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Notes

NOTES

CONSTITUTIONAL LAW—PRAYERS IN THE PUBLIC SCHOOLS—HELD CONSTITUTIONAL.—Is the recitation of a prayer as a daily procedure following the salute to the flag a violation of the United States or New York State Constitutions? In a recent case decided in 1959 the Supreme Court of New York held that while the Board of Regents "may authorize, it may not require, the saying of the prayer in question, but that if it does so, it must bring the authorization to the attention of parents of children in the schools, establish a procedure for excusing non-participants not only from saying the prayer but from the room, if they so elect, and take affirmative steps to protect the religious freedom of both non-participants and participants."[1]

In *Engel v. Vitale* an action of mandamus was brought by taxpayers of Union Free School District Number Nine, New Hyde Park, New York, under an "Article 78" proceeding, to compel the Board of Education district to discontinue the prayer in public schools because it violated the First Amendment of the Federal Constitution and Article 1 of the State Constitution.[2] The five petitioners were taxpayers within the district and parents of children in schools of the district. Permission to intervene was allowed to sixteen taxpayer-parents who opposed the petition, which alleged that the prayer was a daily procedure, that it was said aloud, and that it was contrary to the religious practices of those petitioners and their children. Petitioners included members of the Jewish faith, of the Society for Ethical Culture, of the Unitarian Church, and one nonbeliever.

The prayer was said aloud each day in the presence of a teacher. One request asking that a child be excused from saying the prayer was received and honored, but no child had directly asked to be excused from the classroom during the saying of the prayer, nor had any parent made a request that a child be allowed to leave the room while the prayer was being recited.

The prayer originated in the Regents' Statement of 1951[3] on Moral and Spiritual Training in the Schools; a statement supplemented by the Regents' Recommendations for School Programs on America's Moral and Spiritual Heritage adopted in 1955.[4] The Board in 1958, by majority vote, resolved that the Regents' Prayer be said daily in its schools. The text of the Regents' Prayer is: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[5]

The Constitutional question in respect to the recitation of this prayer dealt with the possible violation of the First and Fourteenth Amendments of the Federal Constitution, and the First Article of the New York State Constitution. The Fourteenth Amendment,[6] the Court held, was not applicable in this instance because its due process clause did not proscribe legislative permission for the saying of a noncompulsory prayer in public schools. In regard to the alleged violation of Article One of the New York

[1] Engel v. Vitale, 18 Misc. 2d 659, 191 N.Y.S.2d 453 (S.C. Nassau 1959).

[2] Id. on a procedural question. The Court ruled that the plaintiffs were entitled to seek relief with the mandamus.

[3] See note 1, supra, 662, 191 N.Y.S.2d 460.

[4] Id. at 662(n), 670, 191 N.Y.S.2d 459(n), 467.

[5] Id. at 660, 191 N.Y.S.2d 459.

[6] U.S. Const. amend. XIV: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

State Constitution,[7] the Court ruled that the "language of the provision is no broader than the construction given the federal 'free exercise' clause and the cases construing the state provision are entirely consistent with the conclusion reached herein."[8] In regard to the First Amendment of the Federal Constitution,[9] the Court stated that while the "free exercise" clause "allows wide latitude to the individual in public expression of his belief and public demonstration of his worship, the freedom is not absolute . . . The state may determine the time and place, and within the limits suggested above, the manner of the exercise of such freedom, when it acts to protect its own legitimate interests or that of other citizens."[10]

In answering the charge that the prayer was religious instruction, the Court in the instant case cited the *Zorach* case,[11] and also held that the prayer was not sectarian in character and the recitation not compulsory in fact.[12] Since the Court found that the prayer was not instruction, not sectarian, and not compulsory, it held that there was no violation of the "establishment" clause of the Federal Constitution. It stated, however, that the "free exercise" clause required that the respondent Board "take affirmative steps to protect the rights of those who, for whatever reason, choose not to participate."[13]

The question of prayers in the New York public schools was raised as early as 1837 with a series of rulings by the Superintendent of Common Schools of the State of New York holding that a "teacher might open his school with prayer, provided he did not encroach upon the hours allotted to instruction and provided that the attendance of the scholars was not exacted as a matter of school discipline."[14] In 1844, an Act of the Legislature prohibited New York City's Board of Education from excluding Bible reading in the classrooms of the schools of the City, but prohibited it from directing which version of the Bible was to be read.[15] This policy was still in effect in 1951 when the Board of Regents recommended the prayer in question.

An early New York case litigated in 1905 concerning prayer and religious instruction in the public schools of the State was *O'Connor v. Hedrick*.[16] In that case a teacher in a public school wore the garb of a Catholic religious order. Before the opening of the school and at the close of both the morning and afternoon sessions she recited

[7] N.Y. Const. art. I, § 3: "The free exercise and enjoyment of religous profession and worship, without discrimination or preference shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

[8] See note 1, supra, at 699-700, 191 N.Y.S.2d at 496.

[9] U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[10] See note 1, supra, at 699, 191 N.Y.S.2d at 495.

[11] Zorach v. Clauson, 303 N.Y. 161, 100 N.E.2d 463 (1951). This decision upheld the New York released time system.

[12] The Supreme Court of Missouri, in Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d, 609 (1941) held that "the school board may not employ its power to enforce religious worship by children even in the faith of their parents."

[13] See note 1, supra, at 662, 191 N.Y.S.2d 461.

[14] New York State, Education Department, Superintendent of Common Schools, Annual Report 1912/13, Part 2, pp. 524-532.

[15] Laws of 1844, Chap. 320. This became 1151 of the Greater New York City Charter; See note 1, supra, p. 474.

[16] 184 N.Y. 421, 77 N.E. 612 (1905).

prayers of the Catholic Church. During the recitation, Catholic children were required to be present while non-Catholic children waited outside "in the heat or the cold, the rain or the storm."[17] This practice, so the Court decided, constituted religious teaching within § 9 of the New York Constitution prohibiting the state or any subdivision thereof from giving aid to any school under the control of any religious denomination. Later, in 1935, the act prohibiting the excluding of Bible reading[18] was assailed in *Lewis v. Board of Education*[19] as being unconstitutional, and in 1938, a case was brought by the taxpayers of the Town of Hempstead to restrain the use of public funds to pay for transportation of pupils to and from private or religiously controlled schools.[20] In the transportation case, the Court held that "Section 14 of the Act of 1842 (ch. 150) specifically barred schools which taught religious or sectarian doctrines from receiving any public money in aid or support thereof."[21] The *Matter of Dargin*,[22] decided in 1951, laid down the rule that a baccalaureate service could not be held in the public school building because it was a religious service. The Court took occasion to note, however, that its decision did not prohibit the opening and closing of school functions with the customary invocation and benediction. In the same year, the practice of released time[23] in the public schools of New York was upheld,[24] and in 1957, the Supreme Court of the State held[25] that the addition of the phrase "under God" in the pledge to the allegiance to the flag of the United States was not unconstitutional since the act was not compulsory and a failure or refusal to recite the pledge did not result in any penalty.

