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Recent Developments

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RECENT DEVELOPMENTS

ADMIRALTY — LACHES — MARITIME DOCTRINE OF EXCUSABLE LACHES UNAVAILABLE TO EXTEND LIMITATIONS CONTAINED IN STATE WRONGFUL DEATH ACT.

Kenney v. Trinidad Corp. (5th Cir. 1965)

Decedent, the chief engineer on a tugboat was killed when the negligent operation of a tanker caused his tug to capsize in the Mississippi River near New Orleans.¹ His body was never recovered, and seven years later his two children sued in admiralty for the wrongful death of their father, basing their claim on the Louisiana provision for wrongful death actions.² Although this statute limited the right of action to one year, plaintiffs contended that under the maritime doctrine of laches their delay was excusable, since they were minors at the time of their father’s death, and because their mother had been advised that suit could not be instituted until the death of her husband had been legally established. The district court rejected this plea and dismissed the action on defendant’s motion for summary judgment.

On appeal, the Court of Appeals for the Fifth Circuit, although recognizing that the delay might have been excusable under maritime law,³ nevertheless affirmed the ruling of the lower court, holding that the time limitation provided by the state-created right of action, and not the maritime doctrine of laches, was controlling. Kenney v. Trinidad Corp., 349 F.2d 832 (5th Cir. 1965).

It is well established that, in the absence of a statutory provision, no right of action exists for a tortious breach of maritime law resulting in death.⁴ Congress, however, has only seen fit to provide partial relief to a seaman’s dependents through the Jones Act,⁵ which gives a seaman or his personal representative a cause of action against his employer, and the Death on the High Seas Act,⁶ which creates a remedy for death occurring beyond a maritime league from the shore of any state. In all other situations a plaintiff is forced to resort to the state wrongful death acts, a

³. See Larios v. Victory Carriers, Inc., 316 F.2d 63 (2d Cir. 1963); McDaniel v. Gulf & South American Steamship Co., 228 F.2d 189 (5th Cir. 1955); Morales v. Moore-McCormack Lines, 208 F.2d 218 (5th Cir. 1953).
⁴. The Harrisburg, 119 U.S. 199 (1886).
practice long approved by the courts. As neither federal statute was applicable to the instant case, plaintiffs were compelled to invoke the Louisiana statute.

Normally, the length of time within which an action may be brought by a seaman for personal injuries is governed by the admiralty doctrine of laches. Unlike the strictly enforced statutes of limitations which are controlling in common law actions, this doctrine requires an examination of the peculiar equities of each case to determine whether the action should be barred.

In the instant case the court rejected plaintiff’s attempt to extend the time limit specified in the Louisiana statute by invoking the doctrine of laches. The decision was based primarily on a line of recent Supreme Court cases holding that where state wrongful death statutes are used as bases of recovery, the right of action is founded on state, rather than maritime law, and the entire substantive law of the state should be applied.

In the leading cases of The Tungus v. Skougard and United N.Y.&N.J. Sandy Hook Pilot’s Ass’n v. Halecki, the majority of the Court held that a state wrongful death statute could provide a remedy based on unseaworthiness only if it were interpreted, as a matter of state law, to embrace such a claim. The Court further ruled that where admiralty adopts a state-created right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations that state has attached.

The minority disputed this interpretation of the function of the state act, contending that it merely supplies a remedy for tortious death, and that the rights and duties of the parties should be determined according to the standard of care imposed by maritime law. State law should not be permitted to diminish the duty owed a seaman under maritime law.

In Hess v. United States and Goett v. Union Carbide Corp., both of which involved death actions arising out of the drowning of land-based workers in state waters, the Court was once again faced with the application of state wrongful death statutes to maritime torts.

In Hess the claim was based on the Oregon Wrongful Death Statute, as well as that state’s Employer’s Liability Law. The latter statute provides for recovery in cases where the defendant employer did not “use every

12. Mr. Justice Stewart, Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan, and Mr. Justice Whittaker.
14. The Chief Justice, Mr. Justice Brennan, Mr. Justice Black, and Mr. Justice Douglas.
17. ORE. REV. STAT. § 30.020 (1953).
device, care and precaution which it is practicable to use for the protection and safety of life and limb." The effect of this statute was to establish a higher standard of care on the part of the employer than that ordained by maritime law. The majority of the Court, including the four dissenters in The Tungus who joined under the compulsion of that case, held that when courts applying maritime law adopt state wrongful death statutes, state substantive law should be followed, even where the state statute imposes a higher standard of care than the maritime law.

In Goett, the Supreme Court, speaking through a five member majority, remanded the case to the Fourth Circuit to determine whether the West Virginia Wrongful Death Statute incorporated general maritime standards or those of the state. Since the lower court's decision preceded the Supreme Court's opinion in The Tungus, it was unclear whether the lower court had properly applied the ruling of that case. Again the four dissenters in The Tungus joined the majority. While reserving their opinion as to whether that case should be overruled, they stated that so long as it remained law, its doctrine should at least be applied evenhandedly.19

In both cases the minority included several justices who had joined the majority in The Tungus. Their position was that state law should not increase the standard of care required by maritime law, although it may be a limiting factor. Their opinions also contained language which indicated a possible realignment of at least one of the justices with the view expressed by the dissenters in The Tungus.20

As a result of these decisions, the Court appears to be divided into three camps. The four dissenters in The Tungus appear to favor granting at least the minimum protection afforded by the maritime law in all cases. However, where state law increases that protection, the admiralty courts should allow the plaintiff to reap the additional benefits. They favor this approach in order to avoid the anomaly of applying maritime law to personal injury cases and state law to wrongful death actions.21

The dissenters in Hess, on the other hand, would apply the state law only where it affords no greater protection than maritime law. Their rationale is based on the theory that federal supremacy22 is violated when the states create a higher standard of duty than the maritime law would require.23 Based on their position in The Tungus, it appears that they do not deem this principle violated where the state law creates a lower standard of care.

Finally, the few members of the majority in both The Tungus and Hess take the position that state substantive law should be19. Goett v. Union Carbide Corp., 361 U.S. 340, 344 n.5 (1960).
20. See Comment, 28 U. Chi. L. Rev. 346 (1961), wherein the author notes that the dissent of Mr. Justice Whittaker in Goett seems similar to the reasoning of the minority in The Tungus.
regardless of how it compares with maritime standards. These justices feel that the courts, in applying a state wrongful death statute, are using a right of action rooted in state rather than maritime law, and in such cases state substantive law should control.\textsuperscript{24}

In the instant case the court initially determined that the time limitation of the state statute was a substantive rule of law.\textsuperscript{25} Although recognizing the uncertain future of \textit{Tungus}, the court felt constrained to follow its ruling that when a state’s wrongful death act is relied on in admiralty, issues must be decided in accordance with the substantive law of the state.\textsuperscript{26} It therefore held excusable laches unavailable to extend the time limit provided by the Louisiana statute.

The most significant aspect of the instant case is not the extended application of \textit{Tungus} doctrine to the issue of laches, but rather the anomalous result which is the inevitable consequence of applying that rule.

The principal case concerns a seaman who was employed in the navigable waters of the United States. In any injury short of death, or in any action under the relevant federal statutes, he would have been granted the full protection of maritime law. But due to the fact that the representatives of the deceased were compelled to follow the rule laid down in \textit{Tungus}, they were not allowed to assert a right otherwise permitted. Such would not be the result were the courts to follow the standard of admiralty supremacy found in other areas of maritime law.\textsuperscript{27}

It is interesting to note that the instant court, after deciding the case under the compulsion of \textit{Tungus} and several other decisions,\textsuperscript{28} specifically approved the position taken by the dissenter in \textit{Tungus} and submitted that the broad constitutional grant of jurisdiction to federal courts in “all Cases of admiralty and maritime jurisdiction”\textsuperscript{29} empowers federal courts to fashion a federal law of the sea to permit recovery for wrongful death on any navigable waters.\textsuperscript{30} The court further stated:

The national interest in an effective merchant marine, the growing importance of inland water transportation, and the increasing commercial activities on territorial waters, call for reconsideration of a federal court’s powers in admiralty in wrongful death cases and the propriety of a uniform federal remedy for wrongful death occurring on a state’s maritime waters.\textsuperscript{31}

The language of the present decision is a clear invitation to the Supreme Court to resolve the existing confusion among lower court

\textsuperscript{24} The Tungus, 358 U.S. 588, at 592 (1959).
\textsuperscript{25} In reaching this result, the instant court relied mainly on the following cases: Allen v. United States, 338 F.2d 160 (9th Cir. 1964); Mejia v. United States, 152 F.2d 686 (5th Cir. 1945), cert. denied, 328 U.S. 862 (1946).
\textsuperscript{26} See 358 U.S. 588, at 593 (1959).
\textsuperscript{27} See cases cited at note 22, supra.
\textsuperscript{28} These other decisions did not deal with the question of laches specifically, and the principle emphasis was placed on \textit{Tungus} as the basis for the result.
\textsuperscript{29} U.S. Const. art. III, \S 2.
\textsuperscript{30} 349 F.2d at 840.
\textsuperscript{31} Id. at 840, 41.
judges. It also joins with the consistent plea of the original dissenters in *The Tungus* to use the state wrongful death acts as an analogy for constructing a federal remedy, while maintaining the maritime substantive law as the basis for determining rights and duties under the acts.

It is submitted that the present case, in conjunction with the various changes and realignment of the justices on the Supreme Court, foreshadows a possible overruling of the present law. In that event, the various doctrines of admiralty law would be applied in all cases of maritime injuries, and the anomalous distinctions exemplified by the present rule would be eliminated.

*Raymond T. Letulle*

**CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — ILLEGALLY SEIZED EVIDENCE BARRED IN A FORFEITURE ACTION.**

*One 1958 Plymouth Sedan v. Commonwealth* (U.S. 1965)

At approximately 6:30 a.m. on December 16, 1960, two officers of the Pennsylvania Liquor Control Board stationed near Camden, New Jersey, at the approach to the Benjamin Franklin Bridge, observed a 1958 Plymouth sedan bearing Pennsylvania license plates proceeding toward the bridge in the direction of Philadelphia. Noting that the car was riding low in the rear, the officers followed it across the bridge into Philadelphia where they stopped it, identified themselves, and questioned the driver. Although they had neither a search nor an arrest warrant, they searched the car. In the rear and trunk they found thirty-one cases of liquor, none of which bore Pennsylvania tax seals. They seized both the car and the liquor and arrested the driver charging him with violation of the Pennsylvania Liquor Code.1 Pursuant to a Pennsylvania statute, the Com-

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32. See Emerson v. Holloway Concrete Products Co., 282 F.2d 271, 281 (5th Cir. 1960), wherein the court states:

> What does death do? I would not here try to fashion a consistent mosaic from the momentary, shifting, sometimes conditional concurrences among the several Justices which now make up the Court's view.

