1965

Antitrust - Resale Price Maintenance - Bona Fide Consignment Considered a Sale for the Purpose of Antitrust Laws

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RECENT DEVELOPMENTS

ANTITRUST — RESALE PRICE MAINTENANCE — BONA FIDE CONSIGNMENT CONSIDERED A SALE FOR THE PURPOSE OF ANTITRUST LAWS.

Simpson v. Union Oil (U.S. 1964)

Plaintiff brought a private antitrust action for treble damages under section 4 of the Clayton Act and sections 1 and 2 of the Sherman Act. He had leased a gas station from defendant subject to a compulsory consignment agreement through which defendant established retail gasoline prices. During the time in question, plaintiff sold at two cents per gallon less than defendant’s price in order to meet competition. He alleged that solely because of this deviation from the agreement, defendant refused to renew the lease. The district court granted the defendant’s motion for summary judgment and the court of appeals affirmed. The Supreme Court granted certiorari and held, “... that resale price maintenance through the present, coercive type of 'consignment' agreement is illegal under the antitrust laws. ...” One Justice dissented and two entered a memorandum indicating that the case should be remanded to the district court for a trial on all the issues. Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964).

As a general rule, the Sherman Act is violated only by contracts, combinations, or conspiracies which have terms constituting an unreasonable restraint of trade. Some agreements however, are per se violations of the Sherman Act; included in this group are agreements to fix prices at which goods are to be sold. Most of these price-fixing agreements take one of two forms. They may be horizontal agreements between competitors at the same level in the same market; or they may be vertical agreements between a vendor and vendee operating in different markets or at different levels of the same market. The agreement necessary to constitute an

3. The "rule of reason" was first used in Sherman Act cases in Standard Oil Co. v. United States, 221 U.S. 1, 63–70 (1911); and is still in effect. See, e.g., Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
4. United States v. Trenton Potteries Co., 273 U.S. 392 (1927), was the first case to hold that price-fixing was a per se offense regardless of reasonableness. See generally Comment, The Per Se Illegality of Price-Fixing — Sans Power, Purpose, or Effect, 19 U. Chi. L. Rev. 837 (1952).
5. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), is an example of a vertical price-fixing agreement. It is stated, id. at 218, that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act..."
offense under the Sherman Act may be formal or implied. It may be inferred from a course of dealing, as where the manufacturer and wholesaler use coordinated methods to police the resale agreement, or where the manufacturer obtains, from those first purchasing the goods, a promise not to deal with sub-purchasers who would cut prices.

Since the purpose of the Sherman Act is to preserve the right of freedom to trade, there has been one notable qualification of the rule prohibiting price-fixing agreements. In United States v. Colgate & Co., the Supreme Court held that a manufacturer has the right to engage incidentally in resale price maintenance if, in the exercise of his business discretion, he selects those persons with whom he will deal. He has the further right to announce the circumstances under which he would refuse to deal.

It is academic to state that what is forbidden by the Federal Antitrust Laws, in vertical agreements, is resale price maintenance. The manufacturer has an unfettered right to sell his products for whatever he feels is commensurate with his desired margin of profit. If his price is too high he suffers through a loss of customers; if he sells too low he will be inviting his competitors to engage in a disastrous price war. It is only where he attempts to maintain control of the price of his products, after sale, that his actions fall within the ambit of the Federal Antitrust Laws. Seeing in this fact a salvation for price-fixing agreements, some manufacturers argued that if there never was a sale to the retailer, there could not be a resale price maintenance agreement. Consequently, consignments, agencies and licensing agreements were established. However the Court did not allow the integrity of the Antitrust Statutes to be impugned by circumlocution. In Dr. Miles Medical Co. v. Park & Sons Co., where

11. 250 U.S. 300 (1919).
12. United States v. Colgate & Co., 250 U.S. 300 (1919). Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208 (1921), extended the Colgate doctrine beyond a statement that goods would not be sold to those not observing the price schedule. But see, United States v. Parke, Davis & Co., 362 U.S. 29 (1960), at 40. In Parke, Davis the court found that the manufacturer exceeded the bounds of the Colgate doctrine by informing a number of retailers that if each would adhere to the price policy one each of their principal competitors would do so also. See generally Comment, An Examination of Doric Simplicity: The Criteria of the Decision to Cease Business Relations, 10 Vill. L. Rev. 117 (1964).
13. 220 U.S. 373 (1911).
the defendant had consignment contracts with over four hundred wholesaler s and retail agency contracts with twenty-five thousand dealers throughout the country, the agreements were held void as mere subterfuges.\textsuperscript{14}

However agreements entered into with a bona fide intent to create an agency, were not unlawful since title remained in the principal and there was no sale to the agent. In \textit{United States v. General Electric Co.,}\textsuperscript{15} the rule is presented in this manner:

We are of opinion, therefore, that there is nothing as a matter of principle, or in the authorities, which requires us to hold that genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust [sic] Act. The owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust [sic] law, by seeking to dispose of his articles directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.\textsuperscript{16}

Placing the principal case into the formula of the previous decisions presents a formidable task. While an agreement to set the price at which gasoline was to be sold is present there was no resale agreement since the retailers were consignees. The consignment was not held by the Court to be a mere fabrication to circumvent the Sherman Act;\textsuperscript{17} and the only alternative explanation is that a new rule has been formulated. The Court, while admitting that the decision in the \textit{General Electric} case did not restrict its ruling to patented goods, distinguished it because of the particular fact situation there involved and refused to extend it to non-patented articles.\textsuperscript{18}

The rule announced in \textit{Union Oil} is that a bona fide consignment, regardless of how lawful it may be between the contracting parties, may still contravene the policy of the Federal Antitrust Acts. In such instances the Court will not recognize the agreement as a consignment but will interpret it to be a sale. Consequently, the agreement will be construed as one for retail price maintenance.

Left unanswered in the present case, to the dismay of those who may be subjected to treble damage suits, is the determination of where the line differentiating legal and illegal consignments will be drawn. The Court has reaffirmed the right of the individual to consign his goods to a dealer and to determine the price at which they will be sold. "When, however, a

\textsuperscript{14} For determination of other agency type agreements see, \textit{e.g.}, United States v. Masonite Corp., 316 U.S. 265 (1942) (del credere factors did not prevent the agreement from violating section 1 of the Sherman Act); Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922) (held, agency intended a sale); Boston Store v. American Gramaphone Co., 246 U.S. 8 (1918) (licensing agreement held void).

\textsuperscript{15} 272 U.S. 476 (1926).

\textsuperscript{16} Id. at 488.

\textsuperscript{17} If this had been the case this agreement could have been easily disposed of by the decisions of previous cases. See note 14 \textit{supra}.

\textsuperscript{18} See generally \textit{Klaus, Sale, Agency and Price Maintenance}, 28 \\textit{COLUM. L. REV.} 312, 441 (1928), where the author questions the decision of \textit{General Electric} as being decided because of size and rhetoric.
'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an agency . . . .19 Here are presented both extremes of consignment agreements. Whether the criteria for illegality be number of dealers, volume of goods sold, size of manufacturer or any one of a number of other factors is not elucidated. Until this new doctrine is more thoroughly formulated it will be difficult for the businessman to ascertain precisely which agreements are prohibited.

Another problem created by this decision is the effect it will have on those who, in good faith, entered into consignment agreements in reliance on the rule set down in the General Electric case. Justice Stewart, in his dissent, defended the General Electric decision and argued that because of the manner in which this case was brought before the court, i.e., the inadequacy of the record, and because of its far reaching effects, it should have been remanded for a plenary trial of all issues. The majority recognized that agreements might have been entered into in reliance on the General Electric doctrine and stated that the new rule would be applied in such cases prospectively.20 It is submitted that until the limits of this rule are more fully defined, prospective application should be given not only as to agreements entered into before this decision but also to agreements which were, in good faith, made with an attempt to satisfy the requirements of lawfulness of this vague rule.

Here then, the Court has recognized an agreement as being in violation of the policy of the Federal Antitrust Statutes and has without hesitation designated it illegal. It has taken away the protection previously afforded by the General Electric case and has considered not the intent of the parties to the agreement but the effect of the consignment on interstate commerce.21 No longer is the concept that one may fix the price for his product a defense against prosecution for maintaining resale price maintenance agreements.

J. Edmund Mullin

20. Lyons v. Westinghouse Electric Corp., as reported in Antitrust & Trade Regulation Report, Nov. 3, 1964, held that while the agency agreement was illegal under Union Oil the rule there will not be retroactively applied. "To hold Westinghouse liable now for damages for making and carrying out a contract which was perfectly legal at the time it was made and carried out, would be manifestly unjust." The case was decided under the General Electric rule.
CONSTITUTIONAL LAW — SOLICITATION OF LEGAL BUSINESS — LABOR UNION'S PLAN FOR RECOMMENDING SPECIFIC LAWYERS TO ITS MEMBERS FOR PERSONAL INJURY LITIGATION CONSTITUTIONALLY PROTECTED.


Plaintiffs sued to enjoin the Brotherhood of Railroad Trainmen from maintaining a Department of Legal Counsel to recommend to Brotherhood members certain lawyers whom the Brotherhood had selected to handle personal injury suits against the Railroad.¹ The State Bar charged that such activity constituted solicitation of legal business and the unauthorized practice of law in violation of the common law, Virginia state statute,² and the Canons of Ethics of the American Bar Association. The Chancery Court's granting of a restraining injunction was affirmed by the Supreme Court of Appeals of Virginia. Petitioners were granted certiorari by the United States Supreme Court which _held_ that the injunction did violate the first and fourteenth amendments by unreasonably restraining freedom of speech, petition and assembly. _Bhd. of R.R. Trainmen v. Virginia State Bar_, 377 U.S. 1 (1964).

Legislative control over the practice of law developed in the United States because of the need to maintain high professional standards in safeguarding the legal rights of the people and in administering justice. This task, then and now, can be carried out only by individuals dedicated to the ideals of the profession, free from the influence of outsiders not similarly dedicated.³

In colonial days the lawyer held a place of leadership in his community and was regarded with dignity and honor. However, in the third quarter of the nineteenth century a hostility grew up against the profession as being undemocratic and un-American because of its exclusive nature. The reaction to this hostility was the lowering of the standards and qualifications for admission into the profession. This, coupled with the discontinuance of the Bar as an organization led the profession to its lowest point.⁴

Before the turn of the century, leaders of the bar

realizing the deplorable condition into which their profession was falling, as well as the imperative necessity of taking a firm stand

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¹ Under the plan the country was divided into 16 regions. The Brotherhood in each region selected a lawyer or firm which it believed capable of representing plaintiffs in railroad personal injury litigation. "When a worker was injured or killed, the secretary of his local lodge would go to him or to his widow or children and recommend that the claim not be settled without first seeing a lawyer, and that in the Brotherhood's judgment the best lawyer to consult was the counsel selected by it for that area." _Bhd. of R.R. Trainmen v. Virginia State Bar_, 377 U.S. 1, 4 (1964).

² Va. Code tit. 54, ch. 4, art. 1, § 42, art. 7, § 83.1 (1950). While the Brotherhood was charged with unauthorized practice of law and solicitation of legal business, the main charge considered in the case and in this note is the solicitation of legal business.

³ Chreste v. Commonwealth, 171 Ky. 77, 186 S.W. 919 (1916).

