1960

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Recommended Citation

Various Editors, Recent Decisions, 6 Vill. L. Rev. 89 (1960).
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RECENT DECISIONS

ADMINISTRATIVE LAW—JUDICIAL REVIEW OF ADMINISTRATIVE DETERMINATION—SUBSTITUTION OF PENALTY BY THE COURT.


Petitioner, employed as a ticket seller by the New York City Transit Authority, was dismissed from her position when she was found guilty by the Authority of collecting fares and not registering them. She brought proceedings under § 1283 et seq. of the New York Civil Practice Act to annul or modify the dismissal, and the Appellate Division of the Supreme Court of New York affirmed the determination of guilt, but modified the Authority's decision by reducing the punishment from dismissal to suspension for six months. Cross appeals were taken: petitioner claimed there was insufficient competent evidence to sustain the findings of guilt; the Authority claimed that the penalty of dismissal was not excessive and should not have been reduced, that the Appellate Division could not fix a new penalty, and finally, that a six-month suspension was illegal. The New York Court of Appeals, two judges dissenting, held that the evidence was sufficient to support the finding of guilt, and that modification by the appellate division in reducing the punishment which it found excessive was not an abuse of discretion. Mitthauer v. Patterson, 8 N.Y.2d 37, 201 N.Y.S.2d 321 (1960).

It is generally understood that employee removal and discipline are almost entirely matters of executive agency discretion and so judicial review thereof is greatly limited. In Miller v. United States the Seventh Circuit granted a rehearing to resolve the question of the proper function

1. N.Y. Civ. Prac. Act. § 1283 et seq. provided a detailed procedure for a “Proceeding Against A Body or Officer.” This is the common method by which relief is sought in New York from administrative determinations. The Civil Service Law was amended in 1941 to provide for review under this article as to appeals from a determination of the Commission.

2. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW IN THE UNITED STATES 265 (1959). Speaking of the Federal system, the court in Hargett v. Summerfield, 243 F.2d 29, 32 (D.C. Cir. 1957), noted that cases “after the passage of the Federal Administrative Procedure Act in 1946, make it clear that employee removal and discipline are almost entirely matters of executive agency discretion and that judicial review of such action is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures . . . so long as there is substantial compliance . . . the administrative determination is not reviewable as to the wisdom or good judgment of the department head in exercising his discretion.”

3. 260 F.2d 286 (7th Cir. 1958).
of the court in proceedings to set aside an order of an administrative agency fixing a penalty within the statutory limits. The court noted that it had no right to change the penalty simply because the agency might have imposed a different penalty. That the removal of a municipal employee by an administrative agency is an administrative function though performed in a judicial manner was noted in a recent Minnesota case.\(^4\)

The court used this argument to buttress the principal that a court may not substitute its judgment for that of an administrative agency if the administrative function is non-judicial. Ten years after the enactment of the Administrative Procedure Act\(^5\) the California court in *Bonham v. McConnell*\(^6\) approved those cases which ordered a remand for reassessment of the penalty where some of the material findings of the agency were not supported by the weight of the evidence, and took the position that if the unsupported charges were minor and the supported ones major, the penalty should not be disturbed.\(^7\) In an Illinois case similar to the instant case\(^8\) the court said that the lower court had no power to determine the extent of punishment, but rather could only weigh the evidence to determine whether the findings of the Commission, with respect to proof in support of the charges, were against the manifest weight of the evidence. Important in the development of judicial review of administrative sanctions in New York is the case of *Sagos v. O'Connell*.\(^9\)

The court of appeals asserted that the reviewing court under Article 78, Section 1296 of the Civil Practice Act could not consider the propriety of the sanction imposed by an administrative agency where a statutory violation was made the sole basis for such punishment.\(^10\) The doctrine enunciated in *Sagos*\(^11\) was applied in full in *Barsky v. Board of Regents*.\(^12\)

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\(^4\) Sellin v. City of Duluth, 248 Minn. 333, 80 N.W.2d 67 (1956). See also, Ging v. Board of Education, 213 Minn. 550, 7 N.W.2d 544 (1942).  

\(^5\) Note CAL. CODE CIV. PROC. § 1094.5 (West 1954): “(b) The inquiry in such a case shall extend to whether ... there was any prejudicial abuse of discretion. Abuse of discretion is established if respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. (e) ... where the judgment commanded that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion ... and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent”  


\(^7\) Nolting v. Civil Service Comm'n, 7 Ill. App. 2d 147, 129 N.E.2d 236 (1955).  

\(^8\) 301 N.Y. 212, 93 N.E.2d 644 (1950). The court of appeals reversed a decision of the appellate division which had remitted the proceeding to the administrative agency for reconsideration of the extent of the punishment on the grounds that it was excessive.  

\(^9\) This decision caused one student of administrative law to note that such limitation on the courts would grant only a “skeletonized form of review” particularly in view of the fact that the sanction contributes “the very warp and woof of the administrative proceeding.” Schwartz, 1950-1951 Survey of New York Law — Administrative Law, 26 N.Y.U.L. Rev. 773, 780 (1951).  


\(^11\) 305 N.Y. 89, 111 N.E.2d 222 (1953).
where the court said in reply to assertions that the Regents dealt too harshly with the appellants: "it is enough to say that we are wholly without jurisdiction to review such questions." To fill this lacuna in the law of judicial review an amendment was made to Section 1296 of the Civil Practice Act which empowered the courts to decide whether the administrative agency had abused its discretion in the imposition of the penalty. Since the passage of this amendment, there have been many cases in which the court felt that the punishment was excessive and then remitted the proceedings to the administrative agency for reconsideration of the penalty. However, the instant case appears to be the first time the court has not only found the discipline excessive, but thereupon substituted its own penalty without permitting the agency to reconsider.