33. See 358 U.S. 588, 611 (1959) (dissenting opinion).


> Any person who shall violate any of the provisions of this article . . . shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than one hundred dollars ($100), nor more than five hundred dollars ($500), and on failure to pay such fine, to imprisonment for not less than one month nor more than three months, and for any subsequent offense, shall be sentenced to pay a fine not less than three hundred dollars ($300), nor more than five hundred dollars ($500), and to undergo imprisonment for a period not less than three months, nor more than one year.
monwealth filed a petition for forfeiture of the automobile. At the hearing, the petitioner sought dismissal of the petition on the ground that the forfeiture of the automobile depended upon the admission of evidence obtained through a violation of the fourth amendment. The trial court sustained petitioner’s position and dismissed the forfeiture petition because the officers acted without probable cause. The Pennsylvania Superior Court reversed and directed that the automobile be forfeited, and the Pennsylvania Supreme Court affirmed. The United States Supreme Court granted certiorari and reversed the Pennsylvania court holding that the exclusionary rule enunciated in Weeks v. United States and Mapp v. Ohio applies to forfeiture proceedings.

Prior to Mapp the states were not obligated to recognize the fourth amendment guarantees. Each state constitution, however, contained guarantees against unreasonable searches and seizures as well as the issuance of warrants without probable cause. Ordinarily these guarantees are thought to apply to the person, his home, and his possessions therein; however, the guarantee against unreasonable search and seizure has also been held to apply to automobiles.

Probable cause to search must be determined in each case according to the particular circumstances involved. However, because an automobile has the capacity to remove the criminal and his loot from the locale of the crime, the probable cause required to permit the search of a vehicle has always been less than that required to search a building. In Pennsylvania the slightest chance that a crime might have been, or is being, committed seems to be adequate probable cause to search.

For example in Commonwealth v. Katz, an officer searched the automobile of an individual who was suspected of being involved in a gambling operation. The officer saw the suspect place a package in the

2. PA. STAT. ANN. tit. 47, § 6-601 (1964 Cum. Supp.) provides in pertinent part: No property rights shall exist in any liquor, alcohol, malt or brewed beverages illegally manufactured or possessed, or in any vehicle, boat, vessel, animals or aircraft used in the illegal manufacture or illegal transportation of liquor, alcohol malt or brewed beverages, and the same shall be deemed contraband and proceedings for its forfeiture to the Commonwealth may, at the discretion of the board, be instituted in the manner hereinafter provided.
3. The trial court’s decision is unreported.
10. Commonwealth v. Ryan, 21 D.&C. 457 (Q.S. Phila. County 1934). In this case a Pennsylvania county court held that the fourth and fifth amendments to the federal constitution, prohibiting unreasonable searches and seizures, do not restrict the power of states, but operate solely on the federal government and federal courts.
11. PA. CONST. art. I, § 8. The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any persons or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or subscribed to by the affiant.
car which was parked in a public parking lot. When the car was unattended, the officer searched it and confiscated the package which was later found to contain lottery slips. The court held that the search was legal and admitted the evidence which it had produced.

At one time the federal courts, too, required very little probable cause to justify the search of an automobile. In fact, some federal tribunals permitted law enforcement agents to search automobiles for contraband indiscriminately, that is, whether there was probable cause or not, holding that the finding of contraband justified the search.\(^\text{15}\) This doctrine has, however, been repudiated by the United States Supreme Court,\(^\text{16}\) which, while recognizing the peculiar situation involved in the search of a vehicle on a highway, makes the test of legality of such a search without a warrant a probable cause for belief that the automobile is carrying contraband.\(^\text{17}\) When one seeks a federal standard for probable cause, however, he encounters some confusion. For example, in 1923, when the indiscriminate search doctrine was still in effect, a prohibition agent observed what he thought were indications that the driver of an automobile was intoxicated, and, without a search warrant, stopped and searched the automobile and found liquor. The search was held to be illegal.\(^\text{18}\)

Federal court decisions in forfeiture actions have also been in some confusion. In 1950, one federal court went so far as to hold: "Where federal officers improperly obtain evidence through an illegal search or seizure, it cannot be used in a criminal proceeding. However, the United States may adopt the illegal seizure for the purposes of property forfeiture obtained by such seizure, with the same effect as if it had been originally seized through duly constituted authority."\(^\text{19}\) In contrast *Boyd v. United States*,\(^\text{20}\) which was decided in 1886, was a proceeding by the United States to forfeit thirty-five cases of plate glass which had allegedly been imported without payment of customs duty. The question before the Court was whether the compulsory production of a man's private papers for use as evidence against him in a proceeding to forfeit his property for fraud against the revenue laws constituted an unreasonable search and seizure violative of the fourth amendment. Holding in the affirmative the Court stated, "the information, though technically a civil proceeding, is in substance and effect a criminal one. ... As, therefore, suits for penalties and forfeiture, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the constitution. ..."\(^\text{21}\)

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20. 116 U.S. 616 (1886).
21. *Id.* at 634.
In the present case, had the forfeiture proceeding been to secure the illegal liquor, the Court probably would have affirmed the Pennsylvania Court.\textsuperscript{22} The return of the contraband would clearly have frustrated the express public policy against the possession of such objects.\textsuperscript{23} However, the nature of the property here, although termed contraband by Pennsylvania,\textsuperscript{24} is not really contraband. There is nothing criminal in possessing an automobile; it is only by reason of the use to which this particular automobile was put that the owner is subject to losing it. The return of the automobile to its owner would not subject him to any possible criminal penalties for possession or frustrate any public policy.

In reaching its decision the Court relied heavily on the fact that a forfeiture proceeding is quasi-criminal in nature.\textsuperscript{25} Its object, like that of a criminal proceeding, is to penalize for the commission of an offense against the law. Had the owner lost his car, valued at $1000, he would have been penalized in a greater amount than that provided for the particular offense with which he was charged.\textsuperscript{26} (The statute provides for a maximum penalty of $500.) That the forfeiture is clearly a penalty for the criminal offense and can result in greater punishment than the criminal prosecution was even recognized by the Pennsylvania courts.\textsuperscript{27} Under these circumstances, it would certainly seem strange to hold that in criminal proceedings the illegally seized evidence must be excluded, but in the forfeiture proceeding requiring the determination that the criminal law has been violated the same evidence would be admissible.

It is only logical to conclude then, that since the exclusionary rule is obligatory upon the states under the fourteenth amendment,\textsuperscript{28} it should also be applicable to forfeiture proceedings such as the one involved here. This conclusion simply extends the rule of \textit{Mapp}\textsuperscript{29} to include the rule of law announced in the \textit{Boyd}\textsuperscript{30} case. It does not in any way change the Pennsylvania law permitting forfeitures,\textsuperscript{31} but simply requires the Commonwealth to have the same probable cause which is needed for a criminal prosecution when dealing with forfeitures of this type.

\textit{Eugene H. Evans}

\textsuperscript{22} United States v. $1,058.00 In United States Currency, 323 F.2d 211 (3d Cir. 1963). This case held that contraband illegally seized may be forfeited and consequently overruled United States v. Plymouth Coupe, 88 F. Supp. 93 (W.D. Pa. 1950); however, the \textit{Plymouth Coupe} case failed to differentiate between contraband, such as narcotics, and the automobile used to transport it.


\textsuperscript{25} Boyd v. United States, 116 U.S. 616 (1886).


It seemed to the court below that to make this man pay the sum of $500 in fines, together with the cost of the proceeding and the storage cost for the automobile, was sufficient punishment under all circumstances. To forfeit a 1959 Chevrolet Impala Coupe in addition to the above seemed to the court below to be entirely out of proportion to the crime involved. We cannot say that the court below abused its discretion in so acting.

\textsuperscript{28} Mapp v. Ohio, 367 U.S. 643 (1961).

\textsuperscript{29} \textit{Ibid.}

\textsuperscript{30} Boyd v. United States, 116 U.S. 616 (1886).

CORPORATIONS — SECURITIES REGULATION UNDER § 16(b) —
CONVERSION OF CONVERTIBLE DEBENTURES CONSTITUTES BOTH "SALE"
AND "PURCHASE" THOUGH NO PROFITS WERE REALIZED ON THE
EXERCISE OF THE PRIVILEGE.

Heli-Coil Corp. v. Webster (3d Cir. 1965)

Defendant had been a director of Heli-Coil Corporation since its
corporation on October 16, 1958. On November 20, 1958, he purchased,
at par value plus accrued interest, $60,000 principal amount of Heli-Coil's
5% callable debenture bonds issued November 1, 1958 and due
November 1, 1973. The company could redeem these debentures at any time
prior to maturity at prices fixed in the debenture. The holder, at his
option, could convert the debentures into common stock at any time prior
to redemption or maturity "at a conversion price equal to $16\% principal
amount of debentures for each share of common stock, or at the adjusted
conversion price in effect at the date of the conversion determined as
provided in said Indenture." The indenture contained additional pro-
visions protecting the conversion right against dilution. The debentures
were never called for redemption and were never registered on a national
securities exchange but were traded in the over-the-counter market. On
November 20, 1958, defendant also purchased, in the open market, 500
shares of Heli-Coil's common stock at $14.50 per share. The common
stock was not listed on a national securities exchange until December
when it was approved and registered on the American Stock Exchange.
On March 18, 1959, defendant exercised his option to convert his deb-
entures and, as a result, received 3,600 shares of Heli-Coil's common stock,
having a par value of $1.00. On July 16, 1959, Webster sold 1,000 of
these shares; on August 26, another 200 shares; and on September 1, an
additional 100 shares.

Heli-Coil Corporation brought an action under Section 16(b) of the
Securities Exchange Act of 1934\(^1\) to recover insider profits realized by
Webster as a result of his conversion of the debentures purchased less
than six months before, and also to recover Webster's profits from the
sales of the common stock, all of which took place within a period of less


For the purpose of preventing the unfair use of information which may have
been obtained by such beneficial owner, director, or officer by reason of his
relationship to the issuer, any profit realized by him from any purchase and sale,
or any sale and purchase, of any equity security of such issuer (other than an
exempted security) within any period of less than six months, unless such security
was acquired in good faith in connection with a debt previously contracted, shall
inure to and be recoverable by the issuer, irrespective of any intention on the
part of such beneficial owner, director, or officer in entering into such transaction
of holding the security purchased or of not repurchasing the security sold for a
period exceeding six months. Suit to recover such profit may be instituted at law
or in equity in any court of competent jurisdiction by the issuer, or by the owner
of any security of the issuer in the name and in behalf of the issuer if the issuer
shall fail or refuse to bring such suit within sixty days after request or shall fail
diligently to prosecute the same thereafter. . . .
than six months after the conversion.\textsuperscript{2} The Federal District Court for the District of New Jersey rendered judgment in favor of Heli-Coil, holding that Webster's conversion transaction constituted both a sale of the debentures and a purchase of the common stock allowing the corporation to recover the profits realized under Section 16(b).\textsuperscript{3} The Court of Appeals for the Third Circuit, on a re-hearing \textit{en banc},\textsuperscript{4} \textit{held} that the conversion transaction was of the type which Section 16(b) was designed to prevent but since no real profits were realized Heli-Coil's recovery should be modified to include only the profits realized from Webster's sales of the common stock.\textsuperscript{5} \textit{Heli-Coil Corp. v. Webster,} \textit{....} F.2d \textit{....} (3d Cir. 1965).