⁴ For a detailed history of this development see _Drinker, Legal Ethics_, pp. 1-32 (1953).
against the rising tide of commercialism and the growing influence of those who would turn the profession from a 'branch of the administration of justice' into a 'mere money getting trade,' began the movement for the reestablishment at the bar of standards of character, education, and training, and also for the organization of bar associations all over the country.\(^5\)

In maintaining the standards necessary for an effective legal profession, the canons of ethics have been most important. The first code of legal ethics was adopted by the Alabama State Bar Association in 1887. They were adopted by the American Bar Association in 1908, and most state bar associations subsequently followed suit.\(^6\) Generally the Canons have been adopted by the Supreme Court of the various states pursuant to state statutes and thus have the effect of law.\(^7\)

The right of the state to legislate in this area is a function of its police power; as stated by Justice Candon in *Rhode Island Bar Ass'n v. Automobile Service Assn,* "in the exercise of the police power it undoubtedly can legislate in this matter."\(^8\) Since "the practice of law is affected with a public interest, it is, therefore, the right and duty of the state to regulate and control it so that the public welfare will be served and promoted."\(^9\) However, as in all exercises of state police power, there cannot be any unreasonable restraint of rights constitutionally protected by the first and fourteenth amendments. This was the issue on which the instant case was decided. The Court reiterated the well-established principle that while the first amendment freedoms are not absolute, there must be a strong public interest in order to restrain them.\(^10\)

Other decisions dealing with state legislation made pursuant to A.B.A. regulations can be classified into three categories. The first is that the individual attorney's actions and practices can be controlled by legislation passed to enforce regulations and standards set up by the state bar associations even when there is a violation of individual rights. In *Martin v. Walton*\(^11\) the Court upheld a state statute prohibiting a resident attorney, who was a member in good standing of the state bar, from practicing before the courts of the state unless he associated with "local" counsel because he was a member of the bar of another state in which he also practiced. The Supreme Court decided that this type of restriction was

\(^5\) Id. at 20.
\(^6\) Id. at 23.
\(^7\) "... the Virginia Canons of Professional Ethics were adopted by the Virginia Supreme Court of Appeals pursuant to VA. CODE ANN., § 54-48 (1958 Replacement), and thus have the force and effect of law." Comment, 72 YALE L.J. 1613, 1618 n.25 (1963).
\(^8\) 55 R.I. 122, 128, 179 Atl. 139, 141 (1935).
\(^9\) Id. at 131, 179 Atl. at 143.
not beyond the allowable range of state action under the Fourteenth Amendment.”

The second category holds that organizations established to provide legal assistance for the benefit of a particular group can be restricted by state statutes. Typical of this type are the automobile club decisions. These organizations, as part of their programs, provide their drivers with legal services through licensed attorneys. The attorneys are provided by the club to defend the club members in personal injury suits, in magistrate and police courts for minor traffic offenses, and to prosecute civil claims for them.

The third variant concludes that the freedom of political expression of a lay group cannot be restricted by state legislation in order to carry out the purposes of the bar associations. This was the opinion of the Supreme Court in *NAACP v. Button*. There the NAACP was using litigation as a form of political expression to achieve political and civil equality. The Court decided that the use of the judicial process for political expression is a constitutionally protected right that cannot be restricted because a state statute defines it as solicitation.

The instant case presents a situation that is unlike the other three. Here, a lay group, not an individual member of the legal profession, organized for the constitutionally protected purpose of representing and protecting labor as a group, not to provide legal services, is using a form of solicitation of legal business for particular attorneys in order to provide its members with representation in the prosecution of their civil claims against their employer, not to use litigation as a form of political expression. As Mr. Justice Clark points out in his dissent: “[P]ersonal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims.” The Brotherhood is using solicitation to further organizational goals and not as an exercise of a constitutional right in and of itself. However, the majority opinion holds that the Brotherhood’s activity is an exercise of freedom of expression and is therefore constitutionally protected as was the activity of the NAACP in *Button*, and cannot be restricted without a showing of compelling need. According to the Court, the first amendment freedoms include the right of members of a union to talk together freely as to the best course to follow in asserting their rights against their employer and the right to choose a representative

12. *Id.* at 25-26.
13. *Chicago Bar Ass’n v. Chicago Motor Club*, 362 Ill. 50, 199 N.E. 1 (1935);
    *Chicago Bar Ass’n v. Motorists’ Ass’n of Illinois*, 354 Ill. 595, 188 N.E. 827 (1933);
    *Rhode Island Bar Ass’n v. Automobile Service Ass’n*, 55 R.I. 122, 179 Atl. 139 (1935).
who can be expected to give the wisest advice in this area. This, according to the Court, is the role filled by the members who carry out the legal counsel program. The Court concluded that therefore “the right of the workers personally or through a special department of their Brotherhood to advice concerning the need for legal assistance — and, most importantly, what lawyer a member could confidently rely on — is an inseparable part of this constitutionally guaranteed right to assist and advise each other.” Recognizing this right, the Court saw no strong public interest to be served by restraining it. It did not consider this type of activity the type of solicitation that would lead to “a commercialization of the legal profession which might threaten the moral and ethical fabric of the administration of justice.” The Court did not think that the Brotherhood plan presented the evils that the anti-solicitation laws were designed to eliminate.

Canon 35 of the A.B.A. Canons of Ethics provides:

The professional services of a lawyer should not be controlled or exploited by any lay agency, personal or corporate, which intervenes between client and lawyer. A lawyer’s responsibilities and qualifications are individual. He should avoid all relations which direct the performance of his duties by or in the interest of such intermediary.

In pursuance of this regulation, anti-solicitation laws have been passed to forbid solicitation by an attorney himself or by a lay group acting for the attorney. The laws are designed to eradicate “the evil results that solicitation tends to cause.” Foremost of these results are: first, the promotion of unnecessary and possibly fraudulent litigation or “stirring up litigation” as it is commonly called; second, the commercialization of the profession by causing monetary interests to be put above client’s interests, competitive tactics, and fee splitting; and third, the deterioration of the traditional attorney-client relationship by the imposition between the two of an intermediary to whom the attorney owes something of value which may be money or something else. While traditionally solicitation has included payment of money by the attorney to the agent if any obligation is owed by the attorney to the agent, there is the further danger of interference with the strict obligation to the client’s interests. Any plan that presents these possible results is a threat to the legal profession and to the administration of justice. Plans similar to the Brotherhood’s program in the instant case have been declared unethical and dangerous to the legal profession.

20. Ibid.
22. All but ten states have anti-solicitation laws making solicitation by a layman or a lay group a crime. Warren, Solicitation of Legal Services — A Crime, 22 Ohio St. L.J. 691 (1961).
profession and have been discontinued by other courts.\textsuperscript{26} In all of these
decisions the courts did not look at the blueprint of the respective plans, but made a "realistic appraisal"\textsuperscript{27} of its operation and discovered, in the factual realities, those evils which solicitation has always tended to cause. In the instant case the Supreme Court did not consider the plan of the Brotherhood as it actually operates. In deciding that no strong public interest warranted the restraint of the Brotherhood's activity the Court looked only at the plan theoretically and did not make a "realistic appraisal". The dissenting opinion written by Mr. Justice Clark, in which Mr. Justice Harlan joined, maintains that the plan does in fact constitute a threat to the legal profession. While theoretically the Brotherhood selects the attorneys who serve as regional counsel, in fact, the president of the union has the power of approval and discharge at his pleasure. Upon the attorney who relies on obtaining his practice in this manner there may therefore be imposed a tacit duty to conduct the litigation to please the president of the union. In the event that the interests of the Brotherhood and the client diverge, this reality "creates a risk that the attorney might digress from the undivided pursuit of his client's interests."\textsuperscript{28}

While theoretically the members of the Department of Legal Counsel advise the injured worker or his survivors on the availability of a certain lawyer, in fact, the worker is urged by his union representative to hire the one and the only attorney that the union wants him to hire. It is naive to disregard the probable pressure that is exerted upon the worker to hire the Brotherhood's approved attorney so that practically "... the choice of attorney usually lies with the organization and not with the member whose interests the attorney will represent."\textsuperscript{29}

While theoretically the Brotherhood provides at its own expense a staff to investigate accidents and makes this evidence available to the regional counsel, in fact the union is reimbursed for this by the attorney from his fee. While theoretically the plan works to advise the workers when an accident occurs, in fact the Brotherhood does not limit this advice to the time when there is actual need of an attorney. It advertises the regional attorney in union literature and at union meetings giving the regional counsel publicity that other attorneys could not use to draw clients. The realistic results of the Brotherhood's plan are the channeling of all the personal injury suits of union members into the hands of the regional counsel who is given free advertising by the Brotherhood, the creation of obligations to the union instead of solely to the client, the limitation of the worker's freedom to choose his own attorney because of

\textsuperscript{26} E.g., The Atchison, Topeka and Sante Fe Ry. Co. v. Jackson, 235 F.2d 390 (10th Cir. 1956); \textit{In re O'Neill}, 5 F. Supp. 465 (E.D. N.Y. 1933); Hildebrand v. State Bar of California, 36 Cal. 2d 504, 225 P.2d 508 (1950); Doughty v. Grills, 37 Tenn. App. 63, 260 S.W.2d 379 (1952).

\textsuperscript{27} Hildebrand v. State Bar of California, 36 Cal. 2d 504, 225 P.2d 508, 511 (1950).

\textsuperscript{28} Note, 11 Stan. L. Rev. 394, 396 (1959).

\textsuperscript{29} Note, 72 Harv. L. Rev. 1334, 1343 (1959).
union pressure, and the possibility of stirring up litigation needlessly in situations where baseless claims would not otherwise be brought.

In deciding whether or not the Brotherhood's freedoms under the first and fourteenth amendments should be restrained, the Supreme Court had to weigh the importance of these rights with the danger created by allowing the Brotherhood to continue its plan of solicitation contrary to state law. The Court should have given more attention to the actual effects of the program to see if they presented that "appreciable public interest in preventing the Brotherhood from carrying out its plan"\textsuperscript{30} that the Court could not find in the theoretical set-up of the plan. The plan does contain the potential for the evils that the Canons of Ethics, the courts, and the legislatures have for years consistently condemned as destructive of the profession.

The Court has in this decision established as a constitutional right a method of solicitation that could greatly impair the legal profession. In balancing this right against the results of its exercise, a situation is presented which calls for the restriction of the rights of a few in order to secure the rights of the many in an independent legal profession.

