. 6865, CCH 1962 BCA Rep. ¶ 3551.

3 338 F.2d at 103-06. In cases where recovery has been granted on a misrepresentation or breach of warranty theory, the Government has had superior knowledge or supplied the specifications. See, e.g., Helene Curtis Indus., Inc. v. United States, 312 F.2d 774 (Cl. Ct. 1963); R. M. Hollingshead Corp. v. United States, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953). In Presto there was no superior knowledge; and plaintiff, although reluctantly, submitted the specifications from a free bargaining position. 338 F.2d at 104-06.
equipment, but as to the time and effort necessary to demonstrate this need.\textsuperscript{4} The court granted plaintiff one-half of the portion of its losses attributable to this mistake.\textsuperscript{5} \textit{Held}, in a case of mutual mistake of fact, absent allocation of risk, where defendant has received a benefit of the type contemplated by the contract and would have been willing to bear a substantial part of the additional costs occasioned by the mistake, the contract can be reformed to divide such unexpected costs.\textsuperscript{6}

The \textit{Presto} ruling bears out indications that the Court of Claims has become dissatisfied with the inflexible rule\textsuperscript{7} on reformation for mutual mistake of fact. In certain instances, the court has previously refused to deny such relief where the result would clearly be inequitable,\textsuperscript{8} and \textit{Flippin Materials Co. v. United States, 101 Ct. Cl. 516, 532-33 (1944)} (government specifications erroneous but plaintiff

\textsuperscript{4} Id. at 107-08. While not specifically set out in \textit{Presto}, in the past the Court of Claims has defined a mutual mistake of fact as "unconscious ignorance by both parties of a fact material to the contract or belief in the present existence of a thing material to the contract." \textit{Morgan v. United States, 80 Ct. Cl. 81, 94, 8 F. Supp. 746, 751 (1934)}. There was no mutual mistake as to the need for turning equipment because both parties had recognized that the need for such equipment was uncertain. See 3 \textit{CORBIN, CONTRACTS \S 598, at 586 (1960)}.  

\textsuperscript{5} 338 F.2d at 112.  

\textsuperscript{6} Id. at 111-12.  

\textsuperscript{7} Reformation for mutual mistake of fact is granted only in those cases where the written instrument does not conform to the actual agreement of the parties. \textit{Ackerlind v. United States, 240 U.S. 531 (1916), modifying 49 Ct. Cl. 635 (1914)}; \textit{Panama Power & Light Co. v. United States, 150 Ct. Cl. 290, 278 F.2d 939 (1960)}; \textit{Sutcliffe Storage & Warehouse Co. v. United States, 125 Ct. Cl. 297, 112 F. Supp. 590 (1953)}; \textit{Austin Co. v. United States, 64 Ct. Cl. 504 (1928)}; \textit{Hygienic Fibre Co. v. United States, 59 Ct. Cl. 598 (1924)}; \textit{Lovell v. United States, 59 Ct. Cl. 494 (1924)}; \textit{5 WILLISTON, CONTRACTS \S 1541, at 4330, \S 1545, at 4336, \S 1548, at 4341 (rev. ed. 1937)}. See generally Note, \textit{The Application of Common-Law Contract Principles in the Court of Claims: 1950 to Present}, 49 VA. L. REV. 772, 791-95 (1963). Reformation has expressly been refused in those cases where the writing conforms to the parties' actual agreement, but the parties would not have entered into the agreement had they known the true facts. \textit{E.g., Maryland Cas. Co. v. United States, 169 F.2d 102 (8th Cir. 1948)}; see 3 \textit{CORBIN, CONTRACTS \S 614, at 728-29 (1960)}; \textit{5 WILLISTON, CONTRACTS \S 1546, at 4336, \S 1548, at 4341, \S 1549, at 4344-45 (rev. ed. 1937)}; \textit{RESTATEMENT, CONTRACTS \S 504 (1932)}. The only remedy previously available in such cases—rescission—was closed to plaintiff in the instant case since the contract had been fully executed. See 3 \textit{CORBIN, CONTRACTS \S 614, at 728-29 (1960)}; \textit{5 WILLISTON, CONTRACTS \S 1541, at 4330 (rev. ed. 1937)}.  

\textsuperscript{8} See, \textit{e.g.}, \textit{Dillon v. United States, 140 Ct. Cl. 508, 512, 156 F. Supp. 719, 722 (1957)} (unprecedented drought and lack of cooperation by defendant); \textit{Poirier & McLane Corp. v. United States, 128 Ct. Cl. 117, 120 F. Supp. 209 (1954)} (retroactive increase in wage rates by Secretary of Labor); \textit{Walsh v. United States, 121 Ct. Cl. 546, 102 F. Supp. 589 (1952)} (parties unaware of previous wage rate increase); \textit{Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 517, 522, 74 F. Supp. 165, 168 (1947)} (unforeseen difficulties encountered in excavation); \textit{Harrison Eng'r & Constr. Co. v. United States, 107 Ct. Cl. 205, 208, 68 F. Supp. 350, 352 (1946)} (state tax retroactively assessed on plaintiff); \textit{Virginia Eng'r Co. v. United States, 101 Ct. Cl. 516, 532-33 (1944)} (government specifications erroneous but plaintiff
States recently set the stage for the instant decision. In that case, the court denied relief, pointing out that the contract allocated the risk to plaintiff and that there was no evidence that the Government would have been willing to pay more had it known the true facts, thus implying a test for relief. In *Presto* the court, adding the requirement of "benefit," made this test explicit and adopted the position that reformation should be granted in cases of mutual mistake of fact in the following circumstances:

To do justice here we need go no further than formulate and apply a rule for cases of mutual mistake in which the contract, properly construed, allocates the specific risk to neither party—and the side from whom relief is sought received a benefit from the extra work of the type it contemplated obtaining from the contract, and would have been willing, if it had known the true facts from the beginning, to bear a substantial part of the additional expenses.

In the instant case the court found these requirements satisfied. Neither party assumed the risk. The Government received from the extra work the type of benefit which it contemplated receiving from the contract, and would have been willing to bear a substantial portion of the additional costs had it known the true facts at the outset.

Beyond the disputed question of whether the ignorance of the parties as to the amount of time and work necessary to discover the need for additional equipment amounted to a mutual mistake of fact, the court made new law as to the allocation of risk between the parties. Although acknowledging negligent in not investigating facts); Federal Motor Truck Co. v. United States, 71 Ct. Cl. 545, 556 (1931) (Government erroneously computes, and plaintiff mistaken as to, amount due subcontractor).

9 312 F.2d 408 (Ct. Cl. 1963).
10 Id. at 415.
11 338 F.2d at 111-12.
12 "[T]he specific risk as to the cost of proving that fact [that turning equipment was necessary] was not distributed, explicitly or implicitly, by the arrangement the parties made. The defendant did not assume that hazard, but neither did the plaintiff." *Id.* at 110.
13 "The Government was interested not only in the end-product—shells—but just as much in the perfection of the new process." *Id.* at 109. "Through this prolonged period of trial and error the Government learned that it could not effectively mass-produce shells by the hot cup-cold draw method without turning equipment. This was a fact the defendant wanted to discover under this contract, not an extraneous benefit." *Id.* at 111 n.21. In reality, and as suggested in the dissent, the job required was of a type that should have been incorporated into a research and development contract. *Id.* at 113.
14 "Perhaps defendant's officials would have refused to incur any of this expense, but we think not since the Government was anxious to establish a production line for the new process which would omit turning equipment." *Id.* at 110.
15 "[C]ontacts . . . certainly cannot be reformed because the parties cannot accurately foretell the future." *Id.* at 113 (Whitaker, J., dissenting).
16 See note 4 *supra* and accompanying text.
the contract before it to be a fixed-price contract,\footnote{17} which by the usual rule would place the risk of unexpected hardships upon the contractor,\footnote{18} the \textit{Presto} court decided that the contract allocated the risk to neither party\footnote{19} and then proceeded to discard the traditional “chips lie where they fall” solution\footnote{20} to such contracts. Instead, according to the \textit{Presto} ruling, no longer need one party bear the full brunt of the loss if his performance has resulted in a benefit to the other party of the type which the latter was seeking. The benefit which the court appears to require is more than detriment or expenditure on the contractor’s part—the defendant must have \textit{received} something; furthermore, the defendant apparently must be found to have been willing at the outset to bear some of the costs had it known the facts at that time. This last requirement leaves open the possibility that this rule may not apply where costs reasonably incurred by the contractor are so great that they outweigh any benefit received by the Government.

The court recognized the division of costs between the parties as a departure from precedent,\footnote{21} but was not deterred thereby.\footnote{22} The Court of Claims may

\footnote{17} The court noted, however, that since the Government was to pay for the machines, in the area of equipment the agreement was at least as close to a cost contract as to a fixed-price one.” 338 F.2d at 109.

\footnote{18} See, \textit{e.g.}, Rolin \textit{v. United States}, 142 Ct. Cl. 73, 160 F. Supp. 264 (1958); 31 \textit{Decs. Comp. Gen.} 1 (1951). However, if these hardships result from some action on the part of the Government amounting to a warranty or misrepresentation, the Government is liable. See, \textit{e.g.}, Helene Curtis Indus., Inc. \textit{v. United States}, 312 F.2d 774 (Cl. Ct. 1963); R. M. Hollingshead Corp. \textit{v. United States}, 124 Ct. Cl. 681, 111 F. Supp. 285 (1953). In addition, performance is excused for physical impossibility arising from completely unforeseeable circumstances. See Mitchell Canneries, Inc. \textit{v. United States}, 111 Ct. Cl. 228, 77 F. Supp. 498 (1948); \textit{cf.} Dillon \textit{v. United States}, 140 Ct. Cl. 508, 156 F. Supp. 719 (1957).


\footnote{20} 338 F.2d at 111, citing 3 Corbin, \textit{Contracts} § 598, at 589 (1960); 5 Williston, \textit{Contracts} § 1548, at 4339, 4341 (rev. ed. 1937).