The court in the instant case approved the criterion used by the appellate division, third department, in Stolz v. Board of Regents to determine whether the Authority abused its discretion under subdivision 5-a, that is, whether the measure of punishment is so disproportionate to the offense, in the light of all the circumstances, as to shock one's sense of fairness. It was the fact that the petitioner had over twenty years service and would lose valuable rights if dismissed that prompted the majority in the instant case to conclude that the penalty was excessive, but it would appear that since the petitioner was in a position of trust, the discipline was perhaps not so excessive as to warrant judicial intervention. The court indicates that it has complete power in the course of its judicial inquiry in determining abuse of discretion and so "can order a lesser discipline, much as it does in criminal cases." By so doing, the court feels it can avoid the circumlocution involved in remitting to the Authority. The intent of the legislature would seem to have been to afford some measure of protection to the individual against arbitrary and capricious action but not to relinquish to the court the agency's discretionary power. Even where the federal courts have the power to

13. Id. at 99, 111 N.E.2d at 226.
14. N.Y. Civ. Prac. Act. § 1296 (5-a), which listed an additional issue to be passed on by the courts: "Whether the respondent abused his discretion in imposing the measure of punishment or penalty or discipline involved in the determination."
17. Id. at 364, 165 N.Y.S.2d at 182.
18. In as much as it spends a great deal of time on personal problems, it would seem that the Authority might have been better qualified than the court to exercise discretion on problems of personnel management. 4 Davis, Administrative Law Treatise 185 (1958).
20. See McKinney's Session Laws of 1955 at 1650 where the Governor in a statement approving the amendment said: "There is no means for judicial review of penalties imposed by an administrative agency. This leaves without remedy one who suffers as a result of an excessive penalty."
21. See Stolz v. Board of Regents 4 App. Div. 2d 361, 165 N.Y.S.2d 179 (1957) at 182, where the court said: "Obviously the words abuse of discretion can-
modify, in addition to affirming or setting aside a determination, the courts refuse to substitute their judgment for that of the agency.\textsuperscript{22} When making the analogy to the substitution of judgment in criminal cases, the majority seems to disregard the difference in the relation between a trial court and an appellate court on the one hand, and an administrative agency and the reviewing court, on the other.\textsuperscript{23} In particular, the analogy to the criminal cases is unconvincing because in criminal cases the court is permitted to reduce a sentence to one not lighter than the minimum penalty provided by the law for the offense of which the defendant was convicted.\textsuperscript{24} There is relatively less discretion involved in applying penalties in a criminal case, whereas the Authority in the instant case had a wide range of punishments—not relating to specific offenses—in its arsenal from which to choose.\textsuperscript{25} In disregarding the residuum of discretion remaining with the Authority, the court appears to have usurped the power of the agency, as the price for avoiding circumlocution.\textsuperscript{26} Even if the court had not reasonably be given so broad an interpretation as to allow the courts to substitute their judgment, as to the appropriate measure of discipline, for that of the administrative agency. If that were done, the power of administration would, to a large extent, be transferred from the administrative agency to the courts since the measure of punishment or discipline is often the heart of the determination. In Leavitt v. Board of Regents, 9 App. Div. 2d 987, 194 N.Y.S.2d 612, 613 (1959), the court noted that while it has "power to review the measure of discipline ... the power should be exercised sparingly, and we may not substitute our judgment for that of the administrative agency." See also McGinnis' Broadway Restaurant v. Rohan, 6 App. Div 2d 115, 175 N.Y.S.2d 857 (1958) where the court noted that the special term was not empowered to dictate what a proper punishment should be.

\textsuperscript{22} In the concurring opinion of Judge Finnegan in Miller v. United States, 260 F.2d 286, 300 (7th Cir. 1958), it was noted that 6(B) of the Commodity Exchange Act, 72 stat. 944 (1958), 7 U.S.C. § 9 (1959), allows the reviewing court to "modify" in addition to affirm or set aside. But it was said that "modify" simply enabled a reviewing court to send back an order for further administrative action. "There is nothing in 6(B) indicating that the scope of judicial review has been enlarged to the point where periods of suspension, for example, can be either increased or decreased, or that revocations can be converted into suspensions." In Federal Power Com'n v. Idaho Power Co., 344 U.S. 17, 21 (1952), the court said "that authority [to affirm, modify or set aside] is not power to exercise an essentially administrative function.”

\textsuperscript{23} In FCC v. Pottsville, 309 U.S. 134, 144 (1940), the court noted that "to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purpose of the movement for administrative regulations and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions ... are observed, courts will stray their province ... ."

\textsuperscript{24} The court may at its discretion reduce the sentence when the punishment for the crime was reduced by the legislature after the conviction, People v. Spagnolia, 260 App. Div. 551, 23 N.Y.S.2d 966 (1940). Also the appellate division has jurisdiction to extend mercy to a defendant by a reduction of the sentence within the limits set by 543(1) of the Criminal Code, to a sentence not lighter than the minimum provided by law for the offense, People v. Potkowski, 298 N.Y. 299, 83 N.E.2d 125 (1948).

\textsuperscript{25} N.Y. Civ. Serv. Laws § 75(3) : "the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service."

\textsuperscript{26} Yet there was no cry of circumlocution when the appellate division in Rodriguez v. Rohan, 3 App. Div. 2d 648, 158 N.Y.S.2d 129 (1957) held the punish-
remitted the proceedings, the Authority would not legally have been permitted to render a discipline of six months suspension, since the maximum suspension provided by law was two months. It is unfortunate that the court saw fit to execute that which the Authority was powerless to do. The court appears to have assumed its function to be charismatic and to have taken on the character of a supercommission.

Arthur T. Downey

CONSTITUTIONAL LAW—Searches and Seizures—Product of Unreasonable Search by State Officers Inadmissible in Federal Courts.

Elkins v. United States (U.S. 1960).

Petitioners were indicted in the United States District Court in Oregon for the offense of intercepting and divulging telephone communications, and of conspiracy to do so, in violation of federal law. Before trial petitioners made a motion to suppress as evidence several tape and wire recordings and a recording machine which had originally been seized by state law enforcement officers in the home of one of the petitioners under circumstances which, two Oregon courts had found, had rendered the search and seizure unlawful. The district court admitted the articles in question, disregarding the question of the reasonableness of the search, because there was no evidence that any agent of the United States was aware that the search was being contemplated or was eventually made by state officers, and the petitioners were convicted. The Court of Appeals for the Ninth Circuit affirmed the convictions. The Supreme Court of the United States, with four justices dissenting, reversed and held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the fourth amendment, is inadmissible over the defendant's timely objection in a federal criminal trial. Elkins v. United States, 80 Sup. Ct. 1437 (1960).

2. The state officers had procured a search warrant based upon "information and belief" that one of petitioners possessed obscene motion pictures and accompanying sound recordings. The search did not reveal such materials, but paraphernalia believed to be used in making wiretaps were found and seized.
At common law and in the United States, the general rule had always been that relevant evidence was admissible in a court of law despite the fact it had been procured in an illegal manner. The fourth amendment had always forbidden unreasonable searches and seizures by federal officers, but it was not until *Weeks v. United States* that the Supreme Court decided evidence seized in violation of the fourth amendment, should be excluded in federal courts. The *Weeks* case seemingly recognized a need to restrain the federal courts from becoming a party to governmental violation of the Constitution by allowing the products of such official lawlessness in a judicial proceeding. In addition it was felt that exclusion of the evidence was the only effective means of enforcing rights secured by the fourth amendment. As illegal searches and seizures by state officials did not violate the fourth amendment, which applied only to federal conduct, the same Court declared evidence illegally seized by state officials to be admissible in a federal court. In the ensuing decisions in which the exclusionary rule of the *Weeks* case was applied, the Court's primary concern was with the determination of when the unlawful search and seizure might be attributed to federal officers and when it might not. However, on the same day one such case was decided, *Lustig v. United States*, *Wolf v. Colorado* was handed down. There the Court held that the security of one's privacy against arbitrary intrusion by the police was "implicit in the concept of ordered liberty," and thus was a protection guaranteed against the states by the fourteenth amendment. However, the Court added that it did not follow that the Constitution required state courts to exclude such evidence, as the means to enforce this constitutional right were to be left to the states. Therefore the *Weeks* rationale, that evidence illegally seized by state officers need not be excluded in federal court because there was no constitutional violation, was no longer valid after *Wolf*.

