Recent Developments
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RECENT DEVELOPMENTS

CONFLICT OF LAWS — Torts — Governmental Interest Rather Than Interest of Parties as Domiciliaries is Primary Consideration in Determining State's Interest under Center of Gravity Theory.


A commercial airliner, owned and operated by defendant, "disintegrated in flight" near the Delaware-Maryland border en route from San Juan, Puerto Rico, to Philadelphia, Pennsylvania, the wreckage falling to earth in the vicinity of Elkton, Maryland. Two of the passengers killed in the accident had resided in Pennsylvania and had purchased tickets in that state for round-trip flights from Philadelphia to San Juan. Their personal representatives brought wrongful death actions in a New York state court against defendant, a New York corporation having its principal place of business in that state. The airline moved to dismiss because under the wrongful death statute of Maryland, the lex loci delicti, plaintiffs had no standing to sue. The trial court’s denial of the motion was reversed by the appellate division, but the Court of Appeals reinstated the order holding that under the "center of gravity" theory as announced in Babcock v. Jackson the state of Pennsylvania had the greatest interest in, and the most significant relationship with, the issue presented, and that, therefore, the law of that state should be applied. In determining which state had the dominant interest the court looked primarily to the governmental interests, that is, the interest of the state in furthering the policy underlying its law,

1. Maryland's wrongful death statute allows recovery only in actions brought "for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused or if there be no such person or persons entitled, then any person related to the deceased by blood or marriage, who, as a matter of fact, was wholly dependent upon the person whose death shall have been so caused." Md. Ann. Code art. 67, § 4 (1957). Plaintiffs were brothers and sisters who would have had no standing to sue under the Maryland statute. Pennsylvania law provides, however, that a wrongful death action may be brought by the widow of the deceased, or "if there be no widow, the personal representative may maintain an action for and recover damages for the death. . . ." Pa. Stat. Ann. tit. 12, § 1601 (1953). A personal representative is also "entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death" under the Pennsylvania statute. Pa. Stat. Ann. tit. 12, § 1602 (1953). Plaintiffs would also have had standing under New York law, which permits a wrongful death action to be brought by the personal representative of the decedent regardless of relationship. Decedent Estate Law § 130.

The substantive rights and liabilities of parties to tort actions have traditionally been determined by the *lex loci delicti*. This rule originally derived its justification from the vested rights theory under which an injured person was said to be vested with a right under the laws of the state in which he was injured, and the state of the forum had an obligation to enforce this right. The vested rights theory was greatly discredited by the commentators, and some states rejected it in favor of an approach in which the forum state applied its own "local law" with respect to choice of law. But even under this "local law" approach, the *lex loci* rule continued to be applied in multi-state tort actions. While advantages of uniformity and predictability of result make the *lex loci* rule attractive, a rule which makes choice of law depend invariably upon the fortuitous circumstance of the place of the injury is not without certain inadequacies.

The universal mechanistic application of *lex loci delicti* as a nostrum for choice of law ills in the field of torts was first challenged in New York in *Kilberg v. Northeast Airlines, Inc.* Edward Kilberg died when a commercial jet plane in which he was a passenger ingested starlings and crashed near Nantucket, Massachusetts. Kilberg had been a domiciliary of New York and had purchased a ticket in that state for a flight to Nantucket. His administrator sued Northeast Airlines in a New York wrongful death action grounded on Massachusetts law. Although the issue had not been raised on appeal, the New York Court of Appeals concluded that the provision of the Massachusetts wrongful death statute which limited to $15,000 the amount of damages recoverable should not be applied because such a limitation on damages in wrongful death actions was contrary to the public policy of New York, and because the measure of damages was a matter of procedure and not substantive law, and thus was not within

4. See the opinion of Mr. Justice Holmes in *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904); the opinion of Mr. Justice Cardozo in *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 120 N.E. 198 (1918); compare *Restatement, Conflict of Laws* § 384 (1934).


6. Professor Cook's definition of the "local law" approach is as follows: "The forum, when confronted by a case involving foreign elements, always applies its own law to the case, but in doing so adopts and enforces as its own law a rule of decision identical, or at least highly similar though not identical, in scope with a rule of decision found in the system of law in force in another state or country with which some or all of the foreign elements are connected. . . . The forum thus enforces not a foreign right but a right created by its own law." *Cook, op. cit. supra* note 5, at 20-21.


the coverage of the *lex loci* rule which pertains only to the latter. In *Davenport v. Webb* the New York high court revealed that the characterization of the damage limitation as procedural rather than substantive had not played nearly so important a part in its decision in *Kilberg* as had the recognition of a strong public policy against the maximum damages provision of the Massachusetts statute. But the underlying rationale of this strong public policy is not clearly defined. On the one hand, the court would seem to have based its decision upon a need to protect domiciliaries of New York against "unfair and anachronistic treatment" under the laws of a sister state whose relation to the transaction may be slight. On the other hand, the decision appears to be grounded upon the forum state's interest in promoting a policy underlying its law which views a limitation on damages in wrongful death actions as "absurd and unjust, in measuring the pecuniary value of all lives, to the next of kin, by the same arbitrary standard." Despite this ambiguity, the *Kilberg* decision must be viewed as having weakened the *lex loci* rule in that it recognized that the law of the forum will be employed in certain instances where the forum state's relation to the particular occurrence is more significant than that of the *locus delicti*.

In *Pearson v. Northeast Airlines, Inc.*, a wrongful death action involving a factual situation identical to that presented in *Kilberg*, defendant contended that the failure of a federal district court sitting in New York to enforce Massachusetts' damage limitation constituted a violation of the full faith and credit clause. A majority of the Court of Appeals for the Second Circuit, adopting a "vested rights" approach, held that New York was under a constitutional obligation to apply the law of Massachusetts *in toto*. Mr. Justice Kaufman, vigorously dissenting, averted to certain language used by Chief Justice Warren in *Richards v. United States* to the effect that a forum state is free to apply the law of any state having a "sufficiently substantial contact" with the particular transaction in question to the exclusion of the law of the *locus delicti*. Judge Kaufman asserted that, as New York was the domicile of the decedent and his beneficiaries and a principal place of business of the defendant, that state had a sufficient interest to justify the exclusive application of its law under the rationale of the *Richards* decision. Since New York was not initially obligated to apply Massachusetts law it could, if Massachusetts law were deemed applicable to the case at bar, constitutionally refuse to apply that law in its entirety in order to further its public policy against limitation of liability. In addition, the dissenter declared the federal policy against forum-shopping is not sufficient to prevent a state's assertion of its interest.

12. 307 F.2d 131 (2d Cir. 1962).
in such a situation. On rehearing en banc, a majority of the court, adopting Judge Kaufman’s dissent, upheld the Kilberg approach as a proper exercise of a state’s power to develop its conflict of laws rules.14

The historic opinion in Babcock v. Jackson16 spelled the end of the reign of lex loci delicti as a rule governing choice of law in New York. In that case the “center of gravity” or “grouping of contacts” theory, which had previously been applied only in contract actions,16 was applied to an action brought under New York’s automobile guest statute by a New York plaintiff against a New York defendant for injuries sustained in an accident in Ontario. But while the “center of gravity” theory as it was applied to contract actions provided no standards and amounted to a mere counting of “contacts,” the rule enunciated in Babcock involved an analysis of the relative “interests” and “contacts” of the states involved on a comparative basis with regard to each issue presented, the law of the state having “the dominant interest” being applied with regard to that issue. Babcock introduced “an approach for accommodating the competing interests in tort cases with multi-state contacts.”17 Pennsylvania followed New York’s lead in Griffith v. United Airlines, Inc.,18 applying the Babcock “center of gravity” theory to a wrongful death action involving a factual situation which paralleled that of Kilberg and Pearson.

Neither Griffith nor Babcock, however, resolve the basic ambiguity of Kilberg with regard to the primary considerations underlying the “policy analysis” approach, for the justification for applying the policy of the forum or that of a foreign state to a particular issue is not clearly defined in either decision. At least one federal district court has taken the position that the interests of the parties as domiciliaries as opposed to governmental interests are paramount. Gore v. Northeast Airlines, Inc.,19 involved a wrongful death action arising out of the same crash that prompted the Kilberg and Pearson litigations and was based on identical facts with the exception that at the time of the commencement of the action plaintiffs were domiciliaries of Maryland. The court applied the Massachusetts limitation on damages asserting that plaintiffs were entitled to no better treatment than they would have received from a Maryland court which would have applied the limitation had the action been brought in that state.20 The Gore decision is effectively overruled by the decision in the instant case.

The instant court, unlike the district court in Gore, did not apply the choice of law rules of Pennsylvania as the state of plaintiffs’ domicile, but

weighed the policies underlying the wrongful death statutes of Pennsylvania and Maryland in determining which state had the dominant interest under the “center of gravity” theory. The fact that decedents were domiciliaries of Pennsylvania, had purchased their tickets in that state, and that Pennsylvania was the place where the flight was to begin and terminate were relevant, as were other “contacts,” only in so far as they resulted in focusing upon the governmental interests of the states involved. Under the Long approach, the weight given a particular contact will vary with the issue presented. While domicile is one of the “touchstones” employed in determining governmental interest, it is not invariably the “keystone.”

The rejection of the Gore “protective approach” to Babcock which emphasized the domicile of plaintiffs in favor of a governmental interest approach as the policy criterion for determining choice of law has serious consequences with regard to the assumed primary objective of conflict of laws — uniformity of result. Under the Long decision forum-shopping becomes a definite problem. A plaintiff is free to “shop” for the most favorable forum, and, under a recent Supreme Court decision, carry the law of that state with him, if, in an action brought in a federal district court, the defendant should secure removal under section 1404(a) of Title 28. But while uniformity of result is an important factor to consider in determining an appropriate rule for choice of law, it should not be viewed as an end in itself. “[A]gainst the advantages of uniformity must be balanced the desirability of latitude for states with divergent ideas to establish their own patterns of community life and standards of domestic behavior.” This balancing is certainly more likely to be achieved under the flexible rule of Long than the more rigid Gore rule under which the domicile of plaintiff is paramount.

It is interesting to speculate whether the New York Court of Appeals, had they applied the Gore rationale in Long, would have achieved the same result as the Pennsylvania Supreme Court employing the same “center of gravity” theory. The question is of interest not only with regard to the implications resulting from a forum state’s application of foreign law in the abstract, but also because standards for the application of the Babcock doctrine are not clearly defined. It is entirely possible that on a given set of facts two courts applying the “center of gravity” theory might reach

25. Harper, Policy Bases of the Conflicts of Laws: Reflections on Rereading Professor Lorenzen's Essays, 56 Yale L.J. 1155, 1159 (1947). The Harper article is significant for the light it sheds on the reasoning behind the “center of gravity” approach. Judge Fuld did not agree with the majority’s position in Kilberg with regard to the Massachusetts’ damage limitation because the court dealt with a matter not raised on appeal. He did, however, state in a concurring opinion citing the Harper article (9 N.Y.2d at 53, 172 N.E.2d at 531) that if the matter were one of first impression, the “significant contacts theory” might be argued effectively. The majority opinions in both Babcock and the instant case were written by Judge Fuld.
different results. At present at least, predictability is not an asset of the "center of gravity" approach. An attorney preparing for litigation resulting from an occurrence which involves multi-state contacts may be uncertain as to the law to be applied with regard to one or more issues of the case. The problem becomes particularly acute in actions arising out of airplane crashes where seventy or eighty actions may be brought against an airline in several states. Negotiation for settlement may be difficult, if not impossible.

Those problems of uncertainty and unpredictability must, however, be viewed in proper perspective. The fact that most torts are committed within a single state and that in most cases involving multi-state torts, the Kilberg and Long cases for instance, the "center of gravity" can easily be ascertained minimizes the problems considerably. Resolution of the difficult case will be achieved only upon further and more explicit definition of the theory. The present decision is the first step in that direction. Of course, it is evident that the "center of gravity" theory will not approach the degree of certainty and predictability offered by the lex loci rule. Neither will it exact the sacrifice of lex loci with regard to policy considerations underlying the law of the states involved in a multi-state transaction in order to accomplish these ends. "The difference is not between a system and no system, but between two systems; between a system which purports to have but lacks, complete logical symmetry and one which affords latitude for the interplay and clash of conflicting policy factors." 26

The battle for predominance between the lex loci delicti and the "center of gravity" approaches is basically a conflict between a rule which places uniformity, predictability, and certainty above all, and a theory which views "justice, fairness and the best practical result" in each individual case as the controlling policy. 27 The choice is essentially between a rule which deals in simplicities and one which aims at an objective appraisal of the realities of each case presented. Whatever lex loci may accomplish by way of simplicity and ease of application, however, is overshadowed by the absurdity of expecting a state to disregard any interest it (or another state) may have in an action for a blind subservience to the law of a state whose interest may be entirely fortuitous. 28 The Babcock-Long approach attempts to give proper weight to the varying interest in multi-state litigation. The establishment of a predictable rule will be a difficult task. But the end result of the search for a definitive "center of gravity" theory will not reduce the quest for an "ungritlike picture of reality" 29 to an absurdity as has been the case with the mechanistic application of the lex loci delicti rule.

Louis F. Nicharot

26. Id. at 1158.
29. Hulme, Speculations 224 (1960); See also Roberts, A Rule is a Rule Because it is the Rule: Intellectual Crisis in Conflict of Laws, 9 Vill. L. Rev. 193, 207 (1964).
CRIMINAL PROCEDURE — CONTEMPT — REFUSAL OF GRAND JURY WITNESS TO ANSWER QUESTIONS MAY NOT BE PUNISHED SUMMARILY UNDER FEDERAL RULE 42 (a).

Harris v. United States (U.S. 1965)

Pursuant to a subpoena, petitioner appeared as a witness before a federal grand jury in the Southern District of New York investigating alleged violations of the Federal Communications Act. Petitioner refused to answer several questions propounded by the United States Attorney on the ground of possible self-incrimination. He was then taken before the district court which, after hearing arguments, ruled that he must answer the questions since his fifth amendment privilege was unavailable in view of the statutorily granted immunity to prosecution accorded witnesses before a grand jury investigating violations of the Federal Communications Act.1 Petitioner returned to the grand jury room where he reasserted his fifth amendment rights and persisted in his refusal to answer the questions. He was again brought before the district court and sworn as a witness. The district judge posed the same questions and directed him to answer in open court. Upon petitioner's continued refusal to reply, the court summarily adjudged him guilty of criminal contempt under Rule 42(a) of the Federal Rules of Criminal Procedure and ordered him imprisoned for one year. The Court of Appeals for the Second Circuit affirmed.2 The United States Supreme Court granted certiorari and reversed, holding, four justices dissenting, that summary commitment under Rule 42(a) is inappropriate where the real contempt is before a grand jury and not in a district court proceeding which is merely ancillary to the grand jury investigation. Petitioner was entitled to notice and a hearing as provided in Rule 42(b) since Rule 42(a) is reserved for criminal contempts involving “exceptional circumstances” occurring in the actual presence of the court.3 Harris v. United States, 382 U.S. 162 (1965).4

2. United States v. Harris, 334 F.2d 460 (2d Cir. 1964).
3. Rule 42. CRIMINAL CONTEMPT
   (a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.
   (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such... The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. ... If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.
Criminal contempt is *sui generis* in that it is not a crime but is punishable by criminal sanctions.\(^5\) The summary power to punish criminal contempt has been styled an "anomaly" in the law\(^6\) and is regarded by some commentators as a vestige of pathological practices spawned by the infamous Star Chamber.\(^7\) Under its panoply, a single judge may charge a person with criminal contempt, prosecute him for it, conduct his trial, find him guilty and sentence him to prison. Apologists contend that the summary contempt power is "inherent" in courts and is necessary to preserve the authority of the judicial institution.\(^8\)

Contempt may be civil as well as criminal, and although the distinction may be crucial in a particular case\(^9\) there are only ill-defined criteria for categorizing a particular contemptuous act.\(^10\) Criminal contempt consists in an obstruction of judicial proceedings in a manner evincing disrespect for the court and is punished as a crime, that is, by fine or imprisonment.\(^11\) Civil contempt is disobedience to a judicial command which disadvantages an adverse party and may be remedied by future compliance;\(^12\) to secure such the court will customarily impose a fine payable to the adverse party or order conditional imprisonment. There is much overlapping and few contemptuous acts are readily classifiable. The contemptuous refusal to answer a question in a judicial proceeding may be either criminal, civil or both\(^13\) since the completed act of defiance is an affront to the court's authority and at the same time may deprive an adverse party of information. To a recalcitrant witness, punishment may be preferable to coercion since confinement under a

\(^5\) Myers v. United States, 264 U.S. 95 (1924); Bowles v. United States, 50 F.2d 848 (2d Cir. 1931), *cert. denied*, 284 U.S. 648 (1931).


