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Recent Cases

CONTRACTS—COVENANTS NOT TO COMPETE—ACTIVITIES PROHIBITED

*Wineteer v. Kite*¹

Vendors sold the only supermarket in Glasgow, Missouri (population 1,200), and agreed not to compete directly or indirectly with vendees for the ensuing ten years. A year later the vendors purchased land two blocks outside of Glasgow and began grading the land for the construction of a shopping center that would house a supermarket. Upon objection by the vendees, the vendors sought a declaratory judgment to determine whether their covenant would preclude their building and leasing a supermarket for a percentage of the gross receipts of the business as conducted solely by a future lessee. The trial court held the covenant inapplicable and the Kansas City Court of Appeals affirmed.²

Whether a vendor's activity constitutes a breach of his covenant not to compete is basically a question of contractual interpretation. However, when the covenant is ambiguous and capable of two different interpretations the courts rely upon rules of construction in their attempt to find the intent of the parties. In such cases a court may properly consider the entire instrument, its subject matter, the motives that led to the agreement, the circumstances which surrounded its execution, and the objectives intended to be effected by it.³ In other words, in construing ambiguous covenants, the purpose to be achieved and spirit of the agreement control instead of the strict meaning of the terms of the agreement.⁴

Since the purpose of most covenants not to compete is the protection of the thing sold to the vendee,⁵ a test which looks to the injurious effect of the vendor's activity on the business sold has been used by most courts to determine whether the vendor has breached his agreement.⁶ This test has been aptly called a "mis-chief test" by an Iowa court which stated the rule as follows:

1. 397 S.W.2d 752 (K.C. Mo. App. 1965).

2. *Id.* at 760.

3. *Tull v. Turek*, 147 A.2d 658 (Del. 1958); *Dannel v. Sherman Transfer Co.*, 211 S.W. 297 (Tex. Civ. App. 1919).

4. *Caldwell-Clements, Inc., v. McGraw-Hill Pub. Co.*, 93 N.Y.S.2d 482, 197 Misc. 691 (1949), *aff'd*, 277 App. Div. 767, 97 N.Y.S.2d 538 (1950).

5. *Tull v. Turek*, *supra* note 3; *Laszlo v. Terao*, 343 Ill. App. 467, 99 N.E.2d 370 (1951); *Davis v. Barney*, 2 Gill & J. 382 (Md. 1830); *Amsterdam v. Marmor*, 125 Misc. 865, 212 N.Y. Supp. 300 (1925).

6. *Alcock v. Alcock*, 267 Ill. 422, 108 N.E. 671 (1915); *Wilson v. Delaney*, 137 Iowa 636, 113 N.W. 842 (1907); *Ammon v. Keill*, 95 Neb. 695, 146 N.W. 1009 (1914); see *Annöt.* 93 A.L.R. 121, 122 (1934) and cases cited therein.

The test, as we conceive, is mischief. And mischief begins when the scope and character of the employment is such as to result in all likelihood in substantial interference with the business which was the subject of the contract. . . . Influence may be exerted indirectly as well as directly, and the purchaser of a business and its good will is entitled not only to protection in respect of customers then patrons, but to enter the field of competition unhampered by any adverse influence of the seller.⁷

Thus, in *Langberg v. Wagner*,⁸ a vendor of a window washing business was restrained from working as a window washer for a competing window washing business because his employment might cause established customers of the business sold to transfer their patronage to the competing business.

However, most courts seem to have limited the application of the "mischief test" to ambiguous covenants with respect to which the vendor has actually been employed or engaged in a competing business as an active participant. Thus, where the vendor has been employed as an inferior servant,⁹ has been employed as a manager,¹⁰ or has participated by advising and assisting another in establishing a competing business,¹¹ and where damage was likely to flow from the assistance, a breach has been established. Where the relationship between the vendor and competitor was that of vendor-vendee,¹² lessor-lessee,¹³ grantor-grantee,¹⁴ or creditor-debtor,¹⁵ the test has not been applied. Where there was no active participation, the courts, rather than relying on any particular test, have based their decisions on an interpretation of the specific provisions of the covenant.¹⁶ This approach normally leads to a holding for the vendor.¹⁷

The reason seems to be that such activity is so remote from and so slightly connected with the business which generates the competition as not to be within the scope of the prohibition. Thus, one legal writer¹⁸ has stated, in criticising *Harrison v. Cook*,¹⁹ which restrained a vendor from loaning money to his vendee's competitor, that "[i]f courts may imply a further obligation by the seller to refrain from even a tenuous connection with a competitor, the buyer gets more than he bargained for, while the seller inadvertently gives up important rights he never contemplated parting with."²⁰ Other authorities have suggested that there can

7. *Wilson v. Delaney*, *supra* note 6, at 641, 113 N.W. at 844.

8. 101 N.J. Eq. 383, 139 Atl. 518 (1927).

9. *Ibid.*

10. *Smith v. Webb*, 176 Ala. 596, 58 So. 913 (1912); see Annot. 93 A.L.R. 121, 127 (1934) and cases cited therein.

11. *Amsterdam v. Marmor*, *supra* note 5.

12. *Reeves v. Sprague*, 114 N.C. 647, 19 S.E. 707 (1894).

13. *Ericson v. Jayette*, 149 Fla. 82, 5 So. 2d 453 (1941).

14. *Simmons v. Johnson*, 11 So. 2d 710 (La. App. 1942).

15. *Slate Co. v. Bikash*, 343 Mass. 172, 177 N.E.2d 780 (1961); *Salzman v. Siegelman*, 102 App. Div. 406, 92 N.Y. Supp. 844 (1905).

16. *Supra* notes 12-15.

17. *Ibid.*

18. *Fleischer, Noncompetition Covenants: An Unexpected Interpretation*, 4 SANTA CLARA LAW. 110 (1963).

19. 213 Cal. App. 2d 527, 29 Cal. Rptr. 269 (1963).

20. *Supra* note 18, at 124.

never be a breach of a covenant not to compete unless the conduct of the vendor amounts to an active participation in the running of the competitive business, or unless the non-participating activity is expressly prohibited in the covenant.²¹ Such suggestions stem from a number of decisions that have interpreted standard non-competition covenants²² as not prohibiting vendor activities that consist solely of the lending of money,²³ the furnishing of goods,²⁴ the extending of credit,²⁵ the selling of buildings and land,²⁶ and the leasing of buildings to a competitor of the vendee.

This is the conclusion Missouri seems to have reached in the noted case. The Kansas City Court of Appeals stated that the vendors do not breach their covenant not to compete as long as they ". . . refrain from disparaging the good will of their vendees by any act or conduct amounting to an active participation in the operation or management of the competitive business. . . ."²⁷ The court did not precisely define "active participation," but said that it is ". . . as defined by the terms of [the opinion of the noted case] and by the law generally."²⁸ From this one may hazard a guess that an active participation will be established if the vendor's participation in the competing business consists of: (1) engaging in the business as a partner or principal or as an inferior servant creating an injurious effect; (2) conducting or controlling the business as a manager; (3) assisting while owning a proprietary interest in the business; (4) actively encouraging the business by performing substantial service for it; (5) organizing a competing corporation. Accordingly, since building and leasing for a percent of gross receipts does not constitute such an active participation, the court held that, as a matter of law, this activity should not be prohibited.²⁹

However, at least three jurisdictions have found a breach of a general covenant not to compete when the activity of the vendor has not amounted to an active participation in the competitive business. In *Davis v. Barney*,³⁰ the Maryland court held that a vendor of a line of stagecoaches, who covenanted not to be con-

21. 17A C.J.S. *Contracts* § 327(4), p. 278 (1963); Annot., 14 A.L.R.2d 1333, 1336 (1950).

22. Agreements not to keep a similar business either directly or indirectly, *Hebert v. Dupaty*, 42 La. Ann. 343, 7 So. 580 (1890); not to directly or indirectly enter into a competing business, *Simmons v. Johnson*, *supra* note 14; not to compete or do anything to prejudice the good will sold, *Slate Co. v. Bikash*, *supra* note 15; not to engage directly or indirectly in the same business, *Nelson v. Johnson*, 38 Minn. 255, 36 N.W. 868 (1888), *Harkinson's Appeal*, 78 Pa. 196 (1875); not to compete directly or indirectly, *Wineteer v. Kite*, *supra* note 1; not to engage in any way in a competitive business, *Gallup Electric Light Co. v. Pacific Improvement Co.*, 16 N.M. 86, 113 Pac. 848 (1911); not to engage in a drug business, *supra* note 12.

23. *Gallup Electric Light Co. v. Pacific Improvement Co.*, *supra* note 22; *Harkinson's Appeal*, *supra* note 22.

24. *Supra* note 12.

25. *Slate Co. v. Bikash*, *supra* note 15.

26. *Hebert v. Dupaty*, *supra* note 22.

27. *Wineteer v. Kite*, *supra* note 1, at 759.

28. *Ibid.*

29. *Ibid.*

30. *Supra* note 5.

cerned, directly or indirectly, in any competing line of stages, would breach his covenant by furnishing competitors with money, credit, or other means for the purpose of enabling them to carry on or better carry on the competing business.³¹ California has enjoined non-participating activities such as leasing and lending in the decisions of *Harrison v. Cook*³² and *Dowd v. Bryce*.³³ In *Harrison*, a vendor was held to have breached his covenant not to establish, conduct, or lend his name to a competing business when his loan to his son enabled the son to establish a competing business and drive the vendee into bankruptcy.³⁴ The *Dowd* court stated that a vendor's lease of other property to a competitor would constitute indirect competition.³⁵ In *J. D. Nichols Stores v. Lipschutz*,³⁶ which quotes the *Dowd* opinion at length, the Ohio court held that a vendor's letting of a clothing shop was prohibited by his covenant not to directly or indirectly interfere in any manner with the business sold.³⁷

In construing these covenants broadly so as to bring non-participating activity within the scope of the prohibition, the three jurisdictions mentioned above seem to have felt that, in the absence of any express language to the contrary, the essential purpose of the standard agreement not to compete is to keep the vendor from doing anything that will tend to prejudice the business sold, whether that activity be a participating or a non-participating one. The *Dowd* case implies that it makes no difference how the vendor brings about the injurious effect on the vendee's business. Since he controls the opportunity to compete, he creates just as much competition by leasing to a prospective competitor as he would by going into the business himself.³⁸ The most straightforward, but perhaps unorthodox, expression of these views is stated in the *Harrison* case wherein the court admitted there was no technical breach of the covenant but asserted that the breach should be established on the basis of the vendor's violation of an implied covenant not to do anything that would deprive the other party of the benefits of the contract.³⁹ The effect of these decisions is to extend the "mischief test" to all cases, with less emphasis being given to the particular language of the covenant.

To find a breach of the covenant in the *Winteer* case it would be necessary for a court to find that the purpose of the covenant not to compete directly or indirectly was to keep the vendor from doing anything to harm the good will sold, either by directly utilizing his knowledge and experience in that type of business to run a competing business himself, or by *indirectly using that knowledge and experience to his advantage by profitably employing or enabling another to achieve the same result*. Had the Maryland, California or Ohio courts construed this covenant, such a purpose probably would have been found on the ground that the

31. *Id.* at 403.