\textit{Dolores B. Sesso}

\textbf{CRIMINAL PROCEDURE — NEW YORK PROCEDURE FOR DETERMINING VOLUNTARINESS OF CONFESSION UNCONSTITUTIONAL UNDER DUE PROCESS CLAUSE OF FOURTEENTH AMENDMENT.}

\textit{Jackson v. Denno} (U.S. 1964)

Petitioner filed for habeas corpus in federal district court asserting that his conviction for murder in New York was invalid because it was founded upon a confession not properly determined to be voluntary. Petitioner had allegedly held up a hotel and fatally wounded a policeman in a gunfight during his escape. Shot twice himself, he had been taken to a hospital where he made a statement as to his guilt.\textsuperscript{1} At the hospital, after receiving pain killing drugs,\textsuperscript{2} he was questioned by an assist-

\begin{itemize}
\item \textsuperscript{30} Bhd. of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1, 8 (1964).
\item \textsuperscript{1} Jackson, when asked for his name said, "Nathan Jackson, I shot the colored cop, I got the drop on him." He also admitted the robbery at the hotel. 378 U.S. 368, 371 (1964).
\item \textsuperscript{2} DORLAND, AMERICAN ILLUSTRATED MEDICAL DICTIONARY (19th ed. 1943), 400, 1287. The drugs used were:
\begin{enumerate}
\item Demerol — a proprietary synthetic preparation, suggested as a substitute for morphine.
\item Scopolamine — a poisonous nerve depressant, used in mania, delirium, insomnia, alcoholic tremor and marked sexual excitement.
\end{enumerate}
\end{itemize}
nant district attorney, the interrogation being recorded by a stenographer. Consistent with New York practice, the trial court had submitted the issue of the confession’s voluntariness to the jury, instructing it to ignore the confession if it felt that it were involuntary; and then to determine guilt from the other evidence in the case. Alternatively, if the confession were found to be voluntary, the jury was told to determine its truth and reliability and to weigh it accordingly. On appeal from a denial of the writ, the Supreme Court of the United States held that the New York procedure did not afford a reliable determination of the voluntariness of the confession and violated the defendant’s constitutional rights under the Due Process Clause of the fourteenth amendment. It then remanded the writ to the district court to allow New York a reasonable time to afford petitioner a hearing or a new trial. *Jackson v. Denno*, 378 U.S. 368 (1964).

In 1936, for the first time, the Supreme Court invoked the Fourteenth Amendment as a protection against the reception of involuntary confessions in state criminal trials. Even before then, however, the Court had attacked procedures under which juries heard evidence as to the voluntariness of confessions. In *Wan v. United States*, it held that where there were undisputed facts showing that compulsion was present, there was no issue for the jury to properly pass on. The Court subsequently went further, declaring, “The United States concedes . . . that the better practice, when admissibility of a confession is in issue, is for the judge to hear a defendant’s offered testimony in the absence of the jury as to the surrounding facts . . .”

Directly on point with *Jackson* is *Stein v. New York*. *Stein* represents the threshold of the Court’s consideration of the effects of various trial procedures utilized to determine voluntariness. The petitioner in *Stein* claimed that the presence of the convicting jury while evidence was being given on the issue of coercion and the leaving of the resolution of that question as well as the one of guilt to the same jury created a “constitutional infirmity which required this Court to set aside the verdict”. The procedure upheld by the Court in *Stein* was the same as that which the Court declared unconstitutional in *Jackson*. This procedure treated the voluntariness question as an ultimate issue requiring the trial judge to have a preliminary hearing as to admissibility, but not allowing him alone to

4. Mr. Justices Clark, Harlan, and Stewart dissented. Mr. Justice Black dissented in part.
5. Brown v. Mississippi, 297 U.S. 278, 285 (1936). This was a case where there was compulsion by torture to extort a confession. The Court said, “But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirements of due process of law. Because a state may dispense with a jury trial, it does not follow that it may substitute trial by ordeal . . . the State may not permit an accused to be hurried to conviction under mob determination — where the whole proceedings is but a mask — without supplying corrective process.” (Emphasis added.)
6. 266 U.S. 1, 16 (1924).
9. Id. at 159–60.
make a final determination. The only condition under which a trial judge could implement a final determination was when he determined that there could be no finding other than involuntariness.\(^{10}\) As a result of this procedure, the Court in \textit{Stein} found itself in the untenable position of declaring that even if the jury found the confession to be involuntary and hence inadmissible,\(^{11}\) the conviction should be affirmed if there was other evidence to support it.\(^{12}\)

The rationale supporting the Supreme Court ruling that the admission in evidence, over objection, of a confession bound to be involuntary, vitiates a judgment of conviction, is that the use of a coerced confession in a state criminal trial is not allowed by the fourteenth amendment of the Constitution.\(^{13}\) Therefore, since there would be a constitutional violation regardless of the sufficiency of the "other" evidence, the use of the New York procedure would result in reversal by the Supreme Court unless the Court found the confession to be voluntary. Even before \textit{Jackson}, it should have been evident that the best — if not the proper — procedure was for the judge to screen all confessions in the absence of the convicting jury.

In \textit{Jackson} the Court stated that jurisdictions following either the orthodox rule or the Massachusetts rule did not violate an accused's constitutional rights.\(^{14}\) The New York procedure was found inadequate because it did not allow the defendant an opportunity to object to the use of involuntary confessions.

\(^{10}\) People v. Weiner, 248 N.Y. 118, 122, 161 N.E. 441, 442 (1928); People v. Leyra, 302 N.Y. 353, 364, 98 N.E.2d 553, 558-59 (1951). See also, People v. Doran, 246 N.Y. 409, 418, 159 N.E. 379, 382 (1927). "The jury . . . and not the court were the ones to determine the question. . . . For the judge himself to have determined the question of fact and to have excluded the confession altogether would have been going very far indeed toward usurping the functions of a jury bordering almost on arbitrary action." This view would obviously motivate a reluctance on the part of most trial judges to omit a confession because of the possibility of involuntariness.

\(^{11}\) Spano v. New York, 360 U.S. 315, 320-21 (1959). "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals, themselves."

\(^{12}\) Ritz, \textit{Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court}, 19 WASH. & LEE L. REV. 35 (1962). See also, Stein v. New York, 346 U.S. 156, 193 (1953). This aspect of the Stein case was abandoned in later cases in favor of the rule of automatic reversal of convictions, whenever an involuntary confession, as determined by the Supreme Court, has been admitted into evidence. See Payne v. Arkansas, 356 U.S. 560 (1958).

\(^{13}\) See, for example, Wilson v. United States, 162 U.S. 613, 622 (1896); Brown v. Mississippi, 297 U.S. 278, 287 (1936); Spano v. New York, 360 U.S. 315, 324 (1959). The Court has extended the rule to cases where the decision might have been supported by the evidence apart from the confession. See Brown v. Allen, 344 U.S. 443, 475 (1953).

\(^{14}\) Meltzer, \textit{Involuntary Confession: The Allocation of Responsibility Between Judge and Jury}, 21 U. CHI. L. REV. 317, 329 (1954); Morgan, \textit{Some Problems of Proof Under the Anglo-American System of Litigation} 164-5 (1956). Under the "orthodox rule" the judge himself determines the admissibility of a confession and leaves to the jury only the weight or credibility to be given to the confession. Under the "Massachusetts rule" the judge first fully and independently resolves the issue and only if the evidence is found to be admissible does the jury consider the voluntariness of the confession. The judge's views are easily recognizable since he admits the confession if he considers it voluntary and rejects it if he feels it is involuntary.
of a confession and then to have a fair and reliable determination on the
issue of voluntariness, uninfluenced by the truth or falsity of the confession.\textsuperscript{15}

The Court offered three major objections to any procedure that left
the question of voluntariness to the jury. Since the jury returns only a
general verdict, it is never known whether it found the confession voluntary
and relied on it or found it involuntary and ignored it. Secondly, the jury
might not agree with or might confuse the idea that a coerced, but true,
confession is not to be relied on. Thirdly, a jury cannot objectively decide
the question of voluntariness where it is, at the same time, receiving other
evidence of the defendant’s guilt. The Court did not attempt to impose a
uniform procedure for criminal trials concerning confessions on the states.
“Whether the trial judge, another judge, or another jury, but not the con-
victing jury, fully resolves the issue of voluntariness is not a matter of
concern here. To this extent we agree . . . that the states are free to allocate functions between judge and jury as they see fit.”\textsuperscript{16}

In his dissent, Justice Black argued that the evidence from the court
below exposed those conditions under which the confession was made to be
“inherently coercive,” thus making it unconstitutional to admit the con-
fession. He would, therefore, have disposed of the case by remanding it
to the district court with directions to grant the petitioner’s application for
habeas corpus.\textsuperscript{17} The other dissenting Justices stressed that the remedies
available were quite sufficient. They stated that a preliminary finding of
fact by the court or an ultimate one by a jury could have both come to the
federal courts regardless of their conclusions, and that therefore the mere
granting of a writ of habeas corpus would have served the defendant
adequately in the instant case.

The sharpest division of opinion concerned one of the major premises
upon which the majority rested its opinion — the lack of integrity or com-
petency of the jury in deciding a question of voluntariness.\textsuperscript{18} Justice
Harlan’s dissent found the majority opinion to be an intrusion on the
sanctity of the jury trial. “The Court’s distrust of the jury system in this
area of criminal law stands in curious contrast to the many pages in its
reports in which the right to trial by jury has been extolled in every con-
text, and affords a queer basis indeed for a new departure in federal regu-
lation of state criminal proceedings.”\textsuperscript{19}

Granted that the majority’s opinion is the more practical, and can be
justified on such grounds, still it is difficult to understand why it did not
outlaw all state procedures except for the orthodox rule. While the con-
trolling question is different under the Massachusetts and New York

\begin{itemize}
\item \textsuperscript{15} Jackson v. Denno, 378 U.S. 368, 377 (1964).
\item \textsuperscript{16} Id. at 391, n.19.
\item \textsuperscript{17} Id. at 409, 410.
\item \textsuperscript{18} Mr. Justice Jackson in Krulewitch v. U.S., 336 U.S. 440, 453, said, “The naive
assumption that prejudicial effects can be overcome by instructions to the jury . . . all
practicing lawyers know to be an unmitigated fiction.”
\item \textsuperscript{19} Jackson v. Denno, 378 U.S. 368, 430 (1964).
\end{itemize}
rules, the fact still remains that the prospect of an ultimate jury determination reduces the judge's sense of responsibility in his initial determination. In close cases the trial judge will probably resolve his doubts by admitting the evidence and thus avoid the responsibility of an irrevocable decision. Viewed practically, the Massachusetts rule very closely resembles the New York rule, leading to the conclusion that realistically only the orthodox rule sustains the court's reasoning.

Harlan's dissent in particular dealt with the unreality of the majority's acceptance of the Massachusetts rule. He argued that the failure of the trial judge to accept the responsibility of refusing to omit a confession, which is inherent when the jury can make a final determination, is a greater hindrance to the defendant than the probabilities existent under the New York rule. For the admission of a confession under the Massachusetts rule would indicate to the jury that the judge had accepted the voluntariness of the confession without revocation and therefore possibly influence them to the detriment of the defendant.

Justice Clark, concurring partly with Justice Black's dissent and fully with Justice Harlan's dissent, based his own opinion on the grounds that the issue was not properly before the Court. He argued that the procedure was never objected to by defendant's counsel in the trial court or in the appeal court. He took issue with the majority's opinion that "the deliberate by-passing of state procedures is the only ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in state courts". The dissenters indicate a number of questions which the majority left unanswered, for example: Should pretrial application to determine voluntariness be mandatory or discretionary? If the judge rules that the confession is involuntary, should the state have a right to appeal immediately? Where is the burden of proof and does the test require a preponderance of the evidence or certainty beyond a reasonable doubt?

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20. Massachusetts Rule — admissibility results only if the judge resolves that question in favor of the prosecution. New York Rule — admissibility results if the trial judge finds the evidence presents a substantial question as to voluntariness.


22. See 9 Wigmore, Evidence, § 2550 (3d ed. 1940). Where he urged that — The commitment of our system to the jury trial presupposes the acceptance of the assumption that the jury follows its instructions, that it will make a separate determination of the voluntariness issue, and it will disregard what it is supposed to disregard. But that commitment presupposes that the judge will apply the exclusionary rules before permitting evidence to be submitted to the jury.


24. Id. at 423.

25. Id. at 370, n.1, the Court's opinion was derived from Fay v. Noia, 372 U.S. 391 (1963). For an excellent résumé of Fay, see, Note, 9 Vill. L. Rev. 168 (1963).