\(^7\) See note 20 infra.

\(^8\) In the case of contempt committed in the actual presence of the court (*in facie curiae*) an additional reason is sometimes given. Since the judge has personally witnessed the acts constituting the contempt there is no need for observing the ordinary processes of the law. Sacher v. United States, 343 U.S. 1 (1952).

\(^9\) Although a criminal contemnor's rights are few, a civil contemnor's are even fewer. Among those rights accorded the former are: presumption of innocence, immunity from double jeopardy, right against self-incrimination, right to compulsory process for obtaining witnesses in his favor, eligibility for executive pardon. None of these are available to a person held in civil contempt. Comment, 57 *Yale L.J.* 83, 96 (1947) and cases cited; see also *Civil And Criminal Contempts In The Federal Courts*, 17 *F.R.D.* 167 (1955); Goldfarb, *The Varieties of the Contempt Power*, 13 *Syracuse L. Rev.* 44 (1961).

\(^10\) Among those that have been suggested are: purpose of the proceeding (punitive or remedial), identity of the prosecuting plaintiff, the prayer for relief and the character of the contemptuous act. *Civil And Criminal Contempts In The Federal Courts*, 17 *F.R.D.* 167, 178–79 (1955).

\(^11\) Nye v. United States, 313 U.S. 33 (1941); *In re Nevitt*, 117 Fed. 448 (8th Cir. 1902).


\(^13\) Boylan v. Detrio, 187 F.2d 375 (5th Cir. 1951).
finding of civil contempt is for an indefinite period, release being contingent upon the witness’s willingness to testify.\textsuperscript{14}

Contempts differ according to \textit{locus} as well. A direct contempt is a contemptuous act “committed in the immediate view and presence of the court or so near the presence of the court as to obstruct or interrupt the due and orderly course of proceedings.”\textsuperscript{15} Indirect or constructive contempts are those occurring out of the presence of the court but which tend to impede the administration of justice.\textsuperscript{16}

The proceedings to punish criminal contempt in the federal courts are three: summary commitment or disposition\textsuperscript{17} (immediate judicial action without right of notice or hearing), summary trial (right of notice and hearing where a defense may be presented)\textsuperscript{18} and jury trial.\textsuperscript{19} Throughout this note “summary proceedings” will refer to both summary commitments and summary trials.

Modern scholarship has discovered that at one time all contempts were indictable crimes but at some juncture became \textit{sui generis} and punishable on the court’s own motion by summary proceedings.\textsuperscript{20} The Constitution

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  \item \textsuperscript{14} If the contemnor can no longer purge himself (where a trial has ended or the term of a grand jury expires), there is some authority that the civil contempt is thereby abated. Yates v. United States, 227 F.2d 844 (9th Cir. 1955), \textit{modified}, 355 U.S. 66 (1957); Howard v. United States, 182 F.2d 908 (8th Cir. 1950), \textit{rev’d on other grounds}, 340 U.S. 898 (1950).
  \item \textsuperscript{15} \textit{Black, Law Dictionary} 390 (4th ed. 1951); but see \textit{Nye v. United States}, 113 F.2d 1006 (4th Cir. 1940), \textit{rev’d on other grounds}, 313 U.S. 33 (1941), where direct contempt in the federal courts is defined as contempt committed in the “physical presence of the court.”
  \item \textsuperscript{16} \textit{O’Malley v. United States}, 128 F.2d 676 (8th Cir. 1942), \textit{rev’d on other grounds}, 317 U.S. 412 (1943).
  \item \textsuperscript{17} For the purpose of convenience, the term “summary commitment,” meaning summary imprisonment, will be used throughout this note. This is not meant, however, to suggest that the court, at its discretion, could not levy a fine as provided in 18 U.S.C. \textsection 401 (1962). As the term is used, it is co-extensive with the procedure delineated in Rule 42(a). The word “summary” as used in Rule 42(a) has been explained as follows:
    \begin{itemize}
      \item We think ‘summary’ as used in this Rule does not refer to the timing of the action with reference to the offense but refers to a procedure which dispenses with the formality, delay and digression that would result from the issuance of process, service of complaint and answer, holding hearings, taking evidence, listening to arguments, awaiting briefs, submission of findings, and all that goes with a conventional court trial.
      \item \textit{Sacher v. United States}, 343 U.S. 1, 9 (1952).
      \item This “trial” or hearing requires that, the accused be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, either relevant to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed.
      \item \textit{Cooke v. United States}, 267 U.S. 517, 537 (1925); see also Fed. R. Crim. P. 42(b) \textit{supra} note 3.
      \item 18 U.S.C. \textsection 402, \textsection 3691 (1962). If the contempt constitutes a criminal offense under any statute of the United States (excluding \textsection 401) \textsection 402 requires that it be prosecuted under \textsection 3691, which provides for jury trial except in certain specified instances.
      \item Much has been written on the origins of the contempt power. For complete discussions, see \textit{Green v. United States}, 356 U.S. 165 (1958); \textit{Nye v. United States}, 331 U.S. 33 (1941); \textit{Goldfarb, The Contempt Power} (1963); \textit{Thomas, Problems of Contempt of Court} (1934); Frankfurter & Landis, \textit{Power Of Congress Over Procedure In Criminal Contempt In "Inferior" Federal Courts — A Study In Separation Of Powers}, 37 HAW. L. Rev. 1010 (1924); \textit{Nelles & King, Contempt By Publication In The United States}, 28 Colum. L. Rev. 401 (1928). Each of these analyses is
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makes no specific mention of the summary power but early American courts considered it to be inherent in their function and exercised it on the authority of Blackstone. The Judiciary Act of 1789 codified the contemporaneous common law practice. Numerous abuses prompted Congress to pass the Act of March 2, 1831 which was intended to restrict the application of the summary power to certain enumerated situations. All other contempts were to be tried before a jury.

Initially, the Act was acknowledged to curtail the theretofore unrestricted use of the summary power by federal courts. However, eighty-seven years after the passage of the Act, the Supreme Court in Toledo Newspaper Co. v. United States said, "there can be no doubt that the [Act of March 2, 1831] conferred no power not already granted and imposed no limitation not already existing." Under this construction a

based, to some degree, on three articles written by Sir John Fox, which constitute the definitive study of the history of contempt of court in England. Fox, The King v. Almon, 24 L.Q. Rev. 266 (1908); Fox, The Summary Process To Punish Contempt, 25 L.Q. Rev. 238 (1909); Fox, The Writ Of Attachment, 40 L.Q. Rev. 43 (1924). Fox's conclusion is that the statement of Blackstone, BLACKSTONE, COMMENTARIES 283-84 (14th ed. 1796), which greatly influenced early American courts, that summary proceedings were "immemorially used" to punish both direct and indirect contempts was at best a half-truth. Fox believed there was some evidence that direct contempts were punishable by summary proceedings, but for the most part were treated as ordinary crimes subject to indictment, presentment or arraignment. It was not until the early sixteenth century that summary proceedings were employed. Their use was accelerated by the advent of the Star Chamber (circa. 1500) which extended summary proceedings to punish indirect contempt. The Star Chamber was abolished in 1641, but "the atmosphere of corrupt and arbitrary practices which it had generated partly survived." Frankfurter & Landis, supra at 1045. For an incisive treatment of the entire problem, see Comment, 15 VAND. L. REV. 241 (1961).

21. WARREN, A HISTORY OF THE AMERICAN BAR (1911).
22. "And be it further enacted, that all the said courts of the United States shall have power to . . . punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same. . . ." Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83.
23. The most notable abuse was that committed by Judge James H. Peck against one "Lake Lawless. Lawless wrote a newspaper article critical of Peck after unsuccessfully arguing a case before him. Peck held him in contempt, sentenced him to one day in prison and suspended him from practice for eighteen months. Lawless petitioned Congress to impeach Peck. The House of Representatives brought articles of impeachment, but the Senate voted against conviction. The next day the bill which eventually became the Act of March 2, 1831, was introduced before the House. See Nye v. United States, 313 U.S. 33, 44-48 (1941).
24. "The power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts." Act of March 2, 1831, ch. 99, § 1, 4 Stat. 487.
25. The directions given the draftsmen were to "inquire into the expediency of defining by statute all offenses which may be punished as contempts of the court or the United States, and also to limit the punishment for the same." 7 CONG. DEB., 21st Cong., 2d Sess. 560-61 (1831). See Nye v. United States, 313 U.S. 33, 47 (1941).
27. 247 U.S. 402 (1918).
28. Id. at 418. This construction has been called an "amazing historical solecism." Frankfurter & Landis, POWER OF CONGRESS OVER PROCEDURE IN CRIMINAL CONTEMPTS IN "INFERIOR" FEDERAL COURTS — A STUDY IN SEPARATION OF POWERS, 37 HARV. L. REV. 1010, 1030 (1924).
summary commitment for criminal contempt was upheld where the defendant had published a newspaper report impugning the integrity of a federal judge. To achieve this result, the court interpreted "misbehavior . . . so near thereto as to obstruct the administration of justice . . . ." in a causal rather than geographic sense. This construction rejuvenated the long arm of the federal courts by allowing summary punishment wherever there was a finding of "obstruction." Toledo was reversed in the landmark decision of Nye v. United States where fraudulently inducing a plaintiff to dismiss a suit was a criminal contempt, it could not be punished by summary proceedings since the act alleged was committed one hundred miles from the courtroom. "So near thereto" was construed to mean nearness in a physical or geographic rather than causal sense. The effect of this decision was to limit the summary power in indirect contempt cases to those described in section 268 of the Judicial Code.

Where criminal contempts were within the legitimate purview of the summary power of the federal courts, distinctions were drawn concerning their proper disposition. In Ex parte Terry an attorney, summarily committed after physically attacking a court officer in open court, argued that he was entitled to notice and a hearing. His commitment was affirmed on the ground that violent interference with court proceedings necessitates immediate judicial action in order to protect the authority and dignity of the court. The delivery of a scurrilous letter to a federal judge accusing him of bias in a suit of interest to the contemnor was held not to be punishable by summary commitment in Cooke v. United States on the theory that immediate retribution was not imperative. Terry was distinguished on its facts since the contempt there was in open court and a violent interference with court proceedings. The Court directed that on remand the contemnor should have notice and a hearing at which he could have counsel and the right to present a defense. It is instructive to note that both courts considered the character of the criminal contempt to be as significant as its locus. Rule 42(a), however, which is asserted by the draftsmen to be a codification of these cases makes the locus of the contempt the only material consideration in determining whether summary commitment will lie.

The above cases illustrate that from the inception of the federal courts, decisional law has focused on the extent of the summary power rather than the legitimacy of its existence. In recent years, however, members of the "activist" or liberal school of the Supreme Court have

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29. 313 U.S. 33 (1941).
30. Section 268 of the Judicial Code of 1912, 36 Stat. 1087, 1163, was substantially the same as section 1 of the Act of March 2, 1831. See note 51 infra.
31. 128 U.S. 289 (1888).
32. 267 U.S. 517 (1925).
33. See note 17 supra.
34. Advisory Committee Notes, note to subdivision (a), Fed. R. Crim. P. 42 (1946).
35. See note 8 supra.
questioned the constitutionality of summary proceedings in criminal contempts. Led by Justices Black and Douglas, a minority of the Court has called for a re-evaluation of the summary power and urged the adoption of two guiding principles: 1) criminal contempts are crimes and the Constitution requires a jury trial; 2) observance of minimal standards of procedural due process requires that all criminal contemnors be granted a summary trial under Rule 42(b).

