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Recent Decisions

J. K. Few

RECENT DECISIONS

CONSTITUTIONAL LAW—Double Jeopardy—State statute allowing reprosecution on original indictment in new trial after conviction of lesser offense reversed, invalid under fourteenth amendment—*United States v. Wilkins* (2d Cir. 1965).

George Hetenyi was tried in New York for first degree murder, but was convicted only of second degree murder. He appealed this conviction and it was reversed because of errors committed by the state. He was tried a second time under the original indictment and was convicted of first degree murder. Again the conviction was reversed. A third trial resulted in a conviction of second degree murder—the same as in the first trial and the judgment was affirmed by the New York courts. In federal habeas corpus proceedings Hetenyi then challenged the constitutionality of the New York statute which permitted these reprosecutions.[1] The district court denied Hetenyi's application for a writ.[2] On appeal to the United States Court of Appeals for the Second Circuit, *held*, reversed. Although Hetenyi was finally convicted of the lesser charge of second degree murder, there was a reasonable possibility that he was prejudiced by the mere fact that he was unconstitutionally charged with the greater crime of first degree murder in the third trial and this possibility deprived Hetenyi of liberty without due process of law. *United States v. Wilkins*, 348 F.2d 844 (2d Cir. 1965) (2-to-1), *cert. denied*, 34 U.S.L. WEEK (U.S. Feb. 22, 1966).

The Supreme Court has never invalidated a state conviction on the ground of reprosecution for the same offense. The leading case in this area of the law is *Palko v. Connecticut*.[3] In that case, as in *United States v. Wilkins*,[4] the defendant was indicted and tried for first degree murder but was found guilty of second degree murder. The conviction was reversed because of errors and the defendant was retried on the original indictment and convicted of first degree murder. Although the essential facts are identical to the facts in *Wilkins*, the dominant issues are different. In *Palko* the state appealed and the only question decided was whether a Connecticut statute permitting state ap-

1. N.Y. CODE OF CRIMINAL PROCEDURE §§ 464, 544 (1958).
2. United States v. Wilkins, 227 F. Supp. 460 (W.D.N.Y. 1964).
3. 302 U.S. 319 (1937).
4. 348 F.2d 844, 850 (2d Cir. 1965), *cert. denied*, 34 U.S.L. WEEK 3283 (U.S. Feb. 22, 1966).

peals in criminal cases was an infringement of the fourteenth amendment. The Court discussed Palko's contention that the fourteenth amendment incorporated the fifth, but said that the fourteenth only absorbed specific provisions of the Bill of Rights when "neither justice nor liberty would exist if they were sacrificed."[5] The statute in question did not subject Palko to "a hardship so acute and shocking that our polity will not endure it."[6] The state was attempting to obtain a trial free from error, a right which the defendant would also have.

In 1937 when *Palko* was decided, the controlling decision on the question of state reprosecution for the same offense was the 1910 case of *Brantley v. Georgia.*[7] In that case the defendant was tried for murder and was found guilty of voluntary manslaughter. Upon his appeal the conviction was reversed and a new trial was ordered. He was retried under the original indictment and found guilty of murder. The Supreme Court held that such a reprosecution "was not a case of twice in jeopardy under any view of the Constitution of the United States."[8] *Brantley* relied solely on the premises raised by *Trono v. United States*,[9] in which the Court held that the fifth amendment did not prohibit this kind of reprosecution, even for federal authorities, where the accused by his own appeal obtained a reversal of the conviction. By his own appeal, the Court said, the defendant waived his rights under the fifth amendment.

In 1957 *Trono* was undermined by *Green v. United States*,[10] where in a five to four decision the Court held that the fifth amendment prohibited the accused from being reprosecuted in a federal prosecution for first degree murder following a conviction of a lesser and included offense *even though the accused had appealed.* By limiting *Trono* to its particular facts, the Court avoided expressly overruling it, but the proposition for which it stood was clearly reversed.[11] *Green* held that the kind of re-

5. Palko v. Connecticut, *supra* note 3, at 326.

6. *Id.* at 328.

7. 217 U.S. 284 (1910).

8. *Id.* at 285.

9. 199 U.S. 521 (1905). Specifically, the Court said of the Philippine statute:
> [T]he phrase in question was to be construed as the same phrase would be construed in the instrument from which it was originally taken, viz., the Constitution of the United States . . . and not as it might possibly be construed with reference to Spanish law or Spanish procedure.

Trono v. United States, 199 U.S. 521 (1905).

10. 355 U.S. 184 (1957).

11. *Id.* at 190.

prosecution in *Wilkins*, if conducted by federal authorities, would violate the fifth amendment.

The precise issue of whether a state may reprosecute an individual for first degree murder where a conviction of second degree murder has been successfully appealed has yet to be decided by the Supreme Court. Circuit Judge Marshall in *Wilkins* said that the answer to this question might be gleaned from "premises and presumptions revealed in those Supreme Court cases in which a double jeopardy claim was interposed against a state" or "from the doctrine of selective incorporation."[12]

There is no doubt that the Court recognizes an element of double jeopardy in the concept of fourteenth amendment due process.[13] The recent decisions leave little room to believe that "our polity will endure," any longer this pattern of reprosecution.[14] In the *Green* case, the Court found no legitimate interest of society to justify such a reprosecution by federal authorities. Indeed it was found to place an unconscionable limitation on a "vital societal interest"—assuring the accused a fair trial free from legal error prejudicing his substantive rights. This interest would be endangered because no matter how gross the legal error which prejudiced him, appeal by the accused would give the prosecution a "second chance" to get a conviction on the greater charge. The Court in *Green* called this dilemma "incredible." It is not likely that the same dilemma in a state court will be any less incredible.

The Supreme Court may decide a question of state reprosecution, such as that raised in *Wilkins*, on the basis of one of three standards. The first two involve the doctrine of incorporation, the third does not. First, under a federal standard, the Court may decide that the fifth amendment provision against double jeopardy is incorporated, as such, into the fourteenth and the states are required to adhere to federal requirements. Second, the Court may decide that only the "basic core" of the double jeopardy clause is incorporated and that while the states are not held strictly to federal requirements there are definite limits to their authority. Third, the Court may apply a "fundamental

12. United States v. Wilkins, *supra* note 4, at 850.

13. *E.g.*, Bartkus v. Illinois, 359 U.S. 129 (1959).

14. See Griffin v. California, 380 U.S. 609 (1965) (comment on failure to testify); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation); Malloy v. Hogan, 378 U.S. 1 (1964) (self incrimination). Can it be reasonably said that these rights are more fundamental than the right against double jeopardy?

fairness" standard. Under this standard only those prohibitions against double jeopardy inherent in the fourteenth amendment would be considered. The test that would be applied would be essentially the same as that applied by the Court in *Palko*. Under this standard the Court still could declare such reprosecutions unconstitutional simply by making the value judgment, as did Judge Marshall in *Wilkins*, that our societal values have evolved to a degree where such a reprosecution is thought to be fundamentally unfair.[15] In *Wilkins* the Court declined to apply a standard. It simply said Hetenyi's detention is unconstitutional "under any of the three standards."[16]

Affirmance of the result reached in *Wilkins* would have a major impact upon state laws. Of the thirty-eight states which have considered the question, half of them have allowed this pattern of reprosecution.[17] Some of them, like New York, have statutes authorizing it.[18] Others, like South Carolina, follow the common law rule that a defendant waives jeopardy when he appeals.[19] Some states have provided for it in their constitutions.[20] Since the Court must upset that much law just to affirm the doctrine laid down in *Wilkins* and since the tendency is toward full incorporation, there is a good chance it will go all the way and incorporate the double jeopardy clause with the full force of the federal standard, sounding the death knell to *Palko v. Connecticut* and other doubtful precedents which have already been considerably eroded by the application of the doctrine of selective incorporation.[21]

IRVIN D. PARKER

15. United States v. Wilkins, *supra* note 4, at 853.

16. *Id.* at 856.

17. For the state law prior to *Green*, see generally Annot., 61 A.L.R.2d 1141 (1958). Since 1958 New Jersey and Arizona have decided the question for the first time. New Jersey barred the reprosecution. State v. Williams, 30 N.J. 105, 152 A.2d 9 (1959). Arizona allowed it. State v. Thomas, 88 Ariz. 269, 356 P.2d 20 (1960). Washington overruled a prior decision and barred the reprosecution. State v. Schoel, 54 Wash. 2d 388, 341 P.2d 481 (1959).

18. *Supra* note 1.

19. State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906); State v. Steadman, 216 S.C. 579, 59 S.E.2d 168 (1950).