Under Section 16(b) of the Securities Exchange Act of 1934,\textsuperscript{6} any profit realized from purchases and sales of a corporation's equity securities\textsuperscript{7} within a six-month period by insiders (directors, officers, or beneficial owners of more than ten per cent of any class of equity security) can be recovered by the corporation or by one or more of its stockholders suing in its behalf.\textsuperscript{8} The insurer who purchases and sells his company's equity securities within the statutory period is held accountable for the profits realized regardless of his expectations and intentions.\textsuperscript{9} Also, it is unnecessary to prove that inside information was actually used.\textsuperscript{10} The operation of 16(b) is made more effective by the requirement of Section 16(a) that insiders make full and prompt reports of all their holdings and dealings

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\textsuperscript{2} Plaintiff's recovery depended upon a finding that a conversion is \textit{both} a purchase and a sale so that the original purchase of the debentures less than six months before the conversion and the sales of common stock within six months after the conversion could each be paired with the conversion to constitute two separate violations of the statute.

\textsuperscript{3} 222 F. Supp. 831 (D.N.J. 1964). The court determined the amount of recovery by subtracting the purchase price of the debentures from their market value at the time of conversion and by adding the difference between the value of the common stock when acquired and the price at which the stock was subsequently sold by defendant. Judgment was given in the amount of $116,544.36, without interest. The district court opinion in \textit{Heli-Coil} is noted in \textit{49 Iowa L. Rev.} 1346 (1964) and \textit{19 Rutgers L. Rev.} 151 (1964).

\textsuperscript{4} Argument was first heard on October 20, 1964. After the submission of an amicus curiae brief by the Securities Exchange Commission, the case was reargued before the full court on May 25, 1965.

\textsuperscript{5} Judgment was therefore reduced to $45,144.36, the profits realized from the sale of the common stock.

\textsuperscript{6} Prior to the enactment of the Securities Acts Amendments of 1964, Pub. L. No. 467, 88th Cong., 2d Sess. (August 20, 1964), [78 Stat. 565], Section 16 was applicable only to insiders of corporations with securities registered on a national securities exchange. The 1964 amendments, providing for registration under Section 12 of equity securities issued by certain over-the-counter companies, extended Section 16 to all "securities registered under Section 12." The transactions in the principal case are not subject to these recent amendments since they took place prior to their effective date.

\textsuperscript{7} "The term 'equity security' means any stock or similar security; or any security convertible, with or without consideration, into such a security or carrying any warrant or right to subscribe to or purchase such a security; or any such warrant or right...." 48 Stat. 882 (1934), 15 U.S.C. § 78c(a)(11) (1964).

\textsuperscript{8} See note 3 supra.

\textsuperscript{9} In Smolowe v. Delendo Corp., 136 F.2d 231 (2d Cir. 1943), \textit{cert. denied,} 320 U.S. 751 (1943) the court stated: "It is apparent too, from the language of 16(b) itself, as well as from the Congressional hearings, that the only remedy which its framers deemed effective for this reform was the imposition of a liability based upon an objective measure of proof." \textit{Id.} at 235.

\textsuperscript{10} \textit{Loss, Securities Regulation} 1069 (2d ed. 1961).
in equity securities to the Securities and Exchange Commission. The purpose of 16(b) — coupled with the reporting requirements of 16(a) — is to protect "outside" stockholders against short-swing market speculation by "insiders" with advance information, and to prevent manipulation by "insiders" of corporate affairs in a manner designed to cause market fluctuations.

The most troublesome problems which arise under Section 16(b) are those involving a determination of what transactions constitute a "purchase" and "sale" within the meaning of the statute. The act states that the term "purchase" includes "any contract to buy, purchase, or otherwise acquire" and that "sale" includes "any contract to sell or otherwise dispose of." Such language may appear, at first blush, to be unambiguous, but courts have often given these terms broad application while at the same time expressly declining to enunciate a "black letter rubric." Indeed, the approach taken by the courts in this area has been described as "pragmatic rather than technical," and most of the decisions have been rendered on an ad hoc basis.

As the number of authoritative interpretations of Section 16(b) increases, two divergent views concerning the analysis of conversion transactions have emerged. The first is illustrated by the case of Park & Tilford, Inc. v. Schulte. In that case the defendants, who owned a majority of the outstanding shares of common stock and thus a controlling interest in the company, also held convertible preferred stock with the right to exercise the conversion privilege until the redemption date. From late 1943 until May of 1944, the market price of the common stock experienced a spectacular rise due to an impending dividend to be paid in kind (liquor). On December 20, 1943, the company served a 90-day notice of redemption of its preferred stock and, on January 19, 1944, the defendants exercised their conversion privilege. Within six months after the conversion, they sold the common stock thus acquired at a substantial profit. The Second Circuit held that the conversion was a "purchase" of the common stock: "We think a conversion of preferred into common stock followed by a sale within six months is a 'purchase and sale' within the statutory language of § 16(b)." The court's language has been called "unduly broad" because it would render all conversions "purchases" regardless of the facts.

15. Roberts v. Eaton, 212 F.2d 82, 85 (2d Cir. 1954).
18. Id. at 987.
of the particular transaction. On the other hand, some commentators contend that such a broad application reflects the congressional purpose in enacting 16(b) as a "rule of thumb."\textsuperscript{20}

The second view is represented by \textit{Ferraiolo v. Newman},\textsuperscript{21} a Sixth Circuit case in which Judge Stewart\textsuperscript{22} concluded that the conversion transaction at issue was not a purchase. Judge Stewart pointed out that unlike the defendants in \textit{Park & Tilford}, those in \textit{Ferraiolo} were not in control of the issuing corporation (Ashland Oil and Refining Co.). He also reasoned that because the convertible preferred stock in Ashland was protected against dilution, the common and preferred stocks of the corporation were "economic equivalents" and thus the receipt of one for the other was not the "purchase" of something new. He further distinguished \textit{Park & Tilford} by stating that because Newman would have lost approximately $9 per share if he allowed his preferred stock to be redeemed, the conversion was, for all practical purposes, involuntary. Judge Stewart concluded that the conversion, on an analysis of all the circumstances, "was not one that could have lent itself to the practices which Section 16(b) was enacted to prevent."\textsuperscript{23} A recent decision in the Ninth Circuit appears to adopt the view expressed in \textit{Ferraiolo}. In \textit{Blau v. Max Factor & Co.},\textsuperscript{24} it was held that defendants' exchange of their common stock for class A stock was not a "purchase" of the class A within the meaning of 16(b) and thus would not impose liability on defendants for the profits they derived from the subsequent sale of the class A stock. The court reasoned that the exchange did not interrupt the continuity of defendants' investment because the common stock had been acquired from 5 to 32 years earlier and therefore the exchange and its timing were irrelevant to the use of inside information for short-term speculation.

The question whether a conversion also constitutes a "sale" of the convertible security was considered in the recent case of \textit{Blau v. Lamb},\textsuperscript{25} which involved a preferred stock transaction similar to that in the principal case. The court referred to the district court's opinion in \textit{Heli-Coil} and applied the \textit{ratio decidendi} of the \textit{Park & Tilford} case to conclude that the conversion transaction was both a purchase and a sale. "Moreover, the danger of insider speculation is no less inherent in a situation where a conversion serves as the second half of the short-swing than where a conversion constitutes the first half or 'purchase' end of the short-swing."\textsuperscript{26}

Whereas the court in \textit{Blau v. Lamb} and the lower court in the present case decided that the defendants had \textit{realized profits} as a result of the conversion transactions, the Court of Appeals in \textit{Heli-Coil} took the contrary position. Neither "profit" nor "realized" is defined in the statute

\textsuperscript{20} See note 12 supra.
\textsuperscript{21} 259 F.2d 342 (6th Cir. 1958), cert. denied. 359 U.S. 927 (1959).
\textsuperscript{22} Now Mr. Justice Stewart of the United States Supreme Court.
\textsuperscript{24} 342 F.2d 304 (9th Cir. 1965).
\textsuperscript{25} 242 F. Supp. 151 (S.D.N.Y. 1965).
\textsuperscript{26} Id. at 156.
or in the relevant case law, but since each debenture was, at the time of the conversion, the substantial economic equivalent of the common stock into which Webster converted it, the court reasoned that "after the conversion Webster retained his investment position in the securities of the issuer, Heli-Coil, and what profits had accrued to him were 'paper' profits held by him at the risk of the market and which could disappear if the market declined to a sufficient extent." However, since the determination whether profits were realized is necessary only after it has been decided to treat the conversion as a purchase or sale, it may be argued that a finding that no real profits were realized is anomalous.

The two divergent approaches to conversion transactions were labeled "subjective" (Ferraiolo) and "objective" (Parks & Tilford) by Chief Judge Biggs in the instant case. Judge Hastie, in his concurring and dissenting opinion, maintains that this is an oversimplification. He describes both approaches as requiring objective standards and then suggests a "rule of reason" instead of the "rule of thumb" analysis applied by the majority. He concludes that "sale" and "purchase" as used in Section 16(b) "should not be construed to include the exchange of securities involved in such a conversion as this case presents." This conclusion would be consistent with the test most often applied by courts in determining whether a transaction should be classified as a purchase or sale. The standard seeks to deter any transaction which is "of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)." It seems unlikely that Congress intended a purely mechanical approach under 16(b), so courts have justifiably refused to apply an "automatic" standard in resolving other questions under Section 16(b) as well.

In the present case, because the convertible security was protected against dilution, the market price of the common stock would continue to be reflected in the market price of the debentures. "Actually, in terms of market economics, with which Section 16(b) is concerned, the security holder, having surrendered his preferred position as a creditor, had less after converting that he had before." Although Webster's new position as a common stockholder gave him new rights of voting and dividend-sharing, it did not give him a market or trading advantage and thus is not relevant to the problem of speculation. Because the right to convert is acquired upon the purchase of the convertible security, such security during the entire period it is held has, in effect, a dual nature, representing either the debenture or common stock depending on the option of the

28. Thus, courts have declined to extend the application of 16(b) in Blau v. Mission Corp., 212 F.2d 77 (2d Cir. 1954), cert. denied, 347 U.S. 1016 (1954) (sale of stock to a wholly-owned subsidiary); Roberts v. Eaton, 212 F.2d 82 (2d Cir. 1954), cert. denied, 348 U.S. 827 (1954) (receipt of stock in a reclassification); Shaw v. Dreyfus, 172 F.2d 140 (2d Cir. 1949), cert. denied, 337 U.S. 907 (1949) (receipt of stock dividends distributed equally to all stockholders).
29. Heli-Coil Corp. v. Webster, ..... F.2d ..... (3d Cir. 1965) (dissenting and concurring opinion).
holder. 31 Thus, by exercising the conversion privilege, Webster did not even place himself in a position where he could make any more advantageous use of inside information than he could have before the conversion.