Dissents filed in *Sacher v. United States*, *Green v. United States*, and *United States v. Barnett* have given clarity and force to this position. In *Sacher* the summary commitment of an attorney found guilty of criminal contempt for contumacious conduct during a prolonged trial was affirmed. Mr. Justice Black, dissenting, was troubled by the fact that a judge who had participated in and possibly precipitated the acrimonious wrangling that marked the relations between bench and bar during the trial should pass judgment on the guilt of the alleged contemnor. Going beyond the competency of the judge, Black proposed that summary proceedings should not be employed to enforce unconditional punishment in criminal contempt cases in view of article II, section 2 of

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37. 343 U.S. 1, 14 (1952).
41. See Dennis v. United States, 341 U.S. 494 (1951). The defendants were charged with conspiring to advocate the violent overthrow of the United States government.
42. The voluminous trial transcript was in itself an impediment to proper appellate review. Mr. Justice Black, however, concluded from certain quoted excerpts that perhaps the trial judge allowed his repugnance for the offense charged to color his attitude toward the defendants' attorneys. The trial judge was Harold R. Medina, who, of all men, should have been most sympathetic toward these attorneys in view of the tension created by the notoriety of the trial. Judge Medina was himself a victim of odium by association when he undertook to defend Anthony Cramer, who was charged with treason during the Second World War. In Edward Bennett William's *One Man's Freedom* (1962) the reflections of Medina on this incident are recounted:
the Constitution ("The trial of all Crimes . . . shall be by Jury . . .") and
the fifth amendment ("No person shall be held to answer for a capital or
otherwise infamous crime unless on presentment and indictment of a
Grand Jury . . ."). He allowed that summary proceedings are proper
to enforce obedience and order in extreme situations but not if utilized to
mete out unconditional prison terms. In Green he elaborated on this
theme and made explicit what he had implied in Sacher. The charge
in Green was for indirect contempt resulting from the defendants' failure
to obey a court order. Writing again in dissent, Black reiterated his
position in Sacher and elucidated the legitimate use of summary pro-
ceedings:

perhaps it should be here emphasized that we are not at all con-
cerned with the power of courts to impose conditional imprisonment
for the purpose of compelling a person to obey a valid order. Such
coercion, where the defendant carries the keys to freedom in his
willingness to comply with the court's directive is essentially a civil
remedy for the benefit of other parties and has quite properly been
exercised for centuries to secure compliance with judicial decrees . . .
In my judgment the distinction between conditional confinement to
compel future performance and unconditional imprisonment designed
to punish past transgressions is crucial, analytically as well as his-
torically, in determining the permissible mode of trial under the
Constitution. 43

In addition to the constitutional guarantee of trial by jury, Mr.
Justice Black cited two practical considerations militating against the
need for summary proceedings in criminal contempts. Where the con-
temptuous acts are committed outside the court or where the contempt
in facie consists of conduct from which several inferences can be drawn,
there are factual questions which the judge by reason of his geographical
remoteness or personal temperament might not be best qualified to deter-
mine. 44 Moreover, "when all that remains is punishment for past sins" 45
there is no cogent reason for ignoring due process in the name of
celerity. In Barnett Governor Ross Barnett argued that he was entitled
to a jury trial for an alleged indirect criminal contempt brought on by
his refusal to comply with a federal court order concerning the admission
of James Meredith, a Negro, to the University of Mississippi. The Court
held the summary power to be inherent in the federal courts, as modified
by statute, and outside the guarantees of the Constitution concerning
"crimes." Justices Goldberg, Warren, and Douglas dissented on the
ground that if the summary power is to be allowed it should be restricted

43. Green v. United States, 356 U.S. 165, 197 (1958) (dissenting opinion of
Black, J.).
44. "It transcends recognized frailties of human nature to suppose that a judge
can be free from the inclinations arising from natural pique which would be engen-
dered by a direct refusal by the accused to obey an order freshly made by him, and
the temptation to strike back which inevitably accompanies ruffled pride." Bailantine
v. United States, 237 F.2d 657, 669 (5th Cir. 1956).
45. Green v. United States, 356 U.S. 165, 216 (1958) (dissenting opinion of
Black, J.).
to minor punishments for petty offenses. Mr. Justice Black, in a separate
dissent, delivered his most critical assessment of the summary power to
date: "It is high time, in my judgment, to wipe out root and branch the
judge-invented and judge-maintained notion that judges can try criminal
contempt cases without a jury."46

With these considerations in mind, the present case should be viewed
against a backdrop of the protracted struggle waged by the "activists"
to hobble the contempt power juxtaposed with the prevailing reluctance
to violate a prerogative asserted to be grounded in the nature of the
judicial institution.

The narrow holding of *Harris* which refuses to sanction the use of
Rule 42(a) to punish a compulsory re-enactment before the district court
of the petitioner's contemptuous refusal to answer the grand jury's ques-
tions is long overdue and is in keeping with the universally accepted policy
of construing Rule 42(a) strictly.47 The legitimate uses48 of such a special
proceeding should not be distorted to deprive a contemnor of his rights
under Rule 42(b).49

When the Court goes beyond this holding and assumes *arguendo* that
Rule 42(a) may at times be applicable to contempts committed at such

46. United States v. Barnett, 376 U.S. 681, 727 (1964) (dissenting opinion of
Black, J.).

47. This decision in no way changes the established construction of 18 U.S.C.
§ 401(l) (note 51 infra) that contempts committed before the grand jury are within
the summary contempt power. All that is disallowed is utilizing Rule 42(a) to punish
the second contemptuous refusal to answer questions propounded before the grand
jury and then repeated before the special district court proceeding. Ordinarily, there
must be two refusals to answer before the grand jury if the witness is to be held in
contempt. If when a question is submitted to him for the first time, the witness in
good faith refuses to answer on the ground of privilege, he is not in contempt. In
most cases he will be taken before the district court where a hearing will be held to
determine the availability of privilege. If the court rules that he must answer the
question, then any subsequent refusal will be a contempt. Calomeris v. District of
Columbia, 226 F.2d 266 (D.C. Cir. 1955); *In re Neff*, 206 F.2d 149 (3d Cir. 1953).
For a consideration of the availability of the fifth amendment privilege to witnesses
before a grand jury, see Annot., 38 A.L.R.2d 236 (1951).

48. Such legitimate uses include the imposition of coercion to encourage the wit-
ess to answer as well as the opportunity given to the contemnor to purge himself.

49. While it is clear from the holding that the Court takes a jaundiced view of
staging a contempt of court in the name of expediency, its analysis is veiled by cryptic
references to the place of the "real" contempt as well as to proceedings that are
"ancillary" to a grand jury hearing. Several alternatives are proposed: (1) petitioner's
refusal was in contempt of the district court but not a contempt of the kind envisioned
by Rule 42(a); (2) petitioner's refusal was in contempt of the district court but was
inseparable from his contempt before the grand jury and could not be punished without
reference to its origin; (3) petitioner's refusal before the district court was not
properly a contempt since the only "real" contempt was before the grand jury. It is
submitted that had the Court pursued this latter line of reasoning the opinion might
have more lucidly revealed the frailty of the district court proceeding. Since dis-
obedience to the order of the court must in some way "obstruct" the administration
of justice to be a contempt, the Court might have reasoned that since the admitted
purpose of the special proceeding was to compel the petitioner to commit a contempt
before the district judge, it could hardly be said that his refusal there "obstructed"
the administration of justice. Rather than impeding the court's business, the refusal
fulfilled the purpose of the proceeding and expedited the business at hand, that is, to
punish the petitioner. See *In re Michael*, 326 U.S. 224 (1945), for a similar analysis
concerning the impropriety of treating perjury as contempt of court.
testimonial episodes, it alludes to a rationale for its decision that imports an ambivalent judicial attitude toward summary contempt.

The Court describes contempt envisioned by Rule 42(a) as "misbehavior" marked by "exceptional circumstances." Illustrative of such misbehavior are situations where disturbances must be quelled, insolent tactics must be stopped, or acts threatening to the judge must be halted. Significant by its absence from this litany, is the passive refusal to answer a question or obey an order. Such disobedience to the lawful command of the court has heretofore been punishable under Rule 42(a) if committed in the actual presence of the court. By stating that Rule 42(a) is reserved for misbehavior, which is the word used in sections 401(1) and 401(2) of title 18, and omitting from examples given of such misbehavior those contempts punishable by summary proceedings characterized as "disobedience" in section 401(3), the Court has indicated that Rule 42(a) might not apply to all criminal contempts committed in the actual presence of the court. While interpreting the Court's intention from its omissions has obvious deficiencies, it can be safely said that under the Court's analysis the character of a criminal contempt prosecuted under Rule 42(a), as well as its locus, will come under scrutiny.

It is clear from the opinion, however, that Justices Black and Douglas have impressed a majority of the Court with their arguments concerning the imperativeness of according all criminal contemnors the minimum right of summary trial under Rule 42(b). Cooke v. United States is cited for the proposition that in indirect contempt cases, due process requires that the accused should have the right to bring forth evidence "either to the issue of complete exculpation or in extenuation of the offense." Adducing exculpatory evidence for contempt committed in facie has always been regarded as superfluous since the judge himself witnessed the contempt and knows all the relevant facts. However, even in contempts committed in facie the judge does not necessarily know all the facts that might tend to mitigate guilt. Such facts may be present in any contempt, but the Court finds the refusal of a witness to testify before a grand jury to be a situation in which their presence is quite likely. The Court states, "what appears 50. Yates v. United States, 355 U.S. 66 (1957).
51. 18 U.S.C. § 401 (1962) is based on 28 U.S.C. § 385 (1940), Judicial Code and Judiciary, Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163, which in turn was derived from the Act of March 2, 1831, c. 99, § 1, 4 Stat. 487. It provides as follows:
A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as
(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
(2) Misbehavior of any of its officers in their official transactions;
(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

52. See In re McConnell, 370 U.S. 230, 237 (1962) (dissenting opinion of Harlan, J.) where Mr. Justice Harlan interpreted the majority opinion (by Black, J.) as saying "only a physical obstruction of pending judicial proceedings is punishable under 18 U.S.C. § 401." Id. at 237.
53. 267 U.S. 517 (1925).
54. Id. at 537.
to be a brazen refusal to cooperate with the grand jury may indeed be a
case of frightened silence. Refusal to answer may be due to fear — fear of
reprisals on the witness or his family. Other extenuating circumstances
may be present."\textsuperscript{55} This analysis should \textit{pari ratione} apply to any criminal
contempt, even those involving "exceptional circumstances." The Court
has already considered a case where the contemnor’s "insolent tactics"
were possibly due to mental imbalance.\textsuperscript{56} In absence of the protections
accorded a contemnor under Rule 42(b), such facts might never be brought
to the attention of the court.

The Court offers another description of contempts envisioned by Rule
42(a) by calling them "unusual situations . . . where instant action is
necessary to protect the judicial institution."\textsuperscript{57} While this is of little value
as an analytic tool, it does illuminate an abstract proposition quoted in
the opinion that urges limiting the power to punish for contempt to the
"least possible power adequate to the end proposed."\textsuperscript{58} If the Court is
suggesting that the "end proposed" is the protection of the judicial institu-
tion, then it does not necessarily follow that the least possible power to
achieve this end, even in the case of threatening a judge, should be an
exercise of the summary commitment power under Rule 42(a). The court
and judge would receive ample protection if the contemnor were to be
removed from the courtroom and provisionally detained until a hearing
under Rule 42(b) might be held.\textsuperscript{59} However, historically the protection
of the judicial institution has always been thought to require immediate
vindication so as to restore swiftly the affronted dignity of the court. This
immediate vindication has traditionally taken the form of instantaneous
punishment for a fixed term.

The Court’s desire to curtail the summary commitment power in cases
of contemptsuous refusal to testify is manifest, but it is questionable whether
a narrow construction of Rule 42(a) will suffice to meet this end. Since
the Court’s reasoning applies only to criminal contempts and refusals to
testify may also be civil contempts, it is apparent that circumvention of the
holding in the instant case is a distinct possibility. Due to the lack of a
clear \textit{ratio decidendi} in \textit{Harris} the contemptuous refusal of a grand jury
witness to answer before a special district court proceeding might still be a
direct civil contempt and within the common law summary commitment

\begin{itemize}
\item \textsuperscript{55} 382 U.S. at 166.
\item \textsuperscript{56} Panico v. United States, 375 U.S. 29 (1963) where a criminal defendant was
found guilty under Rule 42(a) of contemptsuous conduct in open court despite the
earlier introduction of conflicting testimony concerning his mental capacity to stand
trial. His conviction was vacated and remanded for proceedings under Rule 42(b)
after the Court noted that a prison psychiatrist had found him suffering from schizo-
phrenia and had committed him to a mental hospital.
\item \textsuperscript{57} 382 U.S. at 167.
\item \textsuperscript{58} Anderson v. Dunn, 6 Wheat. 204, 231 (1821).
\item \textsuperscript{59} A similar procedure was urged by Edward Livingston in his \textit{Proposed Penal
Code of Louisiana} (1824) which never gained legislative approval. See Frankfurter
(1924).
\end{itemize}
power.\textsuperscript{60} In this case the contemnor could be imprisoned, albeit conditionally, without an opportunity to bring forth evidence in extenuation. Even under Mr. Justice Black's theory\textsuperscript{61} such imprisonment might not be objectionable since the contemnor would be "coerced" not "punished" and would "carry the keys" to his cell. Whether coercion really differs from punishment where the contemnor is too fearful of reprisals to answer is questionable.\textsuperscript{62} While it cannot be gainsaid that a court ought to have the power to compel compliance with its lawful order, it is submitted that the propriety of a particular method of exercising it should not turn upon the purpose in employing it. It is distressing that even though punishment of a past act of refusal necessitates a hearing, coercing future obedience does not.

The instant case stands as a compromise to attract a consensus among a majority of the Court and despite its deficiencies acts as a useful barometer to reflect the extent to which the Court is currently willing to reduce the summary contempt power. By restricting the purview of Rule 42(a) some progress has been made to this end. It is hoped that further inroads may be made into a judicial power to imprison that is as antithetical to due process as it is unique.

\textit{Thomas Colas Carroll}

\textbf{DOMESTIC RELATIONS — ANNULMENT — CONCEALMENT OF ANTI-SEMITIC BELIEFS IS SUFFICIENT FRAUD FOR ANNULMENT.}

\textit{Kober v. Kober} (N.Y. 1965)

Plaintiff wife sued defendant husband for annulment on the grounds of fraud. Plaintiff alleged that, before marriage, defendant falsely and fraudulently concealed from her that he had been an officer in the German Army and a member of the Nazi Party during World War II, and that he was fanatically anti-Semitic, believed in the extermination of the Jewish people, and would require plaintiff to "weed out" her Jewish friends and cease socializing with them. Plaintiff further alleged that she would not have married defendant if she had known of his prejudices. The Appellate Division of the Supreme Court of New York reversed the decision of the trial court denying a motion to dismiss for failure to state a cause of action. The New York Court of Appeals reversed, holding that an allegation of concealment of anti-Semitic beliefs prior to marriage sufficiently states a cause of action for annulment. \textit{Kober v. Kober}, 16 N.Y.2d 191, 211 N.E.2d 817 (1965).

\textsuperscript{60} See note 51 supra.

\textsuperscript{61} See notes 42-43 supra and accompanying text.

\textsuperscript{62} Goldfarb, \textit{The Varieties of the Contempt Power}, 13 SYRACUSE L. REV. 44, 56-57 (1961); see Comment, 57 YALE L.J. 83, 95 (1947), where similarities between imprisonment for civil contempt and imprisonment for debt are discussed.
Under basic contract law, a contract may be rescinded (annulled) on the ground of fraud if it can be shown that the fraud consists of a misrepresentation of material fact made with intent to induce another to enter into the agreement, and in fact accomplishes that result. Since the marriage relationship is based fundamentally upon the law of contracts, it follows that it should be voidable when induced by fraud. However, because of the importance of the marriage contract and the status established thereby, most courts have been reluctant to determine the validity of marriages by the rules governing ordinary civil contracts. Thus, while fraud has been recognized as a valid ground for annulment, public policy has dictated great restriction upon its application. This restrictive application was first embodied in the essentialia or ecclesiastical doctrine under which a marriage would be annulled on grounds of fraud only if the fraud concerned something essential to the marriage, that is, "... something making impossible the performance of the duties and obligations of that relation or rendering its assumption and continuance dangerous to health or life."

The essentialia doctrine has found favor in most American jurisdictions and, prior to 1903, was steadfastly adhered to in New York. However, the increasing pressure exerted upon the New York courts by that state's single-ground divorce law eventually gave rise to the abandonment of the essentialia doctrine in the case of di Lorenzo v. di Lorenzo. In that case plaintiff alleged that he had been induced to marry defendant by her fraudulent representation that he was the father of her child. The Court of Appeals, in a unanimous opinion, held that plaintiff's complaint stated a cause of action for annulment on the ground of fraud, saying that marriage is not to be considered in any other light than a civil contract and that "there is no valid reason for excepting the marriage contract from the general rule..." which, read literally, would justify annulment of a marriage for any misrepresentation of material fact made with intent to induce another to enter into a marriage. Thus, di Lorenzo seemed to place annulment for fraud within the general rules applicable to ordinary commercial contracts.