The matter of prayer in the public schools has also arisen in sister states. As early as 1872 the Supreme Court of Ohio[26] upheld a resolution of the State Board of Education prohibiting religious instruction, reading of the Holy Bible, and morning devotional exercises. In 1884 an Iowa court[27] denied an injunction against the recitation of the Lord's Prayer on the ground that the plaintiff's children were not required to be in attendance at the exercises. A Nebraska court[28] in 1902 ruled that exercises in public schools which included the offering of prayer violated the state constitution which forbade secular instruction. In this instance the prayer was sectarian. That the use of the Lord's Prayer and the Twenty-Third Psalm was not religious worship or the teaching of sectarian or religious doctrines as long as the students were not required to participate was decided by a Kansas court in 1904,[29] and the next year a case in Kentucky[30] held that the opening of school with a prayer did not violate state constitutional provisions

17 O'Connor v. Hendrick, 109 App. Div. 361, 96 N.Y. Supp. 161 (4th Dep't 1905).

18 See note 15, supra.

19 258 N.Y. 117, 179 N.E. 315 (1935).

20 Judd v. Board of Education of Union Free School Dist. No. 2, Town of Hempstead, Nassau County, 278 N.Y. 200, 15 N.E.2d 576 (1938); reargument denied, 278 N.Y. 712, 17 N.E.2d 134. This changed by a 1938 amendment to the section. In Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 556, 91 L. Ed. 711 (1947), the Supreme Court ruled that New Jersey could supply bus transportation to children attending Catholic schools because "children, rather than religion, were being aided."

21 Judd v. Board of Education, supra, at 208, 15 N.E.2d at 580.

22 72 N.Y. St. Dept. Rep. 27 (1951).

23 The release of public school pupils from school attendance to attend religious classes.

24 See note 11, supra.

25 Lewis v. Allen, 5 Misc. 2d 68, 159 N.Y.S.2d 807 (1957).

26 Board of Education of the City of Cincinnati v. John D. Minor et al. 23 Oh. St. 211, 13 Am. R. 223 (1872).

27 Moore v. Moore, 64 Iowa 367, 20 N.W. 475 (1884).

28 State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846 (1902).

29 Billard v. Board of Education, 69 Kan. 53, 76 P. 422 (1904).

30 Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792 (1905).

as long as the pupils were not required to attend. The repeating of the Lord's Prayer arose again in Texas[31] in 1908 with a decision that the state constitution was not violated if the students were invited, but not required, to join.

In contrast to these last three decisions, an Illinois court[32] in 1910 declared the reading of the Bible, the singing of hymns, and the repeating of the Lord's Prayer did violate constitutional guarantees, the decision providing that "prayer was a chief part of worship."[33] In 1916, however, a Wisconsin court[34] ruled that clergymen delivering non-sectarian prayers at public school graduation ceremonies in a church did not violate state constitutional provisions and that parents objecting need not attend such exercises.[35]

In the *Wilkerson v. Rome*[36] case of 1922, the City of Rome, Georgia, brought a writ of mandamus against the individual members of the Board of Education alleging that the Board refused to carry into effect an ordinance requiring that there be daily prayer and reading of the Bible.[37] In its decision, the Court ruled that the Board of Education was subject to city ordinances; that the ordinance did not violate the state constitution; and that mandamus was the proper remedy to compel the Board of Education to perform the duty imposed by the ordinance.[38]

In 1948 the Supreme Court of the United States held that the "utilization of the State's tax-supported public school system and its machinery for compulsory public school attendance to enable sectarian groups to give religious instruction to public school pupils in the public school buildings violates the First Amendment of the Constitution, made applicable to the states by the Fourteenth Amendment."[39]

In a New Jersey case[40] of 1950 the Court found that statutes requiring at least five verses from the Old Testament of the Bible to be read in the public schools each day and permitting repetition of the Lord's Prayer in such schools were not uncon-

[31] Church v. Bullock, 104 Tex. 1, 109 S.W. 115 (1908).

[32] People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251 (1910).

[33] Ibid.

[34] State v. Plymouth, etc., Joint School Dist. No. 6, 162 Wis. 482, 156 N.W. 477 (1916).

[35] Id. at 483, 156 N.W. at 480.

[36] 152 Ga. 762, 110 S.E. 895 (1922).

[37] The ordinance required that "some portion of the King James version of the Bible, of either the Old or New Testaments, to be read and prayer offered to God in the hearing of the pupils of the public schools of the city of Rome daily during the regular sessions of these schools and that such time shall be allowed and appointed for these exercises as will admit of their being conducted with order and impressiveness. That these readings and prayers shall be conducted by the principals of said schools, or by persons invited by them for such services, and the selections of Scripture to be read shall be made by the persons conducting the readings, and the readings shall be without comment. Be it further ordained by the authority aforesaid, that exemption from attendance on these readings and prayers shall be granted to any pupil or pupils whose parents or guardians shall present to the superintendent of the schools request in writing for such exemption upon the grounds of conscientious objections."

[38] There is a minority opinion written by J. Hines who stated that the ordinance "violates the rights secured by all the above constitutional provisions, and therefore is unconstitutional and void."

[39] McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948). Only three cases involving religion and the public schools have reached the U.S. Supreme Court. They are Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 556, 91 L.E. 711 (1947); Zorach v. Clauson, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1951), and McCollum v. Board of Education. This was noted by Robert Fairchild Cushman, The Holy Bible and the Public Schools, 40 Cornell L.Q. 475 (1955).

[40] Doremus v. Board of Education of Borough of Hawthorne, 5 N.J. 435, 75 A.2d 880 (1950).

stitutional.[41] Perhaps the most recent ruling concerning religion in the public schools was made in 1959 by a United States District Court.[42] It had before it a Pennsylvania statute providing for daily reading of ten verses of the Holy Bible and a mass recitation of the Lord's Prayer in the public schools of the state, and found that the statute violated the First Amendment of the Federal Constitution.