\footnote{22} [1] In this class of case [mutual mistake] we see no objection other than tradition. Reformation, as the child of equity, can mold its relief to attain any fair result within the broadest perimeter of the charter the parties have established for themselves. Where
grant equitable relief only as incidental to a monetary award; an example of such relief is reformation in its traditional sense. Though it can perhaps be argued that the remedy fashioned in the instant case stretches this jurisdictional limit of the court, it is an impeccable disposition as between the parties, and furthermore may be defensible under the mushrooming "implied contract" jurisdictional base of the court. It is as apparent as it is unfortunate, however, that jurisdictional limitations upon the court require it to contort the law of contracts to achieve a just result.


Six days prior to the end of its fiscal year, taxpayer sold an office building for an amount in excess of its adjusted basis at the beginning of the taxable year. Taxpayer took a full deduction for depreciation on the building in the year of sale. The Commissioner disallowed the deduction, contending that a depreciation deduction should not be allowed in the year of sale to the extent that the sale price exceeds adjusted basis. The Tax Court found that the excess price resulted from market appreciation rather than from an unreasonable estimate of depreciation expense. Held, year of sale depreciation deduction allowed when, due to market appreciation, sale price exceeds adjusted basis.\(^1\)


The instant decision is in conflict with the line of authority and a Revenue Ruling which have resulted from Cohn v. United States where the Sixth Circuit disallowed a depreciation deduction for the year of sale when actual sale price exceeded the adjusted basis at the beginning of the taxable year. The Cohn court reasoned that since depreciation involved a combination of useful life and salvage value, both of which are estimated, and since useful life may be redetermined in light of new facts, it is logical to permit a redetermination of salvage value based upon actual sale price. Two recent district court cases, however, limited Cohn to apply only where assets are sold near the end of useful life, and in a recent series of decisions, including the principal case, the Tax Court has rejected the Cohn rationale by holding that depreciation deduction in the


The depreciation deduction for the taxable year of disposition of an asset used in the trade or business or in the production of income, otherwise properly allowable under the taxpayer's method of accounting for depreciation, is limited to the amount, if any, by which the adjusted basis of the asset at the beginning of the year exceeds the amount realized from sale or exchange.


6 259 F.2d at 378, citing Wier Long Leaf Lumber Co., 9 T.C. 990 (1947), rev'd on other grounds, 173 F.2d 549 (5th Cir. 1949), where the Tax Court permitted salvage value of one asset to be redetermined based on actual sale price where sale was made near the end of useful life and the estimated salvage value was found to be improper. In passing on the propriety of a depreciation deduction in the year of sale of another asset, however, the court stated that the sale price alone is not determinative of an improper salvage value estimate. But see note 16 infra.

Int. Rev. Code of 1954, § 1231, which provides in part for special treatment of losses on the sale or exchange of depreciable assets, would seem to preclude a redetermination of salvage value if sale price were lower than estimated salvage value, since if the taxpayer could take the difference between sales price and adjusted basis as a depreciation expense in the year of sale, he would never have a capital loss on the asset, and the provision in § 1231 would be superfluous.

year of sale should be allowed where the taxpayer is able to show that the excess of sales price over adjusted basis was due to market appreciation and not to an unreasonable estimate of salvage value.\(^8\)

The conflict between these two lines of authority is primarily a result of different interpretations of certain Treasury Regulations under the Internal Revenue Code of 1954. The Regulations state that “in no event shall an asset (or an account) be depreciated below a reasonable salvage value.”\(^9\) Salvage value is defined as:

\[\text{[T]he amount (determined at the time of acquisition) which is estimated will be realizable upon sale or other disposition of an asset when it is no longer useful in the taxpayer's trade or business or in the production of his income and is to be retired from service by the taxpayer. Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels. However, if there is a redetermination of useful life . . . [under section 1.167(a)-1(b) of the Regulations] salvage value may be redetermined based upon facts known at the time of such redetermination of useful life.}^{10}\]

Those courts which strictly apply the Cohn rule agree that while market fluctuation should not necessitate periodic redetermination of salvage value for the purpose of computing annual depreciation deductions, such redetermination is proper at the end of the taxable year of sale so that salvage value will conform to actual sale price for the purpose of computing the year of sale depreciation deduction.\(^{11}\) Apparently those courts focus on the word “reasonable,” determining that the most reasonable salvage value is that realized on actual resale. The Macabe court, on the other hand, noting that the Code provides separately for productive consumption under section 167(a)\(^{12}\) and for gain or loss due to mar-

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\(^{8}\) Macabe Co., 42 T.C. 1105 (1964); Holder Driv-Ur-Self, Inc., 43 T.C. 202 (1964) (depreciation deduction allowed in year of sale for price in excess of adjusted basis); Melvon C. Miller, 23 CCH Tax Ct. Mem. 1866 (1964) (depreciation deduction disallowed because taxpayer failed to show that gain was due to market appreciation); C. L. Nichols, 43 T.C. 135 (1964) (depreciation deduction allowed taxpayer upon a showing that gain was due to market appreciation); Harry Trotz, 43 T.C. 127 (1964) (depreciation deduction allowed even though gain was taxable as ordinary income on other grounds); Moses Lake Homes, Inc., 23 CCH Tax Ct. Mem. 1756 (1964) (depreciation deduction allowed even though sale price plus mortgage indebtedness assumed by purchaser exceeded adjusted basis); Smith Leasing Co., 43 T.C. 37 (1964) (depreciation deduction disallowed because taxpayer failed to show that gain was due to market appreciation); see Note, 50 Va. L. Rev. 1431 (1964).


\(^{10}\) Ibid.

\(^{11}\) See cases cited note 2 supra.

\(^{12}\) INT. REV. CODE OF 1954, § 167(a).
market fluctuations under sections 1002 and 1231 found that market fluctuations should not be a consideration in determining reasonable salvage value. This court appears to apply the Regulation's definition of salvage value more accurately since it looks only at what was reasonable as determined at the time of acquisition. Thus, if the excess of sale price over adjusted basis resulted solely from genuine appreciation, the original salvage value estimate was not unreasonable, and depreciation should still be allowed to the extent of that estimate. While such a result causes administrative problems because of the subjective tests necessitated by the term "reasonable," it conforms to the spirit of the Code. Just as the taxpayer is not to convert ordinary income into capital gain, so the Commissioner should not be allowed to convert capital gain into ordinary income.

Although the Macabe ruling appears to be a more reasonable interpretation of the Code, it is probable that it does not conform to the method of calculating

15 42 T.C. at 1109. "The concepts of depreciation through the process of exhaustion, on the one hand, and of appreciation or depreciation because of market conditions, on the other hand, are mutually exclusive." Ibid. In making this distinction the court relied heavily on the strict wording of Int. Rev. Code of 1954, § 167(a), which provides that "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) . . . ." (Emphasis added.) See United States v. Ludey, 274 U.S. 295 (1927); Armstrong, Capital Gain Treatment Should Be Restored For Depreciable Business Property, 41 Taxes 175, 188 (1963), where it is stated:

[T]here is no correlation in amount between the depreciation deductions that have been taken and the market or replacement value of the property; and that the depreciation allowance is designed to permit tax-free recovery of a cost that has been incurred in the past, so that time-wise it is looking backward and is not concerned with current or future disposition or realization.

16 This would appear to mean that where there is a readetermination of useful life, and a consequent redetermination of salvage value under Treas. Reg. § 1.167(a)-1(c) (1956), T.D. 6182, 1956-1 Cum. Bull. 98 (amended by T.D. 6712, 1964 Int. Rev. Bull. No. 16, at 11), that salvage value should be determined in light of what would have been reasonable had the new useful life been applied at the date of acquisition, taking into account actual knowledge of subsequent facts indicating that the asset is being productively consumed at a different rate, but not taking into account any subsequent appreciation. See text accompanying note 10 supra.


Furthermore, the "profits" of the taxpayers here are capital gains and incur no more than a 25% tax rate. The depreciation, however, is deducted from ordinary income. By so translating the statute and the regulations, the taxpayers are able, through the deduction of this depreciation from ordinary income, to convert the inflated amounts from income taxable at ordinary rates to that taxable at the substantially lower capital gains rates. This, we believe, was not in the design of Congress. Id. at 97.

18 See 42 U.S. Tax Week 1387 (1964).
depreciation set forth by the Supreme Court in *Massey Motors, Inc. v. United States*\footnote{364 U.S. 92 (1960), 1960 Ill. L.F. 605 (1960), 21 La. L. Rev. 663 (1961), 22 Mont. L. Rev. 94 (1960).} where it was stated that depreciation is to be calculated by the “cost of the property to the taxpayer less its resale value at the estimated time of disposition.”\footnote{364 U.S. at 93. (Emphasis added.) *Accord*, Hertz Corp. v. United States, 364 U.S. 122 (1960). See generally Kirby, *Accelerated Depreciation and the Treasury Regulations*, 54 Nw. U.L. Rev. 434, 446-54 (1959).} A literal interpretation of this statement would seem to require a consideration of possible market fluctuation, since resale value ordinarily depends on market price. It seems preferable to read “resale value” to mean the estimated value (based on taxpayer’s original cost) of the “inherent useful life”\footnote{See Treas. Reg. § 1.167(a)-1(c) (1956), T.D. 6182, 1956-1 Cum. Bull. 98 (amended by T.D. 6712, 1964 Int. Rev. Bull. No. 16, at 11). “Inherent useful life” in this context would mean the amount of time it will take to reduce the asset to junk value through exhaustion, wear and tear and obsolescence under normal use. Of course, where the taxpayer has made abnormal use of the asset, as in *Massey*, the value of the “inherent useful life” remaining would not be the same as the amount of unused straight-line depreciation based on normal use computed from the date of the taxpayer’s purchase. Where obsolescence is a significant determinant of the “inherent useful life” to the repurchaser, however, the mere fact of abnormal use by the taxpayer would not have a proportionate effect on resale value. The burden would be on the taxpayer to show to what extent his abnormal use reduces remaining “inherent useful life.” Resale value would thus be based solely on physical depreciation factors—market appreciation and depreciation would have no effect on salvage value.} remaining in the asset at the anticipated time of resale. Since the *Massey* Court was dealing with a taxpayer’s conscious effort to convert ordinary income into capital gain\footnote{See 364 U.S. at 97. Compare Fribourg Nav. Co. v. Commissioner, 335 F.2d 15 (2d Cir. 1964), *cert. granted*, 85 Sup. Ct. 717 (1965), where the taxpayer’s depreciation deduction in the year of sale of a merchant ship was disallowed because it was sold at a price considerably in excess of adjusted basis, even though most of the excess amount was due to the great demand for shipping as a result of the Suez Crisis of 1956. *Accord*, United States v. Motorlease Corp., 334 F.2d 617 (2d Cir. 1964), *petition for cert. filed*, 33 U.S.L. Week 3192 (U.S. Nov. 24, 1964) (No. 685). The *Macabe* court distinguished Fribourg Nav. Co. v. Commissioner, *supra*, on the ground that there was evidence to show that the taxpayer’s original depreciation scheduling was too rapid and there was no attempt to show the amount of market appreciation. 42 T.C. at 1111.} by unreasonable estimates of useful life and salvage value, as well as by purchase of the assets at bargain prices with resale shortly thereafter in excess of cost, its statement should be limited so as not to apply to a situation like *Macabe*, where the original estimates were reasonable and the increase was due to market appreciation.