In the *Weeks* decision, the Court had supported their exclusionary rule on the basis that the fourth amendment requires such a rule to secure

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5. Id. at 392, 393.
6. Id. at 398.
7. See Byars v. United States, 273 U.S. 310 (1927), where there was actual participation by federal officers; Gambino v. United States, 275 U.S. 310 (1927), where state officers acted solely in behalf of federal officers; Sutherland v. United States, 92 F.2d 305 (4th Cir. 1937), where state officials acted pursuant to a plan of cooperation between federal and state officers.
8. See Burdeau v. MacDonald, 256 U.S. 465 (1921), where the evidence was gathered by private individuals; United States v. Lefkowitz, 52 F.2d 52 (2d Cir. 1931), where the evidence was offered against one other than the victim.
9. 338 U.S. 74 (1949). This case restates the federal participation rule announced in Byars v. United States, 273 U.S. 310 (1927). However, the rule now became known as the silver platter doctrine, deriving its title from Justice Frankfurter's declaration that evidence illegally seized by state authorities is admissible in the federal court if presented to federal authorities on a silver platter.
its effective enforcement. In the instant case, the Court did not search for such a constitutional mandate, nor need they have. The Court has always formulated rules of evidence to be applied in federal prosecutions, and has invoked its supervisory power over the administration of criminal justice without challenge. In the instant case it determined that considerations of healthy federalism and of judicial integrity necessitated that an exclusionary rule be applied to illegally seized state evidence. The Court invoked its supervisory power, and excluded from federal prosecutions all evidence seized by state officers "during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the fourth amendment." The test enunciated by the Court was that of the fourth amendment. This seems to indicate that the majority thought the due process clause of the fourteenth amendment incorporates the fourth amendment in its entirety. "The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." Therefore, the federal courts are to apply the new exclusionary rule without regard to the norms of any state court. As a result, if a state has more stringent standards of admissibility than the fourth amendment test to be now imposed by the federal courts, they would be ignored. States may, and some do, have more rigid norms than those of the fourth amendment. Rules relating to the admissibility of blood tests, to searches incident to a lawful arrest, or as to  

12. The Court also spoke of the deterrent effect which the exclusionary rule would have on state officials, but a discussion of this point is beyond the scope of this note.
13. Elkins v. United States, 80 Sup. Ct. 1437, 1447 (1960). A recent case, James v. United States, 280 F.2d 443 (8th Cir. 1960), suggests there will be problems in applying the rule of the instant case. There defendant was convicted in federal court of possession of an unregistered firearm, but the gun had been obtained by state officers in a search incident to an arrest by state officers for disturbing the peace, a misdemeanor which had not taken place in their presence. The court of appeals, in overturning the conviction, merely noted that the federal arrest statutes would not have allowed an arrest in this situation. Apparently the Elkins test is here interpreted to require that the search be incident to an arrest which would be legal under federal arrest statutes. This poses a significant problem, as some states have arrest statutes, apparently constitutional, which differ from the federal arrest statutes. E.g., Wis. Stat. § 954.03(1) (1959).
14. The majority did not expressly state this to be so, but in his dissent in the instant case Justice Frankfurter says that apparently the Court is equating the scope of the fourteenth amendment with the scope of the fourth. In a later opinion, Ohio ex rel Eaton v. Price, 80 Sup. Ct. 1463 (1960), four members of the majority in Elkins indicated that the fourteenth amendment was to be equated with the fourth. An alternative explanation is, however, possible. It may be that, since it was fashioning only a rule of evidence, the court decided to select a test more familiar and well defined than that of "due process."
16. Although technically two norms may exist in a state, in the form required by the state court through its exclusionary rules, and that required by the legislature, what is referred to here is the norm of the state court, because it makes the ultimate determination on questions relating to the use of evidence.
what constitutes probable cause for an arrest without a warrant,\textsuperscript{19} are concrete examples. Consequently, it may be concluded that the effort of the states to prevent their officials from making use of wrongfully seized evidence, will not always be respected by the newly promulgated exclusionary rule.

Justice Frankfurter, dissenting in the instant case, sought a modification of the \textit{Weeks} doctrine at it related to state seized evidence, rather than its reversal. He would assure a harmonious relationship between state and federal court determinations by looking to the individual state courts to ascertain what norms and sanctions they would apply by way of exclusion. Whether they would admit the evidence in question, or exclude it, the federal courts would follow suit. Justice Frankfurter’s rule would seem to require exclusion on a constitutional basis only in those few situations where the evidence has been so violently seized that its admission in a state court would offend “due process” requirements.\textsuperscript{20} But this rule also misses the mark. Comity would certainly be assured, for the federal courts would be looking to the state courts for their cue. However, the judicial integrity of the federal courts would continue to be violated, for unconstitutionally seized evidence would empty into the federal courts from states which do not have an exclusionary rule, or from states which have an exclusionary rule, but apply it loosely.

The majority test in the instant case would preserve the integrity of federal courts, but state-federal comity would be violated. Justice Frankfurter’s test, espoused in his dissent in the instant case, fully protects state-federal comity, but does so at the expense of the federal court’s integrity. There would seem to be a third possible solution, whereby both state-federal comity and the court’s integrity can be preserved. Such a solution is premised on the fact that there is a justifiable reason for violating state-federal relationships, in refusing to admit evidence from state officials whose acts do not measure up to federal standards. The federal courts must police their own tribunals, and as the \textit{Mc’Nabb} case announced, it has the complete right to do so. The federal courts should not be required to lower their standards, standards which are constantly before the critical public eye, to accommodate the whims of the state. “The effectiveness of courts must always depend in large measure upon the respect which their processes commend by reason of the integrity they reveal.”\textsuperscript{21} It is suggested on the other hand, that it is not too demanding to request federal courts to raise their standards when state requirements are stricter than those which the fourth amendment would impose. By the federal courts raising their admissibility standards comity would be assured, and judicial integrity would not be sacrificed, but raised to loftier standards. Moreover, state protection of civil liberties would be encouraged.