It will be noted in the decision of the instant case that a primary reason for not declaring the prayer unconstitutional was that the prayer was not mandatory. The lack of a mandatory feature would seem to have exercised considerable influence in the decisions of 1884, 1905, and 1908,[43] previously mentioned. Essentially the decision in the instant case did not differ greatly from the ruling of the Superintendent of Schools promulgated in 1837.

What will be the outcome of future litigations on this matter? Quite possibly the 1959 ruling of the United States District Court[44] holding that the rendering of a daily prayer in the public schools of Pennsylvania was in violation of the First Amendment of the Federal Constitution may encourage future litigation. In that decision, the Court declared that the reading of verses from the Bible and the recitation of the Lord's Prayer gave the morning exercise a devotional aspect.[45] It was upon this ground that the statute was held to be unconstitutional.

In the instant case the Court was largely concerned with the compulsory aspects of the statute, and when that feature was found not to be present, the recitation of the prayer was sustained. Involved in the Pennsylvania case was the question of whether the compulsory prayer was part of a service devotional in nature, and, after the Court found that it was, the unconstitutionality of the statute was more readily determined.

The appeal in the *Engel* case has been argued[46] but no decision has been announced. In their briefs, however, the appellants pointed out discrepancies in the facts as set forth in the Court's opinion and noted that the Court accepted the affidavits of the respondent instead of scheduling a trial or hearing to determine the facts of the case. Three main points were made by the appellants. Firstly, that the most recent decisions of the United States Supreme Court and the New York Court of Appeals are to the effect that religious instruction and practice carried on inside public schools and under the aegis of the public school system violates the Federal and State Constitutions. They emphasized that the lower Court's decision was based, not on decisions of the highest court of the land, but upon a ruling of the Superintendent of Common Schools of the State of New York rendered in 1839. Three United States Supreme Court cases cited were *Everson v. Board of Education, McCollum v. Board of Education,* and *Zorach v. Clauson.*[47] The *McCollum* and *Zorach* cases were distinguished on the ground that the program in the *Zorach* case was conducted wholly outside the public schools. "Simply stated, the rule of *McCollum* and *Zorach* is that religious instruction must be kept physically outside the public schools of this land and free from the force or influence of

[41] Ibid. It was not unconstitutional because the statutes did not contravene the establishment of religion clause of the First Amendment and privilege and immunities clause of the Fourteenth Amendment, since such reading and repetition are not designed to inculcate any particular dogma, creed, belief, or mode of worship.

[42] Schempp v. School District of Abington Township, Pa., 177 F. Supp. 398 (E.D. Pa. 1959).

[43] See notes 27, 29, 30, 31, supra.

[44] See note 42, supra.

[45] Id.

[46] Argued on March 25, 1960, by William J. Butler, of Butler, Jablow & Geller, New York.

[47] See note 39, supra.

the public school systems."[48] Appellants claimed that the court below tried to avoid the high court decisions by (1) holding that the prayer is not religious instruction, and (2) by finding that the prayer is not mandatory. Referring to a statement made by the Board of Regents in their introduction to the prayer wherein they said the purpose of the prayer was to teach the children that Almighty God is their Creator, appellants alleged that "the very purpose of the Prayer is to teach the children in the public schools of this State that God is the Creator. The very purpose of the Prayer is instruction.[49] . . . Indeed, prayer is the goal of religious instruction. We learn in order to do. If, therefore, religious instruction in the public schools is unconstitutional, *a priori,* prayer or any other religious practice is unconstitutional."[50] As to the prayer not being mandatory, the appellants point out that the "fatal defect in the Prayer is that it is necessarily a part of the compulsory school system," and that, "removing elements of such compulsion is a useless procedure."[51] They stressed that, in spite of the safeguards advocated by the court below, the prayer, if such safeguards were instituted, would still be unconstitutional under *McCollum* and *Zorach,* "because it will still be part of the compulsory school system."[52]

The second point stressed by the appellants was in answer to the statement of the Court below that prayer is an integral part of our national heritage and was accepted as such at the time of the passage of both the First and the Fourteenth Amendments to the United States Constitution. Appellants argued that the prayer in question cannot be considered traditional since it appeared "on the scene long after the constitutional principle of separation of church and state had become so universally accepted in this State and so thoroughly applied to the public school system of this State that, except in isolated school districts (of which the District herein was not one), there were no prayers in the public schools."[53]

Appellants' third argument was that if the order of the court below were not reversed, the case should be remanded for a trial by jury to settle the issues of fact, "particularly the issue as to whether or not the Prayer is sectarian and thus violative of the State Constitution."[54] They asked: "Does the Prayer conform to the tenets of any particular sect or sects more closely than to any other sect or sects? If it does, it is obviously sectarian."[55] This "critical question," it was alleged, the court below did not answer.

It will be noticed that appellants have stressed the circumstance that the court below followed the ruling of a Superintendent of Schools made in 1839 rather than be guided by three recent United States Supreme Court decisions; that in regard to the matter of national heritage, the separation of church and state has become universally accepted; and, that if the decision is not reversed, there should be a trial by jury to determine whether the Prayer is sectarian.

The mandatory nature of the Prayer, a question which absorbed the court below, while examined by appellants, was not considered so extensively as were the three principal points noted above.

An examination of the extensive history of New York cases concerned with religion in the public schools of the state leaves an impression that the practice of class-

[48] Brief of Petitioners-Appellants, 24.
[49] Id. at 26.
[50] Id. at 27.
[51] Id. at 28.
[52] Id. at 29.
[53] Id. at 40.
[54] Id. at 42.
[55] Id. at 43.

room prayer will not be discontinued as long as decisions hinge on a determination of whether or not the prayer is compulsory. It seems that in future litigation prayer as a devotional exercise must be accepted before prayer in the public schools will be declared unconstitutional.[56] And certainly any litigation which might result in declaring the practice of prayer in the public schools to be unconstitutional should be encouraged.