32. *Supra* note 19.

33. 95 Cal. App. 2d 644, 213 P.2d 500 (1950).

34. *Supra* note 32, at 531, 29 Cal. Rptr. at 272.

35. *Supra* note 33, at 647, 213 P.2d at 501.

36. 120 Ohio App. 286, 201 N.E.2d 898 (1963).

37. *Id.* at 293, 201 N.E.2d at 903.

38. *Dowd v. Bryce*, *supra* note 33, at 647, 213 P.2d at 501-502.

39. *Harrison v. Cook*, *supra* note 32, at 530, 29 Cal. Rptr. at 271.

terms, spirit, and very nature of the agreement imply it. Furthermore, because Mr. Wineteer's building and leasing of a second supermarket in a town the size of Glasgow would have the effect of defeating that purpose by enabling the lessee to encroach seriously upon the market sold to Mr. Kite, and because Mr. Wineteer obviously recognized and desired that effect, these courts probably would have issued the injunction. However, the court in the noted case construed the covenant to mean that the vendor was to not generally engage in a competitive business.⁴⁰ It rejected any possibility of an extension of the mischief philosophy to non-participating activities, and instead seems to have arbitrarily established active participation as the limit beyond which a vendor cannot be restrained unless the covenant expressly prohibits the particular non-participating activity.⁴¹ Even though the vendor would make possible the destruction of the vendee's business, the court disallowed the injunction because he would not actively participate in the subsequent destructive process. This distinction permits a less desirable result since it tends to ignore the spirit and purpose of the contract.

In reaching its decision the court expressly rejected the *Dowd* and *Nichols* reasoning.⁴² It relied on authority that requires a positive expression before decreeing a restraint against non-participating activities.⁴³ It failed to distinguish the *Nichols* covenant which prohibited *indirect interference in any manner*⁴⁴ from the *Wineteer* covenant which merely prohibited indirect competition, and it mentioned the fact that the *Wineteer* covenant did not contain an express restriction against leasing.⁴⁵ All of these factors suggest that if a buyer desires full protection against the possibly damaging activities of his seller, he must include in the covenant an express prohibition against activities that amount to something less than an active participation. Prospective vendees should be put on guard by the decision and perhaps make an inquiry into the past and prospective business dealings of their vendor. An investigation may disclose a need to include in the contract an express covenant against leasing, financing, supplying, or otherwise indirectly assisting.

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40. *Supra* note 1, at 755.

41. *Id.* at 759.

42. *Ibid.*

43. *Houston Transfer and Carriage Co. v. Williams*, 201 S.W. 712 (Tex. Civ. App. 1917), 221 S.W. 1081, 1082 (Tex. Com. App. 1920).

44. *J. D. Nichols Stores v. Lipschutz*, *supra* note 36.

45. *Wineteer v. Kite*, *supra* note 1, at 755.

PATENTABILITY—THE TEST OF NON-OBVIOUSNESS—
SECTION 103 OF THE PATENT ACT

*Graham v. John Deere Co. of Kansas City*¹

Since 1952, when Congress revised the Patent Act,² district and appeals court decisions and articles have been written concerning the effect of section 103³ on the standard of patentability. The Supreme Court had denied certiorari in cases where section 103 was in issue.⁴ In the principal case, the Court not only answers many of the basic questions on this section, but also clarifies some previous decisions on patentability.⁵

The decision includes three cases⁶ having the same basic issue. Since each patent case depends upon its own facts and the "ultimate question of patent validity is one of law,"⁷ this note will deal only with the legal aspects.

The decision of the Court may best be understood if a brief history of patentability is given first. The first Patent Act, passed in 1790,⁸ stated that a patent should be granted to anyone who "hath . . . invented or discovered any useful art, manufacture, . . . or device, or any improvement therein not before known or used."⁹

This act was superseded February 21, 1793, by a second Patent Act.¹⁰ It provided that any person who "invented any new and useful art" and who met the formal requirements as to filing and disclosure, could obtain a patent.¹¹

The Patent Act of 1836¹² reintroduced "invented or discovered," which had

1. 383 U.S. 1 (1966).

2. This is now codified in Title 35, United States Code.

3. 35 U.S.C. § 103 (1952) which reads as follows:

§ 103. *Conditions for patentability; non-obvious subject matter*

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

4. *Lyon v. Bausch & Lomb Optical Co.*, 224 F.2d 530 (2d Cir.), *cert. denied*, 350 U.S. 911 (1955).

5. 383 U.S. at 19.

6. The case named in the citation involved the validity of a patent on a "Clamp for vibrating Shank Plows." The Supreme Court granted certiorari after the patent had been held valid by the Fifth Circuit Court of Appeals and invalid by the Eighth Circuit Court of Appeals. The other two suits were *Calmar, Inc. v. Cook Chemical Co.* and *Colgate-Palmolive Co. v. Cook Chemical Co.* These were on the question of validity of a single patent. The subject matter of the patent was a finger-operated sprayer with a "hold-down" cap. The Eighth Circuit Court of Appeals held this patent valid. The Supreme Court holds that both patents are invalid due to the "obviousness" of the subject matter in view of the prior art.

7. 383 U.S. at 17.

8. 1 Stat. 109 (1790).

9. This particular wording of the section is found at 383 U.S. at 7.

10. 1 Stat. 318 (1793).

11. Certain provisions on disclosure are now found in 35 U.S.C. § 102 (1952).

12. 5 Stat. 117 (1836).

been dropped in the 1793 Act. The 1836 Act also retained the requirement that inventions or discoveries must be "new and useful." Although Congress changed the Patent Act many times, the basic requirements of novelty and utility remained the sole statutory basis for patentability until 1952.¹³

In the 1853 case of *Hotchkiss v. Greenwood*,¹⁴ the Supreme Court added the requirement of "invention." Since *Hotchkiss*, many opinions have been rendered on the meaning of "invention," including several by the Supreme Court.

As time passed, it became questionable whether the standard of patentability was remaining the same. Some courts thought the Supreme Court was moving toward a stricter standard.¹⁵ In the Reviser's Note, which accompanied the 1952 Act, Mr. P. J. Federico stated:

[S]ome modification was intended in the direction of moderating the extreme degrees of strictness exhibited by a number of judicial opinions over the past dozen or more years¹⁶

In 1952, Congress passed the new Patent Act, which added "non-obviousness" as a new statutory requirement for patentability. The Senate and House reports stated:

Section 103, for the first time in our statute, provides a condition which exists in the law and has existed for more than 100 years, but only by reasons of decisions of the courts.¹⁷

There was little doubt by most courts that this new section codified the case law.¹⁸ The question then became, which law was codified? Was it the old law which the Court announced in *Hotchkiss*, or the new, stricter standard which many said had been advanced in recent decisions? The district and appeals courts were split in their opinions.

In 1955, Judge Learned Hand wrote, in *Lyon v. Bausch & Lomb Optical Co.*,¹⁹ that the standard for patentability had been raised in the few years prior to 1952 by the decisions of the Supreme Court. He then found the new act lowered the standard and returned it to that of *Hotchkiss*. Several cases have followed this rea-

13. In 1952 the test of "non-obviousness" was added. An invention must still meet the requirements of novelty and utility before a patent will be issued. These requirements are found in 35 U.S.C. §§ 101-02 (1952).

14. 52 U.S. 248 (1853).

15. *Safety Car Heating & Lighting Co. v. General Electric Co.*, 155 F.2d 937 (2d Cir. 1946); *Unitd States Gypsum Co. v. Consolidated Expanded Metal Co.*, 130 F.2d 888 (6th Cir. 1942), *cert. denied*, 317 U.S. 698 (1943); *Lyon v. Bausch & Lomb Optical Co.*, 224 F.2d 530 (2d Cir.), *cert. denied*, 350 U.S. 911 (1955).

16. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. § 1 (1952).

17. H.R. Rep. No. 1923, 82d Cong., 2d Sess. 7 (1952); S. Rep. No. 1979, 82d Cong., 2d Sess. 6 (1952).

18. *Blish, Mize & Silliman Hardware Co. v. Time Saver Tools, Inc.*, 236 F.2d 913 (10th Cir. 1956), *cert. denied*, 352 U.S. 1004 (1957); *Stanley Works v. Rockwell Mfg. Co.*, 203 F.2d 846 (3d Cir.), *cert. denied*, 346 U.S. 818 (1953).

19. 224 F.2d 530 (2d Cir.), *cert. denied*, 350 U.S. 911 (1955).

soning, and have interpreted section 103 as setting a more lenient standard.²⁰ Other courts have followed the theory that no change was meant by the 1952 Act, and that the "stricter" standard should apply.²¹

Against this background the *Graham* decision is of substantial importance in several respects. First, the Court said that Congress meant to replace the less definite term "invention" with "non-obviousness." This change was made in order to clear up any interpretive differences courts had read into "invention." This will affect many courts which had, even after the 1952 Act, continued to use "invention."²² Some courts had even said: "[I]nvention is synonymous with unobviousness."²³

Next, the Court said Congress intended to abolish the "flash of genius" test.²⁴ The test, if it may be properly called such, arose from *Cuno Engineering Corp. v. Automatic Devices Corp.*²⁵ When that decision was announced there was wide speculation whether it was another step in raising the standard of patentability. After 1952, most courts recognized what Congress had done, and decided that even if there was such a "flash of genius" test, it was thereby abolished.²⁶ Other courts which continued to use "flash of genius" after 1952²⁷ will now have to conform to the majority.

The third thing the Supreme Court did in *Graham* was give the U. S. Patent Office and its Examiners special consideration. The Court said the Commissioner must follow the 1952 Act strictly, and give greater weight to the requirements of

20. *Savoy Leather Mfg. Corp. v. Standard Brief Case Co.*, 261 F.2d 136 (2d Cir. 1958); *R. M. Palmer Co. v. Luden's Inc.*, 236 F.2d 496 (3d Cir. 1956); *Honolulu Oil Corp. v. Shelby Poultry Co.*, 293 F.2d 127 (4th Cir. 1961).

21. Even the Second Circuit may not be in complete agreement, see *Zoomar, Inc. v. Paillard Products, Inc.*, 258 F.2d 527 (2d Cir.), *cert. denied*, 358 U.S. 908 (1958); *Welsh Mfg. Co. v. Sunware Products Co.*, 236 F.2d 225 (2d Cir. 1956). For other decisions see: *Hawley Products Co. v. United States Truck Co., Inc.*, 259 F.2d 69 (1st Cir. 1958); *Stabler v. Bright Leaf Indus., Inc.*, 261 F.2d 383 (5th Cir. 1958), *cert. denied*, 359 U.S. 960 (1959). *Bobertz v. General Motors Corp.*, 228 F.2d 94 (6th Cir. 1955), *cert. denied*, 352 U.S. 824 (1956); *Caldwell v. Kirk Mfg. Co.*, 269 F.2d 506 (8th Cir.), *cert. denied*, 361 U.S. 915 (1959); *Aetna Steel Products Corp. v. Southwest Products Co.*, 282 F.2d 323 (9th Cir. 1960), *cert. denied*, 365 U.S. 845 (1961).