In reply to this argument, Chief Judge Biggs admits "it is true that the common stock acquired by Webster was the economic equivalent of his debentures prior to the conversion and it is difficult to perceive how an economic advantage could be derived by Webster from the conversion, but there is one situation..." He then suggests a hypothetical situation in which a call for redemption has been made or is imminent. Here, since the convertible security would no longer be tied to the price of the common stock, advance knowledge by an insider of an increased dividend to be paid after the senior security has been redeemed would place him in a position to profit unfairly by his conversion. This situation may very well fall within 16(b), but it is difficult to understand his resort to facts not present in the case sub judice as a basis for his opinion. In the transaction in question, no call was made either before the conversion or soon thereafter and the price of the debentures at all times maintained a direct relationship to the common stock.

Chief Judge Biggs' approach is also unnecessarily broad in light of its possible consequences. It does not consider compulsion or lack of it to be a factor in the case at bar, whereas the involuntary nature of the transaction was considered an important distinction in Ferraiolo. That such a broad approach to a conversion transaction can lead to an unjust result is seen in an hypothesis posed by Professor Loss: "[I]f every conversion involved both a 'purchase' of common and a 'sale' of preferred, no director or officer or 10 percent beneficial owner could ever buy preferred or sell common in the market without the risk that a forced conversion within the next six months would subject him to liability." 32 Section 16(b) was obviously not designed to place all securities transactions within the broad definition of a purchase or sale 33 but only those which could lead to the unfair use of inside information.

Therefore, it is submitted that the courts should evaluate each transaction involving the acquisition or disposal of securities in terms of the statutory purpose of deterring transactions promotive of short-term speculation. 34 Because of the difficulties of proof, the determinative question in cases under 16(b) should not be whether the defendant actually used inside knowledge to make a profit, but whether the situation was such that inside knowledge could have been used advantageously. 35 This is not to say that

32. Loss, Securities Regulation 1068 (2d ed. 1961).
33. See note 28 supra.
34. See Blau v. Lehman, 286 F.2d 786, 792 (2d Cir. 1960), aff'd, 368 U.S. 403 (1962); Loss, Securities Regulation 1041, 1066-71 (2d ed. 1961).
a conversion transaction can never be of the kind sought to be proscribed by the statute, where circumstances indicate that a conversion could not in any way have been motivated by a desire to engage in short-swing specula-
tion, the purpose of Section 16(b) is not served by calling the transaction a "purchase" or "sale" within the meaning of its language.

Martin G. McGuinn, Jr.

CRIMINAL PROCEDURE — RIGHT TO COUNSEL — DEFENDANT'S
RIGHT TO COUNSEL AT INTERROGATION DOES NOT DEPEND UPON
A REQUEST.

United States ex rel. Russo v. New Jersey (3d Cir. 1965)

Petitioners were arrested in connection with the slaying of an off duty
policeman who had been attempting to prevent the robbery of a tavern.
During interrogation, they all admitted complicity in the crime and signed
confessions. They did not request counsel and were not informed at any
time prior to the signing of their confessions that they had a right to counsel
or a right to remain silent. After they had been convicted of first-degree
murder, petitioners filed writs of habeas corpus with the United States
District Court for the Eastern District of Pennsylvania in which they
challenged their convictions on the grounds that they had been denied
their sixth amendment right to the assistance of counsel during the period
of police interrogation. The District Court denied the writs, but the Third
Circuit Court of Appeals reversed, holding that a defendant has a right
to counsel from the moment he becomes suspect regardless of whether he
requests such assistance. United States ex rel. Russo v. New Jersey, ......
F.2d ...... (3d Cir. 1965).

Prior to the decisions of the United States Supreme Court in Escobedo
v. Illinois, the scope of the defendant's right to counsel at the interroga-
tion stage was defined by Crooker v. California and Cicenia v. LaGay. In
both cases defendants had confessed to murder after being denied per-
mission to consult with an attorney. Crooker had been advised of his
right to remain silent; Cicenia had not been so advised. On appeal of their
convictions, both maintained that, independently of any question of the
voluntariness of their confessions, denial of their requests for counsel was
an infringement of their rights under the due process clause of the four-

teenth amendment. The Court, applying the rule of Betts v. Brady\(^4\) to a capital case, held that failure to honor petitioners' requests was not, in itself, a violation of due process, but that such a violation depended upon whether an examination of all the circumstances revealed that they had been denied "that fundamental fairness essential to the very concept of justice.\(^5\) While the Court reasoned that the right to counsel in capital cases was absolute at the trial stage, due process did not require the recognition of such a right at the interrogation level.\(^6\) Mr. Justice Clark, speaking for the majority in Crooker, asserted that the acknowledgment of an absolute right to counsel would preclude all police questioning — "fair as well as unfair" — until the accused could confer with an attorney and would seriously hamper the effective enforcement of the criminal law. Mr. Justice Douglas, dissenting,\(^7\) declared that the period after arrest is the most critical stage in the ordeal of the accused and that counsel is necessary at that stage not only to inform the accused of his rights but also to protect him against coercive police practices. In criticizing the totality of circumstances approach of the majority, Justice Douglas referred to a statement in Glasser v. United States\(^8\) that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.\(^9\) He concluded that what was true of a federal case was equally true of a state case.

In Gideon v. Wainwright\(^10\) the sixth amendment guarantee of assistance of counsel was held to be fundamental in all criminal proceedings and binding upon state courts through the fourteenth amendment. The rejection in Gideon of the subjective "fundamental fairness" test of the Betts case reflected an increasing recognition by the Court of the accused's essential need of counsel. The question remained, however, whether the Court's definition of a "criminal prosecution" included the interrogation stage. On this point, Hamilton v. Alabama,\(^11\) which was decided prior to Gideon, is significant in that it recognized a right to counsel at a pre-trial stage. In Hamilton, the accused, upon arraignment in the absence of counsel, pleaded

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4. 316 U.S. 455 (1942). Powell v. Alabama, 287 U.S. 45 (1932), although limited to its facts, was the cause of the eventual recognition of an absolute right to counsel in state capital cases. See Hamilton v. Alabama, 368 U.S. 52, 55 (1961). The Betts rule applied to non-capital cases and required a reversal only where the absence of counsel had resulted in a denial of "fundamental fairness." The determination of whether the bounds of "fundamental fairness" had been exceeded was dependent, as is the test of voluntariness of confessions, on the totality of circumstances of the case and the psychological pressure on the accused. Crooker was the first application of the Betts rule to a capital case.


6. Id. at 441, n.6.

7. Id. at 441. It is significant that the dissenters in Crooker (Chief Justice Warren, Justices Black, Brennan and Douglas), together with Mr. Justice Goldberg, formed the majority in Escobedo. With the exception of Mr. Justice Brennan, who took no part in the decision, the same members of the Court dissented in Cicenia.

8. 315 U.S. 60 (1942).

9. Id. at 76.


not guilty to a capital charge. The Supreme Court held that Hamilton had been deprived of his right to counsel in that he had not had the benefit of an attorney at a "critical stage" in the proceedings against him. The Court considered the issue of prejudice irrelevant.

This critical stage test was broadened in White v. Maryland. White had pleaded guilty at his preliminary hearing even though he was not required to enter any plea at that time, and the plea had been entered in evidence against him. The Court, relying on the Hamilton decision, concluded that while a preliminary hearing was not a "critical stage" under Maryland law, it was as critical in this case as arraignment under Alabama law. White's confession was held inadmissible without regard to prejudice. The White decision thus represented a shift in emphasis. Whereas in Hamilton the procedural forum had been considered all-important, in White the necessity of preventing the accused's pre-trial conduct from affecting the outcome of his trial was controlling.

The stepping-stone for Escobedo was laid in Massiah v. United States. Government agents, employing an electronic listening device, obtained incriminating statements from Massiah after he had been indicted on a federal narcotics charge. The Court, resting its decision on the fifth and sixth amendments, held that as the incriminating statements had been procured in the absence of counsel, they were inadmissible. Once the right to counsel had attached, any confession procured in the absence of counsel was to be excluded. Mr. Justice White's dissent criticized the majority's abandonment of the voluntariness test as the criterion for determining the admissibility of confessions obtained at the post-indictment stage. He asserted that recognition of an absolute right to counsel at that stage required the exclusion of all admissions made to the police regardless of how "voluntary and reliable" they might be. Such a policy, he argued, would have a "severe and unfortunate impact upon the great bulk of criminal cases." The Justice further noted that the chief reason behind the Massiah decision — the absence of counsel at the time the admissions were made — would be equally applicable whenever the right to counsel attached, whether or not there had been an indictment. In Escobedo,

12. 373 U.S. 59 (1963) (per curiam).
13. 377 U.S. 201 (1964). Mr. Justice Stewart, speaking for the majority, relied heavily on Spano v. New York, 360 U.S. 315 (1959), in which the Court had held inadmissible a post-indictment confession, obtained after defendant's request for a lawyer had been denied. While the opinion in that case rested on the totality of circumstances under which the confession had been obtained, four concurring Justices (Black, Brennan, Douglas and Stewart) would have reversed solely on the denial of counsel at the post-indictment stage. Mr. Justice Stewart's dissent in Escobedo indicates that he would recognize an absolute right to counsel no earlier than the indictment stage. 378 U.S. 478, 493-94 (1964).
14. See Enker and Elsen, Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois, 49 Minn. L. Rev. 47, 53-58 (1964), for an argument that Massiah was strictly a fifth amendment case.
16. Id. at 209.
17. Note the statement of Mr. Justice Traynor in People v. Garner, 18 Cal. Rptr. 40, 55, 367 P.2d 680, 695 (1961): "It is hardly realistic to assume that a defendant is less in need of counsel an hour before indictment than he is an hour after."
decided only a few months later, the Supreme Court held that the right to counsel attached at the interrogation level.

Danny Escobedo was arrested and taken to police headquarters for questioning. Under interrogation, he confessed to being involved in a felony during the course of which a person had been killed. He was not permitted to consult his attorney though both he and his attorney had made several requests that he be allowed to do so. The police did not inform him of his right to remain silent, but his attorney had advised him, a few days before his arrest, not to answer any questions. In delivering the opinion of the Court reversing Escobedo’s conviction of murder, Mr. Justice Goldberg spoke in terms of broad legal policy considerations. He asserted that recognition of a right to counsel at the accusatory stage was necessary to protect the free exercise of the constitutional rights of the accused, to guard against police abuses, and generally to assure the proper functioning of our adversary system. However, despite this broad language, the Court professed to limit its holding to the particular circumstances of the case: “We hold only that when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.”

Probably the most difficult question arising out of Escobedo is whether or not the decision is, in fact, to be limited in application to the particular situation which existed in that case.

The instant case is factually distinguishable from Escobedo in that petitioners made no request for counsel during their interrogation and were not aware of their constitutional right to remain silent. The court ruled, however, that these factual distinctions did not warrant a different result. After examining the facts before the police at the time the confessions were obtained, the court concluded that the “focus” of the process had shifted from investigatory to accusatory and that the right to counsel had attached at that point, regardless of whether requests for counsel had been made. To limit Escobedo to its facts, reasoned the court, would be to sanction a situation in which the confession of a person aware of his rights (usually a hardened criminal who has learned of his rights through previous encounters with the police) would be suppressed, while that of a person unaware of his rights would be admitted. It is more logical to hold that the right crystallizes with the beginning of the accusatory process, not with the request for counsel.