F. C. J.

CONSTITUTIONAL LAW—VIOLATION OF DUE PROCESS CLAUSE—REVIEW OF EVIDENCE BY SUPREME COURT HELD CONFESSION TO BE INVOLUNTARY DESPITE STATE COURT'S HOLDING IT TO BE VOLUNTARY.—The Supreme Court of the United States, on January 11, 1960, held[1] that a defendant's confession was involuntary where the evidence establishes the strongest probability that he was insane and incompetent at the time of the confession; accordingly, the introduction of it into the trial was a violation of the due process clause of the Fourteenth Amendment.[2]

The facts of the case are as follows: Jesse Blackburn, a negro, 24 years of age, was charged with having robbed a store in the State of Alabama on April 18, 1948. He was arrested shortly after the robbery and made a confession—the one here in issue—on May 24, 1948. After the confession had been made, the Sheriff reported to the court that Blackburn had exhibited symptoms of insanity. A lunacy commission comprised of three physicians was appointed and the judge, after hearing their report, concluded that there was "reasonable ground to believe that the defendant was insane at the time of the commission of the offense or at the present time." Blackburn was then committed to the Alabama State Hospital for the mentally ill until "he should be restored to his right mind." He remained in the hospital until October 1952 at which time he was declared mentally competent to stand trial.

At his trial Blackburn entered pleas of not guilty, and not guilty by reason of insanity. The confession he made some four years before was introduced as evidence. He testified that he could not remember anything about the crime, the circumstances surrounding it, his confession, or the early period of his treatment in the Alabama State Hospital. Apart from the confession, there was scant evidence against him. Therefore, the question of whether the confession was voluntary and competent to be introduced as evidence was therefore the controlling issue in the case.

The mental illness of Blackburn was shown to have originated while he was a member of the armed forces during World War II. He was discharged in 1944 as being permanently disabled by a psychosis. He was then institutionalized in a Veterans Hospital, where he remained until February 14, 1948. On that date he was released for a ten day leave in the care of his sister. He failed to return to the hospital when his leave expired. Therefore, on the date Blackburn allegedly committed the robbery, he

[56] Agreeing that prayer is a religious exercise: "Spiller v. Inhabitants of Woburn, 12 Allen 127, 94 Mass. 127; Moore v. Monroe, 64 Iowa 367, 20 N.W. 475; State ex rel. Wiess v. District Board, 76 Wis. 177, 44 N.W. 967, 7 L.R.A. 330; State ex rel. Freeman v. Scheve, 65 Neb. 853, 91 N.W. 846, 93 N.W. 169, 59 L.R.A. 927; Hackett v. Brooksville Graded School Dist., 120 Ky. 608, 87 S.W. 792, 69 L.R.A. 592; People ex rel. Ring v. Board of Education, 245 Ill. 334, 92 N.E. 251, 29 L.R.A. N.S. 442; Herold v. Parish Board, 136 La. 1034, 68 So. 116, L.R.A. 1915 D, 941; State ex rel. Finger v. Weedman, 55 S.D. 343, 226 N.W. 348." See note 1, supra, at 469.

[1] Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L. Ed. 2d 242 (1960).

[2] United States Constitution, Amendment XIV ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

was on an unauthorized leave of absence from a mental ward. Blackburn's attorney introduced the depositions of two of the three physicians who had served on his lunacy commission and who had observed Blackburn while he was at the State Hospital. Their testimony was that in their opinion Blackburn was "most probably insane and incompetent" on May 24, 1948, the date he confessed. However, the third member of the lunacy commission testified for the state and stated that Blackburn had been "normal" since he first saw him, that his mental condition was "normal" on the date of the crime, and "good" on the date of his confession, and that he had never seen Blackburn suffer psychotic episodes. This testimony was given by the physician who four years before had concurred with his two fellow physicians on the lunacy commission in finding that Blackburn was insane. Another aspect surrounding the controversial confession was that Blackburn was interrogated for eight or nine hours in a small room with as many as three officers present. There was no charge of physical abuse.

The confession was introduced into evidence over the objections of Blackburn's counsel, and the jury found defendant guilty. The judgment of conviction was affirmed by the Alabama Court of Appeals,[3] which held that the due process clause of the Fourteenth Amendment did not require the exclusion of the confession. The Supreme Court of the United States granted certiorari and unanimously reversed the conviction.

The opinion of the court, written by Mr. Chief Justice Warren, said that the evidence of insanity was compelling and that most probably the confession was not the product of any meaningful act of volition. Therefore, Blackburn's constitutional rights had been violated by the introduction of such confession into his trial, under the Due Process clause of the Fourteenth Amendment. The court said that the use of this evidence to convict Blackburn transgressed the imperatives of fundamental justice which find their expression in due process. In reply to the state's contention that there was a conflict of facts between the testimony of two physicians with that of the third, and that therefore, since the triers of fact had resolved the issue in favor of the state, the Supreme Court was precluded from passing on it, the court said that generally great reliance must be placed on the finders of fact, but here it found there was no genuine issue of fact because the state witness' testimony was in hopeless internal conflict. It characterized the physician's testimony as being an astonishing turn about and incongruous, since there were contradictions even in his depositions introduced at the trial.

The Due Process clause of the Fourteenth Amendment has generally been interpreted as extending its protection to procedural safeguards for people charged with or suspected of crimes. The forfeiture of the lives, liberties, or property of people accused of crime, can only follow if procedural safeguards of due process are obeyed. The requirement of conforming to fundamental standards of procedure at criminal trials was made operative with reference to the states by the Fourteenth Amendment.[4]

The enforcement of our criminal law procedure is that of an accusatorial, as opposed to the inquisitorial, system. Society suffers the burden of proving its charge against the accused. It must do this by skillful investigation and not by protracted, systematic, and uncontrolled subjection of the accused to interrogation for the purpose of eliciting disclosures of confessions. The characteristics of the inquisitional system is alien to our concept of criminal law, and when enforced by zealous police and state officials, will vitiate the conviction.[5]

Although the Constitution puts protection against crime predominantly in the keeping of the states, the Fourteenth Amendment severely restricts the states in the administration of criminal justice. The Supreme Court has the power of reviewing

[3] Blackburn v. Alabama, 268 Ala. 699, 109 S.2d 738 (1959).
[4] Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716 (1940).
[5] Ibid.

decisions of the state court, which are violative of due process. However, it does not have the corrective power over state courts which it has over the lower federal courts. Therefore, two rules have sprung up relating to the determination of whether a confession is voluntary—the so called *McNabb* or federal rule, and the rule applying to the state courts.[6]

Until the year 1936 no case had reached the Supreme Court from the states relating to the issue of confessions being voluntary or involuntary. In that year the case of *Brown v. Mississippi*[7] was decided. There a state court had found the defendants guilty of murder on the sole evidence of their confessions. The confessions were extracted from the defendants under shocking circumstances. They were whipped by sheriff's deputies and were told the whipping would continue until they confessed. One of the defendant's was allowed to hang from a tree limb for short intervals while the sheriff and local citizenry demanded that he admit his guilt. The defendants confessed on the terms dictated by the sheriff; were tried, found guilty, and sentenced to death. There was no denial by the state officers as to the beatings inflicted. The state contended that there was nothing in the Federal Constitution which limited the use of coerced confessions in state courts. The Supreme Court held that the trial of the defendants was a farce and a denial of due process, when their conviction was based on the use of extorted confessions. It said that it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions. The state was free to regulate the procedures of its courts in accordance with its own conception of policy, the court said, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.