2. See 1 BISHOP, MARRIAGE AND DIVORCE § 167 (6th ed. 1881).
4. For a discussion of the ecclesiastical and early common law rule, see Fessenden, Nullity of Marriage, 13 HARV. L. REV. 110 (1899).
5. Lyon v. Lyon, 230 Ill. 366, 368, 82 N.E. 850, 852 (1907). Generally, the courts have held that the misrepresentations must have been as to facts concerning consortium or cohabitation. See, e.g., Smith v. Smith, 171 Mass. 404, 50 N.E. 933 (1898) ; Ryder v. Ryder, 66 Vt. 158, 28 Atl. 1029 (1894).
7. Divorce is permitted only for adultery. N.Y. DOMESTIC RELATIONS LAW § 170. Other states were under no pressure to abandon the essentialia doctrine because those problems which could not be resolved under the strict requirements of this doctrine could be adequately solved by divorce laws permitting dissolution of marriage on such grounds as mental cruelty, abandonment and the like.
8. 174 N.Y. 467, 67 N.E. 63 (1903).
9. Id. at 472, 67 N.E. at 64.
Subsequent decisions, however, proved that the New York courts were most reluctant to apply the broad rule of *di Lorenzo* when to do so would create a totally new basis on which to claim fraud.\(^{10}\) In an effort to eliminate this reluctance, the Court of Appeals reenunciated the *di Lorenzo* doctrine, emphasizing its meaning, in *Shonfeld v. Shonfeld*.\(^{11}\) In that case plaintiff alleged that he had been induced into marriage by defendant's fraudulent representations that she would furnish him with sufficient money to enter into a certain business enterprise. Reversing the lower court, the Court of Appeals held that plaintiff's complaint stated a cause of action for annulment. In reaching its decision the court stated, "any fraud is adequate which is 'material, to that degree that, had it not been practiced, the party deceived would not have consented to the marriage' and is 'of such a nature as to deceive an ordinarily prudent person'."\(^{12}\) The *Shonfeld* ruling seemed to dispell any doubts as to what the New York test for annulment would be in the future; New York courts were apparently to disregard any special policy consideration and treat the marriage contract as they would any other contract. To be sure, the courts became much more lenient in finding sufficient fraud for annulment in the years following *Shonfeld*.\(^{13}\) It should be noted, however, that there was still hesitation to treat the marriage contract as having no greater significance than the ordinary civil contract. Thus, misrepresentations as to character, temperament, social position and financial status were not considered "material enough" to void the marriage contract even under the *Shonfeld* ruling.\(^{14}\)

The *di Lorenzo–Shonfeld* doctrine stood unchallenged in New York for some nineteen years. However, in 1952 this doctrine was considerably narrowed in the case of *Woronzoff-Daschkoff v. Woronzoff-Daschkoff*.\(^{15}\) In that case plaintiff sued for annulment alleging that defendant had formed a conspiracy with his brother to marry plaintiff and secure her wealth, and that if she had known of this conspiracy she would not have consented to marry defendant. Reversing the lower court, the court of appeals dismissed this complaint saying:

> [B]ut this is a suit to annul a marriage for fraud, and, while we have, for better or for worse, retreated...from the old idea that marriages can be voided only for frauds going to the essentials of the marriage,

\(^{10}\) See, e.g., Griffin v. Griffin, 122 Misc. 837, 204 N.Y. Supp. 131 (1924), aff'd, 209 App. Div. 883, 205 N.Y. Supp. 926 (1924) (misrepresentations of love and affection held not sufficient grounds for annulment after the marriage was consummated); Beckermeister v. Beckermeister, 170 N.Y. Supp. 22 (Sup. Ct. 1918) (concealment of motive to avoid prison on bastardy proceedings held insufficient).

\(^{11}\) 260 N.Y. 477, 184 N.E. 66 (1933).

\(^{12}\) Id. at 479, 184 N.E. at 61, quoting in part from *di Lorenzo v. di Lorenzo*, 174 N.Y. 467, 471, 474, 67 N.E. 63, 64–65 (1903). (Emphasis added.)

\(^{13}\) See, e.g., Ryan v. Ryan, 156 Misc. 251, 281 N.Y. Supp. 709 (Sup. Ct. 1935) (concealment of motive to relieve financial distress held sufficient); Costello v. Costello, 155 Misc. 28, 279 N.Y. Supp. 303 (Sup. Ct. 1934) (misrepresentation that wife had never previously married held sufficient).

\(^{14}\) Cervone v. Cervone, 155 Misc. 543, 280 N.Y. Supp. 159 (Sup. Ct. 1935) (defendant's misrepresentation that he had a medical degree held insufficient); Smelzer v. Smelzer, 147 Misc. 413, 265 N.Y. Supp. 220 (Sup. Ct. 1933) (defendant's misrepresentations as to his financial position held insufficient).

\(^{15}\) 303 N.Y. 506, 104 N.E.2d 877 (1952).
that is, consortium and cohabitation, it is, nonetheless, still the law in New York that annulments are decreed, not for any and every kind of fraud . . ., but for fraud as to matters 'vital' to the marriage relationship only. . . 16

Under a literal interpretation of the *di Lorenzo-Shonfeld* doctrine, plaintiff’s complaint might well have stated a cause of action; a jury could reasonably have found that the fraud alleged was material to that degree that had it not been practiced the party deceived would not have consented to the marriage. Thus, while *Woronzoff-Daschkoff* did not purport to overrule *di Lorenzo* or *Shonfeld*, it did narrow the scope of the rule laid down in those cases insofar as it declared that to be sufficient for annulment the fraud would have to go to something “vital” to the marriage relationship.

The New York Court of Appeals has had little opportunity since the *Woronzoff-Daschkoff* case to explain what is to be considered “vital” to the marriage.17 Probably because of this, the lower courts of New York have, for the most part, ignored the “vital to the marriage” concept and have continued to apply the well established rules of *di Lorenzo* and *Shonfeld*.18 It might have been expected, then, that when the instant case came before it, the Court of Appeals would have seized the opportunity to provide guidelines from which the lower courts might determine what things are “vital” under the *Woronzoff-Daschkoff* rule. Instead, the court simply based its decision upon *di Lorenzo* and *Shonfeld*, quoting extensively from each. The court did pay lip service to the *Woronzoff-Daschkoff* doctrine, stating that the representation had to relate to something “vital” to the marriage relationship, but it went on to say that if the representation were of such a nature as to deceive an ordinarily prudent person, then it would constitute sufficient fraud for annulment.19 It appears from this language that in the instant case the court is reverting to the more liberal *di Lorenzo-Shonfeld* doctrine.

It is important to note that throughout the history of annulment for fraud in New York the courts have avoided determining whether plaintiff reasonably relied upon the representation by a subjective test, that is, did this particular plaintiff reasonably rely upon the representations made? Instead, the courts have employed an objective test: would a *reasonable man* have been deceived by the representations? Moreover, the courts have delineated certain representations reliance upon which is *per se* unrea-

16. *Id.* at 511, 104 N.E.2d at 880.
17. It is not often that an annulment case is pursued to the highest court of the state.
18. See Gambacorta v. Gambacorta, 136 N.Y.S.2d 258 (Sup. Ct. 1954) (defendant’s representation that she had divorced her former husband for cruelty when he had actually divorced her for adultery held sufficient); Ciulla v. Ciulla, 207 Misc. 122, 136 N.Y.S.2d 176 (Sup. Ct. 1954) (defendant’s representation that she had been validly married to a former mate when in fact she had lived with him illicitly held sufficient); Madden v. Madden, 204 Misc. 170, 125 N.Y.S.2d 384 (Sup. Ct. 1953) (defendant’s representations that he would stay home at night and not keep secrets from his wife held sufficient because defendant had present intention not to abide by these representations).
sonable. Among these are misrepresentations as to character, temperament, and social or financial status. It is reasoned that these particular qualities are such as to demand inquiry before marriage. Since the marriage relation contemplates a prior courtship period for the very purpose of affording each party an opportunity to familiarize himself with these elements of the other's background, it is assumed that the reasonably prudent man would discover any misrepresentations as to them. The ground for annulment asserted in the present case was the defendant's alleged misrepresentation that he held no anti-Semitic beliefs. This would undeniably be classified under the heading of character or temperament. In fact, the plaintiff's complaint expressly classified it as such. Plaintiff alleged that she relied upon defendant's "... apparent normal character, high moral beliefs and absence of fanatic anti-Semitism. ..." Yet, the court concluded that this is sufficient to state a cause of action. The court can only be holding that a misrepresentation as to character is sufficient fraud for annulment.

The obvious question is why the court found the misrepresentation in the present case sufficient to vitiate the marriage while representations as to character are generally held not sufficient. It is submitted that the representation in the instant case was not merely one as to a particular character trait, rather it was such as to present defendant as a wholly different individual from the one he really was. There is a pivotal difference between a misrepresentation as to a character trait and a misrepresentation as to identity. It must be remembered that the presence or absence of consent is the key to whether a marriage will be annulled for fraud. When a party misrepresents a character trait to another and so induces marriage, the deceived party is in fact consenting to marry the party making the representations, though he may be deceived as to a facet of his character. When a party misrepresents his identity, that is, his whole character, the deceived party is not consenting to marry the party making the representations, but the individual he represents himself to be. To illustrate, when party A represents himself to be a totally different person so that to the party deceived A is not A at all, but B, the deceived party's consent is not to marry A, but B. It would follow that since there was no consent to marry A, and since the existence vel non of a marriage depends upon the presence of consent, the non-consenting party may have the marriage annulled. In the case of Harris v. Harris the New York Court of Appeals found defendant's concealment of his past criminal activities sufficient grounds for annulment. In doing so, the court implied that here was not simply a misrepresentation of character traits, but something more. However, the court, did not discuss the nature of the "something more." It is clear, however, that, as in the instant case, the representation was one going to
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the total personality of the deceiving party. The plaintiff believed she was consenting to marry a law-abiding individual, not a hardened criminal. Under this analysis the court's test would be formulated as follows: when a representation is such as to indicate that the deceiving party is a wholly different person from the one he actually is, there is sufficient fraud for annulment.

The problem that remains is how to predict what the court will consider a misrepresentation of the total personality. Comparison of Harris with the instant case reveals that in both situations the defendants' misrepresentation concealed an anti-social or depraved character. So it seems clear that if a defendant conceals such a character an annulment will be granted. But what if the defendant misrepresents his entire personality and that personality is not a depraved one? The foregoing analysis, which was not expressly used by the court, would logically call for annulment whether the true nature was depraved or not, as long as it made of defendant a different kind of person than he represented himself to be. It is a matter of conjecture, however, whether the court would grant an annulment where the deceiving party is not depraved.

The instant decision was certainly equitable, and it has been shown that it was logically and legally justified. But it should not be overlooked that in any New York annulment case there lurks the spectre of the single ground divorce law. The actual reasoning of the court in the instant case emphasized the intolerable situation in which plaintiff was living and the inequity of abandoning her to remain in it. "Intolerableness" and "inequity" are rather vague concepts; as criteria for granting annulments they would be highly subjective. It is submitted that if the instant decision had been based on a clearer legal analysis, like the one herein suggested, it would have provided a more useful guide for New York's lower courts.

Lee Sherman

EVIDENCE — EXPERT WITNESSES — MEDICAL TREATISES UPON WHICH EXPERT WITNESS HAS NOT EXPRESSLY RELIED MAY BE USED IN CROSS-EXAMINING HIM.

Darling v. Charleston Community Memorial Hosp. (Ill. 1965)

Plaintiff, a minor, instituted an action against defendant hospital to recover for alleged negligent medical and hospital treatment which necessitated the amputation of his leg. During the trial the defendant called as its witnesses a doctor and a superintendent of a hospital in another county. The trial judge permitted plaintiff's counsel to cross-examine these witnesses with respect to certain statements in medical texts. Defendant's experts had not cited these works as bases for their opinions, but they
admitted on cross-examination that the books were a part of their general background knowledge. After a judgment for the plaintiff, defendant appealed, claiming, inter alia, that the cross-examination of its medical experts on treatises upon which they had not expressly relied in their direct testimony was improper. The Appellate Court for the Fourth District affirmed the decision of the trial court, holding that the cross-examination was proper since the record showed that the experts had based their opinions on these treatises. The Supreme Court of Illinois also affirmed but in doing so refused to decide whether the inferior appellate court had properly followed the prior Illinois rule that an expert must expressly base his opinion on a treatise before it can be used against him. Instead, the court adopted the so-called liberal view and held that authoritative learned treatises may be employed in cross-examination of an expert witness even though the witness did not purport to base his opinion on such authorities. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965).

The use of expert witnesses, an exception to the normal ban on opinion evidence, has an important position in any litigation concerning technical or highly complicated areas. Because of the expert’s exalted position, his testimony has an important bearing on the outcome of many cases. In order to reduce the effectiveness of this evidence, trial attorneys use various methods of cross-examination. One method is to attack the expert’s training and special competency. Another is to question the interest or bias of the witness with special attention given to whether the expert has received compensation over and above the normal witness fees. The most effective method of challenging the expert’s testimony, however, is to employ learned treatises in cross-examining him. By using such books the cross-examiner attacks the witness’ opinion itself showing it to be either inconsistent with the witness’ prior writing, if the book was written by the expert, or based upon an improper reading of the authorities, where the book is one expressly relied upon by the witness, or inconsistent with the views of eminent authorities, where the book was not relied upon by the witness. Successful employment of a treatise in any of these cases indicates to the jury in a very dramatic and impressive fashion that the expert’s opinion is either false or ill-considered.

Although lay society generally recognizes the value of treatises and textbooks as a medium of scientific knowledge, the use of such works in courts of law has been the source of much conflict. If treatises were allowed

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5. Hereinafter referred to as treatises.
in as direct substantive evidence, the source of this confusion would disappear. But to so allow them would be violative of the hearsay rule since they are out-of-court statements offered for the truth of the matter asserted.

Many legal commentators have urged that authoritative treatises be allowed in as direct evidence under an exception to the hearsay rule. The rationale for creating this exception is that the author is normally unavailable or, if he is available, the cost of bringing him into court would be prohibitive. Moreover, there is a high degree of probability that authors who write for the purpose of passing on knowledge to students and practitioners are trustworthy. The response to this scholarly advice has been meager: to date only one state has carved out such an exception by judicial decision. Several other states have statutes which permit the use of treatises as substantive evidence in certain specified instances. In addition, a number of jurisdictions have statutes which declare scientific books to be prima facie evidence of facts of general notoriety and interest, but, under the theory that medicine is an inexact science, the courts of these latter states have held that the statutes do not sanction the admission of medical texts.

The greatest confusion exists in the area of the use of treatises as tools for cross-examination. The reason for the bewilderment is that courts cannot agree on how to limit the use of these texts to non-hearsay purposes. The problem is aggravated by the fact that many cases do not even recognize a hearsay problem, basing their holdings on precedent which also ignored this issue. Those courts which do mention the problem can be classified broadly according to the extent to which they permit the use of treatises on cross-examination. However, it must be remembered that the lines between classes are not clear ones, and that the same jurisdiction may adopt different rules in different cases or at different times.