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attaches it can be lost only by a knowing and intelligent waiver\textsuperscript{20} and that no waiver can be presumed from petitioner's failure to claim the right by reason of his ignorance of its existence.\textsuperscript{21}

Russo interprets Escobedo as a sixth amendment case. The presence of counsel is necessary to protect the accused's constitutional rights, included among which is his fifth amendment right to remain silent. Under the Russo interpretation, the police would be required to inform the accused of his right to counsel, and no confession obtained in the absence of an intelligent waiver of that right would be admissible. Both the history behind Escobedo and the broad rationale of the Court's opinion in that case suggest that Russo properly interprets its meaning.

Another view, however, interprets Escobedo as a fifth amendment confession case,\textsuperscript{22} directed at the type of coercion which arises when the accused is placed in a situation in which he feels compelled to answer police questions because he thinks they have the authority to "require" him to answer. Under this view, as under the Russo view, the right to counsel does not depend upon a request, but is conditioned on the accused's not having been effectively informed of his right to remain silent. Support for this interpretation is found in the fact that the Court in Escobedo distinguished that case from Crooker on the basis that Crooker had not been informed of his right to remain silent. This approach is not without its troublesome aspects. First, the view assumes that, at the accusatory stage, the sole function of counsel is to inform the defendant of his right to remain silent. Mr. Justice Goldberg, noting that Escobedo had conferred with his attorney as to the proper course of action in the event of interrogation, stated that Escobedo's awareness of his right to remain silent was inadequate protection where he was faced with the false accusation that he had fired the fatal bullets.\textsuperscript{23} Second, the idea of the police acting simultaneously as both adversary of, and counselor to, the accused is repugnant to our adversary system.\textsuperscript{24} Finally, the dissents in Crooker and Cicenia and the concurring opinions in Spano, which represent the opinions of at least four of the Justices who made up the Escobedo majority of five, nowhere discuss the right to remain silent as the crucial factor in determining the existence of a right to counsel during the pre-trial stages.

A third interpretation of Escobedo is directly opposed to the one posited in Russo. This view limits Escobedo to its facts, maintaining that

\textsuperscript{20} Federal waiver principles (See Johnson v. Zerbst, 304 U.S. 458 (1938)), have been held equally applicable to state criminal proceedings. Carnley v. Cochran, 369 U.S. 506, 515 (1962); Rice v. Olson, 324 U.S. 786, 788 (1945). These principles provide that the right to counsel does not depend upon a request and that once the right attaches, it can be waived only by a knowing and intelligent waiver understandingly made. See Comment, 31 U. Chi. L. Rev. 591 (1964).

\textsuperscript{21} Ibid.


\textsuperscript{24} "The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be." Von Moltke v. Gillies, 332 U.S. 708, 725 (1948).
the Court did not intend in that decision to go beyond the voluntariness test and that the Betts rule is still applicable at the interrogation stage.25 Mr. Justice Goldberg's references to "the circumstances of the case" in defining the question before the Court and in stating the holding of the case, and the Court's failure to overrule Crooker and Cicenia lend weight to this interpretation. The inequity of applying the "objective" Escobedo rationale where a request has been made and the subjective voluntariness test to all other situations is obvious. Such a procedure is clearly incompatible with the philosophies of Gideon, Massiah, and of Escobedo itself. Mr. Justice White, dissenting in Escobedo, rejected this view as the proper interpretation of the Court's decision, stating:

although the opinion purports to be limited to the facts of this case, it would be naive to think that the new constitutional right announced will depend upon whether the accused has retained his own counsel . . . or has asked to consult with counsel in the course of interrogation . . . At the very least the Court holds that once the accused becomes a suspect and, presumably, is arrested, any admission made to the police thereafter is inadmissible in evidence unless the accused has waived his right to counsel.26

The above interpretations of Escobedo draw the "line of battle" between recognition of an absolute right to counsel on the one hand and retention of the voluntariness test on the other. Despite the differences between these theories, both the "absolute right approach" and the voluntariness approach are the result of attempts to enforce the accusatorial nature of our system of criminal law. The difference in the resultant standards of the two views is due, at least in part, to a difference in approach. The "absolute right theory" results from a placing of emphasis upon the importance of the accusatorial system as a whole27 and asserts that recognition of the right to counsel as fundamental to all criminal prosecutions is necessary to the protection of the adversary system. The accused must be free to exercise his constitutional rights from the moment he


becomes suspect in order to assure the fairness of his trial. The voluntariness approach, on the other hand, employs the theory of the adversary system as a guideline in establishing a standard of fairness in each individual case.\textsuperscript{28} As long as these bounds of "fundamental fairness" are not exceeded, as long as the accused has not been prejudiced to such an extent as to deny him a fair trial, the accusatorial system has been protected.

Under the Russo interpretation, Escobedo involves the recognition of an objective standard of police conduct and places an affirmative obligation upon the police to inform the accused of his right to counsel. The Escobedo doctrine provides a deterrent to police abuses and greater assurance of a fair trial than was present under the subjective voluntariness test.\textsuperscript{29} The sacrifice exacted by the doctrine is the burden imposed on law enforcement officers by the strict standards with regard to informing the accused of his rights.

The Russo interpretation of Escobedo as recognizing an absolute right to counsel at the interrogation level has been adopted by only a few courts. The fact that other courts have adopted other and varying interpretations has raised serious problems in the administration of criminal justice in the United States. At present, defendant's constitutional rights may vary with the tribunal. He may or may not have a right to counsel depending on whether he appeals his conviction to a state court\textsuperscript{30} or seeks a writ of habeas corpus in a federal district court. The Third Circuit, which includes Delaware, New Jersey and Pennsylvania, offers a prime example of this phenomenon. While the Third Circuit Court of Appeals adopted a liberal interpretation of Escobedo in the instant case, the Supreme Court of New Jersey has held that the decision is limited to its facts.\textsuperscript{31} Such a situation presents obvious difficulties for local law enforcement officers. If they fail to inform defendants of their right to counsel, in reliance on a state supreme court interpretation of Escobedo, they risk reversal of an otherwise validly obtained conviction if the case should ultimately find its way into a federal court. The only way in which they can preclude such a possible reversal is to follow the federal rule, even though they are not required to do so. It is submitted that before the philosophy behind the Escobedo case can become a reality in our system of criminal law, the Supreme Court must clarify both the extent and application of that decision.

\textbf{Louis F. Nicharot}


\textsuperscript{29} Comment, 31 U. Chi. L. Rev. 331 (1964).

\textsuperscript{30} And even among the states there is disparity. See cases cited notes 19, 22 and 25 supra.

\textsuperscript{31} See cases cited note 25 supra. In Commonwealth v. Negri, 34 U.S.L. Week 2187 (Pa. Sept. 29, 1965), the Pennsylvania Supreme Court which had formerly restricted Escobedo to its facts, see cases cited note 25 supra, expressly adopted the rule of the instant case in order to avoid this conflict.
LABOR LAW — INJUNCTIONS — Norris-LaGuardia ACT does not PROHIBIT STATE COURT FROM ENJOINING BREACH OF LABOR CONTRACT.

*Shaw Electric Co. v. Local 98, Int'l Bhd. of Electrical Workers* (Pa. 1965)

When, as a result of a dispute over the rehiring of a discharged employee,\(^1\) Local 98 of the International Brotherhood of Electrical Workers struck its plant, plaintiff, an electrical contractor, sued the local for breach of contract, seeking compensatory damages, an injunction restraining the union from picketing its place of business and job sites, and an order compelling the union to conform to the collective bargaining agreement. It was plaintiff's position that the strike constituted an illegal termination of the collective bargaining contract. When its preliminary objections to the jurisdiction of the state court were dismissed, defendant appealed to the Pennsylvania Supreme Court which affirmed the dismissal, *holding* that since this was a suit for the breach of a labor contract, the state court could take jurisdiction under the authority of Section 301(a) of the Labor Management Relations (Taft-Hartley) Act\(^2\) and grant an injunction even though a federal court would be barred from granting the same remedy in such a case. *Shaw Electric Co. v. Local 98, Int'l Bhd. of Electrical Workers*, 418 Pa. 1, 208 A.2d 769 (1965).

The crucial issue in the present case — whether a state court can grant an injunction in a suit for breach of a collective bargaining agreement — grew out of a dispute over the interpretation of two basic federal labor law statutes. In the Norris-LaGuardia Act,\(^3\) which was enacted during the depression, Congress had attempted to correct the abuses of the injunction in labor disputes by defining stringent limitations for the use of the remedy by United States courts in labor cases. In a seemingly unrelated statute, Section 301(a), of the Taft-Hartley Act, Congress permitted United States district courts to hear cases involving breaches of collective bargaining agreements without regard to diversity of citizenship or the amount in controversy.

\(^1\) The complaint alleged the following facts: The employee had resigned his position with plaintiff to enter military service before the plaintiff had entered into an agreement with defendant union to hire only workers supplied by defendant. When the former employee returned and applied for re-employment under the Universal Military Training and Service Act, 62 Stat. 614 (1948), as amended, 50 App. U.S.C. § 459 (1964), plaintiff requested that the union admit him to membership so that he could be employed. This request was denied. On the advice of the United States Department of Employment, Bureau of Veteran Re-employment Rights, plaintiff re-employed his former employee although he was not a union member. In retaliation defendant picketed the job sites where plaintiff was employed.

The dissent in the instant case took the position that the complaint, instead of alleging a breach of the collective agreement, had actually alleged an unfair labor practice under Section 8(b)(2) of the National Labor Relations Act, 49 Stat. 452 (1935), 29 U.S.C. § 158 (1964), and that therefore, only the National Labor Relations Board had jurisdiction to entertain the suit.


As enacted, Section 301(a) seemed to be concerned only with enlarging the number of forums available for trying breach of labor contract suits. However, the United States Supreme Court, in *Textile Workers Union of America v. Lincoln Mills*, held that the section was more than jurisdictional in nature and that under it federal courts were permitted to fashion a body of federal law for the enforcement of labor agreements.

In the decade following the passage of the Taft-Hartley Act, state courts had been taking jurisdiction in labor contract cases and deciding them under their own substantive law. Although the Supreme Court, in *Charles Dowd Box Co. v. Courtney*, had ruled that Congress, by granting district courts power to hear breach of labor agreement suits, had not intended to preclude state courts from taking jurisdiction in the area, it was clearly set forth in *Local 174, Teamsters Union v. Lucas Flour Co.* that "incompatible doctrines of local law must give way to principles of federal labor law." Thus, state courts could no longer ignore federal substantive law when deciding labor contract cases.

One of the early indications that the Norris-LaGuardia Act would become interrelated with Section 301(a) appeared in *Gen. Bldg. Contractors Ass'n v. Local 542* wherein defendant urged that Norris-LaGuardia prohibited the granting of an injunction in breach of collective agreement suits. The Pennsylvania Supreme Court rejected the argument, holding that Norris-LaGuardia applied only to "courts of the United States."