26. For the Pennsylvania response to Jackson v. Denno, see Draft Rule 323 on Confession Procedure; Minutes of the 20th Meeting of the Criminal Procedure Rules Committee.

27. Under the New York Rule the burden was on the state to prove voluntariness beyond a reasonable doubt.
The keystone of *Jackson* is the realization that the effectiveness of the defendant's protection against involuntary confessions includes the type of procedure that is exercised. The majority appreciated that the judge-jury allocation as well as the rules regulating preliminary hearings are extremely important factors in the protection of the defendant's rights. They were further concerned with the extent to which the defendant, while testifying on the voluntariness issue, exposed himself to cross-examination and impeachment.28

The differences between the majority and minority are really ones of degree. There is universal agreement in the Court that the questions of guilt and the voluntariness of a confession should be kept separate, but disagreement as to how far this concept should encroach on the sacrosanct position of the jury trial in our system. There is universal agreement that the verdict in a criminal case should be based on justice and fair play, but disagreement as to whether the procedure to be used should concern itself more with the rights of the defendant or the safety of the citizenry.

*Jackson v. Denno*, along with other recent decisions,29 indicates the willingness of the Court to focus on the rights of the defendant based on the belief that harm from excessive police power is just as dangerous, if not more so, than the criminal himself. The problem is one that has vexed the judiciary of every democratic society in the history of law. Our Court, in trying to find the median, seems to have alerted itself to the rights of the accused. Decisions following in this trend of the Court's philosophy should be expected. More specifically, the questions that *Jackson* leaves unanswered should be viewed with this cognizance of the Court's stress on the accused's rights. The authorities that will author the procedural changes imperative after this decision would do well to consider such future decisions instead of limiting themselves to the broad, tangible qualifications of the instant ruling.

*Jeffrey Averett Brodkin*

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**DOMESTIC RELATIONS — ALIMONY A CHARGE AGAINST DIVORCED HUSBAND'S ESTATE.**

*Scott v. Gratigny* (Fla. 1964)

Plaintiff sued her former husband's estate for alimony payments accruing subsequent to his death. The basis of her claim was that the divorce decree had incorporated an agreement of the parties providing for monthly payments of permanent alimony during the remainder of the wife's life or

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until her remarriage. Pursuant to motions for summary judgment, the trial court awarded the former wife a sum of $100 per month from the decedent’s estate for so long as she should live or until she remarried. Affirming the decision, the Florida Court of Appeals held that a recognition in a divorce decree of an agreement between the parties providing for periodic payments of alimony to the divorced wife during the remainder of her life or until her remarriage was sufficient to warrant its enforcement against the decedent’s estate. *Scott v. Gratigny*, 166 So.2d 816 (Fla. App. 1964).

At common law, except by a special act of parliament, the only divorce available was one *a mensa et thoro.* This was a form of judicial separation granted by the ecclesiastical courts which did not dissolve the marital relation. To provide maintenance for the wife during this period of separation, the courts awarded her allowances of money, called alimony, which served as a substitute for the husband’s marital duty of support. These payments were necessitated by the husband’s retention of the absolute ownership of the wife’s chattels, the right to collect her choses in action and earnings, and the sole use of her lands during coverture. When the husband died, the alimony payments terminated. The wife was adequately provided for, however, since her rights were then the same as if there had been no divorce.

With the statutory introduction of both absolute divorce and the concomitant power to grant alimony, more of a problem was presented in awarding alimony payments. The husband’s duty to support his wife concluded upon the absolute divorce and most of the wife’s other marital rights were also severed. There was little likelihood that she would be provided for by her former husband. If the courts held that the obligation to make alimony payments ceased upon the husband’s death, the possibility existed that the wife would be left destitute.

Nevertheless, it soon became the general rule that in absolute divorces, the husband’s obligation to make regular periodical payments of alimony terminated upon his death. The rationale for the rule is that alimony payments are merely a substitute for the husband’s duty to support his wife and that since this duty terminates upon the husband’s death, the alimony

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1. *A mensa et thoro,* literally translated, “From bed and board.” The historical background contained in the first two paragraphs is largely taken from *Madden, Domestic Relations,* §§ 81–82, 97–98 (1931).

2. She lost her right to dower in her husband’s land along with the right to share in his personal estate in most cases. *Madden, op. cit. supra* note 1, §§ 97–98. Some statutes, however, preserve or provide a substitute for these marital rights of the divorced wife. See, *e.g.*, *Ark. Stat. Ann.* tit. 34, § 34–1214 (1962).

3. By the absolute divorce the wife’s land and earnings were restored, however; and her rights in her property were greater than at any time at common law. *Madden, op. cit. supra* note 1, §§ 97–98.

payments should likewise cease. In this context alimony is viewed as merely a personal obligation. Some courts, however, have taken a broader view. They classify alimony not simply as a substitute for the husband’s duty to support his wife during his life, but also as a source of sustenance for the wife after his death in the event that he predecease her. In these states the payment of alimony is not solely a personal obligation, but by statute it can be satisfied out of the estate of the husband.

Even where alimony is viewed as a personal obligation, the courts have not applied the judicial rule where the parties by agreement have decided that the estate will be charged with the alimony payments. The problem in these cases, however, is construing the agreement and determining whether the parties actually meant to extend the payments beyond the husband’s death. Where the agreement specifically states that it is to be binding upon the heirs, executors, administrators or assigns, it is clear that the estate will be bound. Anything less than such an explicit statement, however, is subject to question and the decided cases are in conflict as to the result to be obtained in these situations.

The agreement and the decree which incorporates it very frequently provide that alimony is to continue until the wife’s death or remarriage, until the wife remarries or other like expressions. Some courts have given these expressions their literal meaning and taken the position that they evince an intent to bind the estate. Others have held that such expressions do not indicate an intention to bind the estate and will hold it liable only if a further examination of the decree, agreement or circumstances clearly indicates that it should be bound. A further erosion of the rule has occurred even where there has been no agreement between the parties, but rather a mere recitation in the decree that payments are to continue until the

6. See Wides v. Wides, 300 Ky. 344, 188 S.W.2d 471 (1945).
7. Wides v. Wides, 300 Ky. 344, 188 S.W.2d 471 (1945); In re Braffett, 308 Mich. 506, 14 N.W.2d 129 (1944); Pingree v. Pingree, 170 Mich. 36, 135 N.W. 923 (1912).
8. The California statute requires that the parties put in writing any agreement in order to charge the husband’s estate. CAL. CIVIL CODE, § 139.
10. Babcock v. Babcock, 147 Misc. 900, 265 N.Y. Supp. 470 (Sup. Ct. 1933). The court in Farrington v. Boston Safe Deposit & Trust Co., 280 Mass. 121, 181 N.E. 779 (1932), held that such an expression in the decree, e.g., “during the term of her life,” did indicate an intention to bind the estate. This decision is somewhat weakened by the fact that the parties had made an agreement explicitly providing that payments were not to cease upon the husband’s death, which agreement was ostensibly declared inapplicable by the court.
11. The following are some of the cases which found the estate not liable: Parsons v. Parsons’ Estate, 70 Colo. 333, 201 Pac. 559 (1921); Masters v. Masters, 155 Neb. 569, 52 N.W.2d 802 (1952) (until further order of the court); Billow v. Billow, 97 Ohio App. 277, 125 N.E.2d 558 (1953); De Reimer v. Old Nat’l Bank, 374 P.2d 973 (Wash. 1962). In Storey v. Storey, 125 Ill. 608, 18 N.E. 329 (1898), the court, after examining the circumstances of the parties and the security provisions, held the estate bound. Although there was no evidence of any agreement except the decree itself, the court in Garber v. Robitshek, 226 Minn. 398, 33 N.W.2d 30 (1948), stated that a complete examination of the judgment indicated that the payments were not to cease upon the husband’s death.
wife's remarriage or death. Such an expression has been held to impress
the husband's estate with his former liability.\(^{12}\)

While the Florida courts nominally follow the general rule that alim-
ony payments cease upon the husband's death,\(^ {13}\) they have also adopted
the view that if the parties by agreement specifically state that the alimony
payments are to continue as a charge against the husband's estate, then
their agreement will be effected.\(^ {14}\) The Florida Supreme Court in *Johnson
v. Every*\(^ {15}\) went even further and stated that if either an express agreement
or the decree itself, independent of any agreement, provided for payments
until the wife's death or remarriage then the estate would be bound. The
court, however, receded from this position in denying a petition for re-
hearing,\(^ {16}\) and the recent case of *Aldrich v. Aldrich*\(^ {17}\) removed all doubt as
to their true position by holding that the pronouncement in *Johnson*, that
a recitation in the decree itself, without an independent agreement, would
bind the estate was merely dicta. The decision in the instant case evidences
an approval of this dicta and at most a token compliance with the
requirement of an express independent agreement.

In the present case there was no evidence of any express agreement
between the parties providing for alimony to extend beyond the husband's
death. There was, however, a clause in the final divorce decree stating
that the parties had reached an agreement which provided for permanent
alimony and which was to be set forth in the decree. There was also a
later provision stating that the monthly allowances were to continue during
the remainder of the wife's life or until her remarriage. The dissent insisted
that the language employed by the court in the decree could have been
merely the formal terminology used by the court in granting its award
rather than a statement of the existence of an express independent agree-
ment between the parties. The majority obviously disagreed. One could
conclude therefore that in Florida an estate will be bound, unless the par-
ties specifically agree to the contrary, so long as there is an agreement for
payments of permanent alimony and so long as the decree in recognition of
this agreement happens to declare that the payments will continue until
the wife's death or remarriage. Whether the Florida courts will once
again revert to the dicta in *Johnson* would appear to be a closed question.
The decision of the Florida Supreme Court in *Aldrich* prima facie seems
to preclude such a view; nevertheless the court of appeals in the instant
case indicates an approval of such a position.

\(^ {12}\) Stoutland v. Stoutland, 103 N.W.2d 286 (N.D. 1960). The court stated that
the statute conferred such power upon the court and that the judge was merely exer-
cising this power when he provided for payments to continue until the wife's remar-
riage or death.

\(^ {13}\) Allen v. Allen, 111 Fla. 733, 150 So. 237 (1933).

\(^ {14}\) Allen v. Allen, 111 Fla. 733, 150 So. 237 (1933).

\(^ {15}\) 93 So. 2d 390 (Fla. 1957).

\(^ {16}\) Id. at 397:

We here merely held that there was a contractual and decreral provision suffi-
ciently definite and specific to impress the estate with the obligation assumed by
the divorced husband until the death or remarriage of his former spouse.

\(^ {17}\) 163 So. 2d 276 (Fla. 1964).
The general rule that alimony payments terminate upon the husband's death is an inflexible rule which conflicts with public policy. The wife's need for support does not automatically terminate upon the husband's death. If conditions warrant an extension of payments, the husband's estate should be bound. It is better to place the onus upon the estate of one who led to the dissolution of the marriage than upon taxpayers or some other innocent party.

The decision in the instant case and in other cases refusing to recognize the general rule imply a dissatisfaction with the rule, but the solutions arrived at by the courts are not completely satisfactory. A mere recitation in the decree or the agreement that payments are to continue until the death or remarriage of the wife might entitle the wife to further payments; the absence of such language will most likely preclude an equally deserving woman. Moreover, a wife whose need for maintenance has expired might receive payments to the detriment of her former husband's present wife or children because of the peculiar language of a decree. A more equitable solution is both necessary and available.