There are several ways in which a treatise may be employed to cross-examine an expert witness. The attorney may read from the treatise and ask the witness if he agrees or disagrees with it. The attorney may hand the book to the witness and ask him to find the passage or passages which sustain his opinion. Some jurisdictions allow the cross-examiner to read

7. Uniform Rule of Evidence 63 (31); Model Code of Evidence rule 529 (1942); 6 Wigmore, Evidence §§ 1690-92 (3d ed. 1940); Dana, Admission of Learned Treatises in Evidence, 1945 Wis. L. Rev. 455. But see Grubb, Proposed "Learned Treatises" Rule, 1946 Wis. L. Rev. 81.
8. See 6 Wigmore, Evidence §§ 1691-92 (3d ed. 1940).
10. In Massachusetts and Nevada relevant statements of fact or opinion contained in medical books and treatises of an authoritative nature are admissible in actions for medical malpractice. Mass. Gen. Laws Ann. ch. 233, § 79C (1959); Nev. Rev. Stat. § 51.040 (1957). In South Carolina relevant medical books may be introduced to complement expert testimony in cases where sanity or the administration of poison or any other article destructive to life is in issue. S.C. Code Ann. § 26-142 (1962).
the contradictory extract directly to the jury. The method selected in any case depends primarily on the effect sought to be obtained by use of the treatise and the personal preference of the cross-examiner.

Nearly all jurisdictions allow the use of a treatise written by the testifying expert in order to show that his previous writing is contrary to what he has stated on direct examination. Thus, the purpose of using the treatise in such a case is to impeach the credibility of the witness by means of a prior inconsistent statement, a traditionally non-hearsay use. Practically all courts also permit the use of treatises where the expert admits he has specifically relied on them. Since the purpose of using treatises in this instance is to show that the expert was incorrect in his interpretation of the authorities and not to prove the truth of the material contained in them, this use is purely one of impeachment of credibility. Many courts, termed strict jurisdictions by some commentators, limit the use of treatises to these two situations only. In Ullrich v. Chicago City Ry. the Supreme Court of Illinois held that a physician who based his opinion on his own observations and experience, without relying on any text-books or writers on the subject, could not be cross-examined by reference to medical treatises. In reaching this result the court indicated one of the basic reasons for the strict rule by quoting the following from City of Bloomington v. Shrock:

Where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of theory; and any number of additional books expressing different theories would obviously be quite as competent as the first. But, since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.

Under the so-called liberal rule, authoritative treatises may be used in cross-examination of experts whether or not the expert has made reference to them or purports to rely on them. These jurisdictions reason that since experts base much of their opinion on book knowledge, it would be illogical, if not actually unfair, to deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions. An example of the liberal approach is found in Laird v. Boston & M.R.R. In that case the New Hampshire Supreme Court stated that an expert must of necessity base his opinion on hearsay and whether it shall be

17. See Wall v. Weaver, 145 Col. 337, 358 P.2d 1009 (1961); see also collection of cases at Annot., 60 A.L.R.2d 77, 83 (1958).
18. 265 Ill. 338, 106 N.E. 828 (1914).
19. 110 Ill. 219 (1884).
admitted or not depends upon the expert's familiarity with the hearsay. When the witness is confronted with the contents of books that contradict the view he has expressed, the issue presented is not whether the book states the true opinion of the author, but whether the witness has honestly and intelligently read and applied what is set down in the books.23

Between the strict view and the liberal view exists a strong middle ground which allows the introduction of treatises on cross-examination of an expert where he has admitted that the texts are authoritative.24 The reason for this rule was expressed in Texas Employers’ Ins. Ass’n v. Nixon25 as follows:

When a doctor testifies as an expert relative to injuries or diseases, he may be asked to identify a given work as a standard authority on the subject involved; and if he so recognizes it, excerpts therefrom may be read not as original evidence but solely to discredit his testimony or to test its weight.26

Courts following the liberal and middle approaches allowing the use of treatises on cross-examination though the expert has not expressly relied on them, assert that the inquiry is into the extent of the expert's knowledge, his competency, and the accuracy of his conclusions.27 They reason that when treatises are used for this purpose, they are not being employed to prove the truth of the matter contained in them. This is so because where the cross-examiner presents to the jury several treatises all of which disagree with the opinion of the expert witness and with each other, the jury is asked to believe only that there is a conflict of authority in the area and that no one opinion should be given decisive weight. And where several treatises are introduced all of which express the same opinion, which opinion is different from the one expressed by the witness, the jury is asked to believe either again that there is a conflict of authority or that the witness does not know of these treatises and therefore did not base his opinion on consideration of all the relevant authorities so that his conclusion may be inaccurate, and, in fact, he may be incompetent to testify on the subject. Courts following the strict view fear that to permit an expert to be tested by statements in a treatise upon which he has not expressly relied is indirectly to get the contents of the statements before the jurors who will ignore any instruction from the bench to consider the treatise only for impeachment of credibility and consider the statements in the books as direct evidence. It cannot be denied that this fear has some basis in fact. Jurors are probably incapable of the mental gymnastics required to consider treatises strictly for impeachment purposes.28 So, as a practical

23. Id. at 592.
26. Id. at 812.
27. See Ruud v. Hendrickson, 176 Minn. 138, 222 N.W. 904 (1929).
28. In this respect, see Landro v. Great Northern Ry., 117 Minn. 306, 309, 135 N.W. 991, 992 (1912), where the court considered that reading extracts from treatises on cross-examination made it impossible for the jury to distinguish substantive from impeaching testimony.
matter, there is real danger that the jury will consider an out-of-court statement not made under oath as evidence of a particular fact in the case.

In the instant case the Illinois Supreme Court rejected the position it had taken in the *Ulrich* case in favor of the liberal view that an expert may be cross-examined on any treatise that is authoritative. The court indicated that in order to establish an author's competence the judge may take judicial notice of it or it may be established by the testimony of a witness expert in the subject. In justifying its decision the court stated:

An individual becomes an expert by studying and absorbing a body of knowledge. To prevent cross-examination upon the relevant body of knowledge serves only to protect the ignorant or unscrupulous expert witness. In our opinion expert testimony will be a more effective tool in the attainment of justice if cross-examination is permitted as to the views of recognized authorities, expressed in treatises or periodicals written for professional colleagues.

Although the present court casts its lot with the courts following the liberal view, it does not appear to have followed the rationale used by those courts which maintain that the liberal approach involves no hearsay violation. Indeed, there are good grounds for speculation that the court is willing in a proper case to allow an exception to the hearsay rule which would permit the introduction of treatises in evidence. For example, it is interesting to note the court's strong reliance on commentators who propose that treatises be admitted as exceptions. In addition, the court stated that even though its former rule was supported by the considerations which support the hearsay rule, it has been convincingly demonstrated that these considerations are not applicable to scientific works.

The court's reliance on these authorities invites a comparison between the rule adopted in the instant case, that is, that treatises found to be authoritative by the judge may be used in cross-examination of an expert whether or not he has relied on them and the rule, adopted only in Alabama, that treatises may be introduced as direct evidence. Many arguments have been offered against the latter rule. Primary among these is that it involves a violation of the hearsay rule. In fact, admission of any book in evidence involves a double hearsay problem. The party offering such evidence makes two assertions: (1) the book was actually written by the author named in its initial pages and actually expresses his views, (2) the statements quoted from the book are factually correct. The first of these problems is solved when the book is authenticated; before the book can be used at all the judge must determine that the book was actually written by its ostensible

30. Id. at 335, 211 N.E.2d at 259.
31. E.g., Uniform Rule of Evidence 63(31); Model Code of Evidence rule 529 (1942); McCormick, Evidence § 296 (1942); 6 Wigmore, Evidence §§ 1690-92 (3d ed. 1940).
33. 3 Jones, Evidence § 621 (5th ed. 1958).
author and it naturally follows from an affirmative finding on this question that the book expresses the author's views. As for the second problem, the argument of legal scholars that there exists sufficient need and reliability to create an exception to the hearsay rule which would permit the introduction of treatises in evidence has already been set out above. If the arguments of these scholars are accepted, the hearsay rule is no bar to the admission of treatises as direct evidence. Since the court in the instant case seemed to concede that its new rule involved a violation of the hearsay rule and cited with approval authorities recommending a hearsay exception for treatises, it seems clear that the instant court would not object on hearsay grounds to adopting the Alabama rule.

It has also been objected that the technical language in which most treatises are written would confuse the jury. This problem, however, could be remedied by a requirement that treatises could be admitted in evidence only to complement the testimony of an expert present in court. The expert would thus be available to explain the technical language under oath and subject to cross-examination. However, in so far as the Alabama rule is designed to save the trouble and expense of bringing an expert into court its purpose is defeated by this qualification. It has further been objected that passages might be quoted out of context with the result that the jury would be misled. However, the book would be available for examination by opposing counsel or an expert testifying for the opposing party and any quotation out of context, as well as any misquotation, could be brought to the attention of the jury.

Other objections to direct admission of treatises are: (1) a particular treatise may have been written on the basis of insufficient research, or (2) it may be outmoded and fail to reflect current developments in the field, or (3) it may have been written for use in litigation. All of these latter objections are easily answered. Before any book can be used for any purpose in a trial the judge must make a preliminary finding that the book is authoritative and in order to make an affirmative finding on this question the judge must find that the book is free of any of these defects.

Given a rule that treatises may be introduced in evidence for the truth of the statements contained in them only in conjunction with the testimony of a "live" expert, there would seem to be no reason for the instant court, having adopted the liberal rule with respect to the use of treatises on cross-examination, to decline, when presented with the proper case, to adopt the rule that treatises are admissible as direct evidence. There is, however,

34. See notes 7 and 8 supra and accompanying text.
37. See Dana, Admission of Learned Treatises in Evidence, 1945 Wis. L. REV. 455, 460.
38. Grubb, supra note 35, at 87.
40. See Rowland, Cross-Examination of Medical Experts By The Use of Treatises, 20 GA. B.J. 109, 110 (1957).
a valid basis on which the court could refuse to expand the rule of the present case, and that is that there is a greater need for treatises as a tool for cross-examination than as direct evidence. An expert witness purports to be an authority. The best way to dispute the correctness of his conclusions is to show that there are authoritative opinions expressing the opposite or different views. This purpose is not adequately served by calling to the stand an expert who expresses a different opinion. The testimony of such an expert merely shows that a witness called by party A testifies in favor of party A; it does not necessarily discredit the testimony of the other party’s expert. Even more important is the fact that where treatises are used on cross-examination the expert’s testimony is discredited immediately after it is given. On the other hand, if treatises were allowed as direct evidence they would only buttress the testimony of a live expert. They would not add another element to the plaintiff’s case or the defense.

It is submitted that among all the possible rules with respect to the use of treatises the one chosen by the court in the instant case is the best.

Raymond T. Letulle

FEDERAL COURTS — SENTENCE REVIEW — COURT OF APPEALS HAS POWER UNDER SECTION 2106 OF THE JUDICIAL CODE TO MODIFY DEATH SENTENCE IMPOSED IN VIOLATION OF CORRECT SENTENCING PROCEDURES.

Coleman v. United States (D.C. Cir. 1965)

Defendant, convicted of first degree murder for killing a police officer while perpetrating a robbery, was sentenced to death under the mandatory death provision then existent in the District of Columbia. However, after his conviction was affirmed by the Circuit Court of Appeals, and while his case was pending before the Supreme Court, Congress not only abolished the District’s mandatory death sentence, but also provided that in certain cases death sentences imposed under the old law might be reduced to life imprisonment.

41. See note 6 supra and accompanying text.

4. The interim statute provided that cases tried prior to March 22, 1962, which were before the court for either sentencing or resentencing should be governed by the prior law, except that the judge may, “in his sole discretion, consider circumstances in mitigation and in aggravation and make a determination as to whether the case in his opinion justifies a sentence of life imprisonment, in which event he shall sentence the defendant to life imprisonment. . . .” D.C. Code Ann. § 22-2404 (Supp. IV, 1965).
Defendant's motion for reduction of his sentence under the new act was then rejected by the district court. However, the Court of Appeals remanded the case, instructing the lower court to hold a full evidentiary hearing regarding all circumstances of aggravation and mitigation. The district judge complied, but again confirmed the death sentence, holding that defendant had not shown sufficient justification for its reduction. On appeal, the Circuit Court reduced the sentence to life imprisonment, holding that the lower court had erred in placing the burden of justifying mitigation on the defendant, and that section 2106 of the Judicial Code gave the appellate court power to modify the sentence to one “just under the circumstances.” Coleman v. United States, 334 F.2d 558 (D.C. Cir. 1964).

Prior to 1891, the Judicature Act of 1879 was construed by the circuit courts to permit appellate review and modification of validly imposed sentences. However, when the appellate jurisdiction of the circuit courts was transferred to the circuit courts of appeals in that year, the language relied on for this proposition was omitted; and, in Freeman v. United States, the Ninth Circuit construed this omission so as to deprive the appellate courts of the power of sentence review. Although it ignored both a Supreme Court decision holding that the powers conferred upon federal appellate courts by previous legislation were incorporated in the 1891 act, and a federal statute providing that all provisions of review previously regulating the circuit courts would now apply to the circuit court of appeals, the conclusion in Freeman became the rule in the federal courts. Thus, in 1930 the Eighth Circuit, in the case of Gurera v. United States, stated, “If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute.” Two years later, in Blockburger v. United States, the Supreme Court, in upholding the imposition of consecutive sentences on multiple counts of narcotic violations, adopted this position when it stated:

Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems

6. That section provides:
   The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.
7. Ch. 176, § 3, 20 Stat. 354 (1879). The act provided that “In case of an affirmance of the judgment of the District Court, the Circuit Court shall proceed to pronounce final sentence and to award execution thereon.”
10. 243 Fed. 333 (9th Cir. 1917).
13. 40 F.2d 338 (8th Cir. 1930).
14. Id. at 340, 341.
unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.16

The rule of non-review as enunciated by Gurera and Blockburger was followed without question until the 1952 espionage case of United States v. Rosenberg,17 where for the first time section 2106 was asserted as authority for appellate court review and modification of a validly imposed sentence. The court, in affirming death sentences against the defendants, refused to consider the statute as overruling sixty years of federal precedents. Judge Frank, however, noted that although the statute dated back to the Judiciary Act of 1789,18 and several states with similar statutes had interpreted them to permit reduction of a validly imposed sentence,19 no decision by either the Supreme Court or any federal court of appeals had cited or considered the statute in passing upon the question. Were the question res nova, he continued, the court should give section 2106 serious consideration; but because of the long line of federal precedent to the contrary, the Supreme Court alone was in a position to determine the effect of that section on appellate review.

The Supreme Court, however, in the case of Gore v. United States,20 rejected Judge Frank's suggested interpretation,21 thus declining to "enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. . . . First the English and then the Scottish Courts of Criminal Appeal were given the power to revise sentences, the power to increase as well as the power to reduce them. . . . This Court has no such power."22

Thus, in spite of strong dissents from several judges,23 and against the recommendation of almost all legal commentators who have considered the subject,24 it is apparently well settled that federal appellate courts are
without authority to review validly imposed sentences that are within statutory limits.

There is, however, a well-defined exception to this rule in the area of contempt, where no statutory limit exists to circumscribe the district judge's discretion in imposing sentence. But this power of review and modification derives from the duty of the appellate courts to supervise the lower federal courts, and not section 2106. Thus, in Green v. United States, which involved a prosecution for criminal contempt, the Supreme Court, although affirming the sentences imposed by the trial court, noted that since Congress has not seen fit to impose limitations on the sentencing power for contempt, "appellate courts have a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentence imposed."