20. These states are Colorado, Georgia, Mississippi and Missouri.

21. See generally, Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

CRIMINAL LAW—Admission of Confessions—Ultimate decision upon voluntariness must be left to jury—*United States v. Inman* (4th Cir. 1965).

The defendant was convicted of transporting a stolen car in interstate commerce in violation of the federal statute.[1] The district judge in the jury's absence heard evidence concerning the signing of a confession and determined it to have been made voluntarily. The jury was recalled and the confession was proved. In its charge to the jury the court did not mention the voluntariness of the confession. On appeal to the United States Court of Appeals for the Fourth Circuit, *held*, reversed. When any confession is offered in a criminal proceeding, even though no objection is made, the court should order the jury to withdraw; evidence of the circumstances of the confession then must be heard. Unless the court is convinced beyond a reasonable doubt that the confession is voluntary, it may not be admitted as evidence; if, however, the court is persuaded that the confession is voluntary, it may be put before the jury with an instruction that the jury must find the confession voluntary before they may consider it. *United States v. Inman*, 352 F.2d 954 (4th Cir. 1965). (3-to-0).

Three methods of protecting the accused against the use of involuntary confessions in criminal proceedings have appeared. First is the so-called Wigmore or "orthodox" rule in which the judge hears all the evidence and rules on voluntariness, the jury considering voluntariness as affecting the weight of the confession; this is apparently the rule followed by the trial judge in the instant case. Second is the Massachusetts or "humane" rule in which the judge rules on voluntariness and, if he finds it voluntary, instructs the jury that it too must find the confession voluntary before considering it as evidence; this is the approach called for by the present decision. Third is the New York rule in which the judge admits the confession if there is evidence as to voluntariness over which reasonable men could differ.

It was the New York rule which was invalidated by the United States Supreme Court in *Jackson v. Denno*[2] because "it is impossible to discover whether the jury found the confession voluntary and relied upon it, or involuntary and supposedly ignored it"[3] and because "there is nothing to show that [the question of

1. 18 U.S.C. § 2312 (1964).
2. 378 U.S. 368 (1964).
3. *Id.* at 379.

voluntariness was] resolved at all. . . ."[4] The two other rules on the admissibility of confessions, however, were approved by implication.[5]

It is not clear which rule the Fourth Circuit had employed prior to *United States v. Inman*.[6] Apparently the Massachusetts rule was followed in *Denny v. United States*.[7] The court "found no reason to reject the determination of the district court"[8] where the trial judge told the jury to disregard the confession which had been introduced unless they found that the defendant had made it voluntarily. The later case of *United States v. Smith*[9] threw doubt on the proper rule to be applied. Here the trial judge had charged that as a matter of law the confession, if made, was voluntary. "Whether in fact [the defendant] made the admissions was left to the jury under appropriate safeguards. The absolute instruction [that the confession *was voluntary*] was quite justified."[10] Thus the Fourth Circuit appeared to sanction, if not adopt, the orthodox rule.

The recent *Inman* decision was the first view of the matter by the Fourth Circuit since *Jackson v. Denno*[11] and it might have been supposed that the Supreme Court case had not compelled a choice between the orthodox and Massachusetts rules as a matter of constitutional dimension. However the *Inman* court implied that the orthodox rule might present "grave questions of Constitutional law, such as whether the entitlement to a jury trial does not compel jury determination of the validity of a confession"[12] and therefore relied on the Massachusetts rule as approved by the circuit in *Denny*.

In following the Massachusetts rule the court thought the matter vital enough to due process to override the provisions of Rule 30 of the Federal Rules of Criminal Procedure that requests for instructions shall be made at the close of the evidence or earlier—a requirement not met at the trial. As a further consequence of the problem in *Inman*, the court reaffirmed its ear-

4. *Id.* at 379, 380.
5. See *Id.* at 378 n. 8.
6. 352 F.2d 954 (4th Cir. 1965).
7. 151 F.2d 828 (4th Cir. 1945), *cert. denied*, 327 U.S. 777 (1946).
8. *Id.* at 833.
9. 303 F.2d 341 (4th Cir. 1962).
10. *Id.* at 343.
11. 378 U.S. 368 (1964).
12. 352 F.2d 954, 956 (4th Cir. 1965).

lier decision in *Stevenson v. Boles*[13] that, whether requested or not, the jury must be instructed that an involuntary confession may not be considered as evidence.

PAUL R. HIBBARD

13. 331 F.2d 939 (4th Cir. 1964), *aff'd per curiam*, 379 U.S. 43 (1965).

CRIMINAL PROCEDURE—Appellate Review of Valid Sentence—Under 28 U.S.C. § 2106 federal appellate court may reduce death sentence to life imprisonment. *Coleman v. United States* (D.C. Cir. 1965).

Appellant was convicted in 1960 of the first degree murder of a police officer in the District of Columbia. The conviction was affirmed by the court of appeals. During the pendency of this appeal the mandatory death sentence was abolished, and determination of whether the sentence should be death or life imprisonment was left to the jury. Congress also provided that cases tried before the abolition and which were before the court for sentencing or resentencing should be governed by the prior law, but that the judge could, after considering circumstances in mitigation and aggravation, impose a life sentence if he thought it justified.[1]

Under the new law appellant moved for relief from his death sentence. The district court denied relief, and appellant again went to the court of appeals, which remanded the case to the district court for a consideration of mitigating and aggravating circumstances. The district court again denied the motion and left the death sentence in effect. On appeal to the United States Court of Appeals for the District of Columbia, *held*, sentence reduced to life imprisonment under the authority of 28 U.S.C. § 2106. *Coleman v. United States*, ___ F.2d ___ (D. C. Cir. 1965). (6-to-3).

Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order . . . .

This section has never been used to reduce a sentence validly imposed[2] except in one other case[3] also decided by the Court of

1. 22 D.C. CODE § 2404 (1965).

2. The section had hitherto been used only for such action as ordering a new trial, Bryan v. United States, 338 U.S. 552 (1950), and remanding for resentence, Ballew v. United States, 160 U.S. 187 (1895).

3. Frady & Gordon v. United States, 348 F.2d 84 (D.C. Cir. 1965). The convictions were free from error, but death sentences were invalidly imposed due to (1) the court's instructions on unanimity and (2) the inadequacy of the jury poll. Since it was impossible to reconvene the same jury, and since a new jury could not perform the function, and since the trial judge could not decide punishment (as the amended code requires the jury to do it), the court of appeals directed entry of life imprisonment, the only other authorized sentence.

Appeals for the District of Columbia. In fact, federal courts have no power to modify a sentence which is within the limits of the applicable statute.[4] Speaking of this, the United States Supreme Court recently said: "This court has no such power."[5]

The situation presented to the court of appeals by this case is unique and unlikely to recur: the law changed during appeal; the trial judge died during appeal; and the judge appointed to make a determination under the amended law twice refused to reduce the death penalty. Due to this novelty of situation the case is valueless as a precedent in all but one aspect—the court's use of section 2106 to modify a sentence imposed within the limits of law.

The reasons given by the court of appeals for disturbing the sentence appear tenuous. First, the court thought it error for the district judge to make appellant carry the burden of convincing the court to reduce the sentence; the judge, they stated, should have availed himself of all relevant information in order to determine the proper sentence. The dissent felt that the judge sustained this burden at the hearing by permitting inquiry into a wide scope of circumstances in mitigation and aggravation.

Second, the court thought it error for the district judge to give weight to the law as it was at the time of the trial. The judge, they said, should have imposed punishment under the new law, and should have given no weight to the mandatory death sentence of the prior law. This conclusion is reached, however, by examining certain language in the judge's memorandum—"the sentence shall be governed by the provisions of law in effect prior to the effective date of the amendment"[6]—which is equally capable of being simply a paraphrase of the statute expressly stating this to be the law unless the judge finds a life sentence justified.

Third, the court of appeals found inconsistencies in the judge's language: In one place the judge said, "if factors of a mitigating character were present . . ."[7] and later he said, "upon consid-

4. *E.g.*, United States v. Pruitt, 341 F.2d 700 (4th Cir. 1965); Martin v. United States, 317 F.2d 753 (9th Cir. 1963); Smith v. United States, 273 F.2d 462 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960); Egan v. United States, 268 F.2d 820 (8th Cir. 1959), *cert. denied*, 361 U.S. 868 (1959); United States v. Kapsalis, 214 F.2d 677 (7th Cir. 1954), *cert. denied*, Robinson v. United States, 349 U.S. 906 (1955); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), *cert. denied*, 344 U.S. 838, *rehearing denied*, 344 U.S. 889 (1952).