Many state statutes, including that of Florida, confer broad power on the court when granting an absolute divorce to award such alimony as it deems just and proper. This discretionary power is usually also available to modify the decree whenever the circumstances of the parties have materially changed. The court, therefore, in accordance with this discretionary power to modify, could determine the liability of the husband's estate at the time of his death irrespective of the language employed by the chancellor in framing the original decree. If after individualizing the case and carefully evaluating the past and present circumstances of the parties, the court concludes that circumstances have not changed sufficiently to warrant the release of the estate from the liability, the alimony payments should be continued. Reaching a more equitable solution, the court would also avoid the undesirable situation in the instant case where the uncertain language of the decree was the decisive factor in continuing the payments.

As yet most courts have not adopted such an approach. They have instead tended to construe their statutes narrowly and in some cases disclaimed any statutory power to proceed in such a manner. This hesitancy

18. See note 10 supra.
20. This would be true if the jurisdiction held that a consent decree binding the husband's estate could not be changed. North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936).
In every decree of divorce in a suit by the wife, the court shall make such orders touching the maintenance, alimony and suit money of the wife, or any allowance to be made to her, and if any, the security to be given for the same, as from the circumstances of the parties and nature of the case may be fit, equitable and just. . . .
23. Michigan has accepted such a view based on its statute allowing an award of alimony out of the estate of the husband. Pingree v. Pingree, 170 Mich. 36, 135 N.W. 923 (1912).
24. See note 5 supra.
can be attributed to a large extent to their definition of alimony. Under the suggested solution it can no longer be viewed only in the ecclesiastical sense, as support for the wife during her husband's life, but must also be considered as sustenance for the wife corresponding possibly with her entire life span. Once this broader view is accepted, a judicial rule, rooted in history but inapposite in our present social setting, can be abrogated. Whether the impetus for such a change is to come from the courts by a liberal construction of their statutes or by the legislature, the change should be effected.

Joseph C. Kelly

FEDERAL INCOME TAXATION — SUMMER RESORT NOT OPERATED FOR SOCIAL WELFARE DOES NOT QUALIFY FOR EXEMPTION UNDER "DESTINATION OF INCOME" TEST.

People's Educational Camp Society, Inc. v. Commissioner
(2d Cir. 1964)

Petitioner corporation was organized in 1920 under the New York Membership Corporation Law to take title to certain property in Pennsylvania, in order to develop and run a summer camp (Tamiment) and recreation area in accord with the principles and programs of the American Socialist Society and the Rand School of Social Science. In 1936 and again in 1939, petitioner obtained rulings that it was exempt from the federal income tax as an organization operating for the promotion of social welfare under section 101(8) of the Revenue Act of 1934.1 By 1956 the two founding corporations had ceased to exist, whereas the petitioner had become one of the largest resort areas in Pennsylvania. Petitioner runs the free library of the defunct Rand School and under the title of "Tamiment Institute," sponsors and promotes certain activities relating to the general promotion of social welfare. The Commissioner, in 1956, on the basis of the substantial rates charged and the fact that most of its revenues were used to expand the resort and that only a small portion of the revenues were used for social welfare purposes, revoked the earlier rulings and ruled that the taxpayer no longer met the exemption requirements.2 The Tax Court

1. Section 101(8) of the Revenue Act of 1934 is the same as § 501(c)(4) of the INT. REV. CODE of 1954.
2. An organization whose primary purpose is the operation of a summer resort, a business ordinarily carried on for profit, does not meet the requirements of section 501(c)(4) of the Code as an organization not organized for profit but operated exclusively for the promotion of social welfare within the intendment of that section of the law. Furthermore, the fact that the organization distributes a portion of its profits to charitable and other organizations does not establish that it is operated for purposes beneficial to the community as a whole.

adhered to the Commissioner's determination and held that the operation of the resort was petitioner's primary activity and that said operation did not constitute the "promotion of social welfare."3 The Second Circuit, in a two-to-one decision, affirmed the Tax Court's finding in favor of the Commissioner and further held that the "destination of income" test should not apply to permit an entity devoting so much of its revenue to commercial purposes to qualify for exempt status. People's Educational Camp Society, Inc. v. Commissioner, 331 F.2d 923 (2d Cir. 1964).4

The treatment of exempt organizations is covered primarily by Subchapter F, sections 501 through 526 of the Internal Revenue Code of 1954. The provisions of this subchapter were taken over almost in toto from the provisions of the 1950 Revenue Act. Until their enactment, the tax laws were designed to encourage charitable contributions and charitable organizations.5 However, after the 1950 Act the trend has been to regulate this area more strictly. The cause for this increased regulation were abuses and excesses pointed out by a Congressional investigation.6 Congress became convinced as a result of hearings and the report that charitable organizations were being utilized improperly. Income was escaping taxation to the advantage of some and the disadvantage of many others. Exempt organizations were being used widely for private advantage and to the detriment of non-exempt competitors.

The purpose, therefore, of the revised provisions of the 1950 Revenue Act was to remove or alleviate these excesses or abuses. These remedies involved a more complete and detailed list of criteria for exemption and organizations conforming to them.7 Feeder organizations were denied exemption,8 organizations accumulating unreasonable amounts of income lost their exemptions,9 and the most important measure was the introduction of a tax on unrelated business income.10

The imposition of the unrelated business tax11 was considered as settling one of the biggest problems since the advent of income tax — the degree that organizations qualified for exemption under section 501 could engage in commercial activities to finance their operations.12 Prior to the

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7. Section 501(c) has 16 divisions listing exempt organizations. See also § 501(d).
10. Sections 511 through 514 of INT. REV. CODE OF 1954.
11. The abuse this tax was aimed at was that of unfair competition and sought to alleviate this problem by taxing the designated exempt organization commercial activities which were unrelated to their exempt purpose at the regular corporate tax rate.
enactment of the 1950 Revenue Act the Service had taken one position,\textsuperscript{13} and many of the courts a contrary one,\textsuperscript{14} as to the propriety of commercial activities by exempt organizations. By the enactment of the unrelated business tax, Congress sought to end this conflict; however, Congress did not intend to abolish the exemption of those organizations affected but rather to treat the particular activity that was unrelated to the charitable purpose as a separate entity.\textsuperscript{15} However, under the unrelated income tax only certain organizations are taxed as to this unrelated activity.\textsuperscript{16} The exclusion of certain exempt organizations has been criticized by many commentators in the area and may leave the Service with no choice but to revoke the exempt status of an organization whose unrelated commercial activities cannot be taxed.\textsuperscript{17} Secretary Snyder, in presenting the Treasury suggestions prior to the adoption of the 1950 Revenue Act, recommended the tax on activities of exempt organizations, "... which are clearly unrelated to their primary functions be taxed at regular corporation income tax rates."\textsuperscript{18} He made no recommendations as to preferential treatment of certain organizations, and as one observer remarked: "... if Congress is seeking to put an end to the competitive advantages derived by a charitable corporation over its non-charitable rival, then whatever the proposal, it must have a general application."\textsuperscript{19} (Emphasis added.)

The unrelated business tax is said to have resolved what has been called a "doctrinaire dispute"\textsuperscript{20} - that being the "destination of income" test's applicability to sustaining business activities of exempt organizations so long as the revenue has as its destination charitable purposes. This so-called rule was first announced in \textit{Trinidad v. Sagrada Orden de Predicadores},\textsuperscript{21} where the Supreme Court in a questionable decision,\textsuperscript{22} upheld the exemption of a corporation which derived a portion of its income from commercial activities.\textsuperscript{23}

\textsuperscript{13} The Service position had been that an otherwise exempt organization would lose its exemption if it engaged in business. This was first reflected in Reg. 45 Art. 517(2), developed under the Revenue Act of 1918.
\textsuperscript{14} Bohemian Gymnastic Ass'n Sokol v. Higgins, 147 F.2d 774 (2d Cir. 1945); Commissioner v. Orton Ceramic Foundation, 173 F.2d 483 (6th Cir. 1949); Debs Memorial Radio Fund, Inc. v. Commissioner, 148 F.2d 948 (2d Cir. 1945); Willingham v. Home Oil Mill, 181 F.2d 9 (5th Cir.), cert. denied, 340 U.S. 852 (1950).
\textsuperscript{16} Ibid. Those organizations taxed are those covered by 501(c)(2), (3), (5), (6), and (7).
\textsuperscript{19} Latcham, \textit{supra} note 17, at 646.
\textsuperscript{21} 263 U.S. 578 (1924).
\textsuperscript{22} See, Brown \textit{supra} note 17, at 624, 626. Also, Note 48 \textit{Minn. L. Rev.} 1149, 1161 (May 1964).
a business activity. Adopting the Supreme Court's reasoning, the Second Circuit, in *Roche's Beach, Inc. v. Commissioner*, gave vitality to the "destination of income" test.

Petitioner, in the instant case, sought to retain its exempt status under § 501(c)(4) on alternative grounds: that it was operated exclusively for the promotion of social welfare, or that the operation of the resort was no more than an income producing activity utilized to support its social welfare operations, and therefore is entitled to be exempt under the "destination" test.

The term "exclusively" as found in the Code has been given a liberal construction, so as not to preclude exemption where there are some non-exempt purposes. It has instead been viewed as meaning "primarily." The Circuit Court affirmed the Tax Court's determination that the extensive commercial operations of Tamiment "foreclosed a determination that it is an organization operated exclusively for the promotion of social welfare." The court based its decision on the effect of the operations on the public, and deemed that petitioner's operations had primarily become the running of a commercial enterprise, rather than an activity whose purposes were beneficial to the community as a whole.

As to the alternative argument concerning the applicability of the "destination of income" test (the more important in terms of the circuit's prior decisions), the court refused to extend the rule. They observed that "to use the destination test to exempt this petitioner from the income tax would be an unnecessarily broad application of the test and one which would be out of keeping with the spirit and purpose of the social welfare exemption."

The dissent argues that the majority is breaking with a long line of authority in their circuit which is unwarranted. In support of its argument, the dissent cites various decisions which adopted the destination test, starting with *Trinidad* and *Roche's Beach*. All but two of these cases cited were litigated and decided prior to the enactment of the 1950 Revenue Act. One of the remaining two cases relied on by the dissent involved the question as to whether the Foundation qualified as an organization to which deductible contributions could be made. This would determine whether

23. Part of the so-called commercial activity was the selling of its goods to its own employees which might not be deemed as a really commercial activity. See, Brown, *supra* note 17.
24. 96 F.2d 776 (2d Cir. 1938).
25. In this case there was a cogent dissent by Judge Hand which has gained approval of subsequent courts. See, Brown, *supra* note 17. *See also*, Universal Co. v. Campbell, 181 F.2d 451, 461 (1950).
26. The relevant portion of 501(c)(4) reads:
Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . .
27. Debs Memorial Radio Fund, Inc. v. Commissioner, 148 F.2d 948, 952 (2d Cir. 1945).
29. Id. at 932-33.
30. Boman v. Commissioner, 240 F.2d 767 (8th Cir. 1957).
petitioner could have charitable deductions for gifts he made to the Foundation for tax years 1946-1949, prior to the Revenue Act enactment.