\textsuperscript{20} Rochin v. California, 342 U.S. 165 (1952).
\textsuperscript{21} Hanna v. United States, 260 F.2d 723, 728 (D.C. Cir. 1958).
Therefore, a compromise test is proposed. Evidence seized by state officers ought not be admitted in federal courts whenever either the fourth amendment test, enunciated in the instant case, would be violated or the stricter standards of the state would be infringed. If such stricter standards are not in effect, the courts would under this test, apply the fourth amendment test of the instant case.

John V. Hasson

CRIMINAL LAW—CONSPIRACY—HUSBAND AND WIFE ARE LEGALLY CAPABLE OF CONSPIRACY AGAINST THE UNITED STATES.


Defendants, husband and wife, were charged with conspiracy to commit an offense against the United States in violation of the Federal Conspiracy Statute. The bill of indictment, which alleged that defendants conspired to smuggle goods into the United States, was dismissed by the District Court for the Southern District of California on the ground that it did not state an indictable offense. The court based its dismissal on the assertion that a husband and wife are incapable of conspiring in the legal sense. On direct appeal the United States Supreme Court reversed, with three Justices dissenting, holding that husband and wife are within the scope of the Conspiracy Statute, and that prior decisions to the contrary were simply following the archaic principles of the common law. United States v. Dege, 80 Sup. Ct. 1589 (1960).

At common law the offense of conspiracy between spouses did not exist, due to the theory that husband and wife became one by marriage, and that the legal existence of the woman became merged with that of her husband. In this country, the earlier decisions of many state courts followed this general common law doctrine. That “it was not legally possible for husband and wife to conspire” under a federal statute was first decided as early as 1926 in Dawson v. United States, and that case has

1. 18 U.S.C. § 371 (1948). “If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy...”
3. Williams, Legal Unity of Husband and Wife, 10 Mod. L. Rev. 20 (1947).
4. Commonwealth v. Allen, 24 Pa. County Ct. 65 (1900). “As husband and wife, the defendants could not conspire together, therefore the indictment charged no offense, and the defendants have never been in jeopardy.” Accord, People v. Miller, 82 Cal. 107, 22 Pac. 934 (1889); State v. Clark, 14 Del. (9 Harr.) 536, 33 Atl. 310 (1891); Jones v. Monson, 137 Wis. 478, 119 N.W. 179 (1909).
5. 10 F.2d 106 (9th Cir. 1926).
been strong precedent in the Ninth Circuit and elsewhere.\textsuperscript{6} A present-day rationale for the principle is almost non-existent in the decisions, for the respective courts have grounded their opinions on such basic phrases as "it has been uniformly held,"\textsuperscript{7} and there is "no authority to the contrary."\textsuperscript{8} Rejecting this contention, a number of state courts have held that the fiction of the merged identity of husband and wife has lost much, if not all, of its vitality in modern day America.\textsuperscript{9} The United States District Court of Appeals for the District of Columbia has directly repudiated the common law contention that there could be no conspiracy between spouses, stressing that in modern law husband and wife are considered legally separate in such divergent fields as property, contracts, and torts.\textsuperscript{10} That court also attempted to show that logically such a fiction was simply not in tune with reality, nor fitted to our present-day concept of law.\textsuperscript{11} Recent federal cases\textsuperscript{12} have been more inclined to follow this view than that expounding the common law principle.

In delivering the opinion for the majority of the Court, Mr. Justice Frankfurter has based the decision on the necessity of ridding modern legal thinking of outmoded and antiquated fictions.\textsuperscript{13} In viewing a doctrine of this type, the primary question poses the issue of whether present-day policy considerations demand the retention of the theory, or whether it must stand alone on the merits of its long continued existence. It is the most obvious truism to say that the status of women has changed radically since the "unity concept" was first promulgated. In virtually every realm of legal thinking, the courts and legislatures have done away with "well established" doctrines, based on the "unity concept" of the common law.\textsuperscript{14} These trends are realistic evidence of the desire on the part of our law-

\textsuperscript{6} Gros v. United States, 138 F.2d 261 (9th Cir. 1943); United States v. Shaddix, 43 F. Supp. 300 (S.D. Miss. 1942). Both cases cited Dawson v. United States, supra note 5.

\textsuperscript{7} Dawson v. United States, 10 F.2d 106, 107 (9th Cir. 1926).

\textsuperscript{8} United States v. Shaddix, 43 F. Supp. 300.

\textsuperscript{9} Dalton v. People, 68 Colo. 44, 189 Pac. 37 (1920); People v. Martin, 4 Ill. App. 2d 105, 122 N.E.2d 245 (1954); Marks v. State, 144 Tex. Crim. 509, 164 S.W.2d 245 (1942).

\textsuperscript{10} Johnson v. United States, 157 F.2d 209 (D.C. Cir. 1946).

\textsuperscript{11} Id. at 209, "No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense."

\textsuperscript{12} Wright v. United States, 243 F.2d 569 (5th Cir. 1957); Thompson v. United States, 227 F.2d 671 (5th Cir. 1946).

\textsuperscript{13} United States v. Dege, 80 Sup. Ct. 1589, 1590 (1960). "... and therefore do not allow ourselves to be obfuscated by medieval views regarding the legal status of women, and the common law reflection of them."

\textsuperscript{14} Because of "Married Women's Property Acts", which enable a married woman to acquire, hold, and sell personal property, as if she were unmarried, many state courts have even done away with one of the best established of common law theories, i.e., one spouse could not commit larceny against the property of the other. Butler v. Wolf Sussman, Inc., 221 Ind. App. 47, 46 N.E.2d 243 (1943); State v. Koontz, 124 Kan. App. 216, 257 Pac. 944 (1927). But some courts, however, have rejected this view, holding that the concept of common property in marriage is too strong to find larceny between spouses.
makers to do away with the basic concept from which flows that amorphous “oneness,” whereby two persons obviously guilty of conspiracy are free from prosecution simply because of their marital status. The minority feels that to remove this defense is not only contrary to a rule well established in the common law, but also a merciless stroke against the solemn serenity of conjugal bliss. They premise this belief on the theory that a wife simply by virtue of the intimate life she shares with her husband, might easily perform acts that would technically be sufficient to involve her in a criminal conspiracy with him. They also express concern that possible conviction of “technical conspiracy” presents too great a risk to the American conception of the confidential relationship of marriage. However, such a position would seem to ignore completely the definition supplied by the many federal courts, of the precise nature of the crime of conspiracy, which virtually rules out any conviction simply on the basis of marital confidences. If two people carry out all other requirements for a conviction on conspiracy charges, without any showing of the application of coercion, the simple fact that they are man and wife should not preclude that conviction.