5. Gore v. United States, 357 U.S. 386, 393 (1958).

6. Coleman v. United States, ___ F.2d ___ (D.C. Cir. 1965).

7. *Id.* at ___.

eration of all the circumstances in mitigation and in aggravation . . . ."[8] It concluded from these inconsistencies that the judge had not properly weighed the mitigating and aggravating factors to see if the former outweighed the latter. However, the judge wrote a detailed memorandum stating that in his opinion none of the factors—absence of premeditation, the fact that appellant was unarmed, that the homicide was unplanned, that appellant was mentally retarded, that appellant was intoxicated, and that appellant had been a model prisoner—mitigated against the murder of the policeman.

Having decided to disturb the sentence the court of appeals had four possible courses: (1) to grant a new trial; (2) to remand for designation of another judge to hold a hearing to resentence appellant; (3) to remand to the district judge who had twice refused to reduce the sentence; (4) to dispose of the case itself. The court thought option (1) unnecessary in order to cure the errors respecting sentence; it considered (2) beyond its authority; and (3) was obviously distasteful. The court was left with (4), and since for reasons discussed above it could not sustain the death penalty, it put into effect the only other possible authorized sentence—life imprisonment.

The court of appeals in this case is really saying that it disagrees with the district judge in his assessment of factors in mitigation and aggravation. But sixty years of undeviating federal precedent show that an appellate federal court has no power to reduce a valid sentence. The court in the instant case had no authority to substitute its judgment for that of the district judge in the matter of sentencing.

It is hard to disagree with the dissenting opinion that the justification for imposition of a life sentence is "completely without legal foundation,"[9] that in using section 2106 the court acted "only from expediency and with grave shortsightedness"[10] and that "the exceptions which will be developed by such a subjective standard can only depend on the likes, dislikes, prejudices, and sympathies of judges who, however well-intentioned, are in fact substituting a personal philosophy . . . for Acts of Congress."[11]

S. TUCKER MCCRAVY

8. *Id.* at ___.
9. *Id.* at ___.
10. *Id.* at ___.
11. *Id.* at ___.

CRIMINAL PROCEDURE—Release on Bail Pending Appeal—Refusal of professional bondsmen to write bond pending appeal merely because appellant has begun serving his sentence justifies release on personal bond signed by appellant and any two close relatives. *McCoy v. United States* (D.C. Cir. 1966).

The petitioner James McCoy was convicted of unauthorized use of an automobile and contempt of court. He appealed and the district court granted bail in the amount of 500 dollars. Since he had already begun serving his sentence, professional bondsmen refused to write the bond believing that he would flee the jurisdiction if his appeal failed. McCoy then petitioned the court of appeals for release on personal recognizance.[1] The record showed that he had no previous adult convictions, that he was a lifelong resident within the jurisdiction, and that he resided with his mother, brother, grandfather and two aunts. The United States Court of Appeals for the District of Columbia, *held*, petition granted.[2] It would be manifestly unjust to permit the professional bondsman to withhold bond simply because the petitioner has already begun to serve his sentence. *McCoy v. United States*, ___ F.2d ___ (D.C. Cir. 1966). (3-to-1 concurring in part).

The right to bail in federal courts is guaranteed by Rule 46 of the Federal Rules of Criminal Procedure. Rule 46(a)(1) provides, as do most state laws,[3] the absolute right to bail before conviction, except in capital cases. Rule 46(a)(2) allows bail, pending appeal, unless "the appeal is frivolous or taken for delay." There, granting of bail is within the discretionary power of the court,[4] but "should be denied only in cases in which, from substantial evidence, it seems clear that the right to bail may be abused or the community threatened by the applicant's release."[5]

1. "The procedure whereby the accused is granted liberty upon his execution of a personal bond in the bail amount without being required to supply additional assurances of his presence at trial in the form of a surety bond or other acceptable securities." REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE, at 74 (1963).

2. See text accompanying note 28 *infra* for the terms of release.

3. *E.g.*, S.C. CONST., art. 1, § 20. For a complete list of state provisions see Note, *Bail: An Ancient Practice Reexamined*, 70 YALE L.J. 966, Appendix (1961).

4. Ward v. United States, 76 Sup. Ct. 1063 (1956). See S.C. CODE ANN. §7-8 (1962) which provides an absolute right to bail pending appeal "except that no bail shall be allowed when the defendant shall have been sentenced to death, life imprisonment or for a term exceeding ten years." However, in State v. Whitener, 225 S.C. 244, 81 S.E.2d 784 (1954), it was held that the South Carolina Supreme Court may, in its discretion, grant bail where the sentence exceeds ten years.

5. Leigh v. United States, 82 Sup. Ct. 994, 996 (1962). *Cf.* Williams v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950) where Mr. Justice Jackson,

The burden of proving the applicant a "poor" risk is on the United States.[6] If bail is granted Rule 46(c) provides that it should be allowed in an amount which "will insure the presence of the defendant." The criteria for setting the amount of bail are the nature and circumstance of the offense charged, the weight of the evidence against the accused, his financial ability to give bail and his general character.

In the early common law, bail was an informal procedure whereby the sheriff would release the accused to the custody of a third party. The "bail" became bound for the accused's presence in court and if the accused escaped he was required to surrender himself instead. Although it was uncommon to keep prisoners in jail, the sheriff was free to exercise his discretion.[7] The first attempt to regulate bail was in 1275 when the Statute of Westminster classified offenses as bailable or non-bailable.[8] Subsequent English statutes codified the procedure for obtaining bail[9] and established the protection against excessive bail.[10] During this transitional period the administration of bail passed to the court and the nature of the surety's obligation evolved into a promise to pay money if the accused failed to appear.[11]

This concept of bail carried over into America. It became apparent, however, as society became more mobile and as the frontier expanded, that many defendants were unable to find a person willing to offer himself as security. As a consequence, the commercial surety came into being. He would supply bond in return for a premium or percentage of the bail and the accused would obtain his freedom. In addition to his fee, the professional bondsman would often require some form of collateral security to protect against forfeiture. The risk involved was not great, however, since many courts did not hesitate to waive or refund

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denying an application for bail pending appeal, observed: "Imprisonment to protect society from predicted but unconsummated offense is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it."

6. Ward v. United States, *supra* note 4.

7. See 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 584-90 (2d ed. 1899). For an excellent discussion of the history of bail see Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 965-89 (1965). See also Sullivan, *Proposed Rule 46 and the Right to Bail*, 3 GEO. WASH. L. REV. 919 (1963); Note, *Bail: An Ancient Practice Reexamined*, *supra* note 3.

8. 3 Edw. 1 c. 15 (1275).

9. 1 & 2 Philip and Mary c. 13 (1554) in FREED & WALD, BAIL IN THE UNITED STATES: 1964, 1.

10. I Wm. & Mary c. 2 sec. 1, 2 (10) (1688) in FREED & WALD, *op. cit. supra* note 9.

11. Note, *Bail: An Ancient Practice Reexamined*, *supra* note 3, at 967.

forfeitures where it appeared that the bondsman had been diligent in preventing the accused's escape.[12]

Gradually the professional bondsman's control over bail procedure has become exclusive. Those who are adjudged poor risks by the bondsman remain in jail.[13] Consequently, the ultimate decision of whether the accused is released from custody is determined by a private independent businessman and not by a court of law.[14] In an attempt to curb the abusive features which are inherent in such a system, states[15] have enacted licensing regulations which set maximum premium rates and require bondsmen to make a statement of sufficient assets. The bondsman must also show good moral character. Where no regulation exists the bondsman need only satisfy local courts that he is solvent.[16] The federal system requires a certificate of authority to write bonds in federal court,[17] but is dependent upon the states for further regulatory measures.

The United States Senate has proposed changes in the federal bail procedure which would, in effect, have the accused pay the premium to the court rather than to a bondsman. Senate Bill 1357[18] would provide for the following:

1. Personal recognizance, to include a written promise to appear;
2. Execution of an unsecured appearance bond;
3. Execution of an appearance bond seconded by a cash deposit or other security equal to ten percent of the amount of bail fixed, refundable upon appearance;[19]

12. *Id.* at 967-68.

13. Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (concurring opinion).

14. "Placing such power and discretion in the hands of a private individual is a serious departure from our general policy of conferring the administration of criminal justice upon public officials." Statement by Senator Sam J. Ervin, Jr., at the *Hearings Before the Senate Judiciary Committee on Federal Bail Procedures*, 88th Cong., 2d Sess. 17 (1964).

15. California, Florida, Illinois, Indiana, and New York are reported to have such legislation. The prototype UNIFORM BAIL BOND ACT, adopted by the National Association of Insurance Commissioners, requires all bondsmen and their employees to serve an apprenticeship and pass a state licensing examination. See FREED & WALD, *op. cit. supra* note 9, at 37-38.