The remaining case cited by the dissent is Lichter Foundation, Inc. v. Welch, where the court did follow the "destination of income" rule, but again the years in question were before the effective date of the Revenue Act. The Court in Lichter observed that "it appears that the rule [destination of income] still has the judicial approval of the Second [Circuit] . . . with respect to taxable years prior to Jan. 1, 1951 [effective date of 1950 Revenue Act]." (Emphasis added.) The cases relied on by the dissent are therefore conspicuous in that they were all decided prior to the Act or its effective date. It will be recalled that one of the purposes of the Revenue Act was to settle this problem. The House Report, discussing the area covered by the unrelated business tax amendment observed: "the amendment is intended to show clearly what, from its effective date, the rule is to be, without disturbing the determination in present litigation of the rule of existing law." (Emphasis added.)

It is emphasized that the section 501(c)(4) organization (petitioner is such an organization) is not one covered by the unrelated business tax section. As indicated, there was much controversy as to why certain organizations were given privileged treatment in view of the purpose of this section to eliminate unfair competitive advantages. Rather than bolstering the dissent's position, this is detrimental to it since the only remaining way to deal with an organization not subject to the unrelated business tax is to revoke its exemption. A recent commentator espoused this view in the following terms:

It is submitted that it was not the intent of Congress to adopt a strict destination test for all organizations except those subject to the unrelated business income tax. Rather, the purpose would seem to have been to impose a tax upon the business income of certain enumerated organizations, leaving to all other exempt organizations . . . the prospect of forfeiting their exemptions entirely if they engage in substantial unrelated business pursuits.

The present decision is therefore, in one sense, one that has been a long time coming; and in another respect, one indicative of a needed change in the existing regulations. The case has properly put to rest the extension of a doctrine which many have considered as being improperly applied to the area of business income. Also emphasized in the principal case is the possible need for change or at least clarification as to the effect of the unrelated business tax. We are again in the wake of a Congressional investi-

31. 247 F.2d 431 (6th Cir. 1957).
32. Id. at 437.
33. See text relating to footnotes 6 to 10.
35. Ibid.
The allocation of exempt organizations — the Patman Reports, which may well foretell changes in the taxation of such organizations.

As the situation stands, the only possible method by which to remove the competitive advantage of an organization (such as the one in the principal case) that is not subject to the unrelated business tax is to strike down its exemption. Either Congressional action or a clear Internal Revenue Service ruling in this area would seem desirable.

Kenneth L. Gross

MUNICIPAL CORPORATIONS — Money Payment Exacted by City in Lieu of Compulsory Dedication of Land for Parks and Playgrounds Held Valid.

City of Colorado Springs v. Kitty Hawk Dev. Co. (Colo. 1964)

Plaintiff development corporation (hereinafter Kitty Hawk) entered into a contract to purchase real estate from one Menzer for $442,215.00. The contract called for Kitty Hawk to use "due diligence" to have the plan for the land approved and arrangements for the installation of utilities completed with the defendant City of Colorado Springs (hereinafter City). Kitty Hawk was then informed by the City that water and sewer services would be forthcoming only if Kitty Hawk agreed to have its land annexed to the City. The directors of Kitty Hawk considered abandoning the entire project since one of the conditions precedent to annexation, as required by a City ordinance, was that Kitty

37. As of the moment there are three parts to the Patman Report. The first being the, PATMAN REPORT — TAX EXEMPT FOUNDATIONS AND CHARITABLE TRUSTS, THEIR IMPACT ON OUR ECONOMY. CHAIRMAN'S REPORT TO THE SELECT COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, 87th Cong., Dec. 31st, 1962. The Second Installment — SUBCOMMITTEE CHAIRMAN'S REPORT TO SUBCOMMITTEE No. 1, SELECT COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, 88th Cong., Oct. 16th, 1963. The third and most recent installment has the same title as the second installment but is dated Mar. 20, 1964. For an analysis of the initial report see, Powell, supra note 5.


Allocation of Land for Public Spaces. The owner of the land in each subdivision shall allocate and convey eight per cent of the area of the land in his subdivision, exclusive of streets and alleys, for parks, playgrounds, schools, recreational or similar public purposes, at such location as designated by the City or at the option of the City, said owner, shall in lieu of such conveyance of land in kind, pay to the City in cash an amount equal to eight per cent of the value of the land. If the City and the owner fail to agree on the value of said land, such value shall be fixed and established by the Real Estate Appraisal Committee of the Colorado Springs Board of Realtors. The proceeds of said payments shall be deposited in a separate City account and shall be used only for the acquisition of land for parks, playgrounds, schools, recreational or similar public purposes. The provisions of this ordinance shall be applicable to each area, territory, subdivision or addition which is being, or is hereafter annexed to the City of Colorado Springs to the end that there shall be allocated or paid to the City of Colorado Springs the eight per cent in land or value thereof in dollars as herein provided.
Hawk dedicate eight percent of its land to the City for use as parks, playgrounds, and for other public purposes, or at the option of the City, for Kitty Hawk to pay a sum equal to eight percent of the value of the land. After serious consideration of this matter Kitty Hawk paid the sum of $25,378.08 to the City, after which the water and sewer lines were installed. Five years later Kitty Hawk brought this action for money "had and received," alleging that the ordinance under which the money was paid was unconstitutional. The trial court gave judgment for Kitty Hawk, but the supreme court, with one judge dissenting, reversed, holding that since the City was under no duty to furnish the water and sewer services it did so in a proprietary capacity and thus could impose such conditions by way of agreement concerning annexation as it saw fit. City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (Colo. 1964).

The majority based its reasoning on a contract theory. Since the City had no obligation to furnish the water and sewer services, it could impose whatever conditions it thought necessary for the furnishing of the services. The conditions imposed were annexation and the payment under the ordinance in question. Kitty Hawk was free to remain outside the City if it chose not to be annexed under these conditions, and the fact that it agreed to be annexed demonstrated that there was a meeting of the minds. The consideration running to Kitty Hawk was the water and sewer services. In return the City received the annexation itself and the payment under the ordinance. Thus, each party got what it bargained for and neither can be heard to object now.

The dissent, on the other hand, completely rejects the contract theory employed by the majority. Rather, it reasons, that since the ordinance in question is unconstitutional as applied to land within the city limits, it is likewise unconstitutional as applied to land outside the city limits, notwithstanding the fact that the City sought to impose the compulsory dedication requirement as a condition to annexation. And it follows from this that recovery of the money can be had under the doctrine of business compulsion. Since the ordinance was unconstitutional and since Kitty Hawk had to obtain the water and sewer services or face possible suit on the real estate contract, the payment was made involuntarily. Thus Kitty Hawk never "agreed" to this condition, as contended by the majority,

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To the extent that public uses or areas have been provided in said area or territory annexed to the City, such uses or areas may receive credit at the option of the City to the extent applicable upon the eight per cent allocation of land or equivalent value in dollars thereof.

2. Kitty Hawk asserted that the agreement between it and the City was ultra vires but the court held that Kitty Hawk was estopped to assert this fact because it had received and retained the benefits under the contract. City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467, 473 (Colo. 1964).

3. 392 P.2d 467, 473.

4. The distinction must be made between an ordinance which is unconstitutional on its face and one which is unconstitutional as applied to a particular individual. It is clear from the statement of the facts in the majority opinion that the trial court regarded the ordinance as unconstitutional on its face since it was directly opposed to the due process clause of the Colorado Constitution. Id. at 468.
but rather was forced by the economic necessities of the situation to pay a sum which the City never had any right to demand. To understand fully the meaning of this decision it is necessary to discuss the case in the light of these issues raised by the dissent.

Any discussion of the problem of compulsory dedication of lands must begin with the leading case in the area, Ayres v. City Council. In that case a city ordinance required the dedication of 10 feet of land to widen a highway on the border of a subdivision and the dedication of 80 rather than 60 feet for the extention of a street coming into the subdivision. The court decided that this was a reasonable exercise of the police power on the part of the city and upheld the validity of the ordinance. The rationale for this and similar decisions is that "... the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public."

But while compulsory dedications of land for streets have been upheld, attempts to require land for parks from subdividers have not been so successful. Courts which favor the validity of ordinances requiring dedication for parks and playgrounds stress the local benefits that are derived from such dedications. However, the Pennsylvania Supreme Court has rejected this approach, distinguishing between the necessity of streets in a subdivision and the desirability of parks and playground areas.

Another objection to the compulsory dedication ordinances is that in their enactment the local planning commission may have exceeded the power given it by the state enabling legislation. In Ridgemont Development Co. v. City of East Detroit, wherein the developer was required to convey one lot in each of his two subdivisions to the City for playground purposes, the court ordered a reconveyance of the lots on the ground that there was no statutory authority by which the city could force the conveyance of the lots.

In general, enabling legislation can be divided into three categories where authorization for dedication of land for parks and playgrounds is concerned. Some states expressly authorize such dedications; others expressly prohibit it; and others neither expressly authorize or prohibit it.
The Colorado enabling legislation falls within the third category. The planning commissions are authorized to make provisions for parks and playgrounds but there is no express language giving the commission the power to require the subdivider to dedicate land for this purpose. Thus, in the instant case it is entirely possible that the ordinance could be viewed as a valid exercise of the police power since the enabling legislation could be regarded as permissive as it relates to the dedication of land for parks and playgrounds.

A more specific objection to the ordinance in the instant case is that it provides for a money payment, at the option of the city, in lieu of compulsory dedication. Under the ordinance the money so collected would be used for the acquisition of land for parks, playgrounds and other recreational areas. It must be noted that the specific language would allow the money to be used for these purposes anywhere within the City. The argument in favor of the legality of money payments is that they are a substitute for the work which a developer could have been required to do himself. This reasoning assumes that the funds so collected will be used to benefit the subdivision directly. Indeed, it has been held that if the funds collected are not used to benefit the subdivision directly, the payment is invalid as a tax. Another objection to the legality of money payments, similar to the objection to the requirement of compulsory dedication, is that the enabling legislation does not give the planning commission the power to require these payments. Finally, it is important to note that even where state statutes have expressly authorized compulsory dedication, courts have been reluctant to uphold the legality of money payments.

It is clear, then, that the money payment in the instant case was one that could not be demanded by the City from a developer of land within the City limits. However, the majority argues that since Kitty Hawk was seeking annexation, the City could impose whatever conditions it saw fit in return for the necessary water and sewer services sought by Kitty Hawk. It is doubtful that this is true. The mere fact that the developer is outside the city limits should not operate to deny him a constitutionally protected right which could not be denied him if his land was situated within the City limits.

There is another line of authority which would suggest that the exacting of a money payment in the instant case is unconstitutional because it

16. Supra note 1.
constitutes an unauthorized assumption of power by a municipal corporation. In Reid Dev. Corp. v. Parsippany-Troy Hills Township,\textsuperscript{22} the township sought to enforce minor changes in the subdivision plan by withholding water and sewer services from the plaintiff development corporation. In an action to compel the township to extend its water mains, the New Jersey Supreme Court gave judgment for the plaintiff corporation. The theory underlying the decision is that as a local agency of the state government the township must act fairly, reasonably and without oppression, even when the function is merely proprietary. Thus, in the instant case the City, even though acting in its proprietary capacity, had no right to make an unreasonable demand, in the form of the money payment, as a condition precedent to the extension of the water and sewer services.

However, the conclusion that the ordinance requiring the money payment was unconstitutional does not solve Kitty Hawk's problem. The argument against recovery is that Kitty Hawk made the payment voluntarily, and notwithstanding the invalidity of the ordinance, cannot now recover the money paid to the City. Thus, the question of business compulsion is material here.