The recent passage of sections 1245\footnote{Int. Rev. Code of 1954, § 1245. For a complete discussion of § 1245 see Gallacher, *Section 1245—Depreciation Recapture*, N.Y.U. 22d Inst. on Fed. Tax 503 (1964); Kahn, *Recent Decisions* 835 (1965).} and 1250\footnote{Reconsideration of the *Accord* decision on the basis of 1245 is under consideration by the Court.} of the Internal Revenue
Code represents an attempt by Congress to create an easily applied method to recapture depreciation deductions in certain circumstances.\(^{25}\) Section 1245 taxes the gain on the sale of qualifying property as ordinary income to the extent of depreciation deductions taken after December 31, 1962. Section 1250 taxes the gain on qualifying real property as ordinary income to the extent that depreciation deductions were taken in excess of amounts allowable as straight-line depreciation after December 31, 1963. The final effect of section 1245 will be to severely limit application of the *Macabe* approach as regards property qualifying under that section. With respect to real property held for more than one year and qualifying under section 1250, however, the manner of treating market appreciation in determining reasonable straight-line depreciation will be of increasing importance, since under that section any amount deducted in excess of straight-line depreciation is taxable on resale as ordinary income.\(^{26}\) Of course, *Macabe* will still be applicable to transfers of property not falling within the scope of either of these sections.

It would seem that where the taxpayer is able to show that his depreciation deductions conformed to the actual anticipated expense of retaining the asset in his business (regardless of market fluctuation) as was the situation in *Macabe*, this actual expense should be deductible from ordinary income in every year, including the year of sale. Any other result seems to be a judicial attempt partially to compensate for the administrative difficulties in recapturing unreasonable depreciation deductions taken by some taxpayers.\(^{27}\) The reasoning in *Macabe* seems to conform to the general intent of the Code since it affords the owner of a depreciable asset the same capital gains tax advantages with regard

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\(^{24}\) INT. REV. CODE OF 1954, \(\S\) 1250.


\(^{26}\) If real property is held more than 12 months, additional depreciation means only the excess of the depreciation reflected in the basis over what would have been the depreciation if it had been computed on a straight line basis . . . . Thus under Section 1250, the recaptured depreciation after property has been held more than 12 months is applicable only if there was accelerated depreciation, and then only to the extent it exceeds straight line depreciation.

Kahn, supra note 23, at 922.

\(^{27}\) See 50 VA. L. REV. 1431 (1964).
to actual market appreciation as is afforded the owner of a nondepreciable asset not sold in the ordinary course of business.28

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—ACT OF STATE—

Defendant, an agency of the Spanish government, chartered plaintiff’s vessel to transport wheat from the United States to Spain.1 The charter agreement provided for the submission of contractual disputes to arbitration in New York. The ship sustained hull damage in Spanish ports, allegedly as a result of error on the part of the defendant’s consignee-shipper in designating these ports as safe berths. Defendant having failed to pay for the damage or to submit the dispute to arbitration, plaintiff sought a court order compelling arbitration under section 4 of the United States Arbitration Act.2 In accordance with an ex parte court order, service was effected by registered mail at Madrid.3 The district court, rejecting defendant’s motions to vacate the service as unauthorized and to dismiss the petition for lack of jurisdiction and because of sovereign immunity, granted plaintiff’s motion to compel arbitration. The United States

28 In this regard it has been suggested that § 1245 of the Code be modified somewhat along the lines of Macabe so that only that amount of depreciation deduction that does not represent the actual cost of retaining the asset in the business would be subject to recapture. See Schaprio, supra note 23, at 1507-13.


2 9 U.S.C. § 4 (1958). The court held that “by agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity.” 336 F.2d at 363.

3 9 U.S.C. § 4 (1958) permits service “in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought.” The court found that “since the appellant as [sic] consented beforehand to the jurisdiction of the district court, the sole function of process in this case was . . . to notify the appellant that proceedings had commenced.” Therefore, “service by registered mail did not violate due process.” 336 F.2d at 364.
Court of Appeals for the Second Circuit affirmed,4 after granting a motion by the Spanish Ambassador for permission to appear specially and to reassert defendant’s claim of sovereign immunity5 in a letter directed to the court.6 Held, the transportation of goods purchased by a foreign sovereign for resale is a commercial, nonpublic activity which precludes a claim of sovereign immunity or the application of the act of state doctrine.7

Recognizing that the Tate letter8 “offers no guidelines or criteria for differentiating between a sovereign’s private and public acts”9 and that neither the courts nor the commentators have devised a satisfactory test, the instant court


5 Originally, the defendant’s plea of sovereign immunity was supported only by a “conclusory affidavit” submitted by the Spanish Consul in New York without any showing of authority from an accredited diplomatic minister of Spain. 336 F.2d at 358-59 n.7.

6 The claim of sovereign immunity was treated “as properly presented to the court.” Ibid. It has been held that making a general appearance without properly suggesting a claim of sovereign immunity waives the sovereign’s right to such a claim. See, e.g., Porto Rico v. Ramos, 232 U.S. 627 (1914); Flota Maritima Browning de Cuba, S.A. v. Motor Vessel Ciudad de la Habana, 335 F.2d 619 (4th Cir. 1964), 53 Geo. L.J. 841 (1965). A foreign sovereign may present its claim to immunity either by requesting a suggestion of immunity from the State Department, or by special appearance by a recognized representative of the sovereign. If the State Department suggests lack of jurisdiction, the court must recognize the claim and dismiss the action. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (dictum of Stone, C.J.); Ex parte Peru, 318 U.S. 578, 588 (1945) (dictum of Stone, C.J.); cf. M. H. Cardozo, Sovereign Immunity: The Plaintiff Deserves a Day in Court, 67 Harv. L. Rev. 608 (1954). If the foreign government elects to appear specially, or does so following the State Department’s failure to make a suggestion, the court must determine the availability of sovereign immunity “in conformity to the principles accepted by the department of the government charged with the conduct of foreign relations.” Republic of Mexico v. Hoffman, supra at 35.


9 336 F.2d at 359.
determined to grant immunity "only in clear cases,"10 and maintained that in the absence of executive recognition and allowance, sovereign immunity should be granted only for "strictly political or public acts about which sovereigns have traditionally been quite sensitive,"11 i.e.,

(1) internal administrative acts, such as expulsion of an alien;
(2) legislative acts, such as nationalization;
(3) acts concerning the armed forces;
(4) acts concerning diplomatic activity; and
(5) public loans.12

Since sovereign immunity is designed to avoid possible embarrassment in the conduct of foreign relations, the court left the ultimate delimitation of the doctrine to the State Department:

Should diplomacy require enlargement of these categories, the State Department can file a suggestion of immunity with the court. Should diplomacy require contraction of these categories, the State Department can issue a new or clarifying policy pronouncement.13

In announcing the categories to which it would apply the sovereign immunity doctrine, the court noted that the State Department's refusal or failure to make a suggestion of immunity was significant14 and that the court would not accede to the sovereign's claim "where the State Department has indicated, either directly or indirectly, that immunity need not be accorded."15

Despite the clear exclusion of the transaction involved in this case from the

10 Id. at 360.
11 Ibid.
12 Ibid., citing Lalive, L'immunité de jurisdiction des États et des Organisations Internationales, in 3 Recueil des Cours 205, 259-60 (1953). But see National City Bank v. Republic of China, 348 U.S. 356 (1955), in which the Supreme Court suggested that the immunity of a foreign sovereign should be no more and no less than that of the United States Government in domestic courts. Id. at 363. The case is distinguishable, however, in that China was plaintiff in the action, and attempted to claim sovereign immunity as a defense to defendant's counterclaim. See also Lauterpacht, The Problem of Jurisdictional Immunities of Foreign States, 28 Brit. Yb. Int'l L. 220, 236-41 (1951); Comment, 63 Yale L.J. 1148 (1954).
13 336 F.2d at 360.
15 336 F.2d at 358. The court pointed out that "this is not to say that the courts will never grant immunity unless the State Department requests it." Ibid. To determine whether the State Department has made an indirect indication that the claim need not be recognized the court will determine "whether it is the established policy of the State Department to recognize claims of immunity of this type." Id. at 359; see Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945).
activities which it found to be within the ambit of sovereign immunity, the court subsequently argued along traditional lines to substantiate its denial of sovereign immunity, pointing out that (1) the charter agreement was executed by the head of the defendant's commercial division, (2) the cargo was "consigned to and shipped by a private commercial concern," (3) the agreement included an arbitration clause, (4) recent treaties indicate that maritime transport is considered a commercial or business activity by the United States and other nations, and (5) the wheat cargo "presumptively" will be resold to Spanish nationals, rather than used "for the public services of Spain."

A plea of sovereign immunity having failed, the defendant sought application of the act of state doctrine, since the acts complained of were allegedly authorized by a branch of the Spanish government and occurred within Spanish ports. The court handily rejected this plea for three reasons: (1) the designation of Spanish ports was determined by defendant's consignee; (2) it was effectuated not in Spain but in Mobile, Alabama; and (3) the designation would not have been a public act even if it had been performed by Spain, apparently because this is a type of act frequently performed by private persons.

It appears likely that the instant court would limit acts of state to those public acts that would qualify the foreign sovereign for an acceptable claim of immunity. If so, the restrictive immunity theory and the act of state doctrine would be substantially identical, the only differences being that the former would apply to the public acts of any friendly foreign government acting within or without its own territory, while the latter would apply to public acts of any recognized foreign government so long as the acts occurred within that country's territorial limits.