The *Brown* case was followed by several cases in which the brutal practices of law enforcement tactics were set forth.[8] The Supreme Court has not hesitated to set aside convictions obtained through the use of confessions after repeated questioning of ignorant and untutored persons, in whose minds the powers of police officers were greatly magnified; or confessions of persons who sensed the adverse sentiment of the community and the danger of mob violence; or confessions of persons who had been held in seclusion without the advice of friends and counsel. In most of these cases it is noteworthy that where "third degree" methods have been used to extract confessions from those charged with crime, the confessors were of humble station in life, men of comparatively low intelligence, the poor and uninfluential; often too financially embarrassed to hire counsel and too friendless to have anyone advise them of their rights.[9]

Under what circumstances is a confession to be deemed voluntary or involuntary? The answer is that it depends upon a totality of the circumstances. The Supreme Court will make an independent examination of the record to determine the validity of the claim of involuntariness of confessions. The range of inquiry is broad. Upon the undisputed facts the Supreme Court may conclude that the confession was involuntary; and this conclusion is not foreclosed by the finding of a court, or the verdict of a jury, or both.[10]

[6] McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1942); Cf. United States v. Mitchell, 322 U.S. 65, 64 S. Ct. 896, 88 L. Ed. 1140 (1944).

[7] 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

[8] Turner v. Pennsylvania, 338 U.S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810 (1949); Canty v. Alabama, 309 U.S. 629, 60 S. Ct. 612, 84 L. Ed. 988 (1940); Vernon v. Alabama, 313 U.S. 547, 61 S. Ct. 1092, 85 L. Ed. 1513 (1941); Lomax v. Texas, 313 U.S. 544, 61 S. Ct. 956, 85 L. Ed. 1511 (1941).

[9] Ibid.

[10] Ashforth v. State of Tennesee, 322 U.S. 143, 64 S. Ct. 921, 88 L. Ed. 1192 (1944).

Physical violence in itself is conclusive evidence of an involuntary confession. There is no need to weigh or measure its effects on the will of an individual victim. The tendency of the innocent as well as the guilty to risk remote results of a false confession, rather than suffer immediate pain, is so strong that judges long ago found it necessary to guard against miscarriages of justices by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt. A confession, in order to be voluntary, must be expression of a free choice and with mental freedom to confess or deny a suspected participation in a crime. It must not be obtained as a result of torture, physical or psychological, but must be the offspring of a reasoned choice."[11]

The limits in any case depend upon a weighing of the circumstances of pressure against the power of resistance of the person confessing. The standard will vary with the individual. What would be overpowering to the weak of will or mind would be utterly ineffective against an experienced criminal. Some men can withstand for days that which would destroy the will of another in hours. The test is whether the confessor was in possession of his own will and self-control at the time of the confession. The court will consider the confessor's strength or weakness, whether he was educated or illiterate, intelligent or moronic, well or ill, negro or white. Thus, the Supreme Court will, after taking into consideration the total factors, determine whether a confession was voluntary or involuntary.[12]

In some cases the Supreme Court has struck down a conviction based on a confession where the facts indicated that the accused was subjected to "third degree" methods. In *Ashforth v. Tennesee,*[13] where the defendant confessed after being subjected to thirty-six hours of intensive questioning, without rest or sleep, by relays of police officers, with strong electric lights beaming on him; the court found the confession to be so "inherently coercive" that its existence was irreconcilable with the possession of mental freedom. Here, no subjective test of the defendant's mental and physical powers was resorted to in determining the voluntariness of the confession—on its facts alone it was found to be involuntary. In another case,[14] where the defendant was interrogated intermittently for six days, during which time he was not arraigned before a magistrate, and the opportunity to sleep and a decent allowance of food was in large part denied him; the court found the confession to be involuntary in that all the aggravating circumstances pointed that it did not issue from a free choice, but instead was the product of sustained pressure by the police. When a suspect speaks because he is exhausted, it is immaterial whether he has been subjected to a physical or mental ordeal. An alleged confession obtained through enforced lack of sleep is as clearly in violation of law as one obtained by force and violence.[15]

To threaten the defendant with mob violence, unless he confesses, stamps the confession as involuntary because it is the product of fear.[16] The defendant may confess in order to avoid the same brutal treatment afforded his co-defendant, and therefore, since his confession was prompted by fear, it is involuntary.[17] The length of time the prisoner is interrogated may taint the confession as involuntary depending on the cir-

[11] Leyra v. Denno, 347 U.S. 556, 74 S. Ct. 716, 98 L. Ed. 948 (1954); rehearing denied, 348 U.S. 851, 75 S. Ct. 18, 99 L. Ed. 671 (1954).

[12] Stein v. New York, 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953); rehearing denied, 346 U.S. 842, 74 S. Ct. 13, 98 L. Ed. 362 (1953).

[13] See supra, note 10.

[14] Watts v. Indiana, 338 U.S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801 (1949).

[15] Ziang Sung Wan v. United States, 266 U.S. 1, 45 S. Ct. 1, 69 L. Ed. 131 (1924).

[16] Payne v. Arkansas, 356 U.S. 560, 78 S. Ct. 844, 2 L. Ed. 2d 975 (1958).