The concept of business compulsion has evolved from the ancient doctrine of duress. Originally, there had to be a wrongful threat of physical harm to the person claiming that a transaction was a product of duress, and in order to recover, the person so coerced must have had no adequate remedy at law.\textsuperscript{23} Later the doctrine was expanded to include "any other acts that compel a person to manifest apparent assent to a transaction without his volition or cause such fear as to preclude him from exercising free will and judgment in entering into a transaction."\textsuperscript{24}

Two recent cases are in point. In King Constr. Co. v. W. M. Smith Elec. Co.,\textsuperscript{25} plaintiff-vendor offered defendant-buyer an overhead crane for $16,691.00 and buyer orally accepted the offer. Relying on this contract buyer submitted a bid on a construction contract to the Atomic Energy Commission and the bid was accepted. Vendor then notified buyer that it would not deliver the crane as agreed but wanted $30,750.00 for the same
crane. Buyer sought to obtain this type of crane elsewhere but could not. He then entered into a written contract with the vendor, promising to pay $30,750.00 for the crane. Buyer paid eighty-five percent of the purchase price and refused to pay more. In vendor's suit for the balance of the purchase price buyer counterclaimed for recovery of the amount paid in excess of $16,691.00. The court held that the buyer should recover the amount in excess of $16,691.00 because vendor's demand for $30,750.00 was wrongful, buyer's payment was involuntary, and the buyer had no adequate remedy at law since litigation on the original contract would be time-consuming and buyer would be liable for delay on the construction contract. Thus, buyer's payment was a result of business compulsion or duress, and the fear of economic loss was a sufficient ground for holding that the payment was involuntary.

In *Ridgemont Development Co. v. City of East Detroit*,26 discussed previously, the court found that the city had no authority to compel dedication of the land and said, "In complying with such demand plaintiffs acted under compulsion and are entitled to a reconveyance of the lots in question."27 Implicit in the decision were the findings that the City's demand was unlawful, the conveyances were involuntary and the developer had no adequate remedy at law.

It is clear that in the principal case all the elements of the doctrine of business compulsion were present. The ordinance in question was unconstitutional at least insofar as it exacted a money payment from Kitty Hawk. The payment was made involuntarily as found by the trial court. Furthermore, Kitty Hawk had no adequate remedy at law since it was vulnerable to a suit for specific performance on the real estate contract and litigation on the question of Kitty Hawk's right to water and sewer services would have caused a substantial delay in Kitty Hawk's efforts to develop the subdivision.

In conclusion, it is submitted that the exaction of a money payment was wrongful on the part of the City and since all the elements of the doctrine of business compulsion were present, Kitty Hawk should have been allowed to recover the $25,378.08. It follows from this that the court's solution to the problem of preserving park and playground areas in new subdivisions is not the most felicitous. The problem should be solved on solid statutory ground rather than on a doubtful contract theory. It is the duty of the state legislature to define precisely the limits of municipal power in the area of compulsory dedications of land in new subdivisions. If the statutes are correctly drafted the subdivider will know precisely what is required of him before he invests substantial sums of money. Such a solution will remove the necessity for courts to aid cities in such a doubtful fashion as that in the instant case.

*James P. Gannon*

27. Id. at 394, 100 N.W.2d at 305.
PATENTS — SALE OF REPLACEMENT FABRIC FOR CONVERTIBLE TOP TO UNAUTHORIZED AUTOMOBILE OWNER, FOR REPAIR, CONSTITUTES CONTRIBUTORY INFRINGEMENT OF COMBINATION PATENT.

Aro Mfg. Co. v. Convertible Top Replacement Co. (U.S. 1964)

Defendant, manufacturer of replacement top fabrics for automobile convertibles, was charged with contributory infringement. The plaintiff was assigned rights to a combination patent of the total convertible top consisting of the fabric, a metal supporting structure and a mechanism for sealing the fabric against the side of the car. Without authority, Ford Motor Company incorporated the combination top in some of its models, and the present suit was brought because defendant supplied the unpatented fabrics to owners of these Ford cars. Since these fabrics were custom-made, they could be used only in the Ford automobile. The district court dismissed the complaint. The Supreme Court affirmed the appellate court's reversal, holding that purchasers of the Ford cars directly infringed, and that the manufacturer of replacement fabrics was guilty of contributory infringement for supplying such fabrics to them. Aro Mfg. Co. v. Convertible Top Replacement Co., 84 S. Ct. 1526 (1964).

Contributory infringement has been defined as "the intentional aiding of one person by another in the unlawful making, or selling, or using of the patented invention." By definition, it connotes acting in a way which aids another in infringing, the act itself not being infringement per se. Rather the doctrine deals with the use of an unpatented article in violating the protection given to a patented article.

In Wallace v. Holmes, the plaintiff possessed a combination patent for a complete kerosene lamp. Believing that he could not be held for infringement since he was using less than all the elements of the unpatented

1. This same device was also used by General Motors Corporation in some of its models but with authority, since General Motors had obtained a license from the plaintiff's assignor. This suit then refers only to sales to the Ford owners. In a previous case, Aro Mfg. Co. v. Convertible Top Replacement Co., 365 U.S. 336 (1961), between the same parties, contributory infringement was also alleged. But the suit was based on defendant's supplying replacement fabric tops to both Ford and General Motors owners, it being alleged that this replacement was "reconstruction" of the combination patent and therefore an infringement. It was held that this substitution was "repair" rather than "replacement" and on this basis there was no contributory infringement.

See generally 7 VILL. L. Rev. 149 (1961).

For an explanation of this type of contributory infringement see 3 WALKER, PATENTS, § 509 (Deller ed. 1937).

2. This fact is significant since the section of the Patent Code dealing with contributory infringement excludes a "commodity of commerce suitable for substantial noninfringing use." 35 U.S.C., § 271(c) (1958).

3. Four members of the Court dissented, stating that the purchaser was not an infringer and that the majority's interpretation of the Patent Code was unconstitutional in permitting an extension of patent protection to unpatentable components of a combination patent.

4. 69 C.J.S., PATENTS, § 305 at 882 (1951).

5. 29 Fed. Cas. 74 (No. 17,100) (C.C.D. Conn. 1871).
combination, the defendant sold the lamp minus the chimney, which was a specified element in the claim. However he was treated as a joint-tortfeasor since he acted in concert with the makers of the other element, the chimney, to achieve the final effect of the infringement.

The term "contributory infringement" itself was probably first used in Snyder v. Bunnell, wherein the court stated that intent was a necessary element of contributory infringement. In holding for the defendant, the court distinguished Wallace, since defendant's product in that case was suitable only for one particular use, that is, a kerosene lamp. If so restricted, the doctrine of contributory infringement probably would have found its proper place in relation to our antitrust public policy. However, in the Button-Fastener case, recovery was allowed where defendant sold wire staples for fastening buttons to shoes, even though such staples were suitable for other non-infringing uses. This decision granted the plaintiff a virtual monopoly of the unpatented wire staples. This theory was later approved by the Supreme Court in Henry v. Dick. However, just five years later the Henry case was expressly overruled by the Court in Motion Picture Patents Co. v. Universal Film Mfg. Co. The Motion Picture decision held that the patent right is restricted to precisely what is defined in the claims of the patent.

The means used thereafter by the judiciary to limit the doctrine was the theory of misuse, that is, that a patent could not be used to secure even a limited monopoly outside of the patent grant and that any such attempt was considered misuse, a defense in an infringement action. This defense is simply an application of the equitable maxim of "clean hands." Under the misuse theory the defendant may actually be guilty of contributory infringement, but an attempt by plaintiff to expand his patent protection constitutes a good defense. And since contributory infringement, by necessity, implies an attempt by the plaintiff to restrict something not expressed in the patent, misuse and contributory infringement are logically incompatible. The misuse theory was employed in the famous Mercoid cases in which the defendant sold combination stoker switches which could only be used in the plaintiff's domestic heating system. The Supreme Court assumed, for the purpose of argument, that the defendant was guilty of contributory infringement, but relief was denied. Language can be found

6. 29 Fed. 47 (S.D. N.Y. 1886). Defendant sold "automatic drop" capable of use in plaintiff's "electro-magnetic burglar alarm apparatus."
8. Henry v. A. B. Dick Co., 224 U.S. 1 (1912). Plaintiff's customers bought un patented ink from defendant after buying plaintiff's patented stencil-duplicating machinery with the stipulation that only ink, made by plaintiff, was to be used.
9. 243 U.S. 502 (1917). Thus began the decline of contributory infringement by judicial limitation which was halted only by Congressional action.
10. This theory was first enunciated in Carbice Corp. v. American Patents Development Corp., 283 U.S. 27 (1931).
in the first Mercoid case overruling earlier contributory infringement cases.\textsuperscript{13}

Following these cases, considerable confusion existed. Some courts stated that the doctrine of contributory infringement no longer existed\textsuperscript{14} and others withheld relief as a practical matter while not expressly repudiating the doctrine.\textsuperscript{15} This was the status of contributory infringement until Congress, in 1952, passed a patent act which included a section governing this doctrine.\textsuperscript{16} Neither the constitutionality nor the application of this section had been passed upon by the Supreme Court until the present case.

The Court's reasoning in the Aro case is as follows: (1) Ford owners who put defendant's replacement fabric tops on their cars are direct infringers of plaintiff's patent rights; (2) the defendant-supplier, by selling the replacement, is a contributory infringer since he aided the owners in their infringement.

The premise that the car owners are direct infringers must first be substantiated, since without a direct infringement there can be no contributory infringement.\textsuperscript{17} Under the patent laws, direct infringement is covered by section 271(a) of the Patent Code. It states that \textquote{[W]hoever without authority makes, uses or sells any patented invention . . . infringes the patent.} It is true that if Ford had been authorized to make and place the device on its cars, the consumer-owners would not be infringers since they would have had an \textquote{implied license to use} from the sale.\textsuperscript{18} However, such is not the case in Aro and section 271(a) was held to apply. The Court found that section 271(a) is only a codification of the common law. The prior Aro case held that, \textquote{the new Patent Code, which defines \textquote{infringement}, left intact the entire body of case law governing direct infringement.}\textsuperscript{19} But what prior case law is being followed by section 271(a)? More specifically, \textquote{May plaintiff maintain suit against defendant's customers and recover for infringement because of the use of the same devices?}\textsuperscript{20} The Supreme Court has held in the affirmative.\textsuperscript{21}