Nor does the rule of non-review enunciated in Gurera preclude appellate review of sentences imposed in a fundamentally unfair manner. Such a situation was presented in Townsend v. Burke, where defendant, who had pleaded guilty, was sentenced in the absence of counsel on the basis of an erroneous assumption concerning his prior convictions. The Supreme Court, in overturning the conviction, ruled that such a material error in the sentencing rendered the proceedings lacking in due process.

A similar result has been reached where the district judge violated sentencing procedures provided by statute. In United States v. Wiley, the district judge, acting pursuant to his "standing policy," did not consider defendant for probation because the latter had refused to plead guilty and had insisted upon a trial. The court of appeals, in remanding the case with instructions to consider defendant's motion for probation, ruled that the trial judge had committed error by failing to conduct the pre-sentence investigation required by the Federal Probation Act.

Further inroads upon the Gurera doctrine were made by the District of Columbia Circuit Court in two recent decisions which extended Wiley to include situations where the trial court merely declined to utilize presentencing procedures made available by Rule 32 of the Federal Rules of Criminal Procedure. In the first of these cases, Peters v. United States, the district judge imposed the maximum sentence upon two adolescents convicted of robbery. In a per curiam opinion, the Circuit Court vacated

27. Id. at 188. In Yates v. United States, 356 U.S. 363 (1958), defendant was convicted on eleven counts of criminal contempt for refusing to answer questions concerning the Communist Party membership of others. The Supreme Court remanded for resentencing, but the district court reimposed the same sentence. In setting aside the sentence, the Supreme Court relied upon its supervisory power over the administration of justice in the lower courts.
29. 267 F.2d 453 (7th Cir. 1959). The case is noted in 10 DE PAUL L. REV. 104 (1960), and 75 HARV. L. REV. 416 (1961).
the sentence under section 2106, ruling that the lower court's failure to
direct the authorized presentence investigation constituted error.

In the second case, *Leach v. United States*, the trial judge refused to
grant defendant's request for a psychiatric examination, although three
alternate statutory procedures for determining mental competence were
available. The Circuit Court again set aside the sentence, and remanded
with directions to conduct the appropriate examination. The basis for this
decision, however, was that the trial judge had abused his discretion.
Although the statutes imposed no affirmative duty, the court reasoned that
"the sentencing Judge should use some of the resources which Congress has
provided and . . . may not arbitrarily ignore the data properly obtained
thereby."*33*

*Wiley, Peters* and *Leach* illustrate and support the position of the
instant court that appellate courts have the authority to review a sentence
when the district judge has ignored or violated sentencing procedures
provided by statute. Although the convictions were affirmed, and the sen-
tences imposed were within the bounds of the applicable statute, in each
case the court held that the trial court had followed an incorrect procedure
in imposing sentence, and consequently the sentence itself could be re-
viewed. However, in each case the court founded its power to act upon
different grounds. Therefore, although these cases indicate an increasing
willingness on the part of the appellate courts to protect a defendant from
procedural error or abuse of discretion in imposing sentence, they fail to
establish a definitive basis for such review. Nor did the court in any of these
cases undertake to substitute its own sentence for that of the trial court.

The court in the instant case has clearly indicated that it considers
section 2106 as the most appropriate basis for this authority. In addition,
it construed that section to authorize reduction of the death sentence under
consideration to life imprisonment. Precedent for this result was found in
the court's earlier decision in *Frady v. United States*.34 There defendants
were convicted of first degree murder and sentenced to death. However,
the court of appeals found that the sentences were invalidly imposed due
to an erroneous instruction to the jury and the inadequacy of the required
jury poll. Because of these errors, the court, although confirming the con-
viction, refused to permit the death sentences to stand. Since the only
alternative authorized by statute was life imprisonment, the court, acting
under section 2106, modified the sentence to life imprisonment.

In *Frady*, however, only three judges expressly based the court's
power to modify the sentence upon section 2106. Of the two remaining
judges necessary to constitute a majority, one dissented from the affirm-
ance of the first degree murder conviction, while the other contended that
a two-step procedure should have been utilized in imposing the sentence.
Thus, since neither of these two judges expressed an opinion as to the

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32. *334 F.2d* 945 (D.C. Cir. 1964).
33. *Id.* at 951.
34. *348 F.2d* 84 (D.C. Cir. 1965).
scope of review authorized by section 2106, the propriety of invoking that provision remained subject to some doubt.

In resolving this question, the present court emphasized the impossibility of reconstructing the proper sentencing procedure in the lower court; yet since the conviction had been affirmed, the court deemed it improper to order a new trial. And since the only alternative to the death sentence was life imprisonment, the court concluded it was authorized to make final disposition of the case.

Procedural review of sentences is to be encouraged in so far as it protects the rights of defendants without destroying that element of discretion as to punishment necessarily residing in the trial judge. So long as the trial judge follows correct procedure in determining sentence, its determination as to the proper punishment should not be disturbed.

The present case in no way impugns that principle. Coleman only holds that when it is impossible to correct the error on remand will the appellate court undertake to modify the sentence. It is submitted that section 2106 was correctly interpreted by the court; there is no reason to hold that the statute does not authorize that which it explicitly provides. Given the growing tendency on the part of the federal appellate courts to review and modify improperly imposed sentences, section 2106 would clearly seem to provide the most appropriate basis.

*Joseph F. Ricchiuti*

FEDERAL COURTS — THREE-JUDGE COURTS — CASE ARISING UNDER THE SUPREMACY CLAUSE AND INVOLVING ONLY FEDERAL-STATE STATUTORY CONFLICT IS NOT WITHIN PURVIEW OF SECTION 2281 OF THREE-JUDGE COURT ACT.

*Swift & Co. v. Wickham* (U.S. 1965)

Appellants were packers and shippers of frozen stuffed turkeys which they sold, on a national scale, to retailers. In conformity with the Poultry Products Inspection Act of 1957,1 a federal statute, the turkeys were labeled to indicate their net weight, including the stuffing. Some of the turkeys were sold in New York which had its own statute2 governing the sale of poultry products. This statute had been interpreted to require such food products to be labeled to indicate the net weight of the bird, both stuffed and unstuffed. Appellants requested permission of the appropriate federal agency to change their labels to conform to New York law, but their request was denied. Appellants then sought to enjoin enforcement of the New

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2. N.Y. Agriculture and Market Law § 193(3).
York law, asserting that such enforcement would conflict with and over-ride the requirements of the federal statute. As provided by section 2281 of the Judicial Code, a three-judge court was convened. Acting in both a three-judge and a single-judge capacity, this court dismissed the suit on the merits. Pursuant to section 1253 of the Judicial Code an appeal was taken to the Supreme Court which dismissed for lack of jurisdiction, holding that an injunction to restrain the enforcement of a state statute on the basis of violation of the supremacy clause of the federal constitution does not require the convening of a three-judge court. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

Whenever a party seeks to enjoin, either temporarily or permanently, a state official from enforcing a state statute on the ground that such statute is unconstitutional, the relief sought can only be granted by a three-judge court. The same requirement is imposed upon those litigants seeking to enjoin enforcement of an Act of Congress on constitutional grounds. This procedural device, which is neither a right nor a privilege, is the final product of Congressional concern over federal interference with state legislative regulation.

Historically, the lower federal judiciary had no power to review state court determinations, but in 1875 Congress granted them jurisdiction over all cases arising under the Constitution, laws and treaties of the United States. This grant of power was not attacked in earnest, however, until

3. The district court rejected as insubstantial the claims of unconstitutionality based on the commerce clause and the due process clause of the fourteenth amendment. *Swift & Co. v. Wickham*, 230 F. Supp. 398, 402-03 (S.D.N.Y. 1964). However, the Supreme Court has recently held that a supremacy clause claim coupled with other claims of unconstitutionality not insubstantial on their face requires the convening of a three-judge court, and that direct appeal to the Court is proper, even where the pre-emption issue only is decided in the district court and the other challenges to constitutionality are not passed upon. *Brotherhood of Locomotive Eng'rs v. Chicago, R.I.&P. R.R.*, 382 U.S. 423 (1966).


An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2284 (1964) provides that the 2281 court will be composed as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.


An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.


after the 1907 Supreme Court decision in *Ex Parte Young.* The power of a single federal judge to prevent state enforcement of its own statutes was bitterly criticized, and sometimes with ample justification. As a result of the federal abuses in granting injunctions, Congress, in 1910, passed the Mann-Elkins Act which, while guaranteeing federal protection of constitutional rights, also provided for due deliberation and recognition of the seriousness of the issues involved before a state statute would be pronounced unconstitutional and its enforcement restrained. In 1925 the act was amended to include applications for permanent as well as interlocutory decrees and in the Judiciary Act of 1937 the three-judge requirement was extended to cases where an Act of Congress was challenged as unconstitutional.

The courts have had some problem in deciding what was meant by "state statute" and "state official," but the question of what constitutes a "substantial claim of unconstitutionality" is the one which has presented the most difficulty. In *In re Buder* held that the necessity of construing an Act of Congress to determine the validity of a Missouri taxing statute did not amount to a substantial claim of unconstitutionality and therefore section 266 did not apply. This principle was affirmed in *Ex Parte Young.*

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10. 209 U.S. 123 (1907). In this case the Court affirmed the power of the district judge to enjoin the attorney general of Minnesota from instituting criminal proceedings in order to enforce compliance with a state law regulating railroad rates within Minnesota which was alleged to be unconstitutional.

11. See 42 Cong. Rec. 4853 (1908) (Remarks of Senator Bacon of Georgia); 45 Cong. Rec. 7256 (1910) (Remarks of Senator Overman of North Carolina); 49 Cong. Rec. 4773 (1913) (Remarks of Mr. Clayton of Alabama quoting Governor Byrnes of South Dakota); see also Hutcheson, *A Case For Three Judges,* 47 Harv. L. Rev. 795 (1934).


15. See AFL v. Watson, 327 U.S. 582 (1946). "In our view the word 'statute' . . . is a compendious summary of various enactments by whatever method they may be adopted, to which a State gives her sanction and is at least sufficiently inclusive to embrace constitutional provisions." Id. at 592-93. See also *Ex Parte Collins,* 277 U.S. 565 (1928); *Oliver v. Mayor and Councilmen,* 346 F.2d 133 (5th Cir. 1965); *Note, Three-Judge Court — "Meaning of State Statute,"* 30 N.C.L. Rev. 423 (1952).

16. See *City of Cleveland v. United States,* 323 U.S. 329 (1945); *Bianchi v. Griffing,* 238 F. Supp. 997 (E.D.N.Y. 1965). See generally *Note, 49 Va. L. Rev. 538* (1963), which concludes that the determination of who is a state officer "turns on the interest being served rather than the title of the individual concerned." Id. at 551.

17. The possibility of excepting certain cases which could come within the purview of § 2281 occurred to the courts soon after the passage of § 266 (now 28 U.S.C. § 2281). E.g.,

That there is a conflict between state and federal law does not always bring to mind the issue of unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very real sense unconstitutional.


18. 271 U.S. 461 (1926). This case is usually cited as authority for the "supremacy clause exception."
Bransford, a case which involved a state tax on national banks. The Court admitted that by virtue of the supremacy clause the federal statutes would be superior to those of the state but that this determination in the case at bar involved construction of the federal act and not the constitutionality of the state enactment and that therefore a three-judge court was not required. The strong reaffirmance of this "supremacy clause exception" in Case v. Bowles and the Court's oft-quoted statement that the three-judge requirement was not to be "viewed as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such . . ." was more than amply indicative to the lower federal judicial that a petition alleging conflict between a state and federal statute need not be heard before a three-judge court. However once it had been established that it was necessary to convene a three-judge court, the joining in the complaint of a non-constitutional attack on the statute along with the constitutional one did not dispense with the necessity of three judges. The Court has also made manifest its concern with the unnecessary convening of a three-judge court by expressly holding that the requirement does not exist where the statute challenged is obviously unconstitutional.

Thus the decision in Kesler v. Dept. of Public Safety, striking down the supremacy clause exception and widening the scope of the application of section 2281, seemed inconsistent with prior decisions and was much criticized. In Kesler the Court stated that "neither the language of section 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of section 2281." The Court however, refused to overrule the prior cases and substituted for the "supremacy clause exception" the requirement that a three-judge court be convened if the "case presents a sole, immediate constitutional question. . . ." This statement was followed by a seventeen page analysis of the relevant state and federal statutes which culminated in a dismissal.

20. Id. at 359.
21. 327 U.S. 92 (1946). A three-judge court was held not required where "the complaint did not challenge the constitutionality of the State statute but alleged merely that its enforcement would violate the Emergency Price Control Act." Id. at 97.
23. But see Bradley v. Waterfront Comm'n, 130 F. Supp. 303 (S.D.N.Y. 1955), where it was stated, "However, if the Supremacy claim is substantial enough to support federal jurisdiction in the first instance, it might be argued that the other constitutional claim, though insubstantial, would have to be heard before a Three-Judge Court since a single District Judge can only dismiss for want of jurisdiction." Id. at 311.
25. "We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." Bailey v. Patterson, 369 U.S. 31, 33 (1962).
27. E.g., 15 Stan. L. Rev. 565 (1963); 111 Pa. L. Rev. 113 (1963); 77 Harv. L. Rev. 299 (1962).
28. 369 U.S. at 156.
29. Id. at 174.
of the appeal on the merits. As was pointed out by the dissent in that case, all supremacy clause cases involve some preliminary construction, and the fact that seventeen pages of construction were required to establish a sole immediate question of constitutionality can only add to the confusion in which the lower courts have already become enmeshed in determining when to convene a three-judge court. After only a three year trial period, Kesler has now been overruled by Swift and a complete revival of the “supremacy clause exception” has been effected.

When Congress enacted what is now section 2281, the legislative intent was “to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies.” This Congressional desire to protect state legislation from injunctive frustration by the federal judicial has been recognized by the Court before, but while cognizant of this purpose the Court remained steadfast in its determination that supremacy clause cases were not within the purview of this legislation. Although Congress has never indicated its disapproval of the Court-made “supremacy clause exception,” in light of the above mentioned legislative intent, it cannot be inferred that Congressional silence on this point is indicative of its approval. This judicial desire to construe Congressional silence as approval is indulging in a fiction which the Court recognized in Kesler and unsuccessfully tried to avoid by adopting the “sole, immediate question” test. In the instant case the Court indicated that the supremacy clause exception is without substantial foundation except in the Court’s own decisions but felt persuaded by “policy considerations” to continue it in effect until Congress voices its disapproval. The merits of the perpetuation of this “fictional” approach to applying section 2281 would seem to be analogous to the reasoning associated with the argument for total abrogation of the three-judge requirement. While the Court is powerless to void an Act of Congress except on constitutional grounds, it is submitted that the supremacy clause exception contravenes the intent of Congress and, in effect, renders section 2281 partially inoperative. Nevertheless, the instant case did supply the clarification needed to alleviate the confusion which Kesler imposed upon the district judge in trying to make his threshold determination of proper jurisdiction.