Nothwithstanding these strong policy reasons against retention of the rule it must be borne in mind that in the instant case the Court was interpreting a criminal statute. Chief Justice Warren puts great weight on the contention that when the original Conspiracy Statute was passed in 1867, the common law principle was held in high regard. Following from this undoubtedly true fact, he seeks the conclusion that since the 1948 legislation re-enacted the old statute without material variation, Congress intended the same exact conclusions of law should flow from the new as from the old. This minority view seems to rest upon the so-called “re-enactment rule.” The rule held that where the legislature re-enacts a statute with substantially the same wording as a previous one, a presumption is created of legislative adoption of previous judicial interpretation of that statute. This rule was, for all practical purposes, done away with in

15. United States v. Dege, 80 Sup. Ct. 1589, at 1590 (1960). “Considering that legitimate enterprises between husband and wife have long been commonplace, it would enthrone an unreality into the law to suggest that man and wife are legally incapable of engaging in illicit enterprises and therefore, forsooth, do not engage in them.”

16. Id. at 1592.
17. Id. at 1593.
18. “The elements of a criminal conspiracy are an object to be accomplished; a plan or scheme embodying means to accomplish that object; an agreement or understanding between two or more of the defendants whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement....” Pinkerton v. United States, 145 F.2d 252, 254 (5th Cir. 1944). (Emphasis added.) Accord, United States v. Hutts, 256 U.S. 524 (1921); United States v. Frisbie, 157 U.S. 60 (1886); United States v. Mack, 112 F.2d 290 (2d Cir. 1940); Sprague v. Aderholt, 45 F.2d 790 (D.C. Ga. 1930).
Girouard v. United States. Moreover, even the original rule would have had little effect on the present case, for the prerequisite for its use was a prior well settled judicial interpretation. Such was not the case in 1948, and since there was no other legislative history on the subject, it would seem that this case was in the legitimate area where judicial interpretation was not only permissable but necessary. Congress had passed a statute which dealt in general terms with the crime of conspiracy, and in view of the split by the lower federal courts, the question was open as to how it should be applied to a husband and wife. The Supreme Court was faced with the decision and of necessity had to weigh the merits of the common law rule in its relation to modern enforcement of the statute. In view of the policy decisions implicit in the question, the Court would seem to have been correct in imputing to Congress the intention to punish any and all perpetrators of conspiracy against the United States, regardless of the marital status of such conspirators.

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20. 328 U.S. 428 (1941). It was held that re-enactment after prior judicial interpretation was merely an aid to statutory construction. Accord, Helvering v. Reynolds, 313 U.S. 428 (1941); Commonwealth v. Broadcasting System, 311 U.S. 132 (1940).


22. See supra notes 6 and 12.

23. Mr. Justice Frankfurter stated in a highly regarded article that “In those realms where judges directly formulate law because the chosen lawmakers have not specifically acted, they have the duty of adaption and adjustment of old principles to new conditions.” Frankfurter, Some reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 535 (1947). See generally: Frank, Some Remarks on Statutory Interpretation, 47 Colum. L. Rev. 1259 (1947); Jaffe, An Essay on Delegation of Legislative Power, 47 Colum. L. Rev. 359 (1947).

24. The logic and necessity for embarking on such an inquiry was well stated by Justice Holmes when he said that “We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as what they obviously mean”. Roschen v. Ward, 299 U.S. 337, 339 (1929).

25. "When the legislature uses words which by their nature leave to the courts the job of applying broad vague standards, it is a mistake to suppose that courts are never called upon to appraise and balance the value of opposed interests and to enforce their preference." Judge Learned Hand in United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943).

26. "Such an immunity to husband and wife as a pair of conspirators would have to attribute to Congress one of two assumptions: either that responsibility of husband and wife for joint participation in a criminal enterprise would make for marital disharmony or that a wife must be presumed to act under the coercive influence of her husband and, therefore cannot be a willing participant. The former assumption is unhounourable by sense; the latter implies a view of American womanhood offensive to the ethos of our society." United States v. Dege, 80 Sup. Ct. 1589, 1591 (1960). One objection that has been raised to a courts extending the application of a criminal statute to a situation heretofore thought not to be covered by it is that this involves the evils of ex post facto legislation. The obvious answer to this contention is that the court is merely declaring what the law has always been under the statute in question. See Chavez v. Dickson, 280 F.2d 727 (9th Cir. 1960).
FEDERAL JURISDICTION—DIVERSITY OF CITIZENSHIP—APPLICATION OF UNIFORM NATIONAL LAW IN ACTION BY ADMARIALTY PROCTOR FOR CONTRACT INTERFERENCE.


Plaintiff's client, Vazquez, a Spanish citizen, was injured while working as a seaman aboard a vessel owned by the defendant corporation, a wholly owned subsidiary of co-defendant Esso Tankers, Inc. Under his employment contract, Vazquez was entitled to disability payments for injury and an award for permanent partial disability. However, while in a Maine hospital, Vazquez chose to retain plaintiff as counsel and there executed a document to that effect. A representative of Esso Tankers, knowing that plaintiff had been engaged as attorney and had filed suit against defendants in the District Court for the Southern District of New York, went to Maine where he attempted to persuade Vazquez to discharge plaintiff and settle with the company upon the terms of the employment contract. It was alleged that at that time, as well as in a subsequent letter to Vazquez from defendant's employment agent, assertions were made that attorneys in the United States did not correctly handle seamen's claims and did not care for the future of the person involved. Two months later, Vazquez dismissed plaintiff and left the United States for Spain; his flight was paid for by the defendants. Plaintiff brought this action for damages resulting from defendants' interference with an advantageous contractual relation claiming jurisdiction based upon diversity of citizenship. The district court, Judge Wyzanski presiding, ruled that despite the fact that this case was presented as one within the court's diversity jurisdiction, the questions of law were governed by neither the internal law nor the conflict of laws rules of Massachusetts. In concluding the contract between plaintiff and his client was a valid retainer and defendants had tortiously interfered with that contract, the court applied uniform national law. Greenberg v. Panama Transport Co., 185 F. Supp. 320 (D. Mass. 1960).

Since the case of Swift v. Tyson was superseded by Erie R.R. v. Tompkins, it has been generally accepted that in an action in a federal court based on diversity of citizenship, the substantive law to be applied is the law of the state in which the court sits. This rule extends to encompass the field of conflict of laws. However, it cannot be over-

1. The contract read in part: "... For such services rendered, I agree to pay my said attorney a fee not to exceed services rendered. I agree to pay my said attorney a fee not to exceed one-third of any amount collected by way of court verdict or settlement."


3. 304 U.S. 64 (1938).