[17] United States v. LaVallee, 270 F.2d 513 (2d Cir. 1959).

cumstances. In one case,[18] an infant of fifteen years was held incommunicado during the early hours of the morning and was questioned by relays of police officers for five hours. The state officers refused to admit the infant's attorney. The court found the confession to be coerced. However, the length of time an accused is illegally detained by the police is not conclusive in holding a confession made while under such illegal detention as being involuntary. In *Brown v. Allen*,[19] the defendant was illegally detained for eighteen days at which time he confessed. There was no record of physical coercion or duress generated by prolonged questioning. The accused was told he could remain silent and that any statement he might make would be used against him. This practice, under the federal rule, would stamp the confession involuntary per se. Thus, if a defendant under federal prosecution was illegally detained, in not being promptly brought before a committing magistrate, and was to give a confession while being illegally detained, such confession would be held coercive.[20] In state courts, even though the conduct of the state officers is criminal, in not bringing the accused before a magistrate in violation of state law, this fact will not in and of itself stamp a confession as being coerced.[21]

In *Spano v. New York*,[22] where the defendant was under indictment for a capital crime at the time the confession was extracted from him, the Supreme Court found it to be involuntary after a review of all the circumstances. The defendant was of low emotional stability, poorly educated, and had been denied the aid of his counsel during the interrogation. Also, a ruse was perpetrated on him by a police officer, who was his trusted friend, in order to prompt his confession. It would appear that the denial of counsel was controlling here since the defendant was under indictment at the time he confessed.

Even though there has been no physical brutality and not one of the irregularities in the record would be sufficient to taint the confession as being involuntary, the combination of circumstances may point to coercion. Again, if the defendant displays a self possession and coolness during the questioning and the confession, this negatives the view that he had so lost his freedom of action and his confession may be found to be voluntary.[23] Under the same circumstances, an illiterate, ignorant defendant may have been deprived of his free choice to admit, to deny, or to refuse to answer.[24]

In *Crooker v. California*,[25] a college graduate with one year of law training, who knew of his right to remain silent, and who had been denied his right to counsel in violation of state law, made a confession during this period which was held to be voluntary. The court said that what due process requires in one situation may not be required in another, because the least change of circumstances may provide or eliminate fundamental unfairness.

The beatings as a means of extracting confessions, and the "third degree" methods of intensive interrogation seem to have given way in recent cases to more sophisticated methods. Coercion can be mental as well as physical and the blood of the accused is not the only test of an unconstitutional inquisition. The efficiency of the rack can be matched by more modern modes of persuasion. In *Leyra v. Denno*,[26] the defendant

[18] Haley v. Ohio, 332 U.S. 596, 68 S. Ct. 302, 92 L. Ed. 224 (1948).
[19] 344 U.S. 443, 73 S. Ct. 397, 97 L. Ed. 469 (1953).
[20] See supra, note 6.
[21] Stroble v. California, 343 U.S. 181, 72 S. Ct. 599, 96 L. Ed. 872 (1952).
[22] 360 U.S. 315, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959).
[23] Lisenba v. California, 314 U.S. 219, 62 S. Ct. 280, 86 L. Ed. 166 (1941).
[24] Fikes v. Alabama, 352 U.S. 191, 77 S. Ct. 281, 1 L. Ed. 2d 246 (1957).
[25] 357 U.S. 433, 78 S. Ct. 1287, 2 L. Ed. 2d 1448 (1958).
[26] See supra, note 11.

was closeted with a trained psychiatrist who skillfully interrogated the defendant and extracted a confession from him. The New York Court of Appeals found the admissions made to the psychiatrist so clearly the product of mental coercion that their use as evidence was denied as a matter of law. However, the defendant made other confessions shortly afterwards to police and state attorneys and the voluntariness of these confessions was later put in issue. The state court found them to be untainted by the former confession,[27] but the Supreme Court said they were involuntary as a matter of law. Where an earlier and admittedly involuntary confession and a subsequent confession were so close that one must say the facts of one control the character of the other, the latter confession is involuntary.[28] Merely because the earlier confession is found to be coercive does not taint successive confessions, if the triers of fact find the former was not so close as to control the latter.

Where the Supreme Court finds that the confession was coerced and was introduced into evidence, it will set aside the resulting conviction; even though there is sufficient other evidence in the record to sustain a conviction.[29] This rule appears to have been qualified in the controversial *Stein*[30] case. In that case the defendants were questioned intermittently over a thirty-two hour period and bruises on their bodies were discovered after arraignment. Violence was denied by the police officers, and their testimony was unshaken on cross-examination. The defendants did not testify and expert testimony indicated that the bruises could have been produced by agencies before the defendants arrest. The charge was made that the confessions were coerced but there was sufficient evidence in the record to sustain the convictions. The question of voluntariness was left to the jury under binding instructions from the bench and the defendants were found guilty. The Supreme Court refused to reverse the conviction because they found the question of voluntariness was predicated on disputed facts which the jury could resolve without committing constitutional error. Apparently, the holding in the *Stein* case was based on two conditions; (1) that the voluntariness of the confession must entirely depend upon *disputed* questions of fact, so that an independent determination by the Supreme Court on the *undisputed* facts must not result in the conclusion that the confession was involuntary, and (2) that there must be sufficient evidence apart from the confession to support the verdict of guilty. The defendants were seasoned criminals with long records of convictions and, the fact that one defendant tried to trade his confession for favors, probably influenced the court in holding the confessions free from coercion. Nevertheless, three dissenting opinions differed vigorously with the decision.[31]

[27] People v. Leyra, 304 N.Y. 468, 108 N.E.2d 673 (1952).

[28] Lyons v. State of Oklahoma, 322 U.S. 596, 64 S. Ct. 1208, 88 L. Ed. 1481 (1944), rehearing denied, 323 U.S. 809, 65 S. Ct. 26, 89 L. Ed. 645 (1944).

[29] Malinski v. State of New York, 324 U.S. 401, 65 S. Ct. 781, 89 L. Ed. 1029 (1945).

[30] See supra, note 12.