22. Many courts have stated the three requirements for patent validity are novelty, utility, and invention. See *Warner & Swasey Co. v. Universal Marion Corp.*, 237 F. Supp. 719 (D. Colo. 1964), *aff'd*, 354 F.2d 541 (10th Cir. 1965); *Ekstrom-Carlson & Co. v. Onsrud Mach. Works, Inc.*, 197 F. Supp. 451 (N.D. Ill. 1961), *aff'd*, 298 F.2d 765 (7th Cir.), *cert. denied*, 369 U.S. 886 (1962); *Allied Wheel Products v. Rude*, 206 F.2d 752 (6th Cir. 1953); *Hycon Mfg. Co. v. H. Koch & Sons*, 219 F.2d 353 (9th Cir.), *cert. denied*, 349 U.S. 953 (1955).

23. *Monroe Auto Equip. Co. v. Heckethorn Mfg. & Supply Co.*, 332 F.2d 406, 410 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

24. 383 U.S. at 15.

25. 314 U.S. 84 (1941).

26. *Fisch v. Gould*, 246 F.2d 5 (3d Cir. 1957), *cert. denied*, 355 U.S. 914 (1958); *E. J. Brooks Co. v. Stoffel Seals Corp.*, 266 F.2d 841, 843 n. 5 (2d Cir.), *cert. denied*, 361 U.S. 883 (1959); *Emerson v. National Cylinder Gas Co.*, 251 F.2d 152 (1st Cir. 1958).

27. *Blankenship v. Daisy Mfg. Co.*, 195 F. Supp. 12 (W.D. Ark. 1961); *Chenault v. Nebraska Farm Products, Inc.*, 138 F. Supp. 772 (D. Neb. 1956).

section 103. The Court felt this would accomplish two purposes. First, the large backlog of patent applications would be reduced. Second, there would be a "closer concurrence between administrative and judicial precedent."²⁸

Perhaps the most important thing the Court did in *Graham* was setting up the test and standard for patentability under section 103. It concluded section 103 was merely a codification of principles which had been around since *Hotchkiss*. A long awaited answer came when the Court stated:

The standard has remained invariable in the Court. Technology, however, has advanced and with remarkable rapidity in the last 50 years. Moreover, the ambit of applicable art in given fields of science has widened by disciplines unheard of a half-century ago. It is but an evenhanded application to require those persons granted the benefit of a patent monopoly be charged with an awareness of these changed conditions. The same is true of the less technical, but still useful arts. He who seeks to build a better mousetrap today has a long path to tread before reaching the Patent Office.²⁹

The Court seems to be saying that Judge Hand was only partially correct in the *Lyon* case. His opinion that the courts have been stricter on patents in the last few years was correct. The reason, however, was not that the standard was higher, but that technology had increased in the past few years, and more subject matter was obvious to one with "ordinary skill in the art." Also, the Court makes it clear that the standard did not become more lenient in the 1952 Act.

The Court sets up guidelines to decide whether there is obviousness or non-obviousness about the subject matter. These are in three divisions: (1) the scope and content of the prior art; (2) differences between the prior art and the claims; and (3) the level of ordinary skill in the art that applies to the claims in question. Also secondary tests of long felt need, failure of others, and commercial success may be used to help decide obviousness.³⁰

This decision, which has been far too long in coming, is clear in its purpose and objectives. The courts now know the effect of section 103 and the points to stress in each factual situation. There will be problems in the future, but these should be no harder than those with the reasonable man test which is applied constantly by the courts.

The most questionable section of the opinion is the directive which the Court gives the Patent Office. Since more patents are applied for and issued each year than are litigated, this could be just as important, if not more so, as other parts of the opinion.

The Court seems to make it clear that it wishes the Examiners to follow the tests and standards set out in the opinion. There are, however, several problems which arise in applying such tests and standards. The first is the secondary tests which the Court recognizes. In a suit where invalidity is an issue, there will be

28. 383 U.S. at 19.

29. *Ibid.*

30. *Id.* at 17.

many facts on commercial success and long felt, but unsolved, needs presented to the court. These facts normally will not be before the Examiner when he is deciding if a patent should issue.

Another point which will give the Examiner problems is the question of "ordinary skill in the art." It is true that the Examiners are divided into certain areas and examine applications only in that area. It cannot be hoped, however, that every Examiner will have "ordinary skill in the art" in every application he examines. This could also work in reverse. An Examiner might become so expert in an area that he would tend to be overly critical.

It is not contended that the Examiner cannot make some evaluation of "ordinary skill in the art," but the Patent Office cannot come up to the same standard as the courts.

The point of even trying to have the same standard for the Patent Office as the courts may be questioned. Patent applications are *ex parte* proceedings, rather than *inter partes* proceedings over which the court presides. This gives the court a large advantage both in evidence and in expert testimony. Another factor is the inventor himself. In many cases, the subject matter of the patent application is untried, and the future success unknown. In these cases, the inventor would be reluctant, or refuse, to go to the expense of applying if he had to meet the same standard as in a court action.

For the future, this decision will have only a slight effect upon the Patent Office and the issuance of patents. However, some patent applications will probably be refused which would have been allowed prior to the Court's decision. These will mainly be where the prior art is very close to the invention in the application. Also, these patents, if issued, would contain only narrow patent claims, and would have little commercial importance in most cases. Therefore, the change will have little long-range consequence.

Those courts which have looked toward a more lenient standard since 1952 will have to reconsider their position. Courts which have been "strict" on patents in the past will continue to be. The future of many patents in the courts might well be stated in the words of Mr. Justice Jackson in the *Jungersen* case:³¹ "The only patent that is valid is one which this Court has not been able to get its hands on."

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31. *Jungersen v. Ostby & Barton Co.*, 335 U.S. 560, 572 (1949).

ADMISSIBILITY OF PRIOR IDENTIFICATION TESTIMONY

*State v. Rima*¹

On July 22, 1963, the Kansas City Star Credit Union was robbed by four men. Larkins, driving north on Grand Avenue near the scene of the crime, observed the four men getting into a 1962 Buick, and stopped his vehicle at the left rear of the Buick just as the driver looked back toward him. At the trial, Larkins identified defendant, Rima, as the driver of the Buick, and testified that on the day of the robbery he recognized a picture of defendant "in the mug books at the police station."² Although this statement was not a proper response to the question asked, the defense failed to object or move that the answer be stricken. Larkins also testified that he identified defendant in a police line-up on the evening of the crime. The morning after Larkins had given his testimony concerning the prior identification, the defendant moved for a mistrial. When the motion was overruled, he asked that the jury be instructed "to disregard any testimony concerning this photograph identification."³ This request was also refused for the stated reason that no objection had been made at the time of the testimony.

Defendant was convicted of robbery in the first degree and sentenced to eight years' imprisonment. On appeal, he alleged three errors by the trial court: (1) failure to grant defendant's motion for a directed verdict; (2) denial of the motion for mistrial; and, (3) improper instruction as to defendant's defense of alibi. The Supreme Court en banc affirmed the conviction, holding that it was not error for the trial court to refuse to declare a mistrial or instruct the jury to disregard the testimony by Larkins concerning the prior identification of the photograph of Rima. Defendant placed great emphasis on a 1927 case, *State v. Baldwin*,⁴ in which the Supreme Court en banc ruled that testimony by the prosecuting witness about his prior identification of defendant's picture was irrelevant and inadmissible. Such testimony was considered as evidence of a prior consistent statement, and was therefore inadmissible because offered prior to any attempted impeachment of the witness.⁵ Three years later in *State v. Buschman*,⁶ the court approved the admission of testimony by a witness that he had recognized defendant in a police line-up on the day following the crime. The *Buschman* court attempted to distinguish *Baldwin*,⁷ stating that testimony given by the witness about prior identification was competent for corroborative purposes.⁸

In the noted case, the court overrules *State v. Baldwin*, and indicates that the 1927 decision overlooked the fact that the testimony was not by one witness as to

1. 395 S.W.2d 102 (Mo. En Banc 1965).

2. *Id.* at 104. This statement was made in reply to the question, "When was it that you next saw him [the defendant]?"

3. *Id.* at 105.

4. 317 Mo. 759, 297 S.W. 10 (En Banc 1927).

5. *Id.* at 772, 297 S.W. at 15.

6. 325 Mo. 553, 29 S.W.2d 688 (1930).

7. *Id.* at 559, 29 S.W.2d at 691.

8. *Id.* at 560-61, 29 S.W.2d at 692.

the prior identification by another. Rather it was the identifying witness, himself, who testified as to prior identification.⁹

[I]nsofar as *State v. Baldwin* holds that direct testimony of a witness that he recognized a photograph of a defendant as a person he saw, at the commission of the crime involved, was inadmissible it should no longer be followed.¹⁰

There has long been a split in authority as to the admissibility of evidence of extrajudicial identification, although more recent decisions have reflected the growing trend to consider such evidence as valuable and reasonably safe from such objections as hearsay.¹¹ The factors which may influence a court's decision concerning the competency of such prior identification testimony are so numerous as to preclude the probability of any single rule agreeable to all.¹² One factor, often determinative, is whether the person who testifies as to the out-of-court identification is the identifying witness or a third person who merely observed the identification being made. *State v. Rima* has clearly settled the Missouri conflict which existed between the *Baldwin* decision and *Buschman* as well as other subsequent cases.¹³ Testimony about a prior identification by the witness who identifies a defendant at the trial is competent. It is equally clear that Missouri has not crossed the line into the area of prior identification testimony by a third party observer.¹⁴ The question which *Rima* leaves unanswered is: For what purposes is direct testimony of prior identification admissible? It must necessarily be true that such testimony is admissible regardless of any previous attempt at impeachment; for this is, in effect, the holding in *Rima*. But *quaere*: Is the testimony merely corroborative of the witness' identification at trial, or is it admissible as original or substantive proof of the defendant's identity? In other words, what stand might we expect the Missouri courts to take in each of the following situations?

1. The prosecuting witness testifies that the defendant is the man who robbed him. The state then offers to have the witness testify that he made an identification of the defendant by photograph or police line-up at a time shortly after the robbery.

9. Although evidence of a prior identification is an exception, impliedly recognized by the court in *Rima*, to the rule against admission of prior consistent statements previous to attempted impeachment, there is an important distinction to be drawn between direct and indirect testimony. See the discussion of this distinction below.

10. *Supra* note 1, at 106.

11. *People v. Gould*, 54 Cal. 621, 626, 354 P.2d 865, 867 (1960); *Judy v. State*, 218 Md. 168, 146 A.2d 29 (1958); *Commonwealth v. Saunders*, 386 Pa. 149, 155, 125 A.2d 442, 445 (1956); *State v. Simmons*, 63 Wash. 17, 20-21, 385 P.2d 389, 391 (1963); *State v. Wilson*, 38 Wash. 593, 617-18, 231 P.2d 288, 300 (1951).