4. The Supreme Court has held that the District Court of Delaware, sitting in diversity, was compelled to apply that state's law concerning foreign contracts. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941). Accord, Griffin v. McCoach, 313 U.S. 498 (1941).
looked that there have been situations where *Erie* has been held not to apply. Two of these cases, *O'Brien v. Western Union Telegraph Co.*, and *Sola Electric Co. v. Jefferson Electric Co.*, are cited by Judge Wyzanski as authority for his determination that state law does not automatically apply in the instant case. In the former, it was determined that certain fields are still governed by a federal common law which should be tapped in determining the privilege of defendant in transmitting a libellous message, since Congress had occupied the field by providing a "fairly comprehensive scheme of regulation." In the latter case, the Supreme Court held that since state law cannot be allowed to abrogate a federal statute, defendant in a suit for violation of a patent licensing agreement could base a counterclaim on the Sherman Act even though state law would have estopped him from so doing. In *American Surety Co. v. First Nat. Bank*, it was held that a federal court could fashion a federal rule of law to determine a bank's liability for a deposit of bankruptcy funds. Maritime issues also stand in an area not governed by the *Erie* rule, since general rules of maritime law have always been applicable to rights arising in that field, whether the action is brought in admiralty or law court. In *Vitozi v. Balboa Shipping Co.*, a post *Erie* action for a maritime tort, the court applied federal maritime law, reasoning that although jurisdiction was founded solely upon diversity, this was a field largely entrusted, under the Constitution, to federal rules for the purpose of uniformity. Such cases, however, do not appear to be direct authority for the instant case.

5. 113 F.2d 539 (1st Cir. 1940).
7. 113 F.2d 539, 541 (1st Cir. 1940). The court was making reference to the Communications Act, 48 Stat. 1064 (1934), 47 U.S.C. § 151 (1959).
8. 317 U.S. 173, 176 (1942). Mr. Justice Stone, speaking for a unanimous court said that *Erie* is "inapplicable to these areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law."
9. 141 F.2d 411, 416 (4th Cir. 1944). The court said, "The control of bankruptcy funds, like the right of the federal government to issue checks, is based upon the Constitution and the laws of the United States. The rights and liabilities with respect to handling of such funds 'find their roots in the same federal sources'; and 'in absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.'"
11. 163 F.2d 286, 288 (1st Cir. 1947). See also Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Sea Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Panama Agencies Co. v. Franco, 111 F.2d 263 (5th Cir. 1940).
12. U.S. CONST. art. I, § 8, "Congress shall have the Power ... to make all Laws which shall be necessary and proper ..."; art. III, § 2, "The judicial power shall extend ... to all Cases of admiralty and maritime jurisdiction ... ."
14. The maritime cases to which *Erie* does not apply are certainly not precedent. This case is not predicated upon a maritime tort. See Chambers v. Just, 113 F.2d 105, 108 (5th Cir. 1940), *rev'd on other grounds*, 312 U.S. 668 (1941); Holmes v. O. & C. Ry., 5 Fed. 75, 77 (D. Ore. 1880), *aff'd on rehearing*, 9 Fed. 229 (C.C. Ore. 1881). It does not arise from a maritime contract. See Belfast v. Boon, 74 U.S. (7 Wall.) 266 (1869); Berwind — White Coal Mining Co. v. City of New York,
The fact that one of the contracting parties in this case was a seaman appears to have been material to the court’s decision. Since courts have traditionally maintained a policy of treating seamen as wards of the admiralty,\textsuperscript{15} and since their rights to recover for personal injury are usually governed by the general maritime law and the Jones Act,\textsuperscript{16} it is not illogical to determine the validity of the contracts made in pursuit of these rights by a similarly universal standard. But since the seaman was not a party to this action and had no rights at issue, such a rationale does not appear to validly extend to the question of whether there was an interference with the contract.\textsuperscript{17} Further, the wording of Judge Wyzanski’s opinion indicates that perhaps the chief concern was in the fact that plaintiff was an officer of a federal court and that interference with a contract under which he pursued a federal cause of action in a federal court should be governed by uniform national law.\textsuperscript{18} This rationale applies not only to the question of the validity of the contract but also to whether there was an interference with that contract.\textsuperscript{19} Such reasoning must stand upon its own merits, however, since although there are no express repudiations of it, in existing cases concerning third party interference with the attorney-client relationship, courts in diversity jurisdiction have looked to state law for guidance.\textsuperscript{20} If the true basis for

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\item[135] F.2d 443, 446 (2d Cir. 1943). And it is not a libel in admiralty. \textit{But see}, Collins v. Nickerson, 6 Fed. Cas. 133 (No. 3017) (D. Mass. 1846); Angell v. Bennett, 1 Fed. Cas. 39 (No. 387) (D. Mass. 1844). In these cases it was held that a proctor, who had commenced a suit for a seaman, may proceed in it for costs after a clandestine settlement by defendant with proctor’s client. Under this theory, plaintiff Greenberg could have proceeded to recover his costs in the libel originally filed in the District Court for the Southern District of New York. But this adds no admiralty aspect to the instant case.


\item[17] In a situation such as this case, it would not seem realistic to find the contract invalid when the seaman is a party to the action and valid simply because he is not a party to the action. It follows then that this reasoning should apply to the question of contract validity even though the seaman is not a party, but it does not follow that the same reasoning must apply to all other issues concerning the contract.

\item[18] Greenberg v. Panama Transport Co., 185 F. Supp. 320, 324-25 (D. Mass. 1960), “The controlling principles of substantive law should be enunciated on a national basis applicable to anyone who is said to have interfered with a professional relation between an officer of a national court and his client.”

\item[19] Id. at 324, “Every policy consideration dictates that the federal courts should enunciate uniform national rules to determine the validity of contracts made by proctors in admiralty, who are officers of federal courts, to present claims to federal courts.” The court did not specify the policy considerations to which it referred.

\item[20] Employer Liability Assur. Corp. v. Freeman, 229 F.2d 547, 549 (10th Cir. 1955); State Farm Fire Ins. Co. v. Gregory, 184 F.2d 447, 448 (4th Cir. 1950). Courts have even applied state law where the alleged interference has been such that it could result in the attorney being disbarred before a federal court. French v. United States Fidelity & Guaranty Co., 88 F. Supp. 714, 721 (D. N.J. 1950).
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this opinion is concern for a lawyer operating as an officer of a federal
court, the instant case is open to extensive application. Apparently, if
an attorney-client contract contemplates a suit based upon a federal cause
of action in a federal court it will be governed by federal law. It is further
conceivable that this rationale could extend to the situation where there
is a federal cause of action and a possibility of suit in a federal court or
where an action brought in a state court is removed to a federal court.
It is submitted that such extensions are unwarranted and not intended
by the court. The more likely view is that it was the factual combination
of an officer of a federal court and a traditionally court protected seamen
entering into a contract, the subject matter of which was federal in nature,
that prompted the court to this decision. If this analysis is correct perhaps
the instant case should be applied to only the most similar of fact situa-
tions where these essential elements are present.