16 336 F.2d at 360.
17 Id. at 360-61.
18 Id. at 361.
19 Ibid.; see, e.g., Treaty With Israel on Friendship, Commerce and Navigation, Aug. 23, 1951, art. XVIII, para. 3, T.I.A.S. No. 2948.
20 336 F.2d at 361; see ALLEN, THE POSITION OF FOREIGN STATES BEFORE NATIONAL COURTS 303-08 (1933).
21 336 F.2d at 361.
23 See note 22 supra.
24 336 F.2d at 363.
25 Id. at 359; see note 8 supra.
26 See note 22 supra.
In a libel filed against a Cuban bank, the Republic of Cuba, claiming title to a vessel involved, intervened seeking leave to defend and later filed an answer to the libel. At the time no suggestion of or claim to sovereign immunity was made although a representative of Cuba subsequently unsuccessfully requested that the State Department submit a suggestion of sovereign immunity to the court. Approximately eighteen months later Cuba filed a claim of sovereign immunity which was denied by the district court on the ground that a general appearance had been made and thus all claim to immunity was waived. The Republic of Cuba appealed. Held, where the Executive has not submitted a suggestion of immunity to the court, a sovereign's general appearance is a manifested consent to suit and constitutes a waiver of immunity.

The instant decision, though no departure from precedent, conveys a portent

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1 ADMIRALTY R. 34.
4 335 F.2d 619 (4th Cir. 1964).
5 Richardson v. Fajardo Sugar Co., 241 U.S. 44 (1916); Porto Rico v. Ramos, 232 U.S. 627 (1914); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); The Sao Vicente, 295 Fed. 829 (3d Cir. 1924); The Sao Vicente, 281 Fed. 111 (2d Cir. 1922); The Uxmal, 40 F. Supp. 258 (D. Mass. 1941). Bryan, J., dissenting in the instant case, 335 F.2d at 627-28, argued that no waiver existed because: (1) there was no prejudice by the delay and thus no laches on Cuba's part, citing Gardner v. Panama R.R., 342 U.S. 29, 30 (1951), and BENEDICT, ADMIRALTY § 464 (6th ed. 1940); (2) Cuba's appearance to claim the ship was not a waiver of immunity, citing Ex parte Republic of Peru, 318 U.S. 578, 589, Ex parte Muir, 254 U.S. 522, 532 (1921), and Ervin v. Quintanilla, 99 F.2d 925, 939 (5th Cir. 1938), cert. denied, 306 U.S. 635 (1939); and (3) Cuba's appearance was not voluntary since the action was in rem and she would otherwise lose all right to the ship. Hilton v. Guyot, 159 U.S. 113, 167 (1895); BENEDICT, ADMIRALTY § 231 (6th ed. 1940). By the latter argument the dissent sought to distinguish the appearance of the sovereign in Porto Rico v. Ramos, supra (action in ejectment against sovereign), and Richardson v. Fajardo Sugar Co., supra (action by taxpayer against tax collector). Because of their alternative grounds for decision, the dissent found unpersuasive The Uxmal, supra (ship title not in sovereign), and The Sao Vicente (both cases), supra (faulty presentation of claim of immunity). In each of these cases the ground thought unpersuasive by the dissent was that the sovereign
of a departure from the traditional policy that the executive suggestion be made at the very outset of the litigation. As if warning future litigants, the court said:

The only possible exception [to a holding that a general appearance waives sovereign immunity] we would allow would arise out of a suggestion of immunity from the State Department. Though a foreign power may have waived its immunity in a pending action by the entry of a general appearance, the overriding political considerations would require recognition of the immunity when the State Department suggests its allowance is in the national interest notwithstanding the earlier general appearance.6

Though several corollary issues were contested and decided by the instant court,7 and other questions appear,8 the most far-reaching ramifications arise from the court's broad statement that it may in future cases unquestioningly accept an executive pronouncement that sovereign immunity obtains even though it is made after the sovereign has consented to suit.9

had waived whatever immunity it may have had. See The Secundus, 13 F.2d 469, 472 (E.D.N.Y. 1926) (sovereign made special appearance with faulty presentation of immunity), where the court stated that a "foreign government should not be charged with waiver of jurisdiction unless by express agreement."

6 335 F.2d at 625.

7 A possible res judicata determination of immunity was disposed of by holding that the prior suit had no bearing upon the question of waiver nor was the defense susceptible of assertion at the late date of the proceedings. As to the sensitive question of the extent of immunity the court held that the waiver of jurisdiction inferred a waiver of immunity from execution since the action was in rem and execution was to be upon the res. There is much wisdom and justice but little judicial support for the position of the majority. Harris & Co. Advertising v. Republic of Cuba, 127 So. 2d 687 (Fla. Dist. Ct. App. 1961); Timberg, Sovereign Immunity, State Trading, Socialism, and Self-Deception, 56 Nw. U.L. Rev. 109, 119-22 (1961); Note, 75 Harv. L. Rev. 1607, 1612-13 (1962).

8 The court discussed but did not pass upon whether the judiciary should allow immunity to sovereigns engaged in commercial activity, indicating that such sovereigns should not be immune. 335 F.2d at 623-24 n.10; see Victory Transp. Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), 53 Geo. L.J. 837 (1965); Harris & Co. Advertising v. Republic of Cuba, supra note 7; Letter of Acting Legal Adviser Jack B. Tate, May 19, 1952, in 26 Dep't State Bull. 984; Note, 75 Harv. L. Rev. 1607 (1962). Thus the wisdom of Berizzi Bros. Co. v. S.S. Pesaro, 271 U.S. 562 (1926), was again questioned. See National City Bank v. Republic of China, 348 U.S. 356, 360-61 (1955).

The court did not discuss nor decide whether the judicial standard of sovereign immunity should necessarily be coextensive with an apparent executive standard. Compare Berizzi Bros. Co. v. S.S. Pesaro, supra (State Department indicated nonimmunity but Court granted immunity), and The Luigi, 230 Fed. 493 (E.D. Pa. 1916) (State Department indicated immunity but court denied immunity), with Republic of Mexico v. Hoffman, 324 U.S. 30, 38 (1945) (dictum): "[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize."

9 The question was left open by the Supreme Court in Ex parte Republic of Peru, 318
The precedents relied on in support of the court's statement do not seem to provide an unchallengeable basis for such a view. In the most pertinent situation, reported in *Rich v. Naviera Vacuba S.A.*, the sovereign had contractually waived any right to claim immunity. The court of appeals held that a later suggestion of immunity by the Executive compelled a dismissal of the suit in favor of the sovereign. In *Ex parte Muir* there was neither an appearance by the sovereign nor a suggestion of immunity by the Executive.

U.S. 578, 589-90 (1943) (dictum); accord, United States of Mexico v. Schmuck, 293 N.Y. 264, 274, 56 N.E.2d 577, 581 (1944) (dictum). Implicit in this issue is an affirmative answer to the more basic question of whether the judiciary may properly acquiesce in an executive determination of immunity. This proposition has met considerable criticism by writers.


*10* 295 F.2d 24 (4th Cir. 1961).

11 Mayan Lines had previously obtained a $500,000 judgment against the Republic of Cuba. In the course of this first suit Cuba waived "any and all rights of sovereign immunity which it may now or hereafter be entitled to plead." Rich v. Naviera Vacuba S.A., 197 F. Supp. 710, 719-20 (E.D. Va. 1961). The district court held that this was a contract between the parties binding only on the conscience of the sovereign and that consent to suit did not necessarily involve consent to execute upon property to which no consent had been made, citing Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstyrelsen, 43 F.2d 705 (2d Cir. 1930), *cert. denied*, 282 U.S. 896 (1931). 197 F. Supp. at 722. On appeal the court stated that the position of Mayan Lines, the judgment creditor, "both with respect to liability and enforcement of the judgment, does not significantly distinguish its position from that of the other libellants, in view of the controlling effect that must be given the State Department's action." 295 F.2d at 26.

Additional support could have been mustered for the court's dicta from Miller v. Ferrocarril del Pacifico de Nicaragua, 137 Me. 251, 18 A.2d 688 (1941) (action by attorneys for compensation for services rendered). In dismissing the case, the Supreme Court of Maine stated:

Since the case was properly dismissed because of the action taken by the executive
The dictum of the *Flota* court impliedly rejects the no-longer viable theory of personal immunity for the foreign sovereign; it embraces the theory on which our practice of executive suggestion is based—that the Executive is responsible for the conduct of foreign affairs. If the state of foreign affairs were to demand that a particular sovereign have immunity in order to promote our national interest, it should follow that an executive suggestion should be adhered to regardless of whether the sovereign has consented to suit.

In pushing to the extreme the view that the foreign sovereign is immune in order to protect the interests of the domestic sovereign, the *Flota* court lends credence to the parade of horribles envisioned by those who objected to earlier situations in which the exercise of an executive suggestion infringed the rights of the private litigant and blurred the borderlines between executive and judicial functions.

The proposition of *Flota* cannot be broadly implemented without imposition of liability on the domestic sovereign in certain cases in favor of the private litigant. Should an execution sale following a final judgment in an in rem action be successfully collaterally attacked or should a conventional maritime lien branch of the government, it follows that the court had no jurisdiction to pass upon the contention of the plaintiffs to the effect that the Republic of Nicaragua had waived its claim of immunity from suit by employing as its instrumentality this defendant, which, under the general corporation laws of this state, may sue and be sued, and so that question is not before us. *Id.* at 258, 18 A.2d at 692.

12 254 U.S. 522 (1921).


14 *Id.* at 361; *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943); United States v. Lee, 106 U.S. 196, 209 (1882).

15 The argument will surely be heard that the foreign sovereign, having waived immunity, cannot be heard later to complain even where the executive suggests immunity. But this is to place the emphasis on the wrong sovereign. The purpose of the executive suggestion of immunity is not to protect the interests of the foreign sovereign, but to protect the foreign interests of the domestic sovereign. "[The] principle is that courts may not so exercise their jurisdiction, by the seizure and detention of the property of a friendly sovereign, as to embarrass the executive arm of the Government in conducting foreign relations." *Ex parte* Republic of Peru, *supra* note 14, at 588.