12. *Annotts.*, 71 A.L.R.2d 449 (1960), 70 A.L.R. 910 (1931); 22 C.J.S. *Criminal Law* § 725 (1961); 20 AM. JUR. *Evidence* § 353 (1939).

13. *State v. Robertson*, 328 S.W.2d 576 (Mo. 1959); *State v. Pitchford*, 324 S.W.2d 684 (Mo. 1959); *State v. Childers*, 313 S.W.2d 728 (Mo. 1958); *State v. DePoortere*, 303 S.W.2d 920 (Mo. 1957); *State v. Nolan*, 171 S.W.2d 653 (Mo. 1943).

14. The court in *Rima* was careful to point out that its decision related only to direct testimony.

2. The prosecuting witness is unable to testify whether defendant is the culprit, but he is willing to testify that he identified the robber just after the crime.¹⁵

In situation 1, some courts would allow the prior identification testimony as corroborative evidence;¹⁶ and it was admissible in *State v. Rima* for this purpose, at the very least. If evidence of the previous identification is offered for the truth of it, there is a hearsay problem. Clearly, the testimony in situation 2 would fall in this area; yet some decisions have allowed the evidence,¹⁷ thus recognizing its value and safety from the dangers of hearsay. It is a matter of common practice for one or more witnesses to make some courtroom identification of a defendant, but the worth of such testimony must necessarily be less than evidence of identification made according to standard police station procedures conducted shortly after the crime was committed. The prior identification does not come after a long lapse of time, or in the suggestive atmosphere of the courtroom where the witness faces one man he knows is formally charged with the crime. Furthermore, the hearsay objection has no firm basis, for the witness is available for cross-examination to test his memory, perception and sincerity. Finally, any distinction between the admission of the evidence for corroborative purposes, as opposed to substantive purposes, is so technical as to make it unrealistic to expect a jury to heed a limiting instruction. Just as each juror will consider the witness' courtroom identification, he will likewise decide as to the truth of the prior identification. Direct testimony about prior identification should be admissible for substantive purposes, the only real question being its weight.¹⁸

If we enter the area of third party testimony as to another person's prior identification of the defendant, the arguments for admission break down. Should the identifier be present or available to testify at trial, there is no necessity for allowing someone else to present the evidence. If the declarant is not present or available, then the hearsay dangers exist in full, since there can be no cross-examination of the identifier to reveal a possible defect in his observation, recollection, or sincerity. In spite of the dangers, at least one state has apparently decided that the third party testimony is admissible for substantive, as well as corroborative, purposes.¹⁹

15. If this testimony is admissible the problem arises as to how to connect the testimony about prior identification of the robber with the defendant. Presumably the prosecution would follow a procedure similar to that used in *State v. Simmons*, *supra* note 11, where photographs of a police line-up were introduced. A witness identified the #1 man in the photograph both as one of the robbers, and as the man he had picked out at the line-up; but he was unable to identify defendant as being in the photographs. Several police officers then testified that defendant was the #1 man in the photograph.

It should be noted that situation 2 closely resembles the circumstances under which past recollection recorded is admitted.

16. *U.S. v. Forzano*, 190 F.2d 687 (2d Cir. 1951); *Judy v. State*, *supra* note 11.

17. *State v. Simmons*, *supra* note 11; *People v. Spinello*, 303 N.Y. 193, 101 N.E.2d 457 (1951).

18. *Colbert v. Commonwealth*, 306 S.W.2d 825, 828 (Ky. 1957).

19. *Bullock v. State*, 219 Md. 67, 74, 148 A.2d 433, 437 (1959).

Direct testimony of prior identification as substantive evidence finds support in the court decisions of California,²⁰ Kentucky,²¹ Maryland,²² Pennsylvania,²³ and Washington;²⁴ and at least two states, Ohio and New York, have enacted permissive legislation in this area.²⁵ Whether by statute or court decision, it appears only a matter of time before prior identification testimony is admitted as substantive proof in Missouri. We may be there now. *Rima* does not say.

DAVID K. HARDY

VISITING RIGHTS OF A PUTATIVE FATHER

*Commonwealth v. Rozanski*¹

The married petitioner sired an illegitimate child by the appellant. Although he instituted divorce proceedings in order to marry the mother, intercession by a priest led to reconciliation with his wife. While remaining faithful to his wife, he visited and supported the bastard until, three years after birth, the mother denied him access to the infant. She planned to marry and wished her future husband to assume the role of father. Petitioner was granted visiting privileges. The mother appealed, but the Superior Court of Pennsylvania sustained the decision below. In so doing, it explicitly overruled its holding in *Commonwealth ex rel. Golembewski v. Stanley*, a precedent of only seven months' standing. The central issue of both cases was whether a fit father, *i.e.*, one suitable to undertake the responsibilities of parenthood, could obtain visiting privileges, a limited form of custody, with an infant bastard in the mother's custody. Unless otherwise indicated, this note pertains only to situations where both parents are fit, and the bastard is an infant.

Golembewski held: "As a matter of legal policy, it is detrimental to the welfare of an illegitimate child in the mother's custody to award visitation privileges to the putative father."² *Rozanski* found this policy offensive to Pennsylvania's primary standard governing custody of legitimates and illegitimates: the child's best interest determines matters of custody. Since circumstances possibly could

20. *People v. Gould*, *supra* note 11.

21. *Supra* note 18.

22. *Judy v. State*, *supra* note 11; *Bullock v. State*, *supra* note 19.

23. *Commonwealth v. Saunders*, *supra* note 11.

24. *State v. Simmons*, *supra* note 11; *State v. Wilson*, *supra* note 11.

25. The New York statute provides: "When identification of any person is in issue, a witness who has on a previous occasion identified such person may testify to such previous identification." N.Y. CODE CRIM. PROC. § 393-b (1957). The Ohio legislation provides for third party testimony as well as direct. OHIO REV. CODE § 2945.55 (1953).

1. 206 Pa. Super. 397, 213 A.2d 155 (1965).

2. *Commonwealth ex rel. Golembewski v. Stanley*, 205 Pa. Super. 101, 208 A.2d 49 (1965).

exist where visitation, a limited form of custody,³ would promote welfare, it should not be banned. *Rozanski* also applied to visitation the rule usually treated as the best interest doctrine's corollary: what constitutes the best interest is to be decided by the trial court based on its consideration of the circumstances. Since the lower tribunal directly examined the circumstances, its judgement that visitation promoted the child's welfare was conclusive, abuse of discretion being absent.⁴ Regarding the mother's marital plans, the superior court maintained they were in the future and, therefore, uncertain. If fulfilled, the father then could be replaced by her husband. In the meantime, the child needed a father image.⁵

According to early common law, the parish took custody of a bastard, and the infant was considered parentless.⁶ The courts altered the rule by giving the mother custody and allowing the father a better custodial claim than anyone else if she died or abandoned their issue.⁷ Later universal adoption of the best interest doctrine in bastardy cases raised the possibility of a father prevailing against the mother, but this seldom has occurred.⁸ The courts have justified this infrequency on two grounds. First, the father's parentage cannot be ascertained as certainly as the mother's. Maternal custody, consequently, assures the infant is with one parent.⁹ Second, the mother's natural ties of affection to the infant, and vice versa, are stronger than those with the father. Therefore, maternal tutelage offers the best prospects for the child's care and welfare.¹⁰ Only gross indifference to the child or highly immoral conduct by the mother have led the courts to grant the father custody.¹¹ If both parents are fit, the mother is made custodian. Even a mother with the above unfavorable traits often is awarded visiting privileges when the father is the predominant custodian due to the judiciary's strong feeling about the mother and infant's natural ties.¹² However, when the mother obtains custody, it is usually exclusive.

3. See *Strong v. Owens*, 91 Cal. App. 2d 336, 205 P.2d 48 (1949); *People ex rel. Francois v. Ivanova*, 14 App. Div. 2d 317, 221 N.Y.S.2d 75 (1961); *Ex parte Hendrix*, 186 Okla. 712, 100 P.2d 444 (1940).

4. See *Francois v. Ivanova*, *supra* note 3. According to the older rule, the court of first instance's discretion was not subject to review. This is no longer the case. See *Strong v. Owens*, *supra* note 3; *Veach v. Veach*, 195 P.2d 697 (Mont. 1948).

5. *Commonwealth v. Rozanski*, *supra* note 1 at 400, 213 A.2d at 158.

6. *Horner v. Horner*, 1 Hag. Con. 337, 351, 166 Eng. Rep. 573, 578 (Consistory Ct. of London 1799).

7. *E.g.*, *Aycock v. Hampton*, 84 Miss. 204, 36 So. 245 (1904); *County of Dodge v. Kemnitz*, 32 Neb. 238, 49 N.W. 226 (1891).

8. *In re McGraw*, 228 N.C. 46, 44 S.E.2d 349 (1947); see Annot., 98 A.L.R.2d 431 (1964).

9. *Wall v. Hardee*, 240 N.C. 465, 82 S.E.2d 370 (1954).

10. *Lipsey v. Battle*, 80 Ark. 287, 97 S.W. 49 (1906); see Annots., 98 A.L.R.2d 427 (1964), 51 A.L.R. 1507 (1927).

11. *In re R.H.D.S.*, 370 S.W.2d 661 (St. L. Mo. App. 1963); *People ex rel. Kessler v. Wehnert*, 114 N.Y.S.2d 598 (App. Div. 1952); *People ex rel. Meredith, v. Meredith*, 272 App. Div. 79, 69 N.Y.S.2d 462, *aff'd*, 297 N.Y. 692, 77 N.E.2d 8 (1947); *People ex rel. Lewisohn v. Spear*, 174 Misc. 178, 20 N.Y.S.2d 249 (1940); *Welsh v. Bagnall*, [1944] Ont. 526, [1944] 4 D.L.R. 439.

12. *In re R.H.D.S.*, *supra* note 11; *People ex rel. Kessler v. Wehnert*, *supra* note 11; *People ex rel. Lewisohn v. Spear*, *supra* note 11; *Welsh v. Bagnall*, *supra* note 11; *Allison v. Bryan*, 26 Okla. 520, 109 Pac. 934 (1910).

In a few jurisdictions, the father explicitly has been denied visitation; but in these states, the exclusiveness has rested on statutes giving the mother custody and control.¹³ Most cases merely restate the rule granting the mother custody, and add that it is in the child's best interest when the mother is fit. No provision is made for or against paternal visitation despite the father's professed interest in the child.¹⁴ Consequently, the effect of most decisions is contrary to *Rozanski*. Only New York,¹⁵ and possibly New Jersey,¹⁶ have reached the same conclusion as Pennsylvania. The numerous decrees in other states where paternal visitation has been awarded must be distinguished from the instant case, for in those other jurisdictions the award has followed legitimation of the bastard.