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21. Perhaps, because this suit involves a contract made by a Spanish national
there are other reasons for not subjecting the issues to state law. If state law
were applied Spanish national A might have a valid contract in one state while
Spanish national B's identical contract in Maine might be invalid. But if this is
the sole rationale, then any foreign national involved in any action with a United
States citizen should be able to avail himself of uniform national law merely
because he is not a United States citizen. Such protection is not given to an
American citizen when he enters any of the several states' courts or the federal
district courts.

There is also a strong doubt as to the validity of the retainer contract under
Maine law. Massachusetts courts would determine the validity and interpretation
of a contract by application of the law of the state in which it was executed.
Mass. 1948), aff'd, 176 F.2d 799 (1st Cir. 1949), aff'd, 339 U.S. 827 (1950). Be-
cause of its contingent fee and mention of suit, Maine may have branded the
under this statute are not clear as to whether it would apply to a contract con-
templating a tort action. Hinckley v. Giberson, 129 Me. 308, 151 Atl. 542 (1930);
Orino v. Belveau, 120 Me. 550, 113 Atl. 260 (1921); Manning v. Perkins, 85 Me.
172, 26 Atl. 1015 (1892); Burnham v. Heselton, 84 Me. 578, 24 Atl. 955 (1892).

22. In these situations, this case may be valid authority for determining con-
tract interference, but to apply it in determining the contract's validity may amount
to basing that validity upon the subsequent acts of a party or subsequent acts of
one not even a party.

23. Thus it seems that, rather than being one of the traditional situations where
Erie does not apply because of underlying principles of federal law, this case is
not governed by Erie because of the nature of the relationship established by the
contract. Indeed, Judge Wyzanski implies federal law applies to these facts whether
the suit is brought in a federal or a state court. Greenberg v. Panama Transport Co.,
INTERNAL REVENUE—Depletion—Computation of Gross Income Percentage by Miner—Manufacturer.


Respondent, an Indiana corporation, engaged during the tax year 1951 in the production of fire clay and shale from an underground mine. These minerals were transported to respondent’s plant where they were processed and manufactured into vitrified sewer pipe and related burnt clay products. Respondent brought this action to recover federal income taxes paid in 1951. It asserted that it was entitled to a percentage depletion allowance under the Internal Revenue Code of 1939, and that such allowance should be based on the gross income from its finished vitrified products, which it claimed as its first “commercially marketable product or products.” The government contended that an established local market existed for raw fire clay and shale, and that the allowance should be computed on the hypothetical or constructive income which respondent would have grossed on its raw minerals at the prevailing local market rate. The district court found that, while a local market did exist for the raw minerals, the peculiarities of respondent’s operations made it impossible for it to market such products profitably. It held that they were not therefore, “commercially marketable,” and ruled for respondent.  

1. Int. Rev. Code of 1939, ch. 1, § 23(m), 53 Stat. 12 (now Int. Rev. Code of 1954, § 611(a)), provides: “In computing net income there shall be allowed as deductions: . . . (m). Depletion. In the case of mines, oil and gas wells, other natural deposits, and timber a reasonable allowance for depletion . . . according to the peculiar conditions in each case . . . .” Int. Rev. Code of 1939, ch. 1, § 114(b)(4), 53 Stat. 45, as amended, ch. 521, § 319, 65 Stat. 497 (1951) (now Int. Rev. Code of 1954, § 613(a)), provides: “The allowance for depletion under 23(m) in the case of shale . . . 5 per centum, . . . (iii) in the case of fire clay . . . 15 per centum, . . . of the gross income from the property during the taxable year . . . .”  

2. Int. Rev. Code of 1939, ch. 1, § 114(b)(4), added by ch. 63, § 124(e), 58 Stat. 45 (1944) (now Int. Rev. Code of 1954, § 613(c)), provides: “As used in this paragraph the term “gross income from the property” means the gross income from mining. The term “mining” as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners and operators in order to obtain the commercially marketable product or products . . . .”  

3. Principally the fact that respondent operated an underground mine rather than a strip mine.  

4. The pertinent findings of fact, as summarized by the Court of Appeals, are as follows: (1) that over 300,000 short tons of fire clay (of some 500,000 short tons produced) were sold in the raw form in Indiana in 1951, and that raw fire clay and shale were also sold during the same period in the neighboring regions of Kentucky; (2) that the bulk of these sales were made at Brazil, Indiana, some one hundred and forty miles from respondent’s plant at Cannelton, Indiana; (3) that the average price for the raw minerals at Brazil ranged from $1.60 to $1.90 per ton; and (4) that respondent’s mining costs amounted to $2.41 per ton exclusive of subsequent transportation costs. Cannelton Sewer Pipe Co. v. United States, 268 F.2d 334 (7th Cir. 1959).  

court of appeals affirmed. On certiorari, the United States Supreme Court reversed, and held that the statutory phrase "commercially marketable" must be construed as establishing an industry-wide standard, and that the test of commercial marketability is, therefore, the availability of an existing market for the product in question and not the ability of a particular producer to compete profitably in that market. *United States v. Cannelton Sewer Pipe Co.*, 80 Sup. Ct. 1581 (1960).

The percentage depletion allowance was introduced into the national tax structure by the Internal Revenue Code of 1926, by which Congress granted the deduction to oil and gas producers. Since that time, it has been steadily extended to the producers of all minerals. The essence of the congressional policy is to permit mine owners and operators to deduct a fixed percentage of the gross income of their mineral producing properties as an allowance for the consumption of capital assets, and thereby to encourage such producers to explore and develop further mineral deposits. Congress adopted the percentage depletion system in order to provide a simple and practical method of computing the allowance, and thus avoid the complexities of the older cost depletion and discovery depletion methods. It was not until 1943 that Congress acted to eliminate the ambiguity of the phrase "gross income from the property" by defining it as "gross income from mining," and by adding the definition of mining upon which the instant case turns. It was held in 1954 that the phrase "commercially marketable product or products" must be construed to mean the first such product arrived at (or the first such products, as a single mining operation may yield a number of such basic products). The much noted case of *United States v. Cherokee Brick and Tile Co.*, decided in 1955, held that where no substantial market existed for a raw mineral, it was not "commercially marketable," and that a producer could continue to process it until he arrived at a marketable product; he could compute his depletion allowance on gross income from his final product, the only limitation on the producer being that his processes must be those