[31] Mr. Justice Douglas dissenting: "[I]f the court means what it says, we are entering upon a new regime of constitutional law which should give every citizen pause . . ." Mr. Justice Frankfurter, dissenting: "Unless I am mistaken about the reach of the court's opinion, and I profoundly hope that I am, the Court now holds that a criminal conviction sustained by the highest court of a State, and more especially one involving a sentence of death, is not to be reversed for a new trial, even though there entered into the conviction a coerced confession which in and of itself disregards the prohibition of the Due Process Clause of the Fourteenth Amendment. The Court now holds that it is not enough for a defendant to establish in this court that he was deprived of a protection which the Constitution of the United States affords him; he must also prove that if the evidence unconstitutionally admitted were excised there

If a confession is found to be involuntary by the Supreme Court, the state court can not escape a reversed judgment simply because it left the question of voluntariness up to the jury under binding instructions to disregard the confession if they found it to be coerced; even though there is sufficient evidence in the record, apart from the confession, to convict.[32] The Supreme Court will set it aside if they find by an independent examination of the undisputed facts that it is coerced. However, when the issue has been fairly tried and reviewed and there is no indication that Constitutional standards of judgment have been disregarded, the Supreme Court will accord to the state's own decision great, and in the absence of impeachment, decisive respect.[33]

The practical problem is to separate the true from the false. It is common courtroom knowledge that extortion of confessions by "third degree" methods is charged falsely, as well as denied falsely. The police must obey the law while enforcing it, since life and liberty can be as much endangered by illegal methods used to convict those thought to be criminals, as from the actual criminals themselves. A confession obtained by police will be examined with the utmost scrutiny by the court, where the undeviating intent of the officers to extract a confession from a defendant appears from the record.[34]

The Supreme Court, in searching the record and being guided by the undisputed facts, appears to sit as a super jury in determining the voluntariness of confessions. Undoubtedly, its rulings on the subject have resulted in a higher standard of investigative procedures, by condemning "third degree" methods and other questionable tactics in securing confessions sought to be used at an accused' trial. The instant decision again reaffirms its long line of cases holding that a conviction obtained in a state court by means of an involuntary confession deprives the defendant of due process of law in violation of the mandate of the Fourteenth Amendment, and will be set aside. B. K.

UNFAIR COMPETITION—SECONDARY MEANING—COLOR CANNOT BECOME AN EXCLUSIVE PROPERTY RIGHT IN CONNECTION WITH A MANUFACTURER'S PRODUCT.—In reversing a decision of the Federal District Court of New York,[1] the United States Court of Appeals for the Second Circuit held that the mere possession by the plaintiff's product of a non-functional attribute, i.e. the color pink, for a long period of time does not alone establish secondary meaning. This being so, the plaintiff must establish by a greater degree of proof that the public is being confused or deceived by defendant's marketing a similar product of the same color in order to enjoin such action.[2]

In the instant case, the plaintiff had for several years marketed a pink liquid preparation, "Pepto-Bismol," designed to remedy minor stomach disorders. By 1955, extensive national advertising had caused the plaintiff's product to become the leader in the field of preparations relieving stomach disorders. Defendant in that year introduced a comparable proprietary medicine, "Pepsamar," which was identical to Pepto-Bismol as regards chemistry, color and flavor, but which had a dissimilar container and label.

would not be enough left to authorize the jury to find guilt." Mr. Justice Black, dissenting: "In short the court's holding and opinion break down barriers that have heretofore stood in the way of secret and arbitrary governmental action directed against persons suspected of crime or political unorthodoxy."

[32] See supra, note 16.

[33] Gallegos v. Nebraska, 342 U.S. 55, 72 S. Ct. 141, 96 L. Ed. 1481 (1951), Eckworth v. Denno, 261 F.2d 511 (2d Cir. 1958); cert. den. 358 U.S. 945, 79 S. Ct. 355, 3 L. Ed. 2d 353 (1959).

[34] See supra, note 22.

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[1] Norwich Pharmacal Co. v. Sterling Drug, Inc., 167 F. Supp. 427 (N.D.N.Y. 1959).

[2] Norwich Pharmacal Co. v. Sterling Drug, Inc., 271 F.2d 569 (2d Cir. 1959).

Evidence indicated that the defendant was motivated in manufacturing Pepsamar by retaliatory as well as competitive reasons and that the color pink was emphasized in both the sales and advertising promotion in marketing the product.

The Court below[3] enjoined the defendant from simulating the pink color of Pepto-Bismol in its product. A proviso qualifying the injunction stated that it should not apply so long as Pepsamar was sold in blue bottles or any other color which would conceal the pink color of the stomach preparation. Defendant was further enjoined from describing by words or illustrations in any advertising that Pepsamar was pink in color. The theory of the Court was that the color was a non-functional attribute which the defendant intentionally copied and that the plaintiff did not have to establish secondary meaning in New York to sustain a finding of unfair competition.

To aid in understanding the current concepts regarding the law of unfair competition, it is important to trace their history and development. Like many of the principles of torts, the fundamentals of unfair competition originated in the sense of justice of the common law judges.[4] At common law the suit was brought under the writ of trespass on the case for deceit,[5] and eventually became known in England as "palming off," or its equivalent "passing off."

In order to afford merchants some commercial safety from unscrupulous competitors, a trademark act[6] was passed in the United States in 1875. Two prerequisites necessary to sustain a finding of a valid trademark were that a mark had to be affixed to a commercial article or its container, and that the mark must have been capable of being lawfully appropriated to the use of one person, to the exclusion of all others.[7] Soon after 1800 the Courts began to be aware that traders were sometimes indicating ownership and origin of articles and services by words and pictures which were technically not trademarks and that other traders were duplicating these. The Courts stopped the imitation of these devices which, through long association with the plaintiff's products, had acquired a secondary meaning and became visible symbols of his good will. This class of torts was judicially named Unfair Competition.[8]

In 1940, it was observed:[9]

> The last fifty years have witnessed the amalgamation of trade-mark infringement with Unfair Competition—almost, but not quite. . . . In both, the defendant is passing off his goods as the plaintiff's goods by the use of a visible symbol. Whether the symbol be a technical trademark or not, the falsehood is the same and the instinctive response of the customer is the same. The symbol makes him think he is getting something which he is not.

It can readily be seen therefore that the fundamental consideration in the law of unfair competition is protection of the consumer from deception which might cause him economic loss.[10] The deceptions which the Courts have enjoined in New York and in the Second Circuit may be one of four types.[11] Foremost in the number of cases litigated and most difficult to prove has been relief granted on proof of secondary meaning.

Nowhere has the doctrine of secondary meaning received more admirable treatment than in *Crescent Tool Co. v. Kilborn & Bishop Co.*, when Judge Learned Hand said:[12]

[3] See supra, note 1.
[4] 1 Nims, Unfair Competition and Trade-Marks § 1 (4th ed. 1947).
[5] Restatement, Torts, Chapter 35, Introductory Note (1938).
[6] Trade-Marks Registration Act (1875).
[7] 53 Harv. L. Rev. 1289 (1940).
[8] Ibid.
[9] Id. at 1296-97.
[10] Standard Brands v. Smidler, 151 F.2d 34 (2d Cir. 1945).
[11] See supra, note 2.
[12] 247 Fed. at 300 (2d Cir. 1917).