Another question which should be answered is whether any knowledge of the patent or of its infringement is necessary for the Ford owners to be direct infringers. It certainly cannot be expected that the owners knew

\begin{footnotesize}
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\item[13.] Leeds & Catlin v. Victor Talking Mach. Co., 213 U.S. 325 (1909), a leading Supreme Court case on contributory infringement, is called \textquote{inconsistent.} It must \textquote{no longer prevail against the defense that a combination patent is being used to protect an unpatented part from competition.} Mercoid v. Mid-Continent Inv. Co., 320 U.S. 661, 668 (1944).
\item[14.] Landis Machinery Co. v. Chaso Tool Co., 141 F.2d 800, 801 (6th Cir. 1944) (dictum).
\item[15.] Lincoln Elec. Co. v. Linde Air Products Co., 171 F.2d 223 (6th Cir. 1948).
\item[16.] 35 U.S.C., § 271(c) (1958).
\item[18.] \textquote{[W]here a person had purchased a patented machine of the patentee or his assignee, this purchase carried with it the right to the use of that machinery. . . .} Adams v. Burks, 84 U.S. (17 Wall.) 453, 455 (1873).
\item[20.] Directoplate Corp. v. Huebner-Bleistein Patents Co., 44 F.2d 783 (7th Cir. 1930), \textit{cert. denied}, 282 U.S. 899 (1931).
\item[21.] Birdsell v. Shaliol, 112 U.S. 485 (1884).
\end{enumerate}
\end{footnotesize}
that the manufacturer of their automobile was a patent infringer or even that certain parts were patented. Under case law which has been incorporated in the Patent Code of 1952, the knowledge or intent of the patent infringer is immaterial as to whether he is an infringer or not.\textsuperscript{22} Thus it is seen that the car owners were direct infringers.\textsuperscript{23} The next question is whether the defendant contributed to this infringement under section 271 (c).\textsuperscript{24} The legislative history behind, and court construction of, this section show that only a codification of the previous case law was intended. When the bill was reported out of the House Judiciary Committee, it was stated that section 271 (c) was designed to "codify in statutory form principles of contributory infringement" which have been "part of our law for about 80 years."\textsuperscript{25} Also in the previous \textit{Aro} case Justice Black, concurring, states: "The language and history of that Act show plainly . . . that Congress wanted to continue in force, but not expand, the judge-made doctrine of contributory infringement . . . ."\textsuperscript{26} The case law intended to be written into section 271 (c) is that if there is direct infringement by the owner in repairing his patented combination, the supplier of the repairing parts is guilty of contributory infringement.\textsuperscript{27} Any aid at all, even if only repair and not reconstruction, is contributory infringement.\textsuperscript{28}

\textsuperscript{22} Sontag Chain Stores Co. v. National Nut Co., 310 U.S. 281 (1940). A patent is similar to a recorded deed, "a public record, of which all persons were bound to take notice." Bate Refrigerating Co. v. Gillett, 31 Fed. 809, 816 (C.C.D. N.J. 1887).

\textsuperscript{23} To substantiate the above analysis, cases have been decided, since 1952, stating that there can be direct infringement without knowledge on defendant's part. Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841, 845, 849 (5th Cir. 1959) (by implication).

In the prior \textit{Aro} case, the Court held that the test used by the Court of Appeals was erroneous. The test applied by that court was whether an owner would reasonably believe that he was making only a minor repair. 365 U.S. at 344.

\textsuperscript{24} Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer.


To substantiate this, the Justice cites the Congressional Record (99 CONG. REC. 9323 (1952)) and quotes Senator McCarran, Chairman of the Judiciary Committee which had been in charge of the bill, saying that section 271 codifies the present patent laws.

A majority of the Court in the instant case, however, make one possible qualification of this conclusion. This is the effect of the word "knowing" in section 271 (c). On this issue the majority (although a different majority than on the rest of the issues) believed that to contributorily infringe one must actually know of the patent and that his action constitutes an infringement. The minority state that under case law, where a component is only suitable for the patented combination (as here), no specific intent to infringe is necessary and since section 271 is intended to be a codification of previous law no knowledge of the patent need be required for liability. In either case, this does not affect the main issue, since the defendant received notice of their infringement in a letter sent by the plaintiff. Under either view there is liability after the letter gave notice.

\textsuperscript{27} "$[W]ithin certain bounds, a patented article may be repaired without making the repairer an infringer, but not where it is done for one who is." Union Special Mach. Co. v. Mainin, 161 Fed. 748, 750 (C.C.E.D. Pa. 1908). The Supreme Court has upheld this doctrine. Union Tool Co. v. Wilson, 259 U.S. 107, 114 (1922).

\textsuperscript{28} Although prior to this case the Supreme Court had not applied section 271 (c) to a situation in which contributory infringement was charged, lower federal courts...
The dissenting opinion disagrees with the majority on one of its premises and in the Court's result. It first attacks the premise that there is direct infringement, claiming that *knowledge* of infringement is a necessary element of this offense. Justice Black argues that the majority's interpretation of section 271(a) is inconsistent with another section of Title 35 of the Patent Act, section 287, and therefore it is incorrectly applied. The dissenting judges contend that the clause "no damages shall be recovered by the patentee in any action for infringement except on proof that the infringer was notified of the infringement and continued to infringe thereafter" — is the total single meaning of the section.

The majority answers this by relying on *Wine Ry. Appliance Co. v. Enterprise Ry. Equip. Co.* decided on the repealed section 50 of Title 35, on which the present section 287 is based. In that case the suit was brought against a primary infringer as Ford was, not an infringer in the position of the Ford car owners. This distinction is pointed out by the minority; however, the same reasoning used by the Court in *Wine* is applicable to the present case and the statute in question. The Court states that penalty for failure implies an opportunity to perform in the *Wine* case. The plaintiff, *Convertible Top Replacement Co.*, had no opportunity to comply with section 287 in marking the article since it did not sell or manufacture it, this being done by infringer Ford.

have decided cases by employing a similar analysis. In *Southern States Equip. Corp. v. USCO Power Equip. Corp.*, 209 F.2d 111 (5th Cir. 1953), a supplier of castings to a manufacturer who was infringing by making patented transmission line switches was held guilty of contributory infringement. And *Freedman v. Friedman*, 242 F.2d 364 (4th Cir. 1957), stated that section 271(c) was violated when the defendant sold magnetic inserts for denture plates where plaintiff had a patent for the use of magnetic material with dentures to achieve more holding power. The users of the inserts were the direct infringers who were aided. Both of these cases, as the instant one, involved non-staple goods suitable only for infringement. And in the *Freedman* case it is doubtful that the direct infringer knew of the patent, thus making the similarities even stronger.

29. *Section 287 reads:*

Patentees, and persons making or selling any patented article for or under them, may give notice to the public that the same is patented, either by fixing thereon the word "patent". . . . In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.


The statute reads:

It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "patented," . . . and in any suit for infringement, by the party failing so to mark, no damages shall be recoverable by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, . . .

32. Wine also showed that if "making or selling" does not qualify "patentees," the words "same" and "thereon" in the statutes are not "easily understood." 297 U.S. at 395.
In urging an interpretation of section 271(a) as requiring knowledge, and not just mere use, Justice Black also states that the majority's construction of the statute brings about absurd and unjust results and therefore is erroneous. This common-sense argument states that innocent consumers, completely unknowingly, are subject to suits for infringement in just about anything they buy — automobiles, toasters, etc. The direct answer to this charge is that it was the legislature's intent to codify the existing case law on this point in which mere use without knowledge was sufficient for liability.

After attacking the above premise of the Court's reasoning, the dissenters then argue that the result is unconstitutional. They declare the result to violate Article I, Section 8 of the Constitution whereby Congress is given the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Justice Black states that:

When articles are not patentable and therefore are in the public domain, as these fabric covers were, to grant them a legally protected monopoly offends the constitutional plan of a competitive economy free from patent monopolies except where there are patentable "Discoveries." And the grant of a patent monopoly to the fabrics can no more be justified constitutionally by calling their sale by competitors "contributory infringement" than by giving it any other label.

If this quotation is taken literally, what is being said is that the contributory infringement doctrine is unconstitutional. Contributory infringement involves aiding a direct infringer but the act being done by the contributory infringer is not infringement by itself, so the offense must always involve some unpatented article. This is especially true with the type of contributory infringement involved in this case; the defendant is only engaged in a "repair" and if the car owners were not infringers, the defendant would be innocent. Contributory infringement always involves an attempt to control something which is unpatented.

33. See supra notes 6, 7.
34. See supra notes 20, 21. This common sense argument of the dissent also has a common-sense denial. If the patentee sued a consumer, the judgment obtained for damages suffered because of this one small infringement would be negligible. The consumer will not be sued.
That only damages are recoverable under 35 U.S.C. 284 (1958), and not profits, or royalties, unless such royalties would constitute the "damages" for the infringement, is also decided by the principal case. Under the prior statutes, a patentee could, in an accounting, pursue several alternatives: (1) He could seek damages measured by loss of sales or established in some other way; (2) he could seek to recover the profits made by an infringer upon the theory that the infringer was a trustee ex malificio. However, under the new Act, whole "profits" are no longer expressly intended as a possible measure of damages. The definition of damages has probably been broadened, with a floor enacted as not less than a reasonable royalty. The plaintiff is, in effect, left to establish damages in any way possible to him.
If the dissent is correct and the holding in *Aro* and contributory infringement are unconstitutional either: (1) there must have been an erroneous application of section 271(c) which reaches an unconstitutional result, or (2) section 271(c) is itself an unconstitutional provision of the Patent Act although construed as the legislature intended.

In considering the first alternative — that this is an erroneous, unconstitutional, statutory interpretation, the conflict between the "misuse" theory and the contributory infringement doctrine becomes crucial. The *Mercoid* cases represented the culmination of the trend to limit, or perhaps exterminate, contributory infringement. When the defendant in *Aro* relied on the *Mercoid* cases, the majority stated that section 271 was enacted to reinstate the doctrine of contributory infringement in the law as it existed prior to *Mercoid*. Thus Justice Brennan, for the majority, states that he follows the legislative intent behind the statute. While this is the first time the Supreme Court has relied on the effect of section 271(c), lower courts have interpreted the section in this manner, that is, by indicating a preference for the contributory infringement doctrine as contrasted with the misuse theory.\[37\]

Thus section 271(c) states that the doctrine of contributory infringement controls, despite *Mercoid*, and the Court's explanation of the statute is correct. In considering the alternative basis for this decision to be unconstitutional — that is, that section 271(c) is an unconstitutional statute — it is seen that invalidity cannot be based upon this ground either. As stated above, Article 1, Section 8 of the Constitution gives Congress the power to give patent monopolies. For section 271(c) to be unconstitutional, Congress must have exceeded this grant of power. In interpreting and applying this grant the spirit of the provision must be taken into account in order to properly ascertain the framers' intent. The purpose of the Patent Clause of the Constitution is to promote the progress of the useful arts by stimulating invention through grants of exclusive rights to the benefits derived from this invention. A narrow application of Congress' patent power would defeat its purpose of exciting scientific advances.\[38\] In the past, the liberal patent policy of the Constitution was also carried out by the courts when they developed, by common law methods, the doctrine of contributory infringement.\[39\] As seen above, the Supreme Court participated in this development which Justice Black...

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In the House Judiciary Committee Report, where the bill is favorably reported out, it is stated:

Considerable doubt and confusion as to the scope of contributory infringement has resulted from a number of decisions of the courts in recent years. The purpose of this section is to codify in statutory form principles of contributory infringement and at the same time eliminate this doubt and confusion.


now states is unconstitutional. By including this doctrine in the Patent Code of 1952, Congress was only carrying out this liberal policy of the Constitution, and not promulgating an unconstitutional law.

The final consequence of this case can be seen in the Supreme Court’s following the will of Congress by once again making the contributory infringement a viable part of the patent law. More than a decade after the adoption of the Patent Code of 1952, the Court has at last faced up to its effect on contributory infringement; section 271 has been effective in arresting the trend toward nullification or liquidation of this substantive law doctrine.

This effect is not only satisfactory because the Court recognized the intent of Congress and applied the law according to this intent, but also because contributory infringement has its own value. As is shown in the House Judiciary Committee’s Report — “the doctrine of contributory infringement, which prevents appropriating another man’s patented invention, has been characterized as ‘an expression both of law and morals.’”40 And it certainly seems that under both legal and moral concepts, one who contributes to a direct infringement should likewise incur liability.

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