Legitimation is a legislatively established process whereby, once the father fulfills certain statutory conditions, the bastard's legal status becomes that of a child born in wedlock.¹⁷ While this definition must admit to many exceptions and variations from state to state, it is valid in nearly all jurisdictions in the following respects. First, the child is entitled to inherit from his father.¹⁸ Second, the fit father can obtain visitation. Third, his permission becomes necessary before the child can be adopted by third parties.¹⁹ In order to legitimate the child, many states, including Missouri, minimally require the father marry the mother.²⁰ Visitation litigation is normally incident to divorce or separation proceedings. With the exception of Pennsylvania and New York, no jurisdiction of this type has awarded visitation without marriage to the mother.²¹ Many states, in addition to the marital method, have provided for non-marital legitimation procedures.²² These

13. *E.g.*, *Wallace v. Wallace*, 60 Ill. App. 2d 300, 210 N.E.2d 24 (1965).

14. *Lipsev v. Battle*, *supra* note 10; *Blakemore v. Blakemore*, 217 Ga. 174, 121 S.E.2d 642 (1961); *Dehler v. State*, 22 Ind. App. 383, 53 N.E. 850 (1899); *Pratt v. Nitz*, 48 Iowa 33 (1878); *In re McGraw*, *supra* note 8.

15. *Francois v. Ivanova*, *supra* note 3.

16. *Baker v. Baker*, 81 N.J. Eq. 135, 85 Atl. 816 (1913).

17. See *Lund's Estate*, 26 Cal. 2d 472, 159 P.2d 643 (1945) for discussion of legislature's power to legitimate.

18. *In re Ruff's Estate*, 159 Fla. 777, 32 So. 2d 840 (1947); see Annot., 175 A.L.R. 375 (1948).

19. *In re Adoption of a Minor*, 155 F.2d 870 (D.C. Cir. 1946); *In re McGrew*, 183 Cal. 177, 190 Pac. 804 (1920); *Chance v. Pigneguy*, 212 Ky. 430, 279 S.W. 640 (1926); *In re Anderson*, 189 Minn. 85, 248 N.W. 657 (1933); *In re Adoption of Doe*, 231 N.C. 1, 56 S.E.2d 8 (1949); *Swartwood's Adoption*, 19 Pa. Dist. 819 (1910); *Sklaroff v. Stevens*, 84 R.I. 1, 120 A.2d 694 (1956); *Harmon v. D'Adamo*, 195 Va. 125, 77 S.E.2d 318 (1953); *In re Adoption and Change of Name of a Minor*, 191 Wash. 452, 71 P.2d 385 (1937).

20. *E.g.*, ARK. STAT. ANN. § 61-103 (1947); CONN. GEN. STAT. ch. 795, § 45-274 (1958); GA. CODE § 74-101 (1963); ILL. REV. STAT. ch. 3, § 12 (1966); § 474.070 RSMo 1959; N.J. STAT. ANN. § 9:15-1 (1960); N.Y. DOM. REL. § 24; PA. STAT. ANN. tit. 48, § 167 (1963).

21. *Kilgore v. Tiller*, 194 Ga. 527, 22 S.E.2d 150 (1942). See also *Lipsev v. Battle*, *supra* note 14; *Wallace v. Wallace*, *supra* note 13.

22. *E.g.*, ALA. CODE tit. 27, § 11 (1958); ALASKA STAT. tit. 25, ch. 20, § .050 (1965); ARIZ. REV. STAT. ANN. § 8-103, § 12-631 (1956); CAL. CIV. CODE § 230; COLO. REV. STAT. § 4-1-6 (1963); DEL. CODE § 1302 (1953); FLA. STAT. tit. 46, § 731.29 (1963); IDAHO CODE § 16-1504 (1947); IND. STAT. § 6-207 (1946); N.C. GEN. STAT. ch. 49, § 10 (1943).

are designated by different terms in different states, e.g., adoption, legitimation, or acknowledgement, and involve requirements varying from state to state. For instance, in some jurisdictions the father must admit his paternity in writing,²³ while in others a writing is not required.²⁴ States providing for non-marital legitimation consistently require legitimation before visitation will be awarded.²⁵ Thus, Pennsylvania and New York are alone in awarding it solely on the basis of best interest, without the father's meeting the conditions, marital or non-marital, for legitimation.

Rozanski maintained New Jersey was in line with the New York view and considerable reliance was placed by the superior court on a New Jersey decision, *Baker v. Baker*.²⁶ In that case, the father married the mother after birth, had another child by her in wedlock, separated from her, and was granted visitation with both children. Marriage was not then, though it is now, a method to legitimate in New Jersey. Therefore, New Jersey's rule immediately after *Baker* was that the father could obtain visitation with a bastard he had not legitimated. However, for some time prior to *Rozanski*, a statute of that state had made the mother sole custodian of a non-legitimated bastard, and specifically had denied the father any privileges without her consent.²⁷

In addition to this frail authority, the instant opinion has another weakness. The superior court reasoned the father could inculcate certain desirable qualities the mother could not, and would provide the child with a male figure. The probability the child would develop personal and emotional ties with the father under the aegis of the decree was largely disregarded.²⁸ If the only legal device for severance of these ties was a court finding they no longer were in the child's welfare and that some other custodial arrangements had become preferable, *Rozanski* would be on firmer ground. However, the relationship is also terminable by the mother, regardless of best interest, on the basis of adoption statutes.

As in most jurisdictions,²⁹ Pennsylvania's legislature has provided maternal consent is the only parental permission necessary for adoption of bastards by third parties.³⁰ Also as in most jurisdictions,³¹ adoption in Pennsylvania termi-

23. ALA. CODE tit. 27, § 11 (1958).

24. CAL. CIV. CODE § 230.

25. See *Bagwell v. Powell*, 267 Ala. 19, 99 So. 2d 195 (1957); *In re Heaton's Estate*, 135 Cal. 385, 67 Pac. 321 (1902); *Ex parte Hendrix*, *supra* note 3.

26. *Supra* note 16.

27. N.J. STAT. § 9:16-1 (1960).

28. *Commonwealth v. Rozanski*, *supra* note 1.

29. E.g., ALASKA STAT. tit. 20, ch. 10, § .020 (1963); ARIZ. REV. STAT. ANN. § 8-103 (1956); CAL. CIV. CODE § 224; COLO. REV. STAT. § 4-1-6 (1963); CONN. GEN. STAT. ch. 778, § 45-61 (1958); DEL. CODE § 907 (1953); FLA. STAT. tit. 6, § 72.14 (1963); GA. CODE § 74-403 (1963); IDAHO CODE § 16-1504 (1947); ILL. REV. STAT. ch. 3, § 12 (1966); § 453.030 RSMo 1959; N.Y. DOM. REL. § 111. See also 2 AM. JUR. 2d *Adoption* §§ 25, 26 (1962). For states indicating father's consent is necessary if his parentage is established in a paternity suit see ARK. STAT. ANN. § 56-106 (1947); IND. STAT. ANN. § 3-121 (1946).

30. PA. STAT. ANN. tit. 1, § 2 (1963).

31. E.g., *Spencer v. Franks*, 173 Md. 73, 195 Atl. 306 (1937); See Annot., 114 A.L.R. 263 (1937). See also 2 AM. JUR. 2d *Adoption* § 85 (1962).

nates whatever privileges a father of a legitimate child has.³² Adoption, a fortiori, would conclude privileges of a putative father.³³ Consequently, a mother can halt the relationship by consenting to adoption either by her present or future husband or by other third parties.³⁴

The Pennsylvania court cannot prevent this without disregarding either the statutes by requiring paternal permission or the numerous decisions declaring adoption terminates paternal privileges. Of course, if legitimation had been required in *Rozanski*, as it would be in most jurisdictions, this dilemma would not arise since paternal permission becomes necessary before the court allows adoption. Therefore, the instant opinion's interpretation of the best interest rule allows courts of first instance to create circumstances in which the best interest of the child would be judicially unprotectable. This would occur in the likely event the father-child relationship developed, subsequent to the decree, into one the termination of which would not be in the child's best interest. For this reason, the decision is unsound.

RICHARD W. PETERSON

BANKRUPTCY—BANK MAY BE FORCED TO MAKE DOUBLE PAYMENT UPON CHECKS DRAWN BY A VOLUNTARY BANKRUPT

*Bank of Marin v. England*¹

Debtor drew five checks in favor of a creditor upon its account with the defendant bank. The debtor then filed a voluntary petition in bankruptcy. Six days later, the creditor presented the checks to the bank for payment. The bank, having no notice of the bankruptcy proceedings, paid the checks. The bankruptcy trustee sought to require the bank to pay him the amount paid by the bank upon the five checks. Both the referee in bankruptcy and the district judge ruled that the bank was liable for this sum. The decision was affirmed by the Ninth Circuit Court of Appeals, holding, in effect, that a bank which honors checks without notice that the drawer has filed a voluntary petition in bankruptcy is liable to the bankruptcy trustee for the amount paid.

Section 70(a) (5) of the Bankruptcy Act² provides that the trustee in bankruptcy shall be vested by operation of law with the title of the bankrupt, as of the date the petition is filed, to any rights in action which prior to the filing of the petition the bankrupt could by any means have transferred. The bankruptcy trustee is vested thereby with a bankrupt depositor's claim against a bank as it

32. *In re Adoption of Harvey*, 375 Pa. 1, 99 A.2d 276 (1953).

33. See *Whetmore v. Fratello*, 197 Ore. 396, 252 P.2d 1083 (1953). See also *Willey v. Lawton*, 8 Ill. App. 2d 344, 132 N.E.2d 34 (1956).

34. See *Whetmore v. Fratello*, *supra* note 33.

1. 352 F.2d 186 (9th Cir. 1965). Since this article went to press, the decision of the court of appeals was reversed by the Supreme Court. 87 S. Ct. 274 (1966).

2. Bankruptcy Act § 70(a) (5), 52 Stat. 879 (1938), as amended, 11 U.S.C. § 110(a) (1964).

stood at the time the petition in bankruptcy was filed.³ This is by operation of law and requires no action on the part of the trustee, the bank, or the depositor.

A bank can be placed in an awkward position by the operation of section 70(a) (5). A petition in bankruptcy can be filed in any federal district court, and it would be almost impossible for a bank to keep itself informed about the filing of bankruptcy petitions in every competent jurisdiction. Furthermore, a bank has a duty to its depositors to honor their validly drawn checks. So a bank might easily honor a check after the title to that account has been vested in the trustee, and have no way of knowing about the change in title. This gives rise to the question whether a bank has any defense under the Bankruptcy Act to an action by the trustee to recover an amount paid out of such an account.