16. S.C. CODE ANN. § 7-7 (1962).

17. 31 C.F.R. § 223 (1938). See also 6 U.S.C.A. §§ 1-15.

18. 89th Cong., 1st Sess. (1965).

19. The State of Illinois has experimented with a similar ten percent plan. See generally *Proceedings of the Conference on Bail and Indigency*, 1965 U. ILL. L.F. 1, 39-40.

4. Supervision by a probation officer;

5. Daytime release;

6. Release in custody of a third party;

7. Reasonable restrictions on association or movement; or

8. Any other conditions deemed necessary.

The present Rule 46(d) provides that:

> A person required or permitted to give bail shall execute a bond for his appearance. One or more securities may be required, cash or bonds or notes of the United States may be accepted and in proper cases no security need be required.

This statute would seem to give the courts considerable leeway in setting the conditions of release. Until recently, however, courts normally have set a stated amount of security which the accused is required to post[20] or obtain through a bondsman. The eighth amendment to the United States Constitution prohibits excessive bail to assure that the defendant will gain his freedom,[21] but even if only a modest bail is set the average defendant cannot post the entire amount, so his release is entirely dependent on the professional bondsman. If he cannot obtain the amount of the required premium or if the bondsman is unwilling to undertake the risk he is effectively and extra-judicially denied a release.[22]

The intransigent attitude of the courts in permitting such a situation has been strongly criticized.[23] At present, proposals have been made to amend Rule 46(c) and (d)[24] by spelling out in detail the court's obligation to consider in each case the indi-

20. See FED. R. CRIM. P. 46(d). Absent express statutory authority a deposit in lieu of bail is not acceptable. See generally 8 AM. JUR. 2d *Bail and Recognizance* § 84 (1963).

21. Stock v. Boyle, 342 U.S. 1 (1951). The possibility of other constitutional issues is discussed in Foote, *The Coming Constitutional Crises in Bail: II*, 113 U. PA. L. REV. 1125 (1965). See also Bandy v. United States, 81 Sup. Ct. 197, 198 (1960) where Mr. Justice Douglas stated:

> We have held that an indigent defendant is denied equal protection of the law if he is denied an appeal on equal terms with other defendants, solely because of his indigence. Griffin v. Illinois, 351 U.S. 12 (1956). Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge his freedom?

22. Pannell v. United States, *supra* note 13.

23. *E.g.*, Foote, *Forward: Comment on the New York Bail Study*, 106 U. PA. L. REV. 685 (1958).

24. See 8 MOORE, FEDERAL PRACTICE § 46.13 (2d ed. 1965). See generally Sullivan, *Proposed Rule 46 and the Right to Bail*, *supra* note 7.

vidual situation of the defendant and to impose tailored requirements which, consistent with the needs of justice, will be effective in allowing his release.

The basic attitude of the courts, however, even under the present statute, has begun to change. This is illustrated by two recent cases from the District of Columbia.

In *Pannell v. United States*,[25] the court of appeals was faced with a request to grant a lesser bail pending appeal than that allowed before conviction. Pannell had been convicted of violating federal narcotic statutes and was granted an appeal in forma pauperis. The district court granted 5,000 dollars bail prior to trial but denied bail pending appeal. In his application to the court of appeals[26] he requested, if bail was granted, that the amount be reduced to 2,500 dollars, because he could only afford the premium on the lesser sum. His confinement subjected him to a particular hardship since, while in jail, he was unable to make suitable arrangements for his children.[27] There was evidence that he was a life-time resident in the jurisdiction and that, if released, employment could be arranged. Although the full court (three judges sitting) believed bail should be granted, the majority, over a vigorous dissenting opinion, refused to allow personal circumstances to provide a basis for reducing the bail. The seriousness of the offense was found to be controlling. The court stressed the need for an amended bail statute but a special bail procedure for the defendant was not considered.

In *McCoy* the court looked to the particular facts of the case and held that it would be "manifestly unjust to allow the bondsmen to 'hold the keys to the jail in their pockets.'" The court departed from the normal procedures to fashion the following terms of release to fit the individual case:

(1) Appellant is admitted to bail upon the execution of a personal bond of 500 dollars, the bond to be signed by appellant and any two of his close relatives—mother, father, grandfather, two aunts, all of whom reside in the District.

25. 320 F.2d 698 (D.C. Cir. 1963).

26. FED. R. CRIM. P. 46(a)(2) provides that "pending appeal to the court of appeals, bail may be allowed by the trial judge, by the Court of Appeals, or by any judge thereof or by the circuit justice" (i.e., a Supreme Court justice sitting in this capacity).

27. Pannell's pregnant wife was appealing her conviction in the same case and it was her desire that Pannell be released so that he could get a job and make acceptable arrangements for their three children. They were living under extremely crowded conditions with an aunt who had four children of her own.

(2) Appellant shall reside with a member of his family.

(3) Appellant shall report to the Probation Officer of the U. S. District Court for the District of Columbia on such terms as the latter may impose.[28]

The dissent agreed with the majority's approach in experimenting with more discriminating release procedures but believed that further inquiry into the possibility of danger to the community and the likelihood of flight was required.

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28. McCoy v. United States, ___ F.2d ___ (D.C. Cir. 1966).

DOMESTIC RELATIONS—Alimony—Right to support from prior husband not revived by annulment of wife's subsequent marriage. *Denberg v. Frischman* (N.Y. 1965).

In a separation agreement prior to divorce the plaintiff husband agreed to support the defendant wife so long as she did not remarry. She subsequently married and ceased all demands on the husband. This second marriage was declared void *ab initio* without fault on her part, and she then claimed that the support obligation was revived since through judicial decree she had not, in effect, remarried. The husband brought this action for a declaratory judgment that he no longer had any obligation to support the wife. On appeal from an order denying the husband relief, *held*, reversed. A support obligation is not revived by annulment of a former wife's void second marriage. *Denberg v. Frischman*, 16 A.D.2d 877, 264 N.Y.S.2d 114 (1965). (5-to-0).

The early approach to this problem of termination of support rights by a void second marriage was contrary to *Denberg v. Frischman*.[1] In *Sutton v. Lieb*[2] the Seventh Circuit held that the obligation of support not only was revived, but also that the obligation continued while the wife was living with the second husband. In reaching this result, the court applied a simple, logical rationale. Upon marriage a legal duty is imposed upon the husband to support his wife.[3] This duty survives the divorce of the parties to the marriage and is embodied in either the separation agreement or the judicial decree of divorce. The woman is legally entitled to support from only one husband, and if, after divorce she enters into a valid second marriage, she accepts the duty of support from her second husband and relinquishes the right of support from her first. If, however, the second marriage is void, it creates no duty to support, and thus she does not relinquish her right to support from her first husband and may compel him to fulfill his obligation.[4]

1. Denberg v. Frischman, 16 A.D.2d 877, 264 N.Y.S.2d 114 (1965). For a case involving a voidable marriage see Sefton v. Sefton, 45 Cal.2d 872, 291 P.2d 439 (1955).

2. 199 F.2d 163 (7th Cir. 1952).

3. Reese v. Reese, 178 So. 2d 913, 916 (Fla. 1965).

4. Sutton v. Lieb, *supra* note 2; *accord*, Johnson County Nat'l Bank & Trust Co. v. Bach, 189 Kan. 291, 369 P.2d 231 (Sup. Ct. 1962).

Logically this result cannot be attacked. A marriage, void *ab initio*, has no legal effect on the parties to the marriage or on the rights and duties existing between the parties and a third person. From a social point of view the result is less clear. Through its application the wife is not left without support, which would be the case if the void second marriage was held to terminate the obligation.[5] However, the husband, having no way of knowing the defect in the second marriage, may have assumed new obligations in reliance upon the termination of his duty to support. He always would be subjected to the possibility of having the burden of supporting his first wife shifted back on him.[6]

Recent cases, such as *Denberg*, have abandoned the view of *Sutton v. Lieb*[7] in favor of a position which allows such marriages to terminate support rights.[8] The cases have split on the significance of the woman's ability to obtain support from her second husband. Some have indicated that a revival of support rights occurs if the wife is not given the right of support from the second husband after the annullment.[9] Her guilt or innocence in entering into the second marriage is not a factor in these decisions, but the intent to abandon her right to support from her former husband seems to be controlling. Once she intentionally relinquishes her support rights she is thereafter estopped from reasserting them,[10] and apparently no overt act of the husband in reliance upon the remarriage is necessary to enable him to establish this estoppel. While not perfect in theory, the result reached under this view is sound. It upholds the election of the woman as to which husband she intends to look for support, and it allows the former husband to conduct his affairs in an atmosphere of certainty, enabling him to commit those monies to

5. *Compare* Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929) *with* Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290 (1954).