30. Id. at 176-80.
32. Id. at 119.
33. Phillips v. United States, 312 U.S. 246 (1941). “The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state’s legislative policy. This was the aim of Congress and this is the reconciling principle of the cases.” Id. at 251.
34. Id. at 250-51.
35. See note 26 supra and accompanying text.
36. 382 U.S. at 111, 126.
That the threshold determination of whether to convene a section 2281 court is of the utmost importance and is in need of clear and stable standards is amply demonstrated by the problems inherent in obtaining appellate review of a case heard by the wrong tribunal. When a litigant petitions a federal district court for injunctive relief from the enforcement of a state statute alleged to be unconstitutional, the court, as in all cases, must first determine the existence of federal subject matter jurisdiction. If a three-judge court is mistakenly convened its decision is nevertheless valid, but review can only be had in the circuit court of appeals. As this jurisdictional defect may be raised at any time during the litigation, the safe course would appear to be to lodge a timely appeal in the circuit court concurrently with the section 1253 direct appeal to the Supreme Court and thus avoid a statute of limitations problem. However, if a district judge mistakenly fails to convene a three-judge court and hears the case on the merits his decree is void for lack of jurisdiction and no review of his determination on the merits may be had. In the past, the only procedure available in this situation was mandamus to the Supreme Court; lately however, it has been indicated that an appeal may lie to the circuit court. Both situations illustrate the pitfalls that may trap those not skilled in federal procedure and the importance of a correct threshold determination of jurisdiction by the district judge. A mistake, while not usually fatal to the case, can prove to be costly and time-consuming both to the judiciary and the litigants.

Mr. Justice Harlan, writing for the majority in the instant case, stated that the above reasons are the principal motivation behind the overruling of Kesler. Justification for this disregard of stare decisis is stated to be

39. Ex Parte Poresky, 290 U.S. 30 (1933); Jacobs v. Tawes, 250 F.2d 611 (4th Cir. 1957).
40. "It is . . . the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented. . . ." California Water Service Co. v. City of Redding, 304 U.S. 252, 254 (1938); accord, Fiumara v. Texaco, Inc., 240 F. Supp. 325 (E.D. Pa. 1965); McReynolds v. Christenberry, 233 F. Supp. 143 (S.D.N.Y. 1964).
42. 28 U.S.C. § 1253 (1964): "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.
43. Fed. R. Civ. P. 73(a), allows thirty days for perfecting an appeal from a district court decree. Where the three-judge court's lack of jurisdiction is not discovered until the case is before the Supreme Court the thirty days have usually elapsed with the result that the right to appeal is lost. However, the Court has recently held that in such a situation the parties should not be deprived of appellate review on the merits and has vacated the decree below and remanded to the district court with instructions to enter a fresh decree from which a timely appeal may be taken. Pennsylvania Pub. Util. Comm'r v. Pennsylvania R.R., 382 U.S. 281 (1965).
46. 382 U.S. 111, 127 (1965).
based on a permissible reading of section 2281 and a long standing interest of the Supreme Court in not unduly burdening the federal courts and keeping within narrow confines its own scope of mandatory appellate review.\textsuperscript{47}

The instant case has alleviated the confusion which \textit{Kesler} created and clarified the "supremacy clause exception"; and insofar as this provides clear guidelines for the district courts in the correct application of section 2281 the decision is well received. But it is submitted that it is questionable whether the Court was justified in creating the "supremacy clause exception" at all, and it is regretted that the Court, while according ample recognition to this issue, reinstated a doctrine of long standing which has partially defeated the purpose of this Act of Congress.

\textit{Richard G. Greiner}

\textbf{LABOR LAW — PROTECTED ACTIVITIES — SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT PROHIBITS DISCHARGE OF EMPLOYEES FOR ATTEMPTING TO PERSUADE THEIR EMPLOYER TO HIRE NEGROES.}

\textit{NLRB v. Tanner Motor Livery, Ltd.} (9th Cir. 1965)

Respondent taxi cab company employed at its Santa Monica branch between 50 and 60 drivers, none of whom were Negroes. It did, however, employ Negroes in three other communities where it rendered service. Two employees of the company, who were active in local civil rights groups, went to the respondent's manager to persuade him to hire a Negro driver. Shortly thereafter one of these employees was discharged, purportedly because of involvement in two accidents in two successive days. This employee then began to picket the company in protest of its hiring practices. The second employee was discharged for conduct against the interests of the company after he picketed with the first employee on his off-duty hours. This second employee, however, was subsequently rehired. The trial examiner found that the employees were engaged in "concerted activities" as that term is used in Section 7 of the National Labor Relations Act,\textsuperscript{1} and that they were discharged for that reason, but was of the opinion that Congress did not intend section 7 to be applicable in this context.\textsuperscript{2} The

\textsuperscript{47.} \textit{Id.} at 266-68.

\textsuperscript{1.} 49 Stat. 452 (1935), as amended, 29 U.S.C. \textsection 157 (1964) : Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 18(a) (3)].

\textsuperscript{2.} Tanner Motor Livery, Ltd., 148 N.L.R.B. 1407 (1964) (decision of trial examiner).
National Labor Relations Board found to the contrary on this latter point and entered an order of reinstatement which it sought to have enforced by the instant proceeding.\(^3\) The Ninth Circuit Court of Appeals agreed with the Board and held that concerted activities engaged to persuade an employer to hire Negroes are protected by section 7. *NLRB v. Tanner Motor Livery, Ltd.*, 349 F.2d 1 (9th Cir. 1965).\(^4\)

Section 7 of the National Labor Relations Act guarantees to all employees "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."\(^5\) The respondent in the instant case was charged with violating section 8(a)(1) of the same act, which makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of rights guaranteed" them in the preceding section.\(^6\)

In upholding the employees' contention that their section 7 rights had been violated, the court found that they had engaged in "concerted activity" for the purpose of affecting the "terms and conditions of their employment." The term "concerted activity," as construed by the courts, is used to indicate not merely a literal physical relationship of concert of action between two or more employees, but to describe a "legal status" of the activity in question, which status is determined by looking not only to the other modifying words of the statute, such as "mutual aid or protection," but also by considering several extrinsic factors, such as the nature and purpose of the activity.\(^7\) Certainly not every type of concerted activity is protected by the act, and the Supreme Court has indicated that activity of a violent nature,\(^8\) for an unlawful purpose,\(^9\) or in breach of a contract\(^10\) cannot be condoned under the act regardless of any question of concert. For this reason, it has been suggested, and is in fact often the practice of the courts, to talk in terms of "protected activity" rather than to use the literal terminology of the statute.\(^11\)

In determining what activity is protected under the act it is necessary to keep in mind the language of section 1 which declares the policy of Congress to be one including the encouragement of "the practice and procedure of collective bargaining" and the protection of "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or

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4. However, since there existed an established bargaining representative through whom the employees might have acted the court remanded the case for further conclusions of law and findings of fact as to whether this would limit the extent of protection under section 7.
5. See note 1, *supra*.
11. See note 7, *supra*. 
protection."\textsuperscript{12} Taken together sections 1 and 7 indicate that to be protected an activity must also concern a "term and condition of employment."\textsuperscript{13}

In a recent case, \textit{NLRB v. Washington Aluminum Co.},\textsuperscript{14} several employees walked out of a plant because the furnace had broken down and the employees felt it was too cold to work. Since the activity for which the men were discharged was one protesting an actual physical condition of the premises on which they worked, the Court had no trouble finding the activities to be within the purview of the statute. In so concluding the Court warned against interpreting the broad language of the statute in a "restricted fashion" so as to defeat the purposes of the Act. The Court found further that "the activities engaged in here do not fall within the normal categories of unprotected concerted activities such as those that are unlawful, violent, or in breach of contract."\textsuperscript{15} Examined by itself, the very broad language used in this case would seem to call for the decision reached in the instant case.

However, beginning with the anti-injunction area there is a line of cases which tend to impose a further limitation on the sphere of protection. One such case is \textit{Vonnegut Mach. Co. v. Toledo Mach. & Tool Co.}\textsuperscript{16} Section 20 of the Clayton Act provides that no injunction shall issue "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property . . . ."\textsuperscript{17} The court in \textit{Vonnegut} held that the phrase "terms and conditions of employment" as used in this section contemplated "such things as hours of labor, wages, classifications of employees, sanitary and physical conditions controllable by the employer,"\textsuperscript{18} and that therefore the section could not be used to defeat an injunction against workers on strike merely because the employer had certain contracts\textsuperscript{19} on which the employees did not wish to work. To invoke it in such a case would amount to telling the employer how to "conduct his business." The same rationale

\begin{itemize}
  \item \textsuperscript{13} Under sections 8(a)(5), 8(d) and 9(a) of the National Labor Relations Act it is an unfair labor practice for an employer to fail to bargain with labor representatives "with respect to wages, hours, and other terms and conditions of employment." A question of the scope of legitimate employee interest also arises in this area, but because the language used in section 9(a) is somewhat more restrictive than that of section 7 the standard under the former section may be narrower than the one involved in the instant case. For the definitive discussion of the scope of employee interest under section 9(a), see Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964).
  \item \textsuperscript{14} 370 U.S. 9 (1962).
  \item \textsuperscript{15} Id. at 17.
  \item \textsuperscript{16} 263 Fed. 192 (N.D. Ohio 1920).
  \item \textsuperscript{17} 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).
  \item \textsuperscript{18} Vonnegut Mach. Co. v. Toledo Mach. & Tool Co., 263 Fed. 192, 201 (N.D. Ohio 1920). See also A. J. Monday Co. v. Automobile Workers, 171 Wis. 532, 177 N.W. 867 (1920).
  \item \textsuperscript{19} The contracts were made with a company which was having labor difficulties but which, however, had not been struck.
\end{itemize}
has been employed where Section 7 of the NLRA was involved. In NLRB v. Reynolds's Int'l Pen Co.\textsuperscript{20} employees who had staged a walkout on the company's ball point pen factory in protest against the demotion of a foreman were discharged. The court held that they could not claim protection under Section 7 of the NLRA since the demoting of a foreman was a "prerogative of management."\textsuperscript{21} On the other hand, in the case of NLRB v. Phoenix Mutual Life Ins. Co.,\textsuperscript{22} also involving Section 7 of the NLRA, the salesmen of respondent's insurance company had very close and continuous dealings\textsuperscript{23} with the office cashier. When he resigned, they were all desirous that a particular assistant cashier would fill his position and signed a petition to this effect, but were discharged before they could deliver it. A majority of the court was of the opinion that the concerted activities were protected, as the appointment of a cashier in this instance "bore a reasonable relation to terms and conditions of their employment,"\textsuperscript{24} and ordered reinstatement of the employees. A vigorous dissenting opinion found the activities to be concerned with matters "wholly within the managerial orbit" and as far as the employees were concerned "none of their business."\textsuperscript{25} These cases bespeak an attempt to define a sphere of legitimate labor interest, that is, to draw a line between those matters on which labor should be free to voice an opinion and those which are exclusively the concern of management.

Considering the nature of concerted activity in the Phoenix case and the apparent inconsistency of this decision with Reynolds Pen, it would seem that a court is more likely to hold protected employee activity which amounts to no more than suggestions or advice than activity which halts production or interferes substantially with the conduct of the business. In point of fact, three general areas of employee interest may be discerned. First, there are those things about which an employer must bargain with his men or be guilty of an unfair labor practice.\textsuperscript{26} Second, there are those matters over which management retains complete authority so that mere suggestions by an employee can be treated as insubordination.\textsuperscript{27} Third, there are those matters, as in the Phoenix case, which are within the prerogative of management to the extent that the employer is not required to bargain over them, yet which are of sufficient interest to the employees

\textsuperscript{21} \textit{Id.} at 684.
\textsuperscript{22} 167 F.2d 983 (7th Cir. 1948), \textit{cert. denied}, 335 U.S. 845 (1948).
\textsuperscript{23} The court found that "the degree of efficiency of the cashier and employees in that department often aids or hinders the effectiveness of the work of the insurance salesmen. Inconvenience, embarrassment, added work and loss of sales to prospective customers have, in the past, resulted to salesmen from such incidents as errors which a cashier made in calculating costs. ..." \textit{Id.} at 987.
\textsuperscript{24} \textit{Id.} at 988.
\textsuperscript{25} \textit{Ibid.} \textit{Cf.} Joanna Cotton Mills v. NLRB, 167 F.2d 983 (7th Cir. 1949); Fontaine Converting Works, Inc., 77 N.L.R.B. 1386 (1948).
\textsuperscript{26} See note 13 \textit{supra}.
\textsuperscript{27} Note, 44 ILL. L. REV. 235, 236 & n.7 (1949).
that while they cannot coerce their employer, by strike or otherwise, in making decisions upon them, they cannot be discharged for mere suggestions as to them, since they are "reasonably related to" their employment. 28

The apparent inconsistency between the Reynolds Pen and Phoenix decisions might also be explained by the fact that in the latter case the employees had an economic interest in the functioning of the cashier, while in the former such interest was absent. Indeed, the fact situations in all of the decisions upholding activity as protected under section 7 have indicated the existence of some economic, health, or safety interest in the complaining employees. 29 From this it might very well be argued that since the employees in the instant case had no such interest, but merely desired to work in a racially integrated atmosphere, their activities should not have been held protected. However, there are four possible objections to this line of reasoning. First, the language of the statute is broad enough to cover all concerted activity regardless of the kind of employee interest involved. Second, while it is true that in all the former decisions the fact situations indicated that such interests were present, the language of the cases, especially such later cases Washington Aluminum, did not suggest such a limitation, but rather seemed to point the other way. Moreover, it now seems clear that employee activity is initially considered protected, with an exception being made only when the conduct of the employees "plainly deserves condemnation." 30 It would be very difficult for a court to find the activities of the employees in the instant case deserving of condemnation. Third, the distinction cited seems not to have been followed in later cases. In NLRB v. Guernsey-Muskingum Elec. Co-op, Inc., 31 for example, the employees seeking reinstatement were discharged for complaining about the appointment of a new foreman to replace one who had become ill. The men believed that one of the present crew members should have been elevated to the supervisory position. The court found the activity of the men protected even though their only interest was in making their work "easier." Fourth, granting that some economic or safety interest is a prerequisite of legitimate activity on the part of employees, it could possibly be found in the present case by reference to closely analogous areas of labor law. As early as 1942 Judge Learned Hand, in NLRB v. Peter Callier Kohler Swiss Chocolates Co., Inc., 32 held protected employee activity in protest against the company's antagonism of an outside union on the theory that at some future time the outside union might


29. See, e.g., Metal Blast, Inc. v. NLRB, 324 F.2d 602 (6th Cir. 1963) (seniority rights in layoffs); Walls Mfg. Co., Inc. v. NLRB, supra note 28 (sanitary conditions).


31. 285 F.2d 8 (6th Cir. 1960).

32. 130 F.2d 503 (2d Cir. 1942).
return the favor. The same rationale is used to uphold sympathy strikes and other activities undertaken where the interests of the employees might be said to be indirect.

Any question whether racial discrimination should be considered legitimate grounds for concerted activity would seem to have been answered in the case of *New Negro Alliance v. Sanitary Grocery Co.* The Norris-LaGuardia Act, which prohibits the issuance of injunctions in certain types of labor disputes, provides that the term “labor dispute” shall include “any controversy concerning terms or conditions of employment.” In this case picketing by a group of Negroes, none of whom were employees, for the purpose of persuading the owner of a grocery store to hire Negro clerks, was held by the Supreme Court to be a protected activity under that act. The opinion stated in part,

race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purposes or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment. . .