Prior to 1938, no section in the Bankruptcy Act protected a transaction occurring after the petition was filed. It was repeatedly announced that the filing of a petition in bankruptcy was "a *caveat* to all the world, and in effect an attachment and injunction."⁴ However, the courts noted that where innocent parties were concerned, the mere filing of the petition gave rise to no actual notice that would put such persons on guard. In particular, it was held that a bank was not liable to the trustee when in good faith, and in the ordinary course of business, it paid checks drawn by a depositor against which, unknown to the bank, a petition in bankruptcy had been filed.⁵

In 1938, section 70(d) was added to the Bankruptcy Act.⁶ It enumerates exceptions to the general rule of section 70(a) that the trustee in bankruptcy is vested with the bankrupt's title as of the date the petition is filed. Section 70(d) defines the full extent to which the courts may go in granting protection to a transaction with the bankrupt after the petition has been filed.⁷

3. Section 70(a) originally provided that the trustee was vested with the bankrupt's title as of the date of adjudication. However, the United States Supreme Court held the trustee should be vested with the bankrupt's title as of the date the petition in bankruptcy was filed. See *Everette v. Judson*, 228 U.S. 474, 478 (1913); *Andrews v. Partridge*, 228 U.S. 479 (1913); *Fairbanks Shovel Co. v. Wills*, 240 U.S. 642, 649 (1916); *Acme Harvester v. Beekman Lumber Co.*, 222 U.S. 300, 306 (1911). Section 70(a) was amended in 52 Stat. 879 (1938) to read that the trustee would be vested with the bankrupt's title as of the date the petition was filed.

4. *Acme Harvester v. Beekman Lumber Co.*, 222 U.S. 300, 306 (1911); *Mueller v. Nugent*, 184 U.S. 1, 14 (1902); *In re Scranton Knitting Mills, Inc.*, 21 F. Supp. 227, 228 (N.D. Pa. 1937).

5. *Citizens' Union Nat'l Bank v. Johnson*, 286 Fed. 527, 528 (6th Cir. 1923); *In re Zotti*, 186 Fed. 84 (2d Cir. 1911); *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658, 659 (S.D.N.Y. 1935); *Stevens v. Bank of Manhattan Trust Co.*, 11 F. Supp. 409 (S.D.N.Y. 1931). It should be noted that none of these cases afforded protection to a bank which cashed checks drawn by a bankrupt depositor subsequent to the adjudication of bankruptcy. So these cases would not stand for the proposition that a bank which cashes checks after a voluntary petition in bankruptcy has been filed should be protected. This follows because the Bankruptcy Act § 18(f), as amended, 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964), provides that the filing of a voluntary petition in bankruptcy shall act as an automatic adjudication of bankruptcy.

6. Bankruptcy Act § 70(d), 52 Stat. 881 (1938), 11 U.S.C. 110 (1964).

7. Section 70(d) (5) provides that "[e]xcept as otherwise provided in this

There are two provisions in section 70(d) to which a bank might look for a defense. The first is subsection 2, which provides that one indebted to the bankrupt can pay such indebtedness to the bankrupt or upon his order without liability to the trustee; provided that he does so in good faith and at any time before the adjudication of bankruptcy or before a receiver takes possession of the property of the bankrupt, whichever first occurs. This provision will protect a bank which pays a check in the interval between the filing of an involuntary petition and the adjudication of bankruptcy,⁸ but it will not protect a bank which pays a check after a voluntary petition has been filed by the drawer.⁹ This is because section 18(f)¹⁰ provides that the filing of a voluntary petition shall operate as an automatic adjudication of bankruptcy.

The second provision to which a bank might look for a defense is the "negotiability" proviso of section 70(d) (5).¹¹ *Rosenthal v. Guaranty Bank & Trust Co.*¹² held that one of the purposes of this proviso was to protect a bank which cashed checks in good faith subsequent to the adjudication of bankruptcy. This was erroneous. The "negotiability" proviso states that nothing in the Bankruptcy Act shall impair the negotiability of negotiable instruments. This would protect a bank paying a check only if presentment and payment of the check constitute a negotiation. It has been held that they do not.¹³

Accordingly, a bank which pays a check in good faith without notice that the drawer has filed a voluntary petition in bankruptcy will find no defense under the Bankruptcy Act to an action by the trustee for recovery of the amount paid. This is an absurd result. The bank is under a duty to honor the validly drawn checks of its depositors until it receives a stop payment order. Furthermore, the bank must act on the check within twenty-four hours.¹⁴ In order to exist in the modern commercial community, the bank must perform this duty rapidly. Yet, under the present state of the law, the only way a bank can protect itself against liability to a trustee in bankruptcy in this situation is through the impossible course of

subdivision, . . . no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid against the trustee." Courts have interpreted this to mean that section 70(d) defines the full extent to which the courts may go in granting protection to transactions after the petition is filed. *Lake v. N.Y. Life Ins. Co.*, 218 F.2d 394, 398 (4th Cir. 1955), *cert. denied*, 349 U.S. 917 (1955); See 4 COLLIER, BANKRUPTCY, ¶ 70.68(1), at 1503 (14th ed. 1964).

8. *Feldman v. Capitol Piece Dye Works, Inc.*, 293 F.2d 889 (2d Cir. 1961).

9. *Ibid.*

10. Bankruptcy Act § 18(f), as amended, 73 Stat. 109 (1959), 11 U.S.C. § 41(f) (1964).

11. "Provided, however, That nothing in this title shall impair the negotiability of currency or negotiable instruments." See statute cited note 7 *supra*.

12. 139 F. Supp. 730 (W.D. La. 1956).

13. *Shammas v. Boyett*, 114 Cal. App. 2d 139, 249 P.2d 880, 883 (1952); *Fidelity Deposit Co. v. Maron Nat'l Bank*, 116 Ind. App. 453, 64 N.E.2d 583, 589 (1946); UNIFORM NEGOTIABLE INSTRUMENTS ACT § 963.

14. If the check is presented to the payee bank for payment it must be paid by the close of business on the day of presentment. See UNIFORM COMMERCIAL CODE § 3-506. If the check is presented for deposit then the bank has until midnight of the day following presentment to make any final settlement. See UNIFORM COMMERCIAL CODE § 4-302.

keeping itself constantly informed of the filing of voluntary petitions by its depositors in any competent jurisdiction.

An amendment to the Bankruptcy Act is needed providing another exception to the rule of section 70(a). This should be that a trustee in bankruptcy can have no cause of action against a bank for checks paid after the filing of a voluntary petition unless the trustee has given the bank notice of the bankruptcy proceedings prior to the time the checks were paid or unless the bank in some way had knowledge of the proceedings.

BERNARD D. SIMON III

APPLICATION OF THE "LESSER INCLUDED OFFENSE" RULE TO THE BAD CHECK OFFENSES IN MISSOURI

*State v. Friedman*¹

The trial court convicted the defendant, charged with the felony of having given a check drawn upon a bank in which he knew he had no funds,² of the lesser offense of giving a check upon a bank, knowing he had insufficient funds in or credit with such bank for payment of the check in full, a misdemeanor.³ The basis for this finding was Missouri Rule of Criminal Procedure 27.01(c), which states: "The defendant may be found guilty of an offense necessarily included in the offense charged." The St. Louis Court of Appeals reversed the conviction, holding that the offense under section 561.460 was not a "lesser included offense" of section 561.450.

The test which the court applied in arriving at this result is one approved by the Missouri Supreme Court in an earlier case.⁴ This test states that "[i]f the greater of two offenses includes all the legal and factual elements of the lesser, the greater includes the lesser; but if the lesser offense requires the inclusion of some necessary element not so included in the greater offense, the lesser is not necessarily included in the greater."⁵ In applying this test, the court determined

1. 398 S.W.2d 37 (St. L. Mo. App. 1965).

2. Section 561.450, RSMo 1959. "Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever . . . by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds . . . shall be deemed guilty of a felony. . . ."

3. Section 561.460, RSMo 1959. "Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer, has not sufficient funds in or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor. . . ."

4. *State v. Amsden*, 299 S.W.2d 498 (Mo. 1957).

5. 27 AM. JUR. *Indictments and Informations* § 194 (1940).

that the offense under section 561.460 is not necessarily an included lesser offense of the crime under section 561.450 because of the statutory language. It concludes that the phrase ". . . or credit with such bank," contained in section 561.460, constitutes an element not included in the offense under section 561.450.

This decision indicates that some problems exist in Missouri in determining if one offense is "necessarily included" in another. In applying the "statutory language" test, the court is relying on *State v. Amsden*,⁶ where the Missouri Supreme Court applied the same test to determine if an offense under section 559.300, RSMo 1959 (carnal knowledge of an unmarried female of previously chaste character between the ages of sixteen and eighteen by a person over the age of seventeen), was necessarily included in the offense charged under section 559.260 (forcibly ravishing a woman over the age of sixteen). In holding it was not, the court looked solely to the difference in elements of the two statutory definitions. By this "statutory language" test the offense under section 559.300 would never be included in an offense under section 559.260.

It is obvious, however, that the result based on the "statutory language" test does not conform to the realities of the *Amsden* situation. As a practical matter, it is impossible for a man to commit forcible rape on a girl between the ages of sixteen and eighteen without also meeting the requirements of the lesser offense specified in section 559.300. Assuming the State could have shown that the prosecutrix was of previously chaste character, the commission of forcible rape under these facts necessarily included the lesser offense of carnal knowledge because all of the legal and factual elements of both crimes were present. To satisfy due process requirements, the information must put the defendant on notice that he could be convicted of the lesser offense under section 559.300 without a showing of lack of consent, which is an element of forcible rape, but not of carnal knowledge.⁷ Such requirements can be determined from the accusatory pleading.

A more flexible test to determine when an offense is necessarily included is the "accusatory pleading" test, which emphasizes the allegations of fact contained in the indictment or information. The question of whether a crime is a necessarily included offense is decided by looking at the allegations contained in the accusatory pleading. A number of jurisdictions, including California⁸ and New York, use this test.⁹ Adoption of the accusatory pleading test by the Missouri courts would give the courts more flexibility in determining when a crime is necessarily included in the greater offense. It could result in the lesser offense in *State v. Amsden* being necessarily included, since the facts in evidence apparently satisfy the elements

6. *Supra* note 4.

7. *State v. Wells*, 367 S.W.2d 652 (Mo. 1963).

8. 309 P.2d 456, 458 (Cal. 1957). The California Supreme Court discusses the divergence and lack of clarity among many jurisdictions in deciding if an offense is "necessarily included in a greater offense." The court applies the "accusatory pleading" test to an information which charged robbery of an automobile, and specifically pleaded but did not separately state the lesser offense of "taking an automobile." "Because the information charged defendant with taking 'an automobile,' he was put on notice that he would be prepared to defend against a showing that he took that particular kind of personal property." *Id.* at 463.