18 A litigant has a property right in a final judgment which is of a nature to be protected against an unconstitutional "taking." *Accord*, Hoyt Metal Co. v. Atwood, 289 Fed. 453 (7th Cir. 1923); 16 C.J.S. Constitutional Law §§ 254, 271 (1956). It has been suggested that a determination by the Executive that a sovereign is entitled to immunity is a taking of private property for public use without due compensation. 50 Calif. L. Rev. 559, 564 (1964), citing Seery v. United States, 130 Ct. Cl. 481, 127 F. Supp. 601 (1955), judgment
be nullified by an executive suggestion, it would result in an unconstitutional taking. But the line should not be drawn at this point since there is a wide gap between an unconstitutional taking and a financially burdensome interference in litigation. Allowing an executive suggestion after judgment by a

on the proofs, 142 Ct. Cl. 234, 161 F. Supp. 395 (1958), cert. denied, 359 U.S. 943 (1959). Seery v. United States, supra, although analogous, is not in point. It does contain the following language which supports the stated proposition: “[W]e think there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair Constitutional rights.” 130 Ct. Cl. at 489, 127 F. Supp. at 606. Whether there is a constitutionally protected property right in an existing but not finally determined cause of action appears not to have been authoritatively decided by the federal courts. Harris v. United States, 5 F. Supp. 368-69 (D. Idaho 1933), rev’d on other grounds, 76 F.2d 1010 (9th Cir. 1935); United States v. Standard Oil, 21 F. Supp. 645 (S.D. Cal. 1937). It is said that a common-law right of action is a vested property right but that a statutory right to action is not. 16 C.J.S. Constitutional Law § 254 (1956).


See U.S. Const. amend. V. The first limitation would probably be of minimal value to the private litigant since his possibility of being cut off is greatest at the outset of litigation. M. H. Cardozo, supra note 16. The second limitation appears equally narrow since the requirements of a maritime lien are rather strict and the lien itself is strictly construed. 55 C.J.S. Maritime Liens §§ 7 and 12-23 (1948).

Compare Stephen v. Zivnostenka Banka Nat’l Corp., 155 N.Y.S.2d 340 (Sup. Ct.), aff’d mem., 2 App. Div. 2d 958, 157 N.Y.S.2d 904 (1956), aff’d mem., 3 N.Y.2d 862, 166 N.Y.S.2d 309 (1957), appeal dismissed for want of a substantial federal question, 356 U.S. 22 (1958) (quasi in rem action where Executive indicated that defendant was not entitled to immunity from suit), with Stephen v. Zivnostenka Banka Nat’l Corp., 23 Misc. 2d 855, 199 N.Y.S.2d 797 (Sup. Ct. 1960), motion aff’d on renewal, 213 N.Y.S.2d 396 (Sup. Ct.), aff’d, 15 App. Div. 2d 111, 222 N.Y.S.2d 128 (1961), aff’d, 12 N.Y.2d 781, 186 N.E.2d 676 (1962) (same case where Executive later suggested immunity from execution upon assets seized at the outset). The later suggestion of the State Department left the plaintiff substantially out in the cold. Regardless of the foreign relations that were hanging in the balance, it cannot be said that the action of the State Department was particularly equitable. For the tragic history of this case, see Timberg, supra note 9, at 119-24.
lower court, would permit a sovereign to gamble upon the outcome of the suit—a clearly undesirable practice. The Executive should be compelled to act promptly after the initiation of the suit\textsuperscript{22} and have only one opportunity to suggest immunity.\textsuperscript{23}

It seems surprising that the courts view the executive suggestion as an all-or-nothing proposition. There are many possible extrajudicial methods which would ensure the private litigant at least some recompense when immunity is granted to the foreign sovereign,\textsuperscript{24} but those open to a court are the conditioning of its decree\textsuperscript{25} of immunity upon the payment of litigation costs incurred by the plaintiff by either the foreign\textsuperscript{26} or domestic\textsuperscript{27} sovereign, or the assumption of defense of the suit upon the merits by the United States.\textsuperscript{22}

\textsuperscript{22} Such a proposed limitation was, of course, not considered by the Flota court; the court implied that it would favorably receive a suggestion even after judgment by the lower court.


\textsuperscript{24} Congress could, of course, expressly provide for compensation to the private litigant as if the action by the Executive were an unconstitutional "taking." Cf. note 18 supra. The Executive could refuse to make the suggestion except during episodes of diplomatic crisis, thus granting most private litigants a day in court. The Executive could condition its suggestion of immunity on payment of the litigation costs by the foreign sovereign, or the State Department could itself pay the litigation costs when it grants immunity. The authors of Comment, 63 Yale L.J. 1148 (1954), suggest that (1) for acts committed in the United States, the foreign sovereign should be liable to the same extent that the domestic sovereign is liable; (2) for acts committed outside the United States the foreign sovereign should be liable to the extent that she would be in her domestic courts; and (3) in tort actions against the foreign sovereign involving explosive foreign relations, the United States could be substituted as the defendant. The argument favoring these first two means of protecting the rights of the private litigant without embarrassing the domestic sovereign is that with an established rule the foreign sovereign must know what to expect in dealing with United States citizens. But this argument is true with any fixed rule, such as a consistent application of the Executive's own pronouncement in Letter of Acting Legal Adviser Jack B. Tate, May 19, 1952, in 26 Dep't State Bull. 984. No such strict rule allows for exceptionally critical international situations, however.

\textsuperscript{25} A court may condition its decree to prevent patent injustice. Rice v. D'Arville, 162 Mass. 559, 39 N.E. 180 (1895); Philadelphia Ball Club, Ltd. v. Lajoie, 202 Pa. 210, 51 Atl. 973 (1902).

\textsuperscript{26} Though heeding the executive suggestion by granting the suggested immunity from suit on the merits, the court could impose upon the foreign sovereign litigation costs, different in nature from a judgment on the merits and substantially less in amount, without infringing the primacy of the Executive in such determinations, but rather only
LABOR LAW—HOT CARGO AGREEMENTS—SUBCONTRACTING CLAUSES—A UNION-STANDARDS SUBCONTRACTING CLAUSE DOES NOT CONSTITUTE A HOT-CARGO AGREEMENT WITHIN THE MEANING OF SECTION 8(e) OF THE NATIONAL LABOR RELATIONS ACT, ABSENT EVIDENCE OF AN ILLEGAL UNION-EMPLOYER OBJECTIVE. Meat & Highway Drivers Union v. NLRB, 335 F.2d 709 (D.C. Cir. 1964).

A subcontracting clause in the collective bargaining agreement between the Teamsters Union and several meat packing companies¹ provided:

In the event that the employer does not have sufficient equipment at any given time to deliver his then current sales or consignments . . . ., it may contract with any cartage company whose truckdrivers enjoy the same or greater wages and other benefits . . . .

The National Labor Relations Board held that this was a hot-cargo² clause, illegal under section 8(e)³ of the National Labor Relations Act.⁴ The United

protecting the interests of the litigants before it as a judicial tribunal. This should most clearly be the rule where, and to the extent that, the foreign sovereign’s delay in requesting immunity occasions the litigation costs of the private party.

²⁷ There appears to be no existing method of imposing liability upon the United States for the litigation costs in such a situation unless a “taking” is found to have taken place. But see note 18 supra.

²⁸ Where the international situation is so delicate as to require a grant of immunity, the Executive should be willing to pay the price of immunizing the foreign sovereign by defending the suit on the merits. In a situation less critical, the suggestion of immunity is less warranted, and a fortiori the United States should defend. Such a solution would keep the courts out of the business of judging the state of foreign affairs by requiring the Executive to defend whenever it suggests immunity, but would require more critical evaluation by the State Department of the propriety of its suggestions of immunity in individual cases. Furthermore, the Department of Justice, which has been said to be most zealous in seeing immunity granted to enhance its position before foreign sovereigns when it defends suits against the United States in foreign courts, see Timberg, supra note 9, at 124-25, may less indiscriminately seek executive suggestion when it must defend the suit after immunity is granted.

¹ Armour & Co., Swift & Co. and Wilson & Co. This agreement directly affected only the departments of these companies in the local Chicago area.

² “The term ‘hot cargo’ refers to goods or products coming from or destined for an ‘unfair’ employer; the term ‘unfair’ may refer to a ‘struck employer, to an employer whose goods bear no union label, or to an employer whose wages or other working conditions are deemed substandard by the union.’” BNA, The Labor Reform Law 91 (1959).


It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing
States Court of Appeals for the District of Columbia Circuit reversed and remanded. Held, a union-standards subcontracting clause does not constitute a hot-cargo agreement within the meaning of section 8(e) of the NLRA, absent evidence of an illegal union-employer objective.

business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .


Meat & Highway Drivers Union, 143 N.L.R.B. 1221 (1963) (Wilson & Co.). The Board, in a 4-1 decision, concluded that, since this provision limited the class of persons with whom the employer could do business, economic necessity for the clause had no bearing on the issue, Id. at 1230. Moreover, the Board buttressed this conclusion by finding that illegal union objectives in demanding the clause destroyed any economic justification that might have existed. Id. at 1232. Work allocation and union signatory clauses were also at issue. By votes of 3-2 and 5-0, respectively, the Board found these violative of § 8(e) since they were also directed toward the cessation of business with a certain class of employers. Id. at 1226, 1230.

Meat & Highway Drivers Union v. NLRB, 335 F.2d 709 (D.C. Cir. 1964). The court reversed the Board's decision on the work allocation clause, holding that any jobs that were "fairly claimable" by the bargaining unit could be protected by a no-subcontracting provision. Id. at 713; see Comment, 62 Mich. L. Rev. 1176, 1190 (1964). The union signatory clause was not appealed, since the union acquiesced in the Board's finding that it was illegal. 335 F.2d at 712 n.5.

The instant case, coupled with two previous recent decisions by the same court, Truck Drivers, No. 413 v. NLRB, 334 F.2d 539 (D.C. Cir.), cert. denied, 85 Sup. Ct. 264 (1964), and Orange Belt Dist. Council of Painters v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964), completes a trilogy wherein the validity of a union-standards subcontracting clause under § 8(e) has been firmly established.

In Truck Drivers, No. 413, the court held valid a union-standards subcontracting clause, which read as follows: "Employer agrees to refrain from using the services of any person who does not observe the wages, hours and conditions of employment established by labor unions having jurisdiction over the type of services performed." Yet the significance of this holding was somewhat obscured by the fact that the court also ruled on picket-line and struck-goods clauses.