Norris-LaGuardia was also raised by the defense in *Lincoln Mills*. Because the Court, in that decision, held that Norris-LaGuardia did not limit a court's power to grant equitable relief in a 301(a) suit for specific performance of an arbitration clause, there arose a misconception that Section 301(a) had superseded the Norris-LaGuardia Act. In *Sinclair Refining Co. v. Atkinson* the Court demonstrated the error of this theory by holding that the Norris-LaGuardia Act was still a vital part of the national labor policy and that therefore, the federal courts did not have jurisdiction to grant injunctive relief in 301(a) suits.

The *Sinclair* decision, when juxtaposed with the decision in *Lucas Flour* that state court decisions in 301(a) suits must be in conformity with federal substantive law, raised once again the question of a state court's power to grant an injunction in a breach of labor contract suit.

The Pennsylvania Supreme Court, in ruling in the instant case that it could enjoin a union from striking in violation of its labor contract, reasoned that the statutory language of Norris-LaGuardia referred exclusively to "courts of the United States," and that *Sinclair* had not in any

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7. *Id.* at 102.
10. See *The Supreme Court, 1961 Term*, 76 Harv. L. Rev. 54, 205 (1962).
way suggested that Congress intended to extend Norris-LaGuardia to the state courts. Moreover, the Pennsylvania Court, on examination of the legislative history of Section 301(a), found that Congress, in increasing the number of forums available for suits in the labor contract area, had intended to leave such suits to "the usual processes of law,"11 which at that time included state remedies permitting parties to obtain injunctive relief. The court distinguished the Lucas Flour decision by pointing out that the rationale of the Supreme Court, in demanding the use of federal substantive law principles in the state courts, was that contractual provisions should be interpreted uniformly. The Shaw court believed that the interpretation of a contract clause would not be affected by the form of relief sought.

The question presented in the instant case is not a new one. Justice Traynor, in McCarroll v. Los Angeles County District Council of Carpenters,12 anticipated the rulings in Lucas Flour and Charles Dowd Box Co. when he said that state courts must apply the federal law applicable to collective bargaining agreements and that they have concurrent jurisdiction with federal courts in actions under Section 301(a). He did not, however, agree with the proposition that Norris-LaGuardia was controlling in state court decisions, because even though Congress could require a state to enforce a federal right and grant the remedy necessary to full realization thereof, it would be going too far to say that the state which enforces the federal right could be compelled to withhold remedies usually available in its courts. According to Justice Traynor, Congress must take the state courts as it finds them in so far as the availability of equitable remedies is concerned. Uniform application of substantive federal rights would not be hindered merely because a state court could give a more effective remedy.

Additional support for the Shaw Electric decision appears in American Dredging Co. v. Local 25, Int'l Union of Operating Engineers,13 where defendant had attempted to remove a breach of labor contract suit to a federal court in order to avoid a threatened injunction. One of the court's reasons for remanding the suit to the state court was that it believed that a suit for breach of a labor contract could not be brought originally in a federal district court because there was no dispute or controversy over Section 301(a)'s meaning.14 In strong dicta the court indicated that Sinclair applied only to the federal courts and that Norris-LaGuardia did

11. 418 Pa. at 9, 208 A.2d at 774.
14. This is a highly questionable interpretation of Section 301(a) since that statute appeared to abolish all jurisdictional requirements except the one that there must be personal jurisdiction over the parties. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1964).
not apply to state courts, because Congress has no power to limit state court remedies where it has not preempted the entire field of labor contract policy.

At least one court has refused to follow the *Shaw* court's view of the applicability of the Norris-LaGuardia Act to state courts. In its recent decision in *Independent Oil Workers v. Socony Mobil Oil Co.*, the New Jersey Superior Court stated that "The Norris-LaGuardia Act is certainly part of the federal labor policy and as such must get primary consideration in any suit for an injunction under Section 301." And Judge Hastie's dissent in *American Dredging* emphasized that federal law has superseded local law by force of Section 301(a). Federal labor law, according to Judge Hastie, is now the sole determinant of the respective rights of management and labor under collective bargaining contracts in all industries affecting interstate commerce. Therefore, injunctive relief, in cases such as the present one, is prohibited in *all* forums because of the pre-eminence of federal labor law.

Although the opinions in *McCarroll* and *American Dredging* contain cogent arguments in support of the *Shaw Electric* rationale, it is submitted that because of its incompatibility with the Supreme Court's rulings in *Lincoln Mills* and *Lucas Flour* the present case should not be followed. The argument in *Shaw Electric* and *American Dredging* that 301(a) merely created jurisdiction in the federal courts and had no effect on current procedures in the state courts has been clearly rejected by the Supreme Court in *Lucas Flour* where it said that federal law must be paramount in the area of enforcement of collective bargaining agreements. Although *Lincoln Mills* contains no specific reference to the state courts, the holding in *Lucas Flour* that state court decisions must conform to federal labor policies when added to statements in *Sinclair* that Norris-LaGuardia is still a "... carefully thought out and highly significant part of this country's labor legislation" strongly suggests that in the future state courts will not be permitted to ignore the anti-injunction provisions of the Norris-LaGuardia Act.

An unfortunate byproduct of the *Shaw Electric* decision, and one of the main reasons why it should be overruled, is the possibility that, because of the inability of federal courts to grant injunctions when an anti-strike provision has been violated, state courts will become the most attractive forums for actions for breach of collective bargaining contracts. Section 301(a) was at least intended to increase the number of forums available to hear breach of labor contract suits. This purpose will be partially frustrated if state courts are permitted to continue granting an important remedy which the federal courts are powerless to grant.

*Edwin M. Goldsmith*

16. Id. at 458, 205 A.2d at 82.
17. 370 U.S. at 203.
PATENTS — OBVIOUSNESS — WHEN AN INVENTION BECOMES OBVIOUS TO ONE SKILLED IN THE ART ONE YEAR PRIOR TO FILING OF PATENT APPLICATION, UNDER SECTION 102(b) OF THE PATENT ACT APPLICANT LOSES HIS RIGHT TO A PATENT.

In re Foster (C.C.P.A. 1965)

Appellant filed a patent application on August 21, 1956 for an invention conceived prior to December 26, 1952. Various claims of the application were rejected prior to December 26, 1952 as being "unpatentable over Binder." The reference article written by Binder appeared in the August 1954 issue of "Industrial and Engineering Chemistry." It can be seen that the date of the invention is prior to the date of the reference article. However, the date of the reference article is more than one year prior to the date of the filing of the patent application. Appellant contended that "unpatentable over" meant that the statutory basis of rejection was Section 103 of the Patent Act of 1952.\(^1\) The Court of Customs and Patent Appeals, however, was of the opinion that the words "unpatentable over" did not necessarily mean reliance on Section 103 alone as a basis for rejection, but could also include a rejection based on Section 102(b).\(^2\)

Using Section 102(b) as a basis, the court first considered the examiner's rejection based on the contention that the Binder article was a full disclosure of appellant's invention for more than one year prior to his filing date. This contention was rejected. Again using Section 102(b) as a basis, the court next considered the rejection based on the contention that appellant's invention was obvious in light of the Binder article for more than one year prior to appellant's filing date. It concluded that it was, and held, under Section 102(b), that the Binder article established

\(^1\) 35 U.S.C. § 103 (1952). Section 103 provides:

Conditions for patentability; non-obvious subject matter.

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made.

\(^2\) 35 U.S.C. § 102(b) (1952). Section 102 provides in part:

Conditions for patentability; novelty and loss of right to patent.

A person shall be entitled to a patent unless—

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or

The court's position that "unpatentable over" applies to both § 102 and § 103 rejections is contrary to its position in In re Sinex, 135 U.S.P.Q. 302 (1962). In that case appellant received an "unpatentable over" rejection. In deciding that "unpatentable over" meant a § 103 rejection the court relied in part on § 706.02 and § 706.07(d) of the Manual of Patent Examining Procedure 3d ed., which instructs examiners to use the expression "unpatentable over" for a § 103 rejection.
a statutory time bar which resulted in the loss of appellant's right to a patent. *In re Foster*, 145 U.S.P.Q. 166 (1965).

The Patent Act of 1793 contained two requirements for patentability, novelty and utility. In *Hotchkiss v. Greenwood* the Supreme Court added a third requirement, invention. The requirement of utility is expressed in Section 101 of the Patent Act of 1952; the requirements of novelty and invention are found respectively in Sections 102 and 103. The requirement of invention, however, has been re-expressed in terms of "non-obvious subject matter." Therefore the third requirement may be referred to simply as nonobviousness. In the instant case only the requirements of novelty and nonobviousness were in issue.

Case law prior to the Patent Act of 1952 indicates that a prior publication will "anticipate" an invention and thus negative novelty when it substantially describes the invention in such clear and exact terms that anyone skilled in the art to which the invention pertains will be able to make or practice it. Not only must the invention be clearly and exactly described by the publication but the description must be complete within that one publication. *Bates v. Coe* was a suit for infringement of a patent for an improved drilling and bolt-tapping machine. In order to negative novelty the respondent introduced several patents and a model, all of which antedated complainant's date of conception, but none of which, taken individually, embodied complainant's entire invention. Said the court:

... the respondent cannot escape the charge of infringement by alleging or proving that a part of the entire thing is found in one prior patent or printed publication or machine and another part in another prior exhibit, and still another part in the third one, and from the three or any greater number of such exhibits draw the conclusion that the patentee is not the original and first inventor of the patented improvement.

The publication containing the clear and exact description must be a publication that was available at the time the invention was made, or, as will be pointed out later, more than one year prior to the date of the application for a patent in the United States.

In addition to a rejection based on one reference, claims written to an invention may be rejected on a combination of references, where each reference alone does not disclose the entire invention but taken

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4. 52 U.S. 248 (1850).
5. This statute is generally considered to be a codification of the then existing case law. SMITH, PATENT LAW 449 (rev. ed. 1964).
6. See note 1 supra.
8. 98 U.S. 31 (1878).
9. Id., at 48.
10. The Supreme Court has stated: "A patent relates back, where the question of novelty is in issue, to the date of the invention, and not to the time of the application for its issue." Klein v. Russell, 86 U.S. 433, 464 (1873).
together they teach it. However, when an alleged invention is rejected on a combination of references, the issue is not one of novelty, but of obviousness in light of the teachings of the combined references. In *Allied Wheel Products v. Rude*, a patent infringement suit, respondent introduced several patents none of which taken alone fully disclosed complainant's invention. When the patents were considered together however, they taught the various elements of the disputed invention. In answer to complainant's argument that combining references is not proper to negative novelty the court pointed out that both novelty and invention are necessary for patentability and that although it is improper to combine references to negative novelty it is proper to do so to negative invention. The references used to determine obviousness must be references that were available at the date of the invention. In other words, the test of obviousness is to be made with respect to the time the invention was made.

An applicant whose invention had utility, novelty, and nonobviousness at the time it was made, may nevertheless lose his right to a patent if at the time of the filing of the application, a reapplication of the test of novelty as provided by Section 102(b), reveals that some publication or public use has fully disclosed the invention one year prior to the filing of the application. *General Motors Corp. v. Rubsam Corp.* was a suit for infringement of three patents. Before resolving the issue of infringement, the court considered the validity of the patents. The inventions claimed by the last two patents issued to the plaintiff were disclosed, but not claimed, in the first patent, which was issued more than two years before the filing date of the other two patent applications. The court held that the first issued patent established a statutory time bar which resulted in plaintiff's loss of right to the last two issued patents.