6. 268 F.2d 334 (7th Cir. 1959).
8. Int. Rev. Code of 1954, §§ 611(a), 613(a), (b). The scope of the percentage depletion system is such as to make the instant case and similar litigations of major economic significance to both the government and the mining industry.
9. This underlying purpose has been consistently emphasized by the courts. See e.g. *United States v. Cannelton Sewer Pipe Co.*, 80 Sup. Ct. 1581 (1960); *Anderson v. Helvering*, 310 U.S. 404 (1940); *United States v. Dragon Cement Co.*, 244 F.2d 513 (1st Cir. 1957), cert. denied, 355 U.S. 833 (1957); *United States v. Merry Brothers Brick and Tile Co.*, 242 F.2d 708 (5th Cir. 1957), cert. denied, 355 U.S. 824 (1957).
10. See 4 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 24.03(c).
11. See note 2 supra.
13. 218 F.2d 424 (5th Cir. 1955). Taxpayer, as in instant case, was an integrated miner-manufacturer of burnt clay products from raw clay. The government conceded that there was only a negligible market for raw clay, but contended that taxpayer's processes were of a manufacturing nature and consequently not "ordinary" processes in the statutory sense.
"normally applied by mine owners and operators"\textsuperscript{14} in the industry involved. The court thus rejected the government's contention that the allowance should not extend to any increment in the product's value obtained by a "manufacturing" rather than a "mining" process. The same court subsequently reaffirmed its repudiation of the manufacturing-mining distinction,\textsuperscript{15} and it has been supported in this by every other court which has considered the question.\textsuperscript{16} The principal of Cherokee would seem, therefore, to be a firmly established rule. The government in the instant case has abandoned its attempt to draw the above distinction and has attacked the related question of what constitutes a commercially marketable product. The decisions of the lower courts in this case, and in several other recent cases,\textsuperscript{17} have sought to carry the Cherokee rule one step further by holding that a product is not commercially marketable, even though a market for it exists, if its producer cannot sell it profitably in that market. By this decision, the Supreme Court has rejected this test of "profitability" or "economic feasibility."

In view of the foregoing, it is clear that the instant case leaves the holdings in Cherokee and the other "ordinary treatment processes" cases wholly untouched. A fundamental new rule on a distinct point has been laid down, the chief objection to which is that a product which cannot be profitably sold is hardly marketable commercially, as the latter term is generally understood, even though it may be marketable.\textsuperscript{18} There are, however, powerful countervailing arguments. It must be remembered that the basic purpose of percentage depletion is to allow for the exhaustion of wasting assets; it is not to allow for the cost of either recovery or processing of minerals.\textsuperscript{19} The long legislative history of the percentage depletion method reveals a continuing congressional understanding that the depletable value of a given quantity of mineral is its value in its raw form when there is a market for it in that form.\textsuperscript{20} To permit computation of the

\textsuperscript{14} See note 2 supra.
\textsuperscript{15} United States v. Merry Bros. Brick & Tile Co., 242 F.2d 708 (5th Cir. 1957), cert. denied, 355 U.S. 824 (1957).
\textsuperscript{16} United States v. Dragon Cement Co., 244 F.2d 513 (1st Cir. 1957), cert. denied 355 U.S. 833 (1957); United States v. Sapulpa Brick & Tile Co., 239 F.2d 694 (10th Cir. 1956); Townshend v. Hitchcock Corp., 232 F.2d 444 (4th Cir. 1956). All of these cases are essentially similar in that there was concededly no substantial market for the raw mineral and that the government based its case on the theory that "manufacturing" processes are extraordinary per se in the mining industry.
\textsuperscript{17} Commissioner v. Iowa Limestone Co., 269 F.2d 398 (8th Cir. 1959); Bookwalter v. Centropolis Crusher Co., 272 F.2d 391 (8th Cir. 1959); Standard Clay Manufacturing Co. v. United States, 176 F. Supp. 590 (W.D. Pa. 1959); Sparta Ceramic Co. v. United States, 168 F. Supp. 401 (N.D. Ohio 1958); Riverton Lime & Stone Co., 28 T.C. 446 (1957). It is arguable that the first two cases, supra, involving producers of chemical grade limestone, are distinguishable from the instant case, in that the code treats chemical grade limestone as a mineral distinct, for depletion purposes, from building or agricultural limestone.
\textsuperscript{18} This point is well made in Sparta Ceramic Co. v. United States, 168 F. Supp. 401, 404 (N.D. Ohio 1958).
\textsuperscript{19} See note 9 supra. See also 4 MERTENS, LAW OF FEDERAL INCOME TAXATION, § 24.02.
\textsuperscript{20} When Congress extended the deduction to oil and gas producers in 1926, "gross income from the property" was described as "gross receipts from the sale of
allowance on the increment in value produced by processing beyond that point would be, in effect, to subsidize the processing of minerals, a result clearly not contemplated by Congress. There is furthermore, no evidence of congressional intent to give some members of an extractive industry an advantage over others in the matter of depletion, and this would be the necessary result of an individualized standard of profitability which adjusted to every peculiar or inefficient mining operation. The congressional choice of the words “the ordinary treatment processes normally applied by mine owners and operators” reinforce the Court’s conclusion that the proper standard of commercial marketability is the industry-wide test of market availability, rather than the individualized test of profitability. The recent amendments to the Internal Revenue Code for the most part eliminated the Cannelton Pipe difficulty by expressly defining the term “mining.” It would seem that future litigation, although necessarily confined to problems involving processing prior to January 1, 1961, the effective date of the amendments, will in all likelihood be concerned chiefly with such problems as the availability of a market, and definition of the phrase, “ordinary treatment process.” It would appear that the government’s former contention that “manufacturing” processes are extraordinary per se will no longer be urged.

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References:

   - (i) in the case of coal . . . (ii) in the case of sulphur . . . (iii) in the case of iron ore . . . and minerals which are customarily sold in the form of a crude mineral product sorting, concentrating, and sintering to bring to shipping grade and form, and loading for shipment . . .
3. The fact findings of the District Court, note 4 supra, clearly show that fire clay and shale were customarily sold as crude mineral products in Indiana.
4. The individualized standard urged by respondent would certainly tend to give a competitive advantage to less efficient producers. The less efficient a given operation is, the more processing will be required to produce a profitably marketable product, and the larger will be the depletion allowance. Such a standard would also, of course, favor an integrated miner-manufacturer such as respondent over a non-integrated mining operation.
5. In the instant case the principal center of market activity was one hundred and forty miles from respondent’s plant, but what if it had been one thousand miles away? At what point can a market reasonably be said to be available to a particular producer? In view of the present holding, this is a problem with which the courts will certainly have to deal.