9. Note, 16 U. FLA. L. REV. 341, 342-343 (1963).

of both crimes. By the more rigid "statutory language" test, however, the opposite result occurs.¹⁰ This points up the weakness of the test currently applied by the Missouri courts. With the "accusatory pleading" test the "lesser included offense" question can be decided from the allegations of a particular indictment and the facts shown at trial. This avoids frustrating efficient but just administration of the criminal process by a mechanical application of an inflexible "rule of statutory elements." It would prevent the necessity of multiple indictments and multiple trials of the same facts.¹¹ Further, while use of the "accusatory pleading" test would avoid the problems inherent in trying to determine if the greater offense includes "all of the legal and factual elements of the lesser . . .,"¹² it would seem to satisfy the due process requirement that "the defendant . . . be informed with reasonable certainty whereof he is charged, so that the admissibility of evidence can be determined, and so that, when the case is done, it will bar another prosecution for the same offense."¹³

Adoption of the "accusatory pleading" test in Missouri would be especially helpful in the area of "no funds" and "insufficient funds" checks, which constitutes a large part of the workload of the prosecutor's office and is covered by two different sections of the statutes. A typical problem with which the prosecuting attorney is faced under the "bad check" statutes is whether to bring the indictment under section 561.450 ("no funds") or under section 561.460 ("insufficient funds"). Under the decision in the principal case, an acquittal of a charge under one section may mean a new prosecution under the other section if the prosecutor has failed to foresee the effect of his evidence. This involves additional expense and inconvenience to both the defendant and the State. Further, a prosecutor who thinks he will have difficulty getting a conviction of a "bad check" offender under the felony section will tend to bring his information or indictment under the misdemeanor section as a matter of practical necessity. This will lead to a number of offenders getting off with light punishments under the misdemeanor section when they should have been convicted of the more serious charge.¹⁴ These problems

10. Cf. *People v. Marshall*, *supra* note 8. "If a defendant were charged in statutory language with assault 'with intent to commit murder' ([Cal.] PEN. CODE sec. 217) and, separately, with assault with a deadly weapon' ([Cal.] PEN. CODE sec. 245), the essential legal elements of neither offense charged would be 'necessarily included' in the elements of the other (although both offenses charged might in fact be committed by the same act and, hence, be subject to the provisions of section 654 of the Penal Code); therefore, the term 'included offense,' as used in the foregoing cases . . . must refer to offenses included in the language of the pleading, not to offenses necessarily included in the language of the statutes."

11. *State v. Graham*, 322 S.W.2d 188, 194 (Spr. Mo. App. 1959).

12. *Supra* note 1, at 40.

13. *Supra* note 11. MO. CONST. art. 1, §§ 18(a), 19; MO. R. CRIM. P. 24.01. Cf. *People v. Hess*, 45 Cal.2d 171, 175, 288 P.2d 5 (1955), cited with approval in *People v. Marshall*, *supra* note 8, at 461 n.6. 42 C.J.S. *Indictments and Informations* § 130 (1944).

14. Another serious problem, outside the scope of this note, is the use of the Prosecutor's office as a "collection agency" for bad checks. It is suggested that if we are going to have statutes covering this area, we ought to make them workable and effective.

would seem to be greatly alleviated by use of the "accusatory pleading" test which looks to the pleading to determine not only whether it informs the defendant "with reasonable certainty whereof he is charged," but also whether it defines the crime "with sufficient particularity so as to enable the defendant to avail himself of his conviction or acquittal for protection against a further prosecution for the same cause."¹⁵

In the *Friedman* case, the St. Louis court recognizes that "it is true that the gravamen of both offenses is the intent to cheat and defraud."¹⁶ The court also recognizes that ". . . it would seem obvious that a drawer who knows that he has *no funds* in the bank when he issues a check must of necessity know that his funds therein are *insufficient* to pay the same in full."¹⁷ The court then applies the statutory language test and concludes that the offense under section 561.460 is not necessarily included in the greater offense under section 561.450 because, "[i]n this case the necessary element which is included in section 561.460, and which is not included under section 561.450, is to be found in the words ' . . . or credit with, such bank,' which form a part of the former." The court rules that an acceptable charge under section 561.460 must allege not only that the drawer knew that he had insufficient funds in the bank, but also that he knew that he had no credit with such bank for the payment of the check in full. An allegation that one, with intent to defraud, gave a check upon a bank knowing he had no funds, which according to the court also alleges that he "must of necessity know that his funds therein are insufficient to pay the same in full,"¹⁸ renders superfluous an allegation that he also knew he had not sufficient credit with the bank in order to get an instruction on the lesser offense under section 561.460.¹⁹ The court does not consider that "intent to cheat and defraud" is an element of both crimes, and was alleged in the information, and that credit with the bank would negative this intent under a charge based upon either section. Therefore, the element of "lack of credit" hardly seems a sufficient basis for holding that a violation of section 561.450 does not include a violation of section 561.460. This is because one who has "intent to cheat and defraud" when he writes a check knowing he has *no funds* in the bank must know he has *insufficient credit* with the bank as well as insufficient funds "for payment of the check in full." The words "or credit with" appear to be excess verbiage in section 561.460, in view of the inclusion of "intent to cheat and defraud," which is a necessary element of the crime. This is further indicated by the definition of "no funds" offense by section 561.450, in which lack of credit with the bank is not mentioned while "intent to cheat and defraud" is.

15. Note, 31 SO. CAL. L. REV. 93, 95 (1957); *Hagner v. United States*, 285 U.S. 427 (1931). On the problem of a second jeopardy for the same offense, see generally MO. CONST. art. 1, sec. 19; *State v. Hamlin*, 171 S.W.2d 714 (Mo. 1943); *State v. Bowles*, 360 S.W.2d 706, 707 (Mo. 1962); Miller, *The Plea of Double Jeopardy in Missouri*, 22 MO. L. REV. 162 (1957).

16. *Supra* note 1, at 39.

17. *Ibid.*

18. *Ibid.*

19. *Supra* note 10. "One of the tests of sufficiency of facts stated in an information is whether, if taken as true, they disclose the defendant to have committed the offense."

A showing of "credit with" the bank for payment of the check in full would be a good defense to a charge of either offense. The Missouri courts can look to the accusatory pleading to determine if an offense is necessarily included in the one charged, and achieve results based upon the particular case before them rather than a fixed statutory definition.

Does the fact that the drawer's knowledge of his lack of credit was not pleaded by the prosecutor in this case deprive the defendant of due process of law?²⁰ It is doubtful that a defendant charged with the crime in the principal case would be "taken by surprise" by evidence tending to show "insufficient funds in or credit with such bank for payment of the check in full." The defense of credit as defined in section 561.480²¹ clearly would be available to the defendant as a good defense to either the felony charge under section 561.450 or a charge under section 561.460. Failure to plead lack of credit would not create any danger of surprise under due process concepts. Only by a rigid application of the "statutory language" test is the result of the principal case reached.²² While the "insufficient funds" offense is not an included offense under section 561.450 by the statutory language yardstick, it is under the accusatory pleading test. After transfer of defendant's appeal to the St. Louis Court of Appeals, the prosecuting attorney did not enter his appearance, file a brief, or participate in the hearing, so presumably no arguments against the test applied were presented to the court.

An alternative solution would lie in revision of our statutes. Our present "bad check" laws could be improved by passage of a law similar to that passed in Oklahoma last year.²³ A revised statute taking the present "no funds" check offense out of the "confidence game or fraudulent checks" section and incorporating it with the offense under section 561.460 would simplify prosecutions in this area. Under such a "graded" offense statute, the lesser included offense and double jeopardy difficulties would be eliminated, regardless of the test used. The Oklahoma statutes base the distinction between felony and misdemeanor upon the value of the property obtained and upon prior convictions for bogus checks.²⁴ These are other factors often used to determine if a lesser offense is necessarily included in a greater offense. The "accusatory pleading" test could be effectively applied to cases arising under such a statute. The distinction between a "no funds" check and an "insufficient funds" check could be either retained or resolved by emphasizing the intent "to cheat and defraud." The provisions of section 561.470,²⁵

20. *Supra* note 13.

21. "The word 'credit' as used in sections 561.460 to 561.480 shall be construed to mean an arrangement or understanding with the bank or depository, for the payment of such check, draft or order. (R.S. 1939, sec. 4697)."

22. *State v. Perkins*, 380 S.W.2d 433, 435 (Mo. 1964).

23. OKLA. SESS. LAWS 1965, ch. 216.

24. Note, 3 TULSA L.J. 53, 55 (1966).

25. "As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee. As amended Laws 1963, p. 684, sec. 1." Sec. 561.470, RSMo 1963 Supp.

making failure to pay the check within a specified time prima facie evidence of intent to cheat and defraud, could be incorporated in such a statute. An additional advantage would be the more effective sanction against chronic offenders, who are frequently inadequately punished under our present system.

The burden on the prosecutor's office created by the multitudinous "bad check" offenses is a very real one. It is submitted that either adoption of the "accusatory pleading" test or revision of our statutes would cure the present deficiencies in this area.

RONALD C. SPRADLEY

DUE PROCESS: FTC COMMISSIONERS DISQUALIFIED AFTER SENATE PROBES MENTAL PROCESSES

*Pillsbury Co. v. FTC*¹

In 1952 the government filed a complaint against Pillsbury alleging violations of the Clayton Act's anti-monopoly provision. In 1955 Federal Trade Commission Chairman Howrey testified before the Senate antitrust subcommittee, accompanied by three men who would, as Commissioners, participate in the four-man 1960 *Pillsbury* decision. Senators who felt that the FTC should find against Pillsbury, as it ultimately did, questioned Howrey and his associates extensively regarding the Commission's approach in the Pillsbury case. During the Senate hearings, the *Pillsbury* case was pending before the FTC hearing examiner. Because Congress had probed so deeply into his mental processes as a quasi-judicial officer, Chairman Howrey disqualified himself from participating in the decision. But the court in the instant case invalidated the Commission's order because procedural due process "required at least some of the members in addition to the chairman to disqualify themselves."

A fair trial is not a mere statutory right completely subject to legislative whim. The basic necessity for a fair hearing is that imposed as a minimal requirement by the due process of law clause of the fifth and fourteenth amendments to the Constitution.² Though adherence to strictly judicial standards varies with the type of proceeding involved,³ the basic due process requirement binds administrative agencies as well as courts.⁴ A fair hearing is the "inexorable safeguard"⁵

1. 354 F.2d 952 (5th Cir. 1966).

2. *R.R. Comm'n. v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393 (1938); *Ohio Bell Tel. Co. v. Pub. Util. Comm'n.*, 301 U.S. 292, 304-05 (1937); *Philadelphia Co. v. SEC*, 175 F.2d 808, 817 (D.C. Cir. 1948), *rev'd*, other grounds, 337 U.S. 901 (1949). See CHAMBERLAIN, DOWLING & HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 193-207 (1942). The statute governing administrative hearings is the Administrative Procedure Act, §§ 5-10, 60 Stat. 239-43 (1946), 5 U.S.C. §§ 1004-09 (1964).

3. *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962).

4. *Philadelphia Co. v. SEC*, *supra* note 2; *Kline v. United States*, 41 F. Supp. 577, 583 (D. Neb. 1941).