The objective of Section 102(b) is to encourage the patentee to file his patent application promptly or risk the loss of his right to a patent once the public has gained possession of the invention or knowledge of how to make it. Section 102(b), by encouraging prompt filing of a patent application, is thus in accord with one of the stated objectives of the patent system, to immediately secure knowledge of the invention to

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15. *Hazeltine Corp. v. General Motors Corp.*, 131 F.2d 34 (3d Cir. 1942).
17. The test of novelty is applied in reference to two different dates in the history of the invention, first, at the time when the invention was made, second, at the time of the filing of the patent application. Smith, *Patent Law* 306 (rev. ed. 1964).
18. See note 2 supra.
the public. Until the instant case there has been no second application of the test of obviousness for the purpose of establishing a time bar which would result in a loss of applicant's right to a patent.

The requirement of nonobviousness, or invention as it was known prior to the Patent Act of 1952, was first discussed in the Hotchkiss case. There the Supreme Court stated, "... there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of the skillful mechanic, not that of the inventor." The Court's purpose is applying the test of invention was to determine what degree of skill and ingenuity was involved in producing the invention. Presumably then, the present day test of nonobvious subject matter expressed in Section 103 has the same purpose.

However, in the instant case the underlying rationale on which the majority's opinion is based is that Section 103 has as its purpose the determination of whether the invention is or is not in the possession of the public and that it may, therefore, be applied again under Section 102(b). The fact that the method for determining what is or is not nonobvious or inventive skill is to compare the invention to what one skilled in the art could do by combining the cited references does not change the purpose of the test from one of determining nonobvious or inventive skill to one of ascertaining whether the public is in possession of the invention. But the court stated:

... the purpose of the statute [section 102(b)] has always been to require filing of the application within the prescribed period after the time the public came into possession of the invention, we cannot see that it makes any difference how [sic] came into such possession, whether by a public use, a sale, a single patent or publication, or by combinations of one or more of the foregoing.

The important part of the court's statement is "... or by combinations of one or more of the foregoing." Whenever the examiner in the Patent Office or the opposing party in an infringement suit relies on a combination of references to negative patentability, he is impliedly admitting that the invention is new. If it were not, he could point specifically to an existing embodiment or complete description of the invention. If the invention is new, the public could not possibly be in possession of it, although the invention may potentially be available to those skilled in the art. Since it is impliedly admitted that the public does not have possession of the invention when combinations of references must be used to negative patentability, it is difficult to see how the court in the instant case can use the test of

22. Robinson, Patents § 33 (1890).
24. "As to invention, it is the rule that the patentability of claims depends upon whether or not an applicant, with the cited references before him, could make the structure claimed in his application without the exercise of the inventive faculty." Allied Wheel Products, Inc. v. Rude, 206 F.2d 752, 762 (6th Cir. 1953).
combining references to determine whether the public is in possession of the invention.\textsuperscript{26} Not only is the logic unsound but the test of obviousness is being applied for a purpose other than that for which it was initiated in Hotchkiss.

\textit{Hansen v. Colliver}\textsuperscript{27} presents a more logical approach. In discussing the validity of the patent in suit the court stated:

Invention is, perhaps, the most essential element of patentability. It is the quality which carries a device beyond that level which might be obtained through the exercise of no more than mechanical skill and raises it to the legal stature of patentability.\textsuperscript{28}

Nowhere in its opinion does the present court attempt to apply the test of obviousness to determine what knowledge the public may have about the invention.

In reaching its decision in the instant case the court found it necessary to pluralize the word “publication” in section 102(b). Said the court, “...nor do we find in the context anything to show that ‘a printed publication’ cannot include two or more printed publications.”\textsuperscript{29} This was done for the purpose of including under section 102(b) combinations of references. The language of sections 102(a) and (b) is similar. The only real difference between the two sections is that under the former the test is made with respect to the time prior to when the invention was made, whereas under the latter it is made with respect to the time one year prior to the filing date of the patent application. In other words, novelty is determined at two different periods.\textsuperscript{30} Since the same standards are applied at both times, it would seem logical to pluralize “publication” in section 102(a) also. However, when this is done section 103, which states “... though the invention is not identically disclosed or described as set forth in section 102 of this title...,” becomes redundant, for this language suggests references in combination. Reasoning in reverse, if the language in section 102(a) is not to be pluralized because combinations of references are covered by the language in section 103, since the tests under sections 102(a) and (b) differ only in the time of their application, the word “publication” in section 102(b) should not be pluralized either.

The ramifications of the court’s holding are apparent. If an inventor has an initially patentable invention, which he loses the right to patent because of a section 102(b) obviousness time bar, he will remain silent about his invention, since secrecy will be the only way in which he can protect it. The public will be the loser for when the rejection is based on a combination of references, as it would be in this case, the invention is

\textsuperscript{26} The facts of the case indicate that there was only one reference taken in combination with the knowledge possessed by one skilled in the art. However, the court indicates that the difference between this type of combination and a combination of two or more references is of no legal significance. \textit{Id.} at 173.

\textsuperscript{27} 171 F. Supp. 803 (N.D. Cal. 1959), \textit{modified}, 282 F.2d 66 (9th Cir. 1960).

\textsuperscript{28} \textit{Id.} at 807.

\textsuperscript{29} \textit{In re Foster}, 145 U.S.P.Q. 166, 173 (1965).

\textsuperscript{30} See note 17 \textit{supra}. 
only available to the public after those skilled in the art actually combine the teachings of the references and construct or publish a full description of it. This undesirable result does not occur where an inventor has a section 102(b) time bar based on one reference which clearly describes the invention. Whether or not the inventor now chooses to keep the invention secret will not affect the public adversely because it already has a complete description or embodiment of the invention without having to wait for someone skilled in the art to construct it.

It is submitted that the holding of the court in the instant case is contrary to one of the basic objectives of the patent system, that is, to secure to the public, as soon as possible, knowledge of the invention. Its effect will be to deprive the public unnecessarily of the benefits that could be derived from inventions which as a result of the rule laid down by the court will remain unpublicized. For this reason the decision must be considered an unfortunate one.

Paul A. Kiefer

ZONING — NONCONFORMING USES — AMORTIZATION THEORY OF ABATEMENT OF NONCONFORMING USES VIOLATES MISSOURI CONSTITUTION.

Hoffman v. Kinealy (Mo. 1965)

After the city of St. Louis passed its original comprehensive zoning ordinance in 1926, petitioner's lot, which he used for the open storage of lumber, was contained within a residential use district. In 1950 the city amended the ordinance by providing various periods during which the various types of existing nonconforming uses were to be abated. In the case of open storage yards the prescribed period was six years. At first city officials did not strictly enforce the amortization provision and petitioner was able to secure a use permit for his lumber yard even though the period set for its abatement had elapsed. In 1962, however, his application for a use permit was denied, and he thereupon commenced an action against the board of adjustment averring that the amortization provision in the

31. Robinson, Patents § 33 (1890).

1. A nonconforming use is "the use of a building or land which does not agree with the zoning regulations of the use district in which it is situated." 58 Am. Jur. Zoning § 146 (1948); Ohio State Student Trailer Park Co-Op, Inc. v. Franklin County, 123 N.E.2d 286, 289, aff'd, 123 N.E.2d 542 (Ohio 1953).


amended zoning ordinance violated the Missouri constitution in that it deprived him of his property without just compensation. The trial court upheld denial of the permit, but on appeal the Missouri Supreme Court reversed, holding that the amortization clause violated Article I, Section 26 of the Missouri Constitution, because it constituted a taking without just compensation. *Hoffman v. Kinealy*, 389 S.W.2d 745 (Mo. App. 1965).

The constitutionality of zoning legislation in general has been firmly established since the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, wherein it was held that if enacted pursuant to a state enabling statute a general comprehensive zoning ordinance, reasonable in its application and directed at promoting the general welfare of the community, would be a valid exercise of the state's police power. Thus the way was opened for city planners to regulate in a reasonable manner the *future* uses of property. The problem of eliminating existing nonconforming uses, however, remained not only unsolved but also largely unconsidered.

Initially, city planners took a *laisssez faire* approach to such nonconforming uses, primarily because they feared that any attempt to deal with them directly in the zoning ordinances would be declared unconstitutional as retroactive zoning. Another reason for the hands-off policy was the legislators' belief that if the zoning ordinances were strictly enforced, the nonconforming uses would eventually die out. The latter belief, at least, was not borne out by actual occurrences, and the number of nonconforming uses has in fact increased with the passage of time.

This increase in the number of nonconforming uses can be primarily attributed to the practice of allowing variances. Where a nonconforming use is already present in a use district a property owner seeking a variance for a use of the same nature may employ it as a springboard for an argument that his use should also be permitted.

Aside from amortization, city planners have experimented with three principal schemes in their attempts to eliminate nonconforming uses: (1) condemnation proceedings under the power of eminent domain; (2) prohibiting the renewal of nonconforming uses once they have been abandoned;
(3) prohibition of the enlargement, alteration or substantial repair of such uses.\textsuperscript{11} Condemnation has failed to solve the problem because of the prohibitive costs involved.\textsuperscript{12} The second method has also failed because a nonconforming use which is being profitably operated is unlikely to be discontinued.\textsuperscript{13} The third method has proven unsuccessful because those uses which are operating at full capacity may never need enlargement, alteration or repair, especially where the use is located on an unimproved plot.\textsuperscript{14}

Consequently, various states and municipalities,\textsuperscript{15} recognizing the need for abating nonconforming uses which, although they are not nuisances per se, have various undesirable characteristics, have adopted the amortization concept. "Stated in its simplest terms, amortization contemplates the compulsory termination of a nonconformity at the expiration of a specific period of time, which period is equalled to the useful economic life of the nonconformity."\textsuperscript{16}

In order to enact an amortization provision, a municipality must act in accordance with its state's enabling statute.\textsuperscript{17} Thirty-six states, including Missouri, have enabling statutes which make no reference whatsoever to the status of nonconforming uses.\textsuperscript{18} On the other hand, the statutes of a