6. See Denberg v. Frischman, 16 A.D.2d 877, 264 N.Y.S.2d 114 (1965); Reese v. Reese, *supra* note 3; Gerrig v. Snierson, 344 Mass. 518, 183 N.E.2d 131 (1962).

7. 199 F.2d 163 (7th Cir. 1952).

8. Denberg v. Frischman, *supra* note 1; Reese v. Reese, *supra* note 3; Gerrig v. Snierson, *supra* note 6.

9. *Compare* Reese v. Reese, *supra* note 3 and Gerrig v. Snierson, *supra* note 6, *with* Denberg v. Frischman, *supra* note 1 and Gaines v. Jacobsen, *supra* note 5.

10. Reese v. Reese, *supra* note 3.

other uses without fear of having to resume alimony payments at a future time.[11]

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11. One valid exception to this rule occurs when the second marriage is void due to the legal incompetency of the divorced woman. It has been held that she is not only incapable of entering into a valid second marriage, but also that she is incapable of abandoning her right to support from her former husband.

One court set out the following factors to be considered in determining whether the right of support is terminated by a second marriage:

1. Whether the wife is entitled to alimony or support from the subsequent invalid marriage;
2. Whether the word "remarriage" means any kind of marriage ceremony which is voluntarily entered into by the wife with the intention of marrying;
3. Whether the marriage that is entered into gives rise to any status and rights on the part of the wife;
4. Whether in the sound discretion of the court principles of justice and fairness dictate a certain decision to avoid an unfortunate result;
5. Whether the principles of estoppel of waiver apply against the wife. Minder v. Minder, 83 N.J. Super. 159, 163, 199 A.2d 69, 73 (Super. Ct. 1964).

INSURANCE—Conclusiveness of Judgment—Insurer not bound by facts established against insured where it claims injuries intentionally caused. *Sims v. Nationwide Mut. Ins. Co.* (S.C. 1965).

After being involved in an automobile collision, the insured (Sims) was sued by one of the injured parties on a complaint alleging negligence. The insurer (Nationwide) was notified and called on to defend the action, but it refused to do so, claiming that the injury was in fact intentionally caused. A judgment was obtained against Sims on the basis of negligence and he then sued Nationwide for the amount of the judgment and attorney's fees. The trial court held that since Nationwide had failed to defend the prior action it was precluded from introducing evidence inconsistent with the result of that action, and judgment was given for Sims. On appeal to the South Carolina Supreme Court, in a case of novel impression, *held*, reversed. Because of the conflict of interests between the insurer and the insured, the insurer could not in the prior action assert its defense of intentional causation and at the same time defend the insured against a charge of simple negligence. Therefore it should not be bound by the results of that action establishing policy coverage. *Sims v. Nationwide Mut. Ins. Co.*, 145 S.E.2d 523 (S.C. 1965). (5-to-0).

Liability insurance policies commonly provide that the insurer will defend any suit against the insured in which facts within the policy coverage are alleged, regardless of whether the suit is groundless, false or fraudulent, and if the insurer fails to perform this duty it is liable for any expenses the insured incurs in retaining private counsel. Also, the insurer is bound by all pertinent and material facts established against the insured.[1] The purpose of this doctrine is to prevent two suits involving the same issues—one against the insured and the second against the insurer for indemnity. It is assumed that the insured's and the insurer's interests in opposing the third party's claim are similar.[2]

Public policy requires that these liability policies contain a further provision excluding from coverage injuries caused intentionally or at the direction of the insured. If the suit against the

1. See, *e.g.*, Carolina Veneer & Lumber Co. v. American Mut. Liab. Ins. Co., 202 S.C. 103, 24 S.E.2d 153 (1943).

2. See Farm Bureau Mut. Auto. Ins. Co. v. Hammer, 177 F.2d 793 (4th Cir. 1949).

insured falls within this exclusion, of course, the insurer is under no duty to defend and is not bound by facts proven against the insured which would establish or negate coverage.[3]

Since it usually cannot be ascertained before suit whether the injuries occurred within the exclusion or not, the duty to defend is normally determined from the allegations of the injured party's complaint. If the complaint alleges only intentional acts, the insurer may safely remain out of the case,[4] but if the complaint alleges unintentional acts or acts which may be found to be intentional or unintentional the insurer is obligated to defend.[5]

Difficulties in applying this general law occur where there is a conflict between the known or ascertainable facts and the allegations of the complaint. Probably, if the complaint alleges only intentional conduct, the insurer need not defend regardless of knowledge to the contrary on its part.[6] If the complaint is later amended, however, the insurer must at that time enter the case.[7] The courts have split on the question of the insurer's obligation when the complaint alleges unintentional acts and the insurer either knows or believes that the acts were in fact intentional.[8] This was the issue presented to the South Carolina court in *Sims v. Nationwide Mut. Ins. Co.*[9]

One line of cases has taken the position that the allegations of the complaint continue to control. Illustrative of these is *Miller v. United States Fid. & Guar. Co.*[10] There, it appeared the insured had intentionally run an automobile off the road, injuring its occupant. Suit was brought and a judgment rendered against him for negligence. The insurer had refused to defend and in the insured's suit for indemnity attempted to set up facts showing the intentional nature of the conduct. The court held that it was precluded from doing so. The court said that when the action against the insured is ostensibly within the terms of the

3. See Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521, 523 (4th Cir. 1962).

4. C.Y. Thomason Co. v. Lumbermens Mut. Cas. Co., 183 F.2d 729 (4th Cir. 1950) (applying S.C. law); Annot., 2 A.L.R.3d 1238, 1249 (1965).

5. Employers Mut. Liab. Ins. Co. v. Hendrix, 199 F.2d 53 (4th Cir. 1952) (applying S.C. law); Glens Falls Indem. Co. v. Atlantic Building Corp., 199 F.2d 60 (4th Cir. 1952) (applying S.C. law).

6. *E.g.*, Miller v. United States Fid. & Guar. Co., 291 Mass. 445, 197 N.E. 75 (1935).

7. See Harbin v. Assurance Co. of America, 308 F.2d 748 (10th Cir. 1962).

8. See Annot., 2 A.L.R.3d 1238, 1251 (1965).

9. 145 S.E.2d 523 (S.C. 1965).

10. *Supra* note 6.

policy, the insurer, whether it assumes the defense or refuses to assume it, is bound by all matters decided which relate to coverage. Further, this doctrine does not violate public policy. The insured is not allowed to recover for his own intentional wrong because it had been established by the court where the issue was first tried that he was only negligent.

At least one case has carried this approach to extremes. In *Stefus v. London & Lancashire Indem. Co. of America*[11] only negligence was alleged in the action against the insured, but at his trial the only proof offered related to intentional conduct. The court in the later suit against the insurer, held that regardless of the proof, the allegations controlled, and, thus, the insurer was liable. A vigorous dissent stated that this result leaves the insurer at the mercy of every unscrupulous litigant who, regardless of the facts, alleges a claim on which the insurance company would be liable and then proves another claim on which no liability could attach. He can still collect because the insurer cannot show the true facts.

Such a possibility of unfairness permitted the Fourth Circuit in *Farm Bureau Mut. Auto. Ins. Co. v. Hammer*[12] to fashion a contrary doctrine that the practicalities of the case control. The insured had been convicted of murder and was serving his sentence when a civil suit was initiated on behalf of the deceased and judgment rendered on a theory of negligence. The court held that the insurer was not bound by the prior judgment since it was not qualified to undertake the defense of the insured and that this disqualification was due to the insured's own misconduct. It was not possible for the insurer to defend the insured and at the same time protect its own interests since a showing that the acts of the insured were intentional would establish the liability of the insured to the injured parties to an even greater extent than that alleged in the complaint.

In 1962 the Fourth Circuit expressly affirmed these legal principles in a case involving an almost identical fact situation.[13] The rule was stated thusly:

> This does not mean that by a mere assertion of a conflict of interest the insurer may excuse itself from its contractual obligation to defend. It means only that, when there is an

11. 111 N.J.L. 6, 166 Atl. 339 (1933).
12. 177 F.2d 793 (4th Cir. 1949).
13. Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

> unresolved dispute as to the existence of this obligation, the insurer is not required to participate in a tort proceeding where the insurer's interest would be to prove a state of facts which would establish or magnify the damaged party's claim against the insured. But, if it should be later determined that there is coverage, the insurer would be liable for the cost of the defense independently arranged for by the insured, as well as any judgment against him.[14]

The South Carolina Supreme Court in *Sims* adopted the principles established by *Hammer* and quoted at length from that opinion. In both *Hammer* and *Stout* the insured had been convicted of criminal charges prior to the filing of the civil suits. There is no record in *Sims* that criminal charges were at any time instituted or even contemplated. Apparently this is the only factual distinction between this case and the earlier decisions. This distinction, at most, is merely one of degree.