The court in *Tanner* relied heavily on the language of this case, finding it “equally applicable” to the present situation.

The trial examiner, who found for the respondent, was of the opinion that since Congress had established during World War II a Fair Employment Practices Commission to deal with racial discrimination in government contracts, while in essence the same section 7 was in effect, showed a legislative belief that such matters were not covered by the NLRA. He further found that to allow relief here would present problems in a strike “by employees to compel an employer to hire or discharge Catholics or Protestants, as the case may be, so as to have a working force which would reflect the religious composition of their neighborhood,” or similarly if “avowed atheists” would demand remedial action.

The arguments of the trial examiner have a familiar ring and are invariably heard whenever a racial question of any kind is before the court, and they are usually received with a relatively deaf ear. The Norris-LaGuardia Act and the National Labor Relations Act find an identity...

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33. Compare Modern Motors Co. v. NLRB, 198 F.2d 925 (8th Cir. 1952); Carter Carburetor Corp. v. NLRB, 140 F.2d 714 (8th Cir. 1944).
35. 303 U.S. 552 (1938).
38. 303 U.S. at 561.
40. Id. at 1414.
in their purpose to grant labor an opportunity to bargain fairly with employers without fear of reprisal in the form of job loss or the issuance of injunctions.\textsuperscript{41} The \textit{New Negro} case is therefore sufficiently analogous to the present situation, that, taken together with the strong public policy involved in the area of race relations, it can be said to show Supreme Court recognition of a Congressional intent to have the National Labor Relations Act encompass, as far as its language will allow, equality in hiring practices. The \textit{Phoenix} case demonstrated that even in the sacrosanct area of management's prerogative to hire and fire supervisory personnel at its discretion, labor has a legitimate interest, at least sufficient to permit moderate concerted activities. In the instant case, the court seems to have applied the same reasoning with respect to would-be employees, and, it is submitted, rightly so in view of the great inequities that result from racial discrimination in hiring, the strong public sentiment in this area, and the limited nature of the activities of the employees.

The management camp would seem to have little cause for alarm over the instant holding, for three days after the \textit{Tanner} decision came down the Civil Rights Act of 1964 was enacted into law.\textsuperscript{42} This act not only makes racially discriminatory hiring practices unlawful, but also creates an Equal Employment Opportunities Commission to investigate complaints of unfair employment practices.\textsuperscript{43} Thus is provided, for those employees and others who wish to secure equal job opportunities for all an expedient and effective method of so doing without fear of employer reprisals. Race discrimination in hiring has long been recognized by responsible labor and management officials as a proper subject for collective bargaining.\textsuperscript{44} It is submitted that in recognizing that the racial integration of the plant is a proper objective of concerted activities by employees the instant court has espoused a justifiable and enlightened reading of the National Labor Relations Act.

\textit{William E. Chillas}

\textsuperscript{41} Prior to 1932, the law of labor relations was limited to the few judicial precedents available at the common law and these were very limited in scope. Consequently, injunctions against striking workers were very freely granted. Recognizing the workers need to bargain effectively with employers, Congress adopted a series of anti-injunction statutes which culminated in the Norris-LaGuardia Act of 1932. More affirmative legislation was to follow later with the passage of the National Labor Relations Act (Wagner Act), the Labor Management Relations Act of 1947 (Taft-Hartley Act), and others. These later statutes primarily enacted into positive law those rights of employees which had been recognized many years earlier.


\textsuperscript{43} It shall be unlawful employment practice for an employer—

\begin{enumerate}
  \item to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .
\end{enumerate}


\textsuperscript{44} Many major collective bargaining agreements now contain provisions against racial discrimination. See, \textit{e.g.}, the agreements cited by the instant court at 249 F.2d at 4 n.2.
TORTS — PHYSICIANS AND SURGEONS — INSURER WHICH INDUCES DOCTOR TO DIVULGE CONFIDENTIAL INFORMATION GAINED THROUGH DOCTOR-PATIENT RELATIONSHIP IS LIABLE IN DAMAGES TO PATIENT.


Plaintiff was injured when the hospital bed in which he was lying collapsed. When plaintiff instituted suit against the hospital, defendant, the hospital’s malpractice insurer, contacted plaintiff’s physician, whom it also insured, for the purpose of securing confidential information on the nature and extent of plaintiff’s injuries. To induce the physician to disclose this information, defendant falsely represented to him that plaintiff was considering a similar action against him. Upon discovery of the facts the plaintiffs instituted a separate action against the insurer for this inducement. The United States District Court for the Northern District of Ohio denied defendant’s motion to dismiss the complaint for failure to state a claim. On reconsideration of this order, the court held that one who induces a doctor to divulge confidential information in violation of such doctor’s legal responsibility to his patient, may also be held liable in damages to the patient. Hammonds v. Aetna Cas. & Sur. Co., 243 F. Supp. 793 (N.D. Ohio 1965).

As the reasoning of the court in the instant case indicates, no action lies for inducement of a physician’s disclosure of confidential information unless that disclosure is itself an actionable wrong on the part of the physician. The issue of whether a physician is liable for making such a disclosure is by no means a new one, but it has nonetheless been scarcely litigated. The first known case on the issue of unauthorized divulgence was A.B. v. C.D., a Scottish case in which plaintiff hired defendant doctor to examine his child, born six months after his marriage, and to give him a confidential report as to whether the child had been born prematurely. Upon deciding that the child was not premature, the doctor delivered a copy of his report to the minister of plaintiff’s church, with the result that plaintiff was expelled from the congregation. On the issue of whether the employment of the doctor imposed upon him an obligation of secrecy the court said,

that a medical man, consulted in a matter of delicacy, of which the disclosure may be most injurious to the feelings, and possibly, the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication, without incurring any imputation beyond what is called a breach of honour, and without the liability to a claim of redress in a court of law, is a proposition to which, when thus broadly laid down, I think the Court will hardly give their countenance. 

2. “Bearing in mind the medical profession’s traditional aversion to breach of confidence, it is not surprising that the development of legal prohibitions against disclosure has been limited.” Note, 52 Colum. L. Rev. 383, 385 (1952).
3. 14 Sess. Cas. 2d 177 (Scot. 1st Div. 1851).
4. Id. at 180.
Forty-five years later, a British court held a doctor liable in an action for "breach of doctor-patient confidence" when the physician, disclosed a miscarriage terminating a pregnancy which was the product of an adulterous affair.5

It was not until 19206 that an American court of last resort was called upon to determine a physician's liability for voluntarily revealing out of court a patient's confidence. In Simonsen v. Swenson8 the court held that a state licensing statute prohibiting "betrayal of a professional secret to the detriment of a patient"9 imposed a duty of trust and confidence upon the physician, the breach of which "would give rise to a civil action for the damages naturally flowing from such wrong."10 A 1960 New York case, Clark v. Geraci,11 cited the Simonsen case for the proposition that an action for divulging confidential communication should lie. The court held that the duty of secrecy implied in the state privileged communication statute12 should extend to out of court utterances by physicians. Both licensing statutes and privileged communications statutes usually prescribe a standard of conduct for physicians. The former prohibit unauthorized out-of-court disclosures, while the latter forbid physicians to make unauthorized disclosures on the witness stand. Neither, however, provides for recovery by patients whose confidences have been disclosed in violation of the statute.

In Hague v. Williams13 the New Jersey Supreme Court found the absence of a statute a conclusive bar to a patient's recovery for unauthorized divulgence. In that case the parents of an infant brought an action against a doctor for disclosing to an insurer to whom the parents had applied for life insurance on the infant that the child had had heart trouble since birth. The court distinguished Simonsen and Clark on the presence in those cases of statutes which served as indicia of the existence of "an established public policy recognizing a confidential relationship."14 It may be argued, however, that recovery should be granted in the absence of a statute entailing a duty of secrecy upon physicians. Indeed, it may be argued that a court with its hand on the pulse of popular feeling and recognizing the

5. For the only known report of this case, see the discussion of Hitson v. Playfair, 1 Brit. Med. J. 815, 882 (1896).
6. An earlier case, decided on an issue of pleading, had dicta declaring, "Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favor of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that, for so palpable a wrong, the law provides a remedy." Smith v. Driscoll, 94 Wash. 441, 162 Pac. 572-73 (1917).
7. The instant case and this note deal only with disclosure made out of court.
8. 104 Neb. 224, 177 N.W. 831 (1920).
10. 104 Neb. at 227, 177 N.W. at 832.
14. Id. at 335, 181 A.2d at 347, see also Berry v. Moench, 8 Utah 2d 191, 331 P.2d 814 (1958).
needs of society has the discretion to label something contrary to public policy. And a course of conduct is against public policy when it is repugnant to the reasonable man’s conception of justice. Moreover, it has been held that anything which tends to debase the learned professions is at war with the public interest and is therefore contrary to public policy.\(^1\)

In the instant case, the federal district court sitting in Ohio had before it both a privileged communications statute\(^1\) and a medical licensing statute\(^1\) which proscribed private disclosure of the confidential statements of patients. The court found that together with the American Medical Association's Code of Professional Ethics\(^1\) these statutes declared the public policy of Ohio to be against unauthorized disclosure. The instant case stands unique among the cases in this area, however, in that the court expressly\(^1\) rested its decision on public policy. "Modern public policy, not the archaic whims of the common law, demands that doctors obey their implied promise of secrecy."\(^2\)

The court did, however, discuss other theories upon which recovery could be based. For one, the court found that a contract existed between physician and patient and that that contract contained an implied warranty that any confidential information which the physician gained through the relationship would not be released without the patient’s consent. It has been held that the relationship of physician and patient is a contractual one\(^1\) and that the patient may bring an action ex contractu for a breach of duty arising out of the contract of employment.\(^1\) It has also been asserted that promises may be found in service contracts by implication.\(^1\) Moreover, it has been suggested in at least one case that such a promise of secrecy is implied in law as an essential element of any contract between physician and patient.\(^1\)

A third theory upon which the court found that an action would lie against the doctor is invasion of privacy. "If a doctor should reveal any of these confidences, he surely effects an invasion of the privacy of his patient."\(^1\) In The Right of Privacy, Hofstadter and Horowitz state:

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17. OHIO REV. CODE § 4731.22 (1953) which provides in relevant part:
   The state medical board may refuse to grant a certificate to a person guilty of . . . grossly unprofessional or dishonest conduct . . . [which] means:
   
   (b) The willful betrayal of a professional secret . . .
18. AMERICAN MEDICAL ASSOCIATION, PRINCIPLES OF MEDICAL ETHICS 3-4 (1923).
19. It should be noted that in the Hague case Judge Haneman indicated in his opinion that Clark and Simonsen impliedly relied on public policy. The instant case is the first to use the term public policy in its rationale. For a good definition of public policy see Pittsburgh, C., C., & St. L. Ry. v. Kinney, 95 Ohio St. 64, 115 N.E. 505 (1916).
23. 3A CORBIN, CONTRACTS § 682 (1960).
24. Quarles v. Sutherland, 389 S.W.2d 249, 252 (Tenn. 1965), indicates that the only possible basis of recovery for unauthorized divulgence is breach of contract.
Recent Developments

One right of privacy which constitutes a distinct and well defined field is that of professional consultations. Communications between doctor and patient . . . are confidential and privileged. The person making such confidence has the right to permit or not to permit the professional man to disclose statements made to him in the course of their professional relations. Such matters [however] . . . are not comprehended under the term 'right of privacy.'

Dean Prosser has also recognized a tort of invasion of privacy by disclosure. But it has been held that in order to constitute the tort of invasion of privacy, the disclosure must be a public and not a private one, that is, it must be contained in printings, writings, pictures, or other permanent publications or reproductions; mere communication by word of mouth will not suffice. Since the disclosure in the instant case was not made public it would seem that no action for invasion of privacy would lie.

Having found that a physician would be liable in damages for divulging confidential information gained through the doctor-patient relationship, it would seem an easy matter to go one step further and hold that one who induces this conduct is also liable in damages. Indeed the Restatement of Torts provides the applicable rule:

For harm resulting to a third person from the tortious conduct of another, a person is liable if he

(a) orders or induces such conduct, knowing of the conditions under which the act is done or intending the consequences which ensue, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself. . .

This rule has been extended to make actionable the inducement of any actionable wrong, whether tortious at common law or not. Thus one who induces a violation of public policy by another would seem to be responsible to the injured person for damages under the rule laid down in the Restatement.

However, while this seems to be the most direct reasoning for holding the malpractice insurer liable, the court in the present case ignored it and ultimately based its decision on an "inducing the breach of a fiduciary relationship" theory. Briefly, the court ruled that a doctor-patient relationship is a fiduciary one, with the legal obligations of a trustee imposed upon the fiduciary (doctor). The court found that the same principles of law governing the behavior of a trustee are applicable to all fiduciaries.

It concluded that since one is liable for inducing or participating in the breach of a trustee's duty, a person may be similarly liable for inducing or participating in the breach of any fiduciary duty. It is not clear here why the court did not simply rely on the line of cases holding that one who participates with a fiduciary in a breach of his duties is liable to the injured party for the damages resulting from the fiduciary's dereliction.32

There are at least two other theories, not mentioned by the court, which might be suggested as a basis for recovery against an inducer of divulgence. The first is the relatively well known tort of "interference with contractual relations." It has often been held that a person who induces a breach of contract, including one for personal services, may be held liable for the injury caused.33 A second possible basis of recovery is the "civil conspiracy doctrine." It is well established that a person will be criminally liable for conspiring with another to commit a tortious act.34 It has also been held that a cause of action lies in tort for a conspiracy which results in the commission of a wrong.35 However, civil conspiracy differs from its criminal counterpart in that a conspiracy is not actionable unless it actually results in the doing of a wrongful act.36 One of the problems in applying this theory is proving a combination. If the defendant merely induced the doctor to commit the wrong, this would not amount to a combination. But it may be argued that at the point when the doctor succumbs to the inducement and agrees to divulge, the two parties become active participants in a combination to commit the wrong of divulging confidential information. When the physician proceeds to divulge the information, the required act is committed.

It is submitted that the court wisely employed the public policy doctrine in finding that the conduct of the doctor constituted an actionable wrong. In a sparsely litigated area such as this, with lack of binding precedent, it often serves the needs of society for a court to label conduct as detrimental to the public policy and hence actionable. However, it is not entirely clear why the court bypassed the simple "inducement of an actionable wrong" doctrine in favor of its reasoning that one who induces a fiduciary to breach his duties is liable to the injured party. A more direct method would have been to find that the doctor had committed the actionable wrong of unauthorized divulgence, and hence the defendant was liable for inducing it.

Alan Gilbert Ellis


33. Tipton v. Burson, 73 Ariz. 144, 238 P.2d 1098 (1951). This doctrine has been well recognized in the tort area. See, e.g., 1 HARPER & JAMES, TORTS § 6.5 (1956); PROSSER, TORTS 950 (3d ed. 1964). It has been held that a person who knowingly induces a breach of contract may be guilty of a tort, and furthermore, that interference with the contract not amounting to inducement of breach may also be actionable. Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962).

34. PERKINS, CRIMINAL LAW 540 (1957).