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\item \textsuperscript{11} Hertz, \textit{op. cit. supra} note 9.
\item \textsuperscript{12} Bassett, \textit{Zoning} 27 (1940): "No effective zoning plan could be accomplished by the exercise of eminent domain... the cost of the process would be enormous." See State \textit{ex rel.} Twin City Bldg. & Inv. Co. v. Houghton, 144 Minn. 1, 176 N.W. 159 (1920); Young, \textit{City Planning and Restrictions on the Use of Property}, 9 \textit{MINN. L. REV.} 93 (1925).
\item \textsuperscript{13} Hertz, \textit{Nonconforming Uses: Problems and Methods of Elimination}, 33 \textit{DICTA} 93 (1956).
\item \textsuperscript{14} Ibid.
\item \textsuperscript{15} The enabling statute in Pennsylvania was changed in 1955 to allow the various counties to devise formulae for terminating nonconforming uses. The amortization theory is specifically mentioned in the amendment. \textit{PA. STAT. ANN. tit. 16, § 2033 (1955). See \textit{PHILADELPHIA, PA., ZONING AND PLANNING CODE} § 14-104 (13) (1962) which provides for discontinuance of certain nonconforming uses after five years. Boston, Chicago, Cleveland, Los Angeles, Seattle, Denver and San Francisco have adopted in varying forms the amortization concept. Katarinicic, \textit{op. cit. supra} note 7, at 12.
\item \textsuperscript{16} Id. at 1; see also Note, 44 \textit{CORNELL L.Q.} 450, 453 (1959).
\item \textsuperscript{17} Klne v. City of Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949).
\item \textsuperscript{18} Alabama, \textit{ Ala. CODE ANN. tit. 37, §§ 772-85 (1959); Arizona, Ariz. Rev. Stat. Ann. art. 6, §§ 9-461, 9-462 (1956); California, CAL. GOVT. CODE ANN. tit. 7, §§ 65090-715 (West 1955); Connecticut, \textit{CONN. GEN. STAT. §§ 8.1, 8.2 (1958); Delaware, Del. CODE ANN. tit. 22, § 301 (1953); Florida, Fla. STAT. ANN. §§ 176.02, 176.03 (1961); Hawaii, \textit{HAWAI'I REV. LAWS} ch. 149, § 196 (1955); Idaho, \textit{IDAHO CODE ANN. § 31-3801 (1957); Indiana, \textit{IND. ANN. STAT. §§ 53-701 to 53-794 (Burns 1951); Iowa, \textit{IOWA CODE ANN. ch. 414 (1962); Louisiana, \textit{LA. REV. STAT. tit. 33, § 472 (1950); Maine, \textit{MAIN. REV. STAT.} ch. 93, § 1 (1934); Maryland, Md. ANN. CODE art. 66B, § 1 (1957); Michigan, \textit{MICH. STAT. ANN. § 5.2934 (cities and villages), § 5.2973(1) (townships) (1954); Minnesota, \textit{MINN. STAT. ANN. § 462.01 (1961); Missouri, \textit{MO. REV. STAT.} ch. 64, § 64.010, ch. 89, § 89.010 (1959); Montana, \textit{MONT. REV. CODE ANN. tit. 11, § 11-2701 (1957); Mississippi, Miss. CODE § 3590 (1956); Nebraska, \textit{NEB. REV. STAT.} § 19-801 (1962); Nevada, \textit{NEV. REV. STAT. tit. 22, § 278.250 (1957); New Mexico, \textit{N MEX. STAT.} § 14-28-9 (1953); New York, \textit{N.Y. VILLAGE LAW} § 175 (McKinney, Book 63, 1951); N.Y. \textit{TOWN LAW} § 261 (McKinney, Book 61, 1951); N.Y. \textit{GENERAL CITY LAW} § 24 (McKinney, Book 20, 1951); North Carolina, \textit{N.C. GEN. STAT.} art. 14, § 160-72 (1951); North Dakota, \textit{N.D. CENT. CODE} tit. 40, § 40-47-01 (1960); Ohio, \textit{OHIO REV. CODE} § 303.02 (counties); § 713.15 (municipal corporations) (Baldwin 1953); Oregon, \textit{ORE. REV. STAT.}}
few states expressly protect such uses, while others have express provisions for their elimination.\textsuperscript{19} The fact that the enabling act contains no provision for the elimination of nonconforming uses, however, does not preclude the municipalities governed by it from adopting amortization.\textsuperscript{20}

The constitutionality of the amortization theory has been considered by a number of courts in jurisdictions whose enabling statutes make no mention of either the termination or the perpetuation of nonconforming uses. In \textit{State ex rel. Dema Realty Co. v. Jacoby},\textsuperscript{21} one of the earlier cases considering the amortization theory, the Louisiana Supreme Court held that a property owner's retail drug store had to be abated within one year pursuant to an ordinance so providing. In that case it is not clear on what theory the court reached its decision. However, the court, in dismissing the property owner's argument, stated that if there was a \textit{reasonable} exercise of the police power, there would be no taking violative of the constitution.\textsuperscript{22} In the landmark case of \textit{Harbison v. City of Buffalo}\textsuperscript{23} the city passed an amendment to its zoning ordinance calling for the cessation, within three years, of junk yards located in certain districts. The New York Court of Appeals, after balancing the relative interests of the public and the individual entrepreneur, held that the amortization concept could be constitutional. Under the terms of the formula applied by the court, each case must be considered on its own merits. In each situation there must be a balancing of the conflicting interests involved, and if substantial harm would be inflicted upon the property owner, the amortization period, as applied to him would be unconstitutional.\textsuperscript{24}

In the instant case the court never discussed whether the amortization period was reasonable; nor did it consider the relative deleterious effect on the petitioner. The court simply precluded the use of the amortization theory as a method of abating nonconforming uses in Missouri, without

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\item[\textsuperscript{20}] Katarinicic, \textit{op. cit. supra} note 7.
\item[\textsuperscript{21}] \textit{Id.} at 7. An explanatory note to the Standard State Enabling Act, which made no attempt to protect nonconforming uses, in essence states that certain conditions peculiar to a particular locale might arise which would be better handled on the local level by retroactive zoning provisions. The Act was drafted in 1923 by the Advisory Committee on Building Codes and Zoning appointed by Secretary of Commerce Hoover. Many states modeled their enabling statutes after this act.
\item[\textsuperscript{22}] 168 La. 752, 123 So. 314 (1929); see companion case \textit{State ex rel. Dema Realty Co. v. McDonald}, 168 La. 172, 121 So. 613 (1929), which reached the same conclusion.
\item[\textsuperscript{23}] \textit{Village of Euclid v. Ambler Realty Co.}, 272 U.S. 365 (1926).
\item[\textsuperscript{24}] 4 N.Y.2d 553, 152 N.E.2d 42 (1958).
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weighing the conflicting interests involved. The argument that an amortization provision, since it commands the eventual removal of an existing use at the expense of the landowner, must necessarily involve a taking "without just compensation" seems to have been conclusive to the Missouri Court. However, the court overlooked the fact that there can be a "taking" violative of the constitution only where there is a "vested property right." If the nonconforming user has no "vested property right," then a restriction placed on the existing use would not constitute a taking without just compensation.

It is submitted that the proper procedure to follow in determining the constitutionality of any given amortization provision is to consider its application to the particular landowner before the court, and determine whether as applied to him there is a "taking" because he has a "vested property right." The gauge used in determining whether a landowner has a "vested property right" is the amount of capital he has invested in improving his land and the structures thereon. Where the nonconformity is in the nature of a structural use, representing a substantial investment, or consists of a failure to comply with the dimensional requirements of height, width, or depth, the "vested property right" theory may well be applicable. However, where, as in the instant case, the nonconforming use is located on an unimproved parcel of land the applicability of that theory is doubtful.

Where an amortization provision is designed to eliminate offensive nonconforming uses which represent a relatively inconsequential investment, such provision should not be considered a taking. If the harm to the property owner is insubstantial, and particularly if the nonconforming use under consideration has characteristics of a nuisance, amortization seems to be a constitutionally sound method of accomplishing its termination. When a reasonable period of time is allotted for abatement, sufficient to allow recoupment of the owner's investment, this should effectively balance the conflicting interests of the public benefit and the individual harm.

In City of Los Angeles v. Gage it was stated:

The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements.

In the instant case, petitioner was permitted six years within which to cease his storage yard operations, and since the land was relatively unimproved the hardship to him would be negligible in comparison to the

26. Ibid. The court in this case decided that the property owner's use of the premises for raising pigeons did not constitute a "vested property right" and consequently, compelled the owner to abate the use.
28. Id. at 453, 274 P.2d at 44. In this case the court held that the property owner had to remove his retail plumbing business from its existing location pursuant to an ordinance calling for its liquidation within five years.
benefit to the community of having the use terminated. The only expense that petitioner would incur would be that involved in finding a new location and in hauling the lumber away. It is submitted that the noise from the trucks loading and unloading, the danger to children who might be attracted to the yard, and the fact that a storage yard is not compatible with a residential neighborhood are valid reasons for eliminating petitioner's use. These considerations seem clearly to outweigh the relatively slight financial burden on the individual property owner. Since petitioner had not substantially improved the value of his land, he had no "vested property right" which, if his use were eliminated, could serve as the basis for an argument that there had been a taking without just compensation. It seems that in the instant case the Missouri Supreme Court has departed from the usual interpretation of what constitutes a taking in violation of constitutional due process requirements. If the legislation is reasonably calculated to benefit the health, safety and morals of the community, it should be sanctioned by the courts as long as the onus on the individual is not too severe.  

Most of the courts that have considered the amortization theory have recognized that "reasonableness" should be the test to determine the constitutionality of an amortization provision. "A balance must be found between social harm and private injury." Although most jurisdictions have not considered, as yet, the constitutionality of amortization, there is some indication from the recent decisions that amortization would be upheld as constitutional if applied to a property owner suffering little or no harm from the cessation of his nonconforming use.  

Zoning ordinances have been enacted by a great many cities and towns in an effort to implement orderly urban development. Since zoning legislation creates nonconforming pockets whose elimination in certain cases is essential to combat neighborhood blight, decreases in adjoining property

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30. The Court, in the Village of Euclid case, held that zoning legislation is constitutional if there is a reasonable relationship to the public welfare. Those courts which have considered the amortization theory have invariably applied the "reasonableness" test; e.g., Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964); Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958).  


33. Most of the recent cases hold the amortization concept constitutional, although reserving the right to make independent determinations in particular situations. In accord with the decision in Harbison v. City of Buffalo, 4 N.Y.2d 553, 152 N.E.2d 42 (1958) are: Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957); Wolf v. City of Omaha, 177 Neb. 545, 129 N.W.2d 501 (1964); McKinney v. Riley, 105 N.H. 249, 197 A.2d 218 (1964); City of Seattle v. Martin, 54 Wash. 2d 541, 342 P.2d 602 (1959). But see, O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401 (1949); City of Akron v. Chapman, 16 Ohio St. 382, 116 N.E.2d 697 (1953), which was criticized in 67 HARV. L. REV. 1283 (1954). Compare Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956).
values, and a poor residential environment, a constitutional method must be devised to insure the eventual cessation of pre-existing lawful uses. Amortization would certainly insure the eventual elimination of some of the more harmful nonconforming uses, like junk yards, garages, parking lots, and storage yards, since the cost of abating these uses would be relatively minimal compared to the deleterious effect on a residential community of having the use continued ad infinitum. In these cases if the applicable constitutional principles are realistically applied by the courts to amortization schedules which provide a reasonable time in which to abate the nonconforming uses, there should be no question as to the constitutional validity of that legislation. The Missouri Supreme Court by striking down the amortization concept in toto has apparently failed to recognize that this theory of removing nonconforming uses can be constitutionally applied in certain situations. The decision in the instant case closes the door on amortization without taking cognizance that it can be validly and successfully used in eliminating some of the more harmful nonconforming uses.

Arthur Brandolph


... it would seem to be the logical and reasonable method of approach to place a time limit upon the continuance of existing nonconforming uses, commensurate with the investment involved and based on the nature of the use. ... Id. at 1108, 317 P.2d at 805.