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14. *Id.* at 523 n. 1.

PLEADING—Filing of Counterclaim—No waiver of right to change of venue when specifically reserved. *Harmon v. Graham* (S.C. 1965).

The plaintiff Harmon instituted this suit in Richland County after being involved there in an automobile accident. The defendant was a resident of Darlington County. The defendant moved for a change of venue to Darlington County[1] and then filed an answer and counterclaim, specifically reserving his rights under the motion. The plaintiff contended that the defendant waived his right to a change of venue by filing his counterclaim, since, in so doing, he had voluntarily invoked the jurisdiction of the Court of Common Pleas of Richland County. The trial court rejected this argument, and on appeal to the Supreme Court of South Carolina, *held*, affirmed. There is no waiver of the right to a change of venue through the filing of a counterclaim, where such right has been specifically reserved. *Harmon v. Graham*, 145 S.E.2d 521 (S.C. 1965). (5-to-0).

The view held by the majority of jurisdictions is that there is no waiver of the right to a requested change of venue if an answer is subsequently filed, unless by his conduct in the case the defendant indicates an intention to invoke the jurisdiction of the court.[2] There is authority for the proposition that participation in the pleadings, such as by requesting a continuance or by filing a cross action, is a waiver of the right to a change of venue.[3] However none of the cases have dealt precisely with the question presented in *Harmon*: Does the defendant waive his right to a change of venue by filing a counterclaim although he has specifically reserved his rights under the motion?

This case is one of first impression in South Carolina but not one that was particularly difficult to solve. The plaintiff's case was built around the theory that since a counterclaim is not mandatory its filing amounts to the filing of a separate action arising out of the same set of facts.[4] The defendant relied principally on the theory that where rights have been specifically reserved there is no implied waiver. A waiver has been defined as "the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right."[5] The South Carolina case of *Barfield v. Southern Cotton*

1. S.C. Code Ann. § 10-303 (1962).
2. 92 C.J.S. *Venue* § 124 (1944). Annot., 141 A.L.R. 1176 (1944).
3. 92 C.J.S. *Venue* §§ 124, 217 (1944).
4. S.C. Code Ann. §§ 10-652, 10-705 (1962); Collins v. Johnson, 242 S.C. 112, 130 S.E.2d 185 (1963).
5. Black, Law Dictionary (4th ed. 1951).

Oil Co.[6] held that there was no waiver of the right to a change of venue by reason of the filing of an answer, where such right had been specifically reserved. The defendant argued in *Harmon* that the holding should be extended to cases where in addition to an answer, a counterclaim is filed and further he argued that due to the substantive nature of the right to a change of venue as held in *Brice v. State & Co.*[7] and *Shelton v. Southern Kraft Corp.*[8] no waiver should result even if there is no reservation of the right to a change of venue.

The South Carolina Supreme Court of course did not need to consider the defendant's second argument in order to find for him and consequently did not render an opinion on whether or not there would have to be a reservation of the right in order to prevent a waiver. However, there is a strong indication that a reservation may not be necessary under the South Carolina statutes. In addition, it has long been settled in South Carolina that the right to a change of venue is not held to be waived even though the motion comes after the filing of the answer.[9] In such a case there is no reservation of the right at all.

In reaching its decision the court relied primarily on a California decision which held that there was no waiver when the defendant filed an answer and cross complaint at the same time he filed his motion for a change of venue. In California both the right to a change of venue and the right to file a counterclaim either with the answer or subsequently is guaranteed by statute. The court observed that it would be unreasonable to hold that by following the statute a privilege conferred by the statute is lost.[10] A similar statutory situation exists in South Carolina. Section 10-303[11] gives the defendant a right to have the trial take place in the county of his residence and 10-705[12] gives him the right to file a counterclaim. The South Carolina court concluded that in line with the reasoning of the California court, "it would be an anomaly . . . to hold that [the defendant] could not assert his right under the latter section of the code without waiving his right under the first mentioned section, which right was expressly reserved."[13]

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6. 87 S.C. 322, 69 S.E. 603 (1910).
7. 193 S.C. 137, 7 S.E.2d 850 (1940).
8. 195 S.C. 81, 10 S.E.2d 341 (1940).
9. *E.g.*, Lee v. Neal, 233 S.C. 206, 104 S.E.2d 291 (1958); Brown v. Palmetto Baking Co., 220 S.C. 38, 66 S.E.2d 417 (1951); Nixon & Danforth v. Piedmont Mut. Ins. Co., 74 S.C. 438, 54 S.E. 657 (1906).
10. Goss v. Brown, 64 Cal. 381, 221 Pac. 683 (1924).
11. S.C. CODE ANN. § 10-303 (1962).
12. S.C. CODE ANN. § 10-705 (1962).
13. Harmon v. Graham, 145 S.E.2d 521 (S.C. 1965).

TORTS—Cause of Action—Action allowed where elements of complaint did not fall into a single classic category of tort—*Morrison v. NBC* (N.Y. 1965).

Joseph L. Morrison, a member of the faculty at the University of North Carolina, appeared on "21", a television quiz show broadcast over NBC's network, on April 14, April 21, and April 28, 1958, losing to Elfrida Von Nordroff. In the fall of 1959 it became widely known that the show "21" had been "fixed" since some contestants had been briefed on questions and answers before going on the air.[1] Morrison sued in the New York courts, claiming that, by being misled by the false representations of the producers of the show into believing the show was fair, he participated and, when the public scandal later occurred, sustained harm to his reputation and was deprived of scholastic fellowships for which he had applied. On appeal to the New York Supreme Court, Appellate Division,[2] *held*, although Morrison's case did not rest on "prima facie tort,"[3] or defamation,[4] or fraud or deceit,[5] or negligence,[6] the conduct of the defendants and the harm to Morrison "fall neatly within general principles of law, even if not within any of the numbered forms of a form book."[7] *Morrison v. NBC*, 266 N.Y.S.2d 406 (App. Div. 1965). (3-to-2).

1. See *In re* Application of Melody Music, Inc. (WGMA), 36 F.C.C. 701, 702-05 (1964) for a brief description of the actions of defendants Barry and Enright in how they went about fixing the show and their actions before a grand jury.

2. See Record on Appeal, p. 71, Morrison v. NBC, 266 N.Y.S.2d 406 (App. Div. 1965). The present case as it appeared before the Appellate Division was cast in a series of complicating motions. In a prior hearing, Morrison v. NBC, 243 N.Y.S.2d 927 (Sup. Ct. 1963), five causes of action were stated. Motions were made by defendants to strike these and this was granted as to all but the first, the court stating, "The first cause is rested as plaintiff states on a claim of defamation by association." 243 N.Y.S.2d at 928. The defendants appealed this ruling. The lower court went on to hold, however, that the cause of action was barred by the statute of limitations. This ruling is appealed by Morrison.

3. "[M]isplaced speculation about the applicability of prima facie tort doctrine to this case should be eliminated." Morrison v. NBC, 266 N.Y.S.2d 406, 409 (App. Div. 1965). See Halpern, *Intentional Torts and the Restatement*, 7 BUFFALO L. REV. 7 (1957).

4. "[T]he claim is not for defamation because defendants did not publish in any form anything derogatory to or concerning plaintiff." Morrison v. NBC, 266 N.Y.S.2d at 410.

5. "[T]he acts of defendants are not in deceit although they fit precisely all but one of the several elements of deceit. They fall short with respect to the nature of the harm sustained by plaintiff." 266 N.Y.S.2d at 410.

6. "The claim is not for negligence because, while the harm may not have been intended, the act and effect of putting plaintiff into the false position of appearing to be a cheater was." 266 N.Y.S.2d at 410.

7. 266 N.Y.S.2d at 410. By not classifying Morrison's cause of action as libel or slander the court removed the bar of the one-year statute of limitations. The applicable statute was the six-year statute of limitations.

Morrison is but one of a number of cases which have been brought in New York by persons who were the innocent parties on the quiz shows involved in the fixing scandals.[8] Although these cases have different results,[9] they do show the difficulty one jurisdiction is having with litigation arising from television which involves the general area of harm to one's reputation.