In Orange Belt, the court, faced with a fringe-benefits clause, indicated that this provision would be valid if it did not require the subcontractor to be a signatory to the union contract. This was only dictum because the court ultimately refused to rule on the issue, finding that the text of the clause was not part of the record. Thus the case was remanded to the Board for supplementation of the record.
Section 8(e), which proscribes agreements between employers and labor organizations causing the cessation of business with another employer, was enacted to prevent union coercion of neutral employers through contractual provisions⁷—to close the so-called hot-cargo “loophole”⁸ existent in section 8(b)(4) of the Labor Management Relations Act.⁹ Yet, a literal application of the statute would seem to bar agreements far beyond this limited purpose.¹⁰ As a result, legislative intent, rather than literalism, has been held to be determinative of the scope of the statute.¹¹ However, since the intent of Congress with

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⁸ It was not unlawful to enter into and voluntarily abide by a contractual provision not to handle the goods of another employer. Local 1976, Carpenter's Union v. NLRB, 357 U.S. 93 (1958). For a detailed consideration of hot-cargo clauses under Taft-Hartley, see Daykin, Legality of the Hot Cargo Clauses, 9 Lab. L.J. 559 (1958); Rothenberg, Cooling the “Hot Cargo” Contract, 8 Lab. L.J. 239 (1957); Scolnik, Hot Cargo Clauses, 9 Lab. L.J. 27 (1958); Comment, 34 N.Y.U.L. Rev. 1299 (1959).


¹⁰ See 105 Cong. Rec. 17884 (1959), 2 Legis. Hist. 1428 (remarks of Senator Morse). The prevalent fear among the commentators was that § 8(e), if read literally, would void any contractual protection of the union's unit work. This would place the determination of the quantity of the work load strictly in the hands of the employer, even though the unit was traditionally entitled to the work. See Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 1086, 1119 (1960); Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 273 (1959); Farmer, Secondary Boycotts—Loopholes Closed or Reopened?, 52 Geo. L.J. 392, 402 (1964); Farmer, The Status and Application of the Secondary-Boycott and Hot-Cargo Provisions, 48 Geo. L.J. 327, 337 (1959); St. Antoine, Secondary Boycotts and Hot Cargo: A Study in Balance of Power, 40 U. Det. L.J. 189, 197 (1962).

¹¹ “Literalism is not the touchstone for construction of section 8(e).” District No. 9, Int'l Ass'n of Machinists v. NLRB, 114 U.S. App. D.C. 287, 290, 315 F.2d 33, 36 (1962); accord, Los Angeles Mailers Union v. NLRB, 114 U.S. App. D.C. 72, 75, 311 F.2d 121, 124 (1962); Milk Drivers Union, 133 N.L.R.B. 1314, 1317 (1961) (Minnesota Milk Co.), enforced, 314 F.2d 761 (8th Cir. 1963). This nonliteral approach is exemplified by the following two situations: (1) The words “enter into” in § 8(e) were applied retroactively even though the statute uses the present tense. E.g., Van Transp. Lines, Inc., 131 N.L.R.B. 242 (1961); Pilgrim Furniture Co., 128 N.L.R.B. 910 (1960). (2) The argument that the absence of the word “refrain” in the second clause of § 8(e) and the absence of the word “services” in the first clause, meant that a clause to “refrain from rendering services” was not within § 8(e), was rejected. NLRB v. Joint Council of Teamsters, 338 F.2d 23 (9th Cir. 1964); cf. NLRB v. Servette, Inc., 377 U.S. 46 (1964). Decisions of the Supreme Court have repeatedly warned against the dangers of an approach to statutory construction which confines itself
respect to subcontracting clauses is peculiarly elusive,\(^\text{12}\) the choice of any particular standard, absent congressional directive, can readily give rise to the kind of disagreement present in the instant case between the Board and the court of appeals.

Although the Board had initially indicated it would follow a case-by-case approach,\(^\text{13}\) it later adopted a stringent "who" and "when" test. Any provision which limited the class of persons with whom the employer could deal was invalid,\(^\text{14}\) while a clause which only restricted when the employer could subcontract was upheld.\(^\text{15}\) Disclaiming the Board's criterion, the instant court considered the crux of the issue to be whether the clause was directed toward the protection of the economic integrity of the bargaining unit.\(^\text{16}\) If this were the tenor of the

to the bare words of a statute. E.g., Utah Junk Co. v. Porter, 328 U.S. 39, 44 (1945) ("literality may strangle meaning"); Markham v. Cabell, 326 U.S. 404, 409 (1944); Church of Holy Trinity v. United States, 143 U.S. 457, 459 (1891).

\(^\text{12}\) It cannot be conclusively determined by examining the legislative history of § 8(e) which types of subcontracting clauses Congress intended to declare illegal. Compare Cox, The Landrum-Griffin Amendments to the National Labor Relations Act, 44 MINN. L. REV. 257, 273 (1959), and Powell, The Impact of Section 8(e) on Subcontracting Clauses in Collective Bargaining Agreements, in SYMPOSIUM ON THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 897-901 (Slovenko ed. 1961) [hereinafter cited as SYMPOSIUM], and Comment, 45 CORNELL L.Q. 724, 748-50 (1960), and Comment, 38 N.Y.U. L. REV. 96, 113-14 (1963), and Comment, 71 YALE L.J. 158, 170 (1961), with 105 CONG. REC. 16590 (1959), 2 LEGIS. HIST. 1708 (Thompson-Kennedy explanation of the Landrum-Griffin bill), and 105 CONG. REC. 17884 (1959), 2 LEGIS. HIST. 1428 (remarks of Senator Morse), and Dannett, The Legality of Subcontracting Provisions Under Section 8(e), SYMPOSIUM 905, and Peet, The Subcontracting Clause in Collective Bargaining Agreements, 38 U. DET. L.J. 389, 403 (1961).

\(^\text{13}\) Milk Drivers Union, 133 N.L.R.B. 1314 (1961) (Minnesota Milk Co.). The Board stated: "With respect to contracts and agreements prohibiting an employer from the contracting or subcontracting out of work regularly performed by his employees we shall examine each such contract or agreement as it comes before us." Id. at 1316-17.


\(^\text{15}\) Ohio Valley Carpenters Dist. Council, 136 N.L.R.B. 977 (1962) (Cardinal Indus., Inc.) (holding a no-subcontracting clause valid). Once the validity of this clause was established, no other cases arose on this issue.

\(^\text{16}\) This test was first advanced in District No. 9, Int'l Ass'n of Machinists v. NLRB, 114 U.S. App. D.C. 287, 290, 315 F.2d 33, 36 (1962). In later cases, this court reiterated its test as the proper method for treatment of a subcontracting clause under § 8(e). See Orange Belt Dist. Council of Painters v. NLRB, 117 U.S. App. D.C. 233, 328 F.2d 534 (1964);
provision, the incidental effects should not render it invalid even though it caused a cessation of business with other employers.17

Application of these two tests to a union-standards subcontracting clause produced conflicting results in the instant case since this type of provision, which restricts subcontracting to employers whose wage standards are equivalent to those of the bargaining unit, possesses both valid and invalid objectives under section 8(e). Inasmuch as it prevents the undermining of the bargaining unit's work by employer subcontracting to acquire cheaper labor, it seems to be a valid protection for the economic integrity of the bargaining unit.18 The clause has an invalid aspect in that it pressures the independent subcontractor to increase his wage standards or unionize in order to do business with this em-

Building & Constr. Trades Council v. NLRB, 117 U.S. App. D.C. 238, 328 F.2d 540 (1964); Bakery Wagon Drivers v. NLRB, 116 U.S. App. D.C. 87, 321 F.2d 353 (1963). Similar tests have been proposed by the commentators. See Aaron, supra note 10, at 1119 (whether it "will directly benefit employees covered thereby"); Cox, supra note 12, at 273 (whether it "seeks to protect the wages and job opportunities of the employees covered by the contract").

17 See Aaron, supra note 10, at 1119, where the author suggests that if the clause will directly benefit the bargaining unit, "its other motives, as well as the incidental effects of such an arrangement on outsiders, should not be made the basis for declaring the agreement illegal." Cf. Douds v. International Longshoremen's Ass'n, 224 F.2d 455, 459 (2d Cir. 1955) (L. Hand, J.), cert. denied, 350 U.S. 873 (1956) where the court stated that "the object of an action is the concluding state of things that the actor seeks to bring about . . . and it does not apply to those that are only intermediate to it."

18 To fit properly within the meaning of "subcontracting" the work contracted out must be work which otherwise would be performed by the bargaining unit. See Truck Drivers, No. 413 v. NLRB, 334 F.2d 539, 548 n.13 (D.C. Cir.), cert. denied, 85 Sup. Ct. 264 (1964). The clause in Meat & Highway Drivers did pertain to work within the scope of the bargaining unit since it was not conditioned on full employment. If for any reason "the employer should have an equipment shortage, under this contract he could subcontract work which his employees could do, even though some of his employees stood idle." 335 F.2d at 716. But see 143 N.L.R.B. at 1238, where Chairman McCulloch, concurring in the Board's result, contends that since the clause might apply to overflow work, it is not directed to the protection of the bargaining unit.

19 See Cox, supra note 12, at 273; Previant, The New Hot-Cargo and Secondary-Boycott Sections: A Critical Analysis, 48 Geo. L.J. 346, 355 (1959); St. Antoine, supra note 10, at 197; cf. Milk Wagon Drivers Union v. Lake Valley Farm Prods., 311 U.S. 91, 99 (1940); Teamsters Union v. Oliver, 358 U.S. 283, 294 (1958) where the Court, in sustaining a union-standards subcontracting clause, stated: "This is thus but an instance . . . in which a union seeks to protect lawful employee interests against what is believed, rightly or wrongly, to be a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." Consideration should also be given to the fact that the union may not possess the degree of bargaining power necessary to secure a no-subcontracting clause. See Comment, 62 Mich. L. Rev. 1176, 1191 (1964).
Consequently, the propriety of the clause would appear to depend on which objective is controlling in each particular case.