5. *Morgan v. United States*, 304 U.S. 1, 15 (1938).

guaranteeing the parties in a quasi-judicial proceeding at least that fundamental fairness which is the essence of due process.⁶ Administrative adjudication must be the decision of an impartial tribunal after a full and open hearing at which the parties are entitled to notice and the right to be heard.⁷ Failure to observe these requirements invalidates the proceedings and renders the decision void or voidable.⁸

One factor vitiating the proceedings is participation in the decision by a disqualified judicial officer. Due to common law, statutory, or constitutional due process requirements,⁹ judges have long been subject to disqualification for pecuniary interest, kinship, personal bias or prejudice, and prejudgment of the case. Courts early held that quasi-judicial officers were also subject to disqualification¹⁰ and tended to apply the same rules as they had applied to judges.¹¹

Two often-cited decisions disqualified officials for bias¹² and for pecuniary interest.¹³ More in point with the instant case are decisions dealing with a prior public expression of views by a quasi-judicial officer which implies prejudgment of the case and sacrifices the appearance of impartiality. One court refused to disqualify a quasi-judicial officer who wrote that since he knew the case so well, there was no need of a hearing.¹⁴ The Supreme Court declined to disqualify a Cabinet officer who had vigorously criticized the second *Morgan* decision in a letter to the New York Times.¹⁵ Again the high court would not disqualify Fed-

6. *In re Murchison*, 349 U.S. 133, 136 (1955); *Morgan v. United States*, *supra* note 5, at 19.

7. *R.R. Comm'n. v. Pacific Gas & Elec. Co.*, *supra* note 2; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 73 (1936) (Brandeis, concurring opinion).

8. *ICC v. Louisville & N. R.R.*, 227 U.S. 88, 91 (1913); *Texaco, Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964); *Cupples Co. Mfrs. v. NLRB*, 103 F.2d 953, 956 (8th Cir. 1939). See 1 AM. JUR.2d *Administrative Law* § 68 (1962).

9. *Tumey v. Ohio*, 273 U.S. 510, 523, 532 (1927).

10. *State ex rel. Miller v. Aldridge*, 212 Ala. 660-62, 103 So. 835-36 (1925).

11. Notes, *Disqualification of Administrative Officials for Bias*, 13 VAND. L. REV. 712 (1960).

12. *State ex rel. Miller v. Aldridge*, *supra* note 10.

13. "Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Tumey v. Ohio*, *supra* note 9, at 532. More recently the courts have indicated ambiguous concern for the due process implications of commingling the prosecuting and the adjudicating functions. See *In re Murchison*, *supra* note 6, 44 CALIF. L. REV. 425 (1956); *SEC v. R. A. Holman & Co.*, 323 F.2d 284 (D.C. Cir. 1963); *Amos Treat & Co. v. SEC*, *supra* note 3, at 266-67, *Law, Disqualification of SEC Commissioners Appointed from the Staff: Amos Treat, R. A. Holman, And the Threat to Expertise*, 49 CORNELL L.Q. 257 (1964), 51 GEO. L.J. 186 (1962), 76 HARV. L. REV. 831 (1963).

14. "However tactless or undesirable such remarks may have been, they fell short of a statement that nothing that might be shown at such a hearing would change his mind." *Lumber Mut. Cas. Ins. Co. v. Locke*, 60 F.2d 35, 38 (2d Cir. 1932).

15. "Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. Both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941).

eral Trade Commissioners who had expressed firm views on the illegality of a certain practice in reports to Congress and the President and in testimony before Congress.¹⁶ Twice courts who did not disqualify the officer indicated their displeasure. In the *Brownell* case the Attorney General had publically condemned an organization about which he would later have to make a quasi-judicial determination.¹⁷ In the *Gilligan* case the Securities and Exchange Commission issued an unfavorable press release in similar circumstances.¹⁸ But in the recent *Texaco* case, the court disqualified FTC Chairman Dixon on due process grounds for delivering a speech charging Texaco with illegal practices before participating in the FTC *Texaco* decision.¹⁹

The instant case is unusual in that here the prior expression of views occurred during a probe of the officials' mental processes. High federal courts early took it for granted that it was wholly improper for a court to probe the mental processes of a judge,²⁰ quasi-judicial officer²¹ or board.²² The classic statement of this policy appears in the fourth *Morgan* decision.

The Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to probe the mental processes of the Secretary." Just as a judge cannot be subjected to such a scrutiny, so the integrity of the administrative process must be equally respected.²³

Numerous federal decisions reiterate this principle.²⁴

One line of cases, however, maintains that judicial review opens all questions

16. "The fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject. . . . Judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and of fact." *FTC v. Cement Institute*, 333 U.S. 683, 701, 703 (1948).

17. *Nat'l. Lawyers Guild v. Brownell*, 225 F.2d 552, 555 (D.C. Cir. 1955).

18. ". . . the Commission's reputation for objectivity and impartiality is opened to challenge by the adoption of a procedure from which a disinterested observer may conclude that it has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 468-69 (2d Cir. 1959) (dictum).

19. *Texaco, Inc. v. FTC*, *supra* note 8.

20. *Fayerweather v. Ritch*, 195 U.S. 216, 306-07 (1904).

21. *United States ex rel. West v. Hitchcock*, 205 U.S. 80, 86 (1907); *DeCambra v. Rogers*, 189 U.S. 119, 122 (1903).

22. "The essence of the discussion of a common cause and the judgment ensuing upon that discussion must lie in freedom of expression The logic of this position requires the preservation from questioning of each member of the general body." *NLRB v. Botany Worsted Mills*, 106 F.2d 263, 267 (3d Cir. 1939).

23. *United States v. Morgan*, *supra* note 15, at 422 (citations omitted).

24. See, e.g., *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947); *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 48 (3d Cir. 1942); *NLRB v. Air Associates, Inc.*, 121 F.2d 586, 591 (2d Cir. 1941); *Bethlehem Shipbuilding Corp. v. NLRB*, 114 F.2d 930, 942 (1st Cir. 1940); *Kline v. United States*, *supra* note 4.

relating to the regularity of the administrative board's proceedings. Although most courts, relying on the presumption of administrative regularity, declined to compel the board to answer interrogatories regarding its manner of considering the case, they nevertheless stoutly upheld their power to do so.²⁵ One court did order the board to answer such interrogatories.²⁶ The value of these decisions as authority is minimized, however, by the fact that all occurred between the first and fourth *Morgan* decisions. In the first *Morgan* case, the Supreme Court implied that courts could probe the decisional processes of a Cabinet officer, but retreated from this position in the second decision, and crystallized its anti-probing policy in the fourth *Morgan* case.²⁷

The instant case combines the two traditional classes of cases discussed above. The anti-probing decisions deal with probing after the officer's decision. But the disqualification cases concern an official's expression of views on the case prior to his decision. The *Pillsbury* case prohibits probing of mental processes, which is usually done to preserve the integrity of decisions already rendered; but the decision's rationale is that of the disqualification cases: to assure litigants an impartial tribunal which has not prejudged a case still pending. Thus these two classes of cases coalesce in *Pillsbury*, where officials were disqualified because their mental processes had been probed.

Another feature complicating the case is that it concerns, not the typical judicial probing of a judicial decision, but congressional probing of an administrative decision. Courts wish to give administrative adjudications the anti-probing protection enjoyed by judicial determinations. Administrative efficiency also demands that officials be spared the harassment, political pressure, and loss of time entailed in probing their decisions. Nor are courts insensitive to litigants' right to a fair hearing by an impartial tribunal, as required by constitutional and statutory due process provisions.²⁸ To maintain public confidence in the soundness of administrative adjudication,²⁹ "justice must satisfy the appearance of justice."³⁰

Nevertheless there are strongly conflicting policy considerations. Even judges are not perfectly neutral adjudicating machines. Quasi-judicial officers have the additional responsibility of making agency policy and informing the public.³¹ Chosen for their sympathy with agency aims, they often have firm convictions

25. See, e.g., *Inland Steel Co. v. NLRB*, 105 F.2d 246, 249 (7th Cir. 1939); *Cupples Co. Mfrs. v. NLRB*, *supra* note 8; *NLRB v. Biles Coleman Lumber Co.*, 98 F.2d 16, 17 (9th Cir. 1938); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937).

26. *NLRB v. Cherry Cotton Mills*, 98 F.2d 444, 447 (5th Cir. 1938).

27. *Morgan v. United States*, 298 U.S. 468, 482 (1936); *Morgan v. United States*, *supra* note 5, at 18; *United States v. Morgan*, *supra* note 15, at 422. See SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 141-48 (1958).

28. See cases and statute cited note 2, *supra*.

29. *Morgan v. United States*, *supra* note 5.

30. *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Amos Treat & Co.*, *supra* note 3, at 267.

31. Elman, *A Note on Administrative Adjudication* 74 YALE L.J. 652 (1965).

about protecting the sector of the public interest assigned to their agency.³² Naturally this tends to conflict with the desire for impartial quasi-judicial officers without prior opinions amounting to prejudgment of the case.³³ Furthermore, congressional committees are charged with overseeing administrative agencies.³⁴ Congress cannot decide intelligently on statutory changes regarding an agency without examining its past performance. Thus the due process argument is not a compelling as it might seem at first, because of the delicate, dual role of the quasi-judicial officer and because of Congress's duty to oversee administrative agencies. Hence courts have been quicker to criticize such officers than to disqualify them. But these considerations do not justify the infringement of due process which occurred in the *Pillsbury* case. Therefore the instant case sets salutary limits which both the prudent administrator and the legislator would do well to observe. Here the court held that for Congress to probe extensively the mental processes of quasi-judicial officers regarding a pending case was not legitimate supervision of the agency's legislative function, but interference with its judicial function, depriving the litigants of due process of law.

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32. It was partly to secure this "bias" that adjudication in these areas was entrusted by Congress to administrative agencies instead of to the courts. See 2 DAVIS, ADMINISTRATIVE LAW 135 (1958).

33. Of course officials may have definite policy views without prejudging the facts of a particular case. For a vigorous argument against the "neutral" officer, see FTC Chairman Dixon's article, "Disqualification" of Regulatory Agency Members: *The New Challenge to the Administrative Process* 25 FED. B.J. 273 (1965). See also Comment, *Prejudice and the Administrative Process* 59 NW. U. L. REV. 216 (1964). There is the added problem that if agency officers disqualify themselves, there may be no one legally competent to make a determination. This doctrine of "necessity" was relied on heavily in *FTC v. Cement Institute*, *supra* note 16, at 701 where the court observed that: "Had the entire membership of the Commission disqualified itself . . . this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings . . ." On necessity see Annot., 39 A.L.R. 1476 (1925).

34. Broden, *Legislative and Executive Oversight of the Administrative Process* 26 ICC PRAC. J. 768 (1959). See Newman & Keaton, *Congress and the Faithful Execution of the Laws—Should Legislators Supervise Administrators?* 41 CALIF. L. REV. 565 (1953-54); *Report on Congressional Oversight of Administrative Agencies of the Committee of Administrative Law of the Association of the Bar of the City of New York*, 5 RECORD ABNYC 11 (1950).