When there has been harm to one's reputation, the normal means of adjudicating this wrong lies in defamation[10] which is, in turn, made up of the twin torts of libel and slander.[11] The

8. Holt v. CBS, 22 App. Div. 2d 791, 253 N.Y.S.2d 1020 (1964); Friedlander v. NBC, 20 App. Div. 2d 701, 246 N.Y.S.2d 889, *reversing* 241 N.Y.S.2d 477 (Sup. Ct. 1963); Davidson v. NBC, 204 N.Y.S.2d 532 (Sup. Ct. 1960) Goldberg v. CBS, 205 N.Y.S.2d 611 (Sup. Ct. 1960); Goostree v. Lorillard, 202 N.Y.S.2d 456 (Sup. Ct. 1960); Clark v. NBC, 195 N.Y.S.2d 940 (Sup. Ct. 1960) (defendant's motion to strike certain parts from complaint denied); *aff'd mem.*, 11 App. Div. 2d 642, 203 N.Y.S.2d 1009 (1960); *rehearing*, 209 N.Y.S.2d 60 (Sup. Ct. 1960) (cause of action of libel by virtue of extrinsic facts requires a showing of special damages and plaintiff set forth only what may be regarded as general damages).

9. In Friedlander v. NBC, 241 N.Y.S.2d 477 (Sup. Ct. 1963), the Supreme Court of New York County dismissed Friedlander's causes of action, in a factual situation similar to that in *Morrison*, for prima facie tort ("Damage is an essential element in a cause of action for prima facie tort and must be pleaded specially." 241 N.Y.S.2d at 479, quoting from Leather Dev. Corp. v. Dun & Bradstreet, Inc., 15 App. Div. 2d 761, 761, 224 N.Y.S.2d 513, 514 (1962)), fraud and deceit ("[T]here is nothing in the allegations from which an inference may be reasonably drawn that plaintiff was damaged by reason of his participation in the program is shown", 241 N.Y.S.2d at 480), and conspiracy ("There is no cause of action for civil conspiracy. Allegations of conspiracy serve only to connect defendants with the acts of co-conspirators." 241 N.Y.S.2d at 481), but dismissed defendant's motion to strike the cause of action for breach of contract. The court reasoned that when the defendants accepted Friedlander as a contestant, an implied agreement arose on the part of the defendants that the quiz show would be conducted honestly. On appeal, Friedlander v. NBC, 20 App. Div. 2d 701, 246 N.Y.S.2d 889 (1964), the Appellate Division granted the motion to strike the cause of action for breach of contract stating, "[I]t is clear that mere participation by a person in a particular enterprise does not necessarily charge him with responsibility as a principal upon contracts made or implied in furtherance of the enterprise" *Id.* at 701, 246 N.Y.S.2d at 890.

10. See Donnelly, *History of Defamation*, 1949 WIS. L. REV. 99; Lovell, *The 'Reception' of Defamation by the Common Law*, 15 VAND. L. REV. 1051 (1962); Veeder, *History and Theory of Law of Defamation, Part I*, 3 COLUM. L. REV. 546 (1903); Veeder, *History and Theory of Law of Defamation*, 4 COLUM. L. REV. 33 (1904).

11. Libel is divided into libel *per se* and libel *per quod*. Words slanderous *per se* are words which intrinsically, without innuendo, import injury, and are words from which damage . . . flows as a natural consequence. From such words malice is implied and damages are conclusively presumed to result. Courts take judicial notice of damage resulting from libel or slander *per se*. On the other hand, words slanderous *per quod* are those whose injurious effect must be established by due allegation and proof, and in order to state a cause of action for libel or slander *per quod*, as distinguished from libel or slander *per se*, the special damage or damages resulting therefrom must be alleged, a mere general allegation of damages being insufficient.

Koerner v. Lawler, 180 Kan. 318, 321, 304 P.2d 926, 929 (1956). See generally 33 AM. JUR. *Libel and Slander* § 5 (1941).

advent of radio and television has caused much activity in this area of tort law mainly because the written-spoken distinction is inapplicable when the defamatory remarks are broadcast over wavelengths to unknown audiences.[12] In seeking a means to vindicate Morrison's alleged harm,[13] this court struck out on a new path in sustaining Morrison's cause of action. The court declared that even if Morrison failed to state a cause of action because the separate elements of his complaint did not fall into any one classic category of tort, it would not "suffer a hardening of its categories making neither for sense nor justice" since this would "mark a return to a specious procedural formalism."[14]

In writing about the Anglo-American method of jurisprudence, Dean Roscoe Pound once stated:

> [O]ur common law has the means of developing [new premises] to meet the exigencies of justice and of molding the results into a scientific system. Moreover it has the power of acquiring new premises . . . . Indeed fundamental changes have been taking place in our legal system almost unnoticed, and a shifting was in progress in our case law from the individualistic justice of the nineteenth century, which has passed so significantly by the name of legal justice, to the social justice of today . . . .[15]

This idea of the law as a moving body and its application to tort law was at one time disputed between those who felt the law of tort was based on general principles[16] and those who felt that it should be based on specific remedies.[17] One obvious example of this growth based on general principles is the develop-

12. See, *e.g.*, PROSSER, TORTS 771-72 (3d. ed. 1964). See also EMERY, BROADCASTING AND GOVERNMENT 274-77 (1961); O'Neil, *Television, Tort Law, and Federalism*, 53 CAL. L. REV. 421 (1965); Note, 42 VA. L. REV. 63 (1956). In the lower court, it was held that Morrison had stated a cause of action for defamation by association, Morrison v. NBC, 243 N.Y.S.2d 927 (Sup. Ct. 1963). In the present case, the appellate division dismissed this for lack of publication, *supra* note 4.

13. "The claim then charges defendants with corrupt purposes, lying to plaintiff to induce his innocent participation in a corrupt enterprise, as a result of which, on public exposure of the enterprise, plaintiff sustained harm to his reputation and academic prospects." Morrison v. NBC, 266 N.Y.S.2d 406, 409, (App. Div. 1965).

14. 266 N.Y.S.2d at 409.

15. POUND, THE SPIRIT OF THE COMMON LAW 158 (3d ed. 1931).

16. See POLLOCK, TORTS 16-17 (15th ed. ——).

17. See SALMOND, TORTS 17-31 (12th ed. ——).

ment of the right of privacy.[18] The law of torts, then, is far from being static or stationary since one cannot say where the limits of its development will be set. Whenever it appears that one person's interests are entitled to protection against another's conduct, "the mere fact that the claim is novel will not of itself operate as a bar to the remedy."[19]

In the past, the courts of New York have not limited themselves to specific categories.[20] In an early case, *Lucci v. Engel*,[21] for example, the court held that an action on the case would be proper "where existing forms of action did not give a remedy."[22] More recently, in *Penn-Ohio Steel Corp. v. Allis-Chalmers*[23] there is dictum to the effect that it was not necessary to sustain a cause of action that the pleading allege defendant was motivated in making a false statement by a desire to injure the plaintiff. "It is enough if the falsehoods charged were intentionally uttered and did in fact cause the plaintiff to suffer actual damage in his economic or legal relationships."[24]

If it may be assumed that *Morrison* does come within the classification of action on the case, or some other broad undefined "catch-all" category of tort law since the defendants' actions

18. The right to privacy had its beginning in an article written by Samuel D. Warren and Louis D. Brandeis, Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 93 (1890). In that article the authors reviewed cases in which relief had been granted on the basis of defamation, invasion of some property right, and breach of confidence or an implied contract and concluded that a broader principal ran throughout the cases which deserved separate recognition. See PROSSER, TORTS 829-51 (3d ed. 1964).

19. PROSSER, *op. cit. supra* note 18, at 3.

20. See Gale v. Ryan, 263 App. Div. 76, 31 N.Y.S.2d 732 (1941) where a cause of action was upheld when Gale was investigated by tax authorities as a result of false statements given by Ryan. The court stated:

> While everyone is subject to investigation . . . with respect to his income, it is the allegation of the complaint that the plaintiff has wrongfully been subjected to investigation through the improper actions of these defendants and that he has been . . . otherwise damaged. Under the allegations of the complaint, we think that the plaintiff has stated a cause of action which has received recognition."

Id. at 78, 31 N.Y.S.2d at 734.

21. 73 N.Y.S.2d 78 (Sup. Ct. 1947).

22. 73 N.Y.S.2d at 79. The court held, however, that in *Lucci* the allegations made out a cause of action in libel and that if it were described as an action on the case, the effect would be to allow Lucci to escape the one-year statute of limitations applicable to libel.

23. 7 App. Div. 2d 441, 184 N.Y.S.2d 58 (1959).

24. *Id.* at 444, 184 N.Y.S.2d at 61. The court went on to decide, however, that the complaint was insufficient because of a failure to allege special damages and no showing of what allegedly false information had been given.

may not be classified as defamatory,[25] and that the harm did not flow "directly from the false position . . . into which plaintiff was put, but rather from the public exposure that was likely to follow,"[26] the question of damages becomes the crucial point.