While the Board refused to consider economic necessity since the clause came within the "who" category, the instant court correlativelly declined to consider the pressure exerted on other employers, viewing the clause as per se valid since economic justification was present. But the court chose to remand rather than reverse on this point because the Board had found illegal union objectives in demanding the clause. Irrespective of this, however, the court did indicate that such a unilateral purpose, standing alone, could not impugn the per se validity of such a provision. Since section 8(e) is worded in terms of "contract or agreement," an additional finding of employer acquiescence in the illegal objective was required before the clause could be invalidated. Arguable as this precise point may be, it does seem to be an academic requirement since the facts which disclose an illegal union objective are usually apparent to the employer in the collective bargaining session. Thus his signature on the agreement combined with this knowledge appears sufficient to support a finding of acquiescence.

On a purely theoretical plane, the approach of both the Board and the court in the instant case appears undesirable. When confronted with a union-standards subcontracting clause which patently has a dual thrust toward validity and invalidity, the tribunal should not categorize but scrutinize the clause in its

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21 143 N.L.R.B. at 1230.

22 335 F.2d at 715.

23 143 N.L.R.B. at 1232. This finding of fact was based on a statement by Secretary-Treasurer O'Brien of Local 710 that the local had to have language in the agreement that would protect the Union, and the facts that, prior to the insertion of the union-standards clause, the local had bargained for a union signatory clause. Id. at 1231.

24 335 F.2d at 716.

25 Literalism would demand this conclusion, but this same court has disclaimed a literal interpretation of § 8(e). See, e.g., District No. 9, Int'l Ass'n of Machinists v. NLRB, 114 U.S. App. D.C. 287, 315 F.2d 33 (1962); Los Angeles Mailers Union v. NLRB, 114 U.S. App. D.C. 72, 311 F.2d 121 (1962). No commentator has suggested that employer concurrence is a necessary element for a violation of § 8(e). See Aaron, supra note 10, at 1119; Cox, supra note 12, at 273; St. Antoine, supra note 10, at 207; Victor, "Hot Cargo" Clauses, 15 Lab. L.J. 269, 272 (1964).

26 Using the instant case as an example, the facts comprising the illegal union objective, note 23 supra, consisted of a statement made directly to the employer and a prior offering to the employer of a union signatory clause. Hence, knowledge of the union's objective was undoubtedly present.

attendant circumstances. Only in this way can the true objective of an ambiguous clause be ferreted out.

In a more practical vein, the instant case, coupled with *Truck Drivers, No. 413 v. NLRB* and *Orange Belt Dist. Council of Painters v. NLRB*, does foreshadow the advent of such a factual approach by virtue of the court's pronouncement that a union-standards clause is per se valid. Although this seems at first an overshift in the opposite direction, it is needed in order to cajole the Board toward a proper weighing of the facts and circumstances in each case. In this way, all the parties—union, employer and subcontractor—can receive fair treatment under section 8(e).

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28 Some of the circumstances to be considered are the relative bargaining strength of the parties; the possible existence of a dispute between the union and the other subcontractors; the conduct and demands of the union at the collective bargaining table; and the prior dealings between the union and the contracting employer. See Comment, 62 Mich. L. Rev. 1176, 1188 (1964).

29 When a court is faced with an ambiguity, it should look beyond the face of the contract to determine the true intent of the parties. See 17A C.J.S. Contracts § 295(f) (1963); Restatement, Contracts §§ 231, 233 (1932); 4 Williston, Contracts § 613 (Jaeger ed. 1961).


32 Such prodding is appropriate since the Board, even after the strong language of the court in *Orange Belt*, still denied validity to a union-standards subcontracting clause which was less restrictive than the one in the instant case because it gave the employer complete freedom in an emergency situation. Teamsters Union, 145 N.L.R.B. No. 145 (Feb. 4, 1964) (California Ass'n of Employers).
BOOK REVIEWS


It is a brave scholar who will attempt to bridge the enormous gap which has developed between law and political science. Even an irenic approach to this intellectual hiatus would involve an intrepid adventure. If a beginning were to be tried, one might expect it first in those obvious areas of intersection such as administrative law\(^1\) or constitutional law. The lawyers and the political scientists have so long acted as if they have nothing to discuss of common professional interest, that only tiny steps of rapprochement seem possible.

Disdaining these realities, Judith N. Shklar, of the Department of Government at Harvard, has launched a brilliant and forceful attack on some of the fundamental concepts which have created and which perpetuate the isolation of law from other kinds of social theory, especially political science.\(^2\)

In the complicated pattern of her thought, the central strand is an insistence that legalism is only one moral attitude among many competing moralities. It is a morality of rule-following and in the Western World pervades not only public institutions but also most private organizations, social as well as business. To lawyers and judges, legalism tends to serve as a sufficient political theory. While Dr. Shklar proclaims no total disaffection for legalism, she objects vociferously to its monopoly of social and political theory.\(^3\)

\(^1\) The Committee on Administrative Law of the Association of American Law Schools initiated a joint committee with the American Political Science Association. The results have been very limited and a fundamental difference in outlook toward administrative law has been apparent from the outset. This is made explicit in the 1963 report of the participating law professors. See Association of American Law Schools, 1963 Program and Reports of Committees 222-29.

\(^2\) This is a common complaint among political scientists. "Particularly in modern times, so much political activity is focused upon, and revolves around, the making of law that political science without law is a phantom. Many students of law are unwilling to admit the reverse. Why?" Friedrich, Constitutional Government and Politics 10 (1st ed. 1937).

\(^3\) It might be conceded that law men have on occasion carried their rhetoric too far. "Of Law there can be less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage—the very least as feeling her care, and the greatest as not removed from her power." 1 Hooker, Ecclesiastical Polity xvi, quoted in Oxford Dictionary of Quotations 253 (2d ed. 1953). Lincoln was no less extravagant:
To a considerable extent her objection is also cast in terms of what legalism has done to legal theory. By implying a difference between law and nonlaw, legalism has fostered a sterile jurisprudence. The excessive concern over the definition of "law" has been based upon a supposed "thereeness" of a discrete body of discoverable rules.\(^4\) In their own separate ways, both the positivists and the natural-law advocates have fallen prey to this danger.

In a brilliant chapter, this paradoxical similarity of natural law and positivism is convincingly argued. While the natural-law school asserts that law and morals intersect, the positivists insist upon a radical distinction between the two. Yet both schools are primarily interested in definitions. The positivist extreme is seen in Kelsen who carries formalism (expressed in defining what is law) so far as to make law remote from the social phenomena to which it is intended to apply. The natural lawyer also seeks to distinguish between law and nonlaw and to escape subjectivity. He does this by an appeal to objective morality, a higher law. This approach, she claims, necessarily implies an ideology of agreement and runs counter to tolerance in a pluralistic society.

As between the two schools of jurisprudence, she appears to prefer the natural law,\(^5\) because it is frankly ideological (on such matters as the rights of man) and hence more nearly directed toward the actual function of law. Yet the author is too much of a positivist to accept a metaphysical approach to ethics, and is too deeply committed to social diversity to espouse unity in ultimate moral judgments. How the author

Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character [charter?] of his own, and his children’s liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primmers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars.

1 Collected Works of Abraham Lincoln 112 (Basler ed. 1953).

4 "Lawyers do not merely sustain the vulgar notion that law is capable of being made entirely stable and unvarying; they seem bent on creating the impression that, on the whole, it is already established and certain." Frank, Law and the Modern Mind 7 (1930).

6 For the attractiveness of natural-law thinking, see Orton, The Liberal Tradition 77-118 (1945).
would resolve value conflicts is left unanswered. Even recognition of legalism as only one of a number of competing moralities does not solve the problem of value judgments, however much it may contribute to modesty in making those judgments.  

Included in Dr. Shklar's work are numerous practical demonstrations of the unfortunate consequences of legalism. The traditional approach of the American Bar Association to social issues is a ready example. Lawyers as a group, she asserts, have a mode of thought which makes it difficult to approach national and international problems except in terms of adjudication. Politics is viewed by them as a form of warfare, ending in compromise without due regard to rationality.

International law provides an arena for the testing of the author's ideas. The papal encyclical of John XXIII, *Pacem in Terris*, is cited as a reflection of the natural-law theory, whose appeal is certainly not merely sectarian. The American Bar Association's efforts to promote "world law" is of a kindred spirit. The enthusiasm of Kelsen and other realists for a universal set of legal norms demonstrates the adherence to legalism common to both of the two major schools of jurisprudence.

Political trials are also examined as case studies of the inadequacy of legalism as a political theory. The legalistic approach is to look only to the past, to the precedents. This accounts for the extensive efforts made at Nuremberg to separate law from politics, and the widespread residual uneasiness of lawyers about the war trials. Alternative attitudes would free one from the past and would focus either upon the present political value of the trials (such as impact on the new German political structure)

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6 Consider the ultimately unsuccessful search for objective norms in the work of a scholar of jurisprudence who frankly declares that legal theory is one of several competing theories among cultural ideology. NORTHRUP, *THE LOGIC OF THE SCIENCES AND THE HUMANITIES* 276-77, 328-47 (1948).

7 There might be explanations for lawyers' conduct, making legal theory irrelevant. For example, it has been suggested that the economic ties to clients explain lawyers' views, especially their conservatism. LERNER, *AMERICA AS A CIVILIZATION* 426-41 (1957).

8 One might wonder whether obscurantism in doctrine and theory is a temptation foreign to political science. It has been suggested that in politics the need for ideology is sometimes less to clarify than to obscure issues and thus facilitate the uniting of diverse factions. PETERSON, *THE JEFFERSON IMAGE IN THE AMERICAN MIND* 100-01 (1960).

9 Perhaps the embryonic state of international law makes this necessary. At least in establishing social order, law is the primeval need. "To sum up—law—rigid, definite, concise law—is the primary want of early mankind. That which they need above anything else, that which is requisite before they can gain anything else." BAGEHOT, *PHYSICS AND POLITICS* 16 (1956 ed.).
or the historical, long-range effect (such as discouraging aggressive warfare). In any event, it is the author's point that political trials cannot fruitfully be conducted as if they involve the ordinary application of municipal law in a courtroom. Most interesting is her contrast of the Tokyo trial with the Nuremberg trial of major war criminals, in which the former is described as a battle between natural law and positivism.