In *Zausuer v. Fotochrome Inc.*,[27] the court stated:

> [W]hen causes of action are pleaded in tort for intentional harms falling outside the categories of the 'conventional' or 'traditional' torts, special damages must be alleged and subsequently proven . . . . [S]pecial damages must be alleged with sufficient particularity to identify actual losses and related causally to the alleged Tortious Act.[28]

In *Morrison*, however, the court departed from this rule and stated that recovery should not depend on allegations as proof of special damages by analogizing Morrison's harm to that for which the law of defamation allows recovery in the way of general damages.[29] The test was whether the "loss is a direct and natural consequence of the wrongdoing."[30]

Since there is no traditional remedy for which Morrison qualifies, the court has, in effect, created a new cause of action. For this reason, and because the analogy of Morrison's harm to that which normally results from defamation is, at best, remote, it

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25. The action for injurious falsehood is distinguished from an action of libel or slander . . . , the former action is one on the case for damages willfully and intentionally done without just cause, occasion (*sic*), or excuse, and, since the false statement injures him only by misleading other persons into action that is detrimental to him, it is governed by more lenient rules of liability . . . .

86 C.J.S. *Torts* § 48, at 971 (1954).

26. Morrison v. NBC, 266 N.Y.S.2d 406, 413 (App. Div. 1965).

27. 18 App. Div. 2d 649, 235 N.Y.S.2d 698 (1962).

28. *Id.* at 649, 235 N.Y.S.2d at 699.

29. Morrison v. NBC, *supra* note 26, at 415. Yet the court earlier states: There has been some discussion whether plaintiff's reputation could have been harmed, turning on whether it was reasonable . . . for the public to generalize that the corruption exposed applied to all rather than only to some of the contestants in the rigged contest. That is a question of fact. The pleading alleges that it happened. The proof of the pleading may well be another matter.

266 N.Y.S.2d at 414.

30. 266 N.Y.S.2d at 416. Commenting on this method of reasoning, Professor McCormick writes:

> It seems dubious, however whether this (rationale) corresponds with the facts. Injury to reputation and into feelings, allowable as 'general' damages, are by no means the inevitable results of a false accusation. It is believed that, in truth, the requirements about special damage rest, not upon any analytical distinction, but wholly upon the historical division between defamations.

McCormick, Damages 424 n. 28 (1935). See 22 Am. Jur. 2d *Damages* § 15 (1965).

would appear that he should be required to show that he has been specially damaged.[31] To hold otherwise would open the courts to untold litigation against tortfeasors whose action, while not falling within any of the classic tort categories, may have nevertheless resulted in some harm to another.[32]

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31. A plaintiff does not necessarily fail to maintain his action because the language is non-defamatory but he is obliged to prove his case much more fully. Certain points whose existence is 'presumed' in a case of defamation are required to be proved if the language is non-defamatory.
Smith, *Torts without Particular Names,* 69 U. PA. L. REV. 91, 105 n. 44 (1921).

32. As of this writing, the attorneys for NBC and the other defendants have filed for permission to appeal this decision to the court of appeals rather than proceed to try the case on its merits.

TRADE REGULATIONS — Unfair or Deceptive Advertising Practices—"Buy 1, Get 1 Free"—*FTC v. Mary Carter Paint Co.* (Sup. Ct. 1965).

Between 1955 and 1960, Mary Carter Paint Company increased its sales from one million dollars to twelve million dollars, a growth attributable at least in part to its merchandising practice of setting the price of a can of its paint equal to that of national brand paints of comparable quality and advertising and giving a second can free of extra charge.[1] Pursuant to this practice, such advertising slogans as "Buy 1, Get 1 Free" and "Every Second Can Free of Extra Cost" were employed. In 1961, proceedings before the Federal Trade Commission[2] resulted in a determination that such advertising was false and misleading in violation of Section 5 of the Federal Trade Commission Act.[3] On petition for review, the United States Court of Appeals for the Fifth Circuit set aside the order as "impermissibly vague."[4] The Supreme Court granted certiorari and, *held*, reversed and remanded to the Commission for clarification of its order. Although there was some ambiguity in the Commission's opinion, its determination could not be said to be arbitrary or clearly erroneous. *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965). (8-to-1).[5]

It is not an uncommon practice for an article to be advertised as "free" where a condition to its receipt is the purchase of some other article at a stated price. The former is "free" only because it is without additional cost to the purchaser. It is not free in the sense that it is given away absolutely and unconditionally with no strings attached, or that it is motivated by a "detached and disinterested generosity,"[6] or that the seller does not expect to recoup its cost out of the price he obtains for the articles sold.[7] It is probably for this reason that the Federal Trade Commission has taken inconsistent positions regarding the use of the word "free".

Initially, *Book-of-the-Month Club, Inc.*[8] prohibited the use of the word "free" to describe merchandise which was not in fact

1. See Mary Carter Paint Co. v. FTC, 333 F.2d 654, 655 n. 1 (5th Cir. 1964).
2. Mary Carter Paint Co., 60 F.T.C. 1827 (1962).
3. FEDERAL TRADE COMMISSION ACT § 5, 15 U.S.C. § 45 (1964).
4. Mary Carter Paint Co. v. FTC, 333 F.2d 654 (5th Cir. 1964).
5. Mr. Justice Harlan, dissenting, would not have disturbed the judgment of the court of appeals.
6. Commissioner v. LoBue, 351 U.S. 243, 246 (1956).
7. See Mary Carter Paint Co., 60 F.T.C. 1827, 1853-66 (1962) (Elman, Commissioner, dissenting).
8. 48 F.T.C. 1297, 1307 (1952).

given as a gift or gratuity or was not given without requiring the purchase of some other merchandise or the performance of some other service. Later, however, significant changes in the membership of the Commission led to a reappraisal of its earlier position and the enunciation of the so-called "free rule" in the *Black*[9] case. Accordingly, an article could be advertised as "free" even though the purchase of another article was required, so long as the terms of the offer were clearly and conspicuously set forth, the price of the article required to be purchased was not increased, and its quality and quantity were not diminished.[10]

Although Mary Carter seemingly complied with the requirements of the *Black* case "free rule," the Commission held the rule not to be an all encompassing regulation. It noted that a necessary corollary to the rule was that an article cannot be advertised as "free" which can be obtained only on the purchase of a second article if the article required to be purchased has no established market price. Mary Carter, having always sold paint buckets in matched pairs, misrepresented in effect that the stated price for the two was the customary price for one can. The fact that the purchaser was given no concession when the "free" can was not taken did not cure the misrepresentation.

The order was challenged by the dissenting commissioner, the court of appeals, and Mr. Justice Harlan in dissent, not as an erroneous and untenable proposition of law, but as confusing, unpermissibly vague, and not "sufficiently clear and precise to avoid raising serious questions as to [its] meaning and application."[11] Where the *Black* case was clearly intended to formulate an authoritative and complete exposition of the Commission's position on the subject and to give the businessmen of the United States a "clear and unequivocal answer,"[12] the FTC opinion here was "no more than a generality of legal statement which lacks any precision of meaning adequate to satisfy the requirement of clarity."[13] Conceding this point, the Commission requested and got a remand of the case for clarification of its order.[14]

9. Walter J. Black, Inc., 50 F.T.C. 225 (1953). *Book-of-the-Month Club, Inc.* was also reopened and substantially modified. 50 F.T.C. 778 (1954).

10. See Guide V, Guides Against Deceptive Pricing, 23 Fed. Reg. 7965 (1958). For the current guide, see Guide IV, 29 Fed. Reg. 180 (1964).

11. FTC v. Henry Broch & Co., 368 U.S. 360, 368 (1962).

12. Walter J. Black, Inc., 50 F.T.C. 225, 232 (1953).

13. Mary Carter Paint Co. v. FTC, 333 F.2d 654, 656 (5th Cir. 1964).

14. *Id.* at 660 (Judge Brown concurring specially).

Awaiting the Commission's forthcoming clarification, it appears that its argument with the use of the word "free" in the *Mary Carter* context is that the offer of the "free" article is open to all alike; that, being unlimited both in point of time or area, it affords the recipient no comparative advantage; that in fact it does not involve the giving away of a free article; and that the intended beneficiaries of the statute—the ignorant, the unthinking, and the incredulous[15]—should be protected in their justifiable belief that when they are offered something "free" they are getting "something for nothing." If this is the reasoning of the Commission, it would indeed be unfortunate to limit its application to this one aspect of our national life.

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15. Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).