What does this incisively critical author really support? Clearly she wants us to view law and morals as parts of a continuum not subject to sharp distinctions. In society this continuum is complicated by competing moralities. Some moralities foster law; others are inimical to it. In some situations the morality known as legalism fosters liberal values; in other situations it is inimical to them. The techniques of law are useful for the resolution of some social problems; the same techniques are impossible of application to other problems. If the legalism is of a positivist brand, it unrealistically evades the ultimate moral issues; if the legalism is of the natural-law brand, it attempts to deny the existence of moral pluralism and competing values.

The bench mark from which she proceeds is an unargued preference for peace, democracy and personal freedom. Law can be the handmaiden of these values, but she fears its use to obstruct them. An example which she does not use might be found in the sit-in cases, where activity in support of racial equality contravened state and local trespass laws. If the application of these laws could be found to violate the fourteenth amendment, legalism created no conflict with the morality which demanded a reversal of the trespass convictions. This was achieved by construing trespass prosecutions as state action in support of racial segregation. Other expedients within the mask of legalism have also been used, such as a finding that a state's interpretation of its trespass laws was sufficiently novel to constitute a retroactive condemnation of conduct not known to be criminal when it occurred. Had the Civil Rights Act of 1964 not

10 The author fails to recognize that law (or legalism) in insisting upon fairness of procedure, might be said to have a consistently "liberal" effect. See Freund, ON UNDERSTANDING THE SUPREME COURT 57-66 (1949), which presents the Brandeis tradition of respect for the competence of nonjudicial agencies, subject, however, to deep concern over fair procedure.

11 This fear may be well founded. See, e.g., the kind of nonsense about the "rule of law" and the incompetence of administrative tribunals that has been perpetuated at least since the time of Dicey. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 183-84 (8th ed. 1915). It is still being repeated. See STRONG, A HISTORY OF MODERN POLITICAL CONSTITUTIONS 282-85 (1st Am. ed. 1963).

provided a general solution to the bulk of these problems, it would be interesting to observe the Supreme Court’s struggle with the sharp conflict in values. In any event, these cases pose a difficulty for lawyers and judges because their fidelity to the law precludes a bold substitution of a judgment based on any competing morality, no matter how compelling.

The history of the sit-in cases is evidence that the law in action is different from Dr. Shklar’s insular legalism. Yet the intellectual excitement engendered by reading this slim but serious volume is not appreciably diminished by the inescapable recognition of considerable straw in the men who are knocked down. Any author is entitled to define her own terms, and in the definition of legalism the writer smooths the path for her subsequent attack. Insofar as she implies that she is discussing law and lawyers as they really work and act, at least a mild protest must be entered. Where will one find the lawyer who disdains negotiation and seeks only courtroom adjudication? Is it true that lawyers and judges look always to the precedents and ignore the current conflicts of interests and the implications for the future? Are political realities and economic facts foreign to judicial adjudication?

Legalism as depicted by Dr. Shklar is more readily found in the jurisprudence texts than in the law office and the courtroom. Like a man whose deeds surpass his proclaimed philosophy, our legal system exercises a substantial measure of freedom from the theories used to explain it. Legalism is a mode of thought and speech which lingers (and certainly not entirely without consequences) while life and fact change. An attack on this mode of thought was timely. One will wait long for a more skillful onslaught.

Surely the author is not arguing against the rule of law in democratic societies, but against a narrow construction of that rule and a narrow

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15 See Hamm v. City of Rock Hill, 86 Sup. Ct. 384 (1964). But there are those who plausibly insist that even in using the Civil Rights Act of 1964, the Court displayed no more than a transparent legalism. Note the separate dissenting opinions by Justices Black, Harlan, Stewart and White.
16 It is unhistorical to treat law as perenially divorced from other sources of wisdom. “Law was the most universal and permanent form of Greek moral and legal experience.” 1 Jaeger, PAIDEIA: THE IDEALS OF GREEK CULTURE 109 (2d ed. 1945). See Sabine, HISTORY OF POLITICAL THEORY 63-68 (1937), where law is treated by a political scientist as composed of accumulated wisdom.
17 The relationship between law and morals can be explicated in a manner which properly emphasizes the special contribution which law can make to morality in society. The recent work of Professor Fuller, THE MORALITY OF LAW (1964), while not reaching the resolution of ultimate substantive conflicts, is especially illuminating.
practice of the processes by which it develops and changes to meet real
needs. It is not too much to demand that there be developed a juris-
prudence adequate to provide a theoretical framework for law as it really
functions and for its proper aspirations. In such a jurisprudence there
cannot be a gulf between law and the other social sciences.

THOMAS J. O'TOOLE*

FEDERALISM AND CIVIL RIGHTS. By Burke Marshall. Foreword by Robert

Since World War II the national insistence that racial injustice be
eliminated has been abundantly expressed in presidential order, Supreme
Court decision, congressional law and by the people themselves at the
polls, and yet that mandate has been almost completely frustrated in some
parts of the South. The historical fact that the country failed to solve the
same problem in Civil War and Reconstruction and then forgot it for
three-quarters of a century, does not concern those who clamor loudest
for an increased “federal presence” in areas where civil rights are denied
to the Negro. It is understandably difficult for those who yearn for instant
justice to understand that the delicate state-federal system of law enforce-
ment which now seems to stand in the way of the exercise of undeniable
constitutional rights has until recently served this nation well since its
foundng, and that they themselves should be reluctant to encourage a
tendency which might well lead to a national police force.

In his two remarkably articulate essays, Burke Marshall, recently
resigned Assistant Attorney General, Civil Rights Division, Department
of Justice, gives us the benefit of three and a half years of experience
in facing the problem of federalism and civil rights. The country is
determined, once and for all, to get rid of its caste system and yet our
Constitution leaves the control over normally routine decisions affecting
the daily lives of all citizens to state institutions. Mr. Marshall was
assigned the job of protecting citizens in their civil rights when in many
areas the state institutions not only were unwilling to cooperate but were
in fact militantly organized to deny those clearly designated rights.

For a long time this now intolerable situation had been accepted by
Negroes and whites. In fact it was only in 1954 that the full range of
federal rights became known. As Marshall puts it, since that time it has

* Professor of Law, Georgetown University Law Center.
been “the national decision that the legal right of Negroes to be free from official and systematic discrimination cannot be left to trial by combat between private citizens and the states, but must be made real through federal law enforcement.” These words were solemnly reinforced by the passage of the Civil Rights Act of 1964. Even as early as 1957, the Justice Department was empowered to bring suits in an attempt “to make the right to vote a reality for Negroes everywhere” and to control abuses where “state police power and criminal processes have been used in retaliation against efforts to encourage Negroes to exercise their rights to vote and to protest the caste system.”

The right to vote is basic. The federal system does not work at all where Negroes are denied the franchise. Local officials represent not the people but the people who vote. In Mississippi today the elected officials serve only those who are opposed to Negro rights. Since the fall of 1960 the Department of Justice has worked diligently to eliminate racial barriers to voting, through recognized methods of law enforcement by federal court litigation and injunction. But the latitude for state discrimination is virtually infinite. Marshall lists the methods of discrimination used in Mississippi. As of May 1964 his Department had brought sixteen voter registration suits affecting twenty-two counties in the state. His efforts always to negotiate first proved fruitless because the political viability of white supremacy was at stake. Though there have been a few apparent breakthroughs in Alabama and Louisiana, none came in Mississippi (unless the registration of some 900 Negroes in Panola County since the writing of these essays may be considered as such). In any case, the drearily slow process requires close federal judicial supervision of the conduct of registrars and places a heavy burden on federal judges—which in turn makes the Mississippi situation least hopeful. It is impossible for the Department to guarantee fully that private citizens or local officials will not harass those trying to vote or to prevent the state from changing the rules by amending its laws. Economic dependence of Negroes is beyond the influence of the Department. But Marshall does not think the situation is hopeless; the need is for money, energy, lawyers, and time. His concern is whether the fast-moving civil rights crusade will allow the necessary time. The prospects for the near future are not good.

The United States is committed to the elimination of the double standard in the daily administration of the law, in particular “the unconstitutional exercise of police power” against citizens trying to claim their constitutional rights. But constitutional limits on police power are so vague that a deliberate double standard is often impossible to prove in court. At present the “federal courts strongly resist interfering with state
court criminal proceedings." There have been few cases historically where the federal courts have enjoined a state from prosecuting criminal charges for any reason. One such case arising in Tylertown, Mississippi in 1961 is described in detail. The usual assumption is that personal constitutional rights can be protected by the complex state-federal court systems. This is true legally but not factually in civil rights cases. Many civil rights workers do not understand (or do not care about) the scope of their protection under the first amendment. They are more concerned with bringing on a total crisis. Marshall spells out many difficulties in automatic removal to federal courts of trials claimed to infringe constitutional guarantees. Powers granted to federal courts to prevent state prosecutions from depriving a defendant of rights guaranteed under the fourteenth amendment would have to apply generally, that is to any criminal proceeding where a constitutional question might be raised, as well as to civil rights cases. Remedy should be sought elsewhere.

Mr. Marshall illustrates the problem by telling the story of the 1961 freedom riders in Alabama where state authorities failed to protect federal rights and to maintain order (thus bringing in U.S. Marshals) and in Mississippi where order was maintained but federal law was not. Whenever local officials (as in the case of James Meredith's entry into the University of Mississippi) have tried to resolve the matter at hand by terror and violence, the federal government has had to step in with its own counter-force. In every such conflict, the federal courts have eventually enjoined state authority from illegal action and the local police have sooner or later met their responsibility for maintaining order.

The former Assistant Attorney General wonders how long the federal system will permit resistance to demand for direct federal control over local police action. He feels that the danger of overwhelming abuses of police authority will be overcome by local restraint and experience. He has nothing to say, of course, about the present (January 1965) crisis in which there is the usual doubt as to whether a Mississippi jury will look at the facts in a civil rights case on their merits.

For years Mississippi leaders denied the legality of Supreme Court civil rights decisions in the assumption that the Court represented neither sound interpretation nor the will of the people. With the crushing victories for civil rights in the 1964 law and in the election of Lyndon Johnson, there must come an understanding that the country will not much longer tolerate the continued subversion of federal rights.

JAMES W. SILVER*

* Professor of History, University of Mississippi, currently on leave to teach at the University of Notre Dame.
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