The cases of so-called 'non-functional' unfair competition . . . are only instances of the doctrine of secondary meaning. All of them presuppose that the appearance of the article . . . has become associated in the public mind with the first comer as manufacturer or source, and, if a second comer imitates the article exactly, that the public will believe his goods have come from the first, and will buy, in part, at least, because of that deception. Therefore, it is apparent that it is an absolute condition to any relief whatever that the plaintiff in such cases show that the appearance of his wares has in fact come to mean that some particular person—the plaintiff may not be individually known—makes them and that the public cares who makes them, and not merely for their appearance and structure . . . .

Analysis of the decisions therefore shows that a functional feature cannot acquire any secondary meaning; that only a non-functional can.[13] A feature of goods is functional if it affects their purpose, action or performance, or the facility or economy of processing, handling or using them. A feature is non-functional if, when omitted, nothing of substantial value in the goods is lost.[14] However, a defendant has as much right to copy the non-functional features of the article as any others, so long as they have not become associated with the plaintiff.[15]

Applying the law to the case under discussion,[16] the Court held in effect that the defendant had every legal right to duplicate the chemical composition of the stomach remedy since this was a functional feature. In justifying the use of the color pink, the Court said, in part, that this was clearly a duplicity of a non-functional feature, but since the shape of the bottles and the different labelling varied so greatly, there would be no deception perpetrated on the public. Courts have long held that the beauty or novelty of a product developed by a producer or the fact that large sums were expended on advertising will not prevent imitators from being enriched by a "free ride" in the absence of confusion[17] and this is true even if the defendant copies "slavishly"[18] or "down to the last detail."[19] The most the defendant can be accused of is a flattering appreciation of the plaintiff's successful business practice, but such appreciation falls short of unfair competition.[20] Further, large expenditures for advertising do not compel a conclusion that the task has been accomplished and a secondary meaning established.[21]

With this background in secondary meaning, it remains to be determined whether the color pink can be monopolized in connection with an upset stomach remedy. In *American Waltham Watch Co. v. United States Watch Co.*,[22] it was said that a man cannot appropriate a geographical name, or a color, or any part of the English language, or even a proper name to the exclusion of others whose names are like his. This therefore means that color, except in connection with some definite arbitrary symbol or in association with some characteristics which serve to distinguish the article as made or sold by a particular person is not subject to trademark monopoly.[23] The justification

13 Upjohn Co. v. Schwartz, 246 F.2d 254 (2d Cir. 1957).

14 Restatement, Torts, § 742 (1938).

15 See supra, note 12.

16 See supra, note 2.

17 Charles D. Briddel, Inc. v. Alglobe Trading, 194 F.2d 416 (2d Cir. 1952).

18 A. C. Gilbert Co. v. Shemitz, 45 F.2d 98 (2d Cir. 1930).

19 Electric Auto-Lite Co. v. P. & D. Manufacturing Co., 109 F.2d 566 (2d Cir. 1940).

20 Dixie Vortex Co. v. Lilly-Tulip Cup Corp., 19 F. Supp. 511, 523 (E.D.N.Y. 1937).

21 General Time Instr. Corp. v. United States Time Corp., 165 F.2d 853 (2d Cir. 1948).

22 173 Mass. 85, 53 N.E. 141 (1899).

23 Campbell Soup Co. v. Armour & Co., 175 F.2d 795 (3d Cir. 1949); Barbosol Co. v. Jacobs, 160 F.2d 336 (7th Cir. 1947); Winthrop Chemical Co. Inc., v. American Pharmaceutical Co. Inc., 94 F.2d 587 (2d Cir. 1938).

for this was clearly stated in *Diamond Match Co. v. Saginaw Match Co.*,[24] a case in which the defendant marketed a match with a red top and blue tip, similar to one which was being manufactured and sold by plaintiff. The Court refusing to enjoin defendant said, "The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest." The meaning of this, of course, is that the list of colors will soon run out.[25] This holding was subsequently further elaborated upon with the view that certain of the primary colors are unsuitable for the appearance of particular products, thus narrowing the use of colors by one desiring to manufacture that item.[26] In a case where the Courts refused to enjoin a tissue manufacturer from using pastel shades, the Court held that pastels created a mental impression that the tissue was soft as a baby's skin.[27]

A unique idea was expressed in the *Norwich Pharmacal* case,[28] in a dictum portion of the opinion, in which Judge Moore pointed out that the pink color might have a functional value. The Court admitted that the pink color had no healing effect in itself, but went on to say that the color was designed to present a pleasing appearance to the customer and sufferer. Upon the premise that a disordered stomach will accept that which is pleasing and reject that which is repulsive, a finding of functional value might well be made because a rejected stomach medicine scarcely has a fair opportunity to fulfill its function.

Thus it can be seen that a color alone is not the subject of protection by the Courts but taken in association with other characteristics and therefore serving to distinguish one's goods, it will be protected by the Courts.[29] In *Gillette Safety Razor Co. v. Triangle Mechanical Laboratories*,[30] the defendant changed the color of its razor blades from white to blue and began to market them in blue packages and to describe them as "Blue Blades" all for the purpose of enabling it to compete with the widely advertised Gillette Blue Blades. There the Court enjoined distribution on the ground that there was deception, saying in effect that there were not other "sufficient characteristics to distinguish plaintiff's product from defendant's." Another similar case was *Coca Cola Co. v. Gay-Ola Co.*[31] There the defendant manufactured syrup for use in soda fountains and colored it to exactly resemble the complainant's, which was earlier in the market, extensively advertised and well known. The coloring was non-functional. Defendant also colored its barrels and kegs red, which was the distinctive color used by complainant and placed no marks thereon to indicate the place of manufacture. Here the Court held that the public was being deceived and enjoined the defendants unless means were provided to prevent such deception. *Radio Corporation of America v. Decca Records*,[32] using the same principles held that the defendants use of a red label in the center of a phonograph record with the name of the company clearly printed thereon did not create confusion in the minds of the retail buyers of records, with the plaintiff's similarly colored label on their record and an injunction was not granted.

The Courts have granted relief on occasion where no proof of secondary meaning

[24] 142 Fed. 727 (6th Cir. 1906).

[25] Tas-T-Nut Co. v. Variety Nut and Date Co., 245 F.2d 3 (6th Cir. 1957).

[26] Pacific Coast Condensed Milk Co. v. Frye & Co., 85 Wash. 133, 147 Pac. 865 (1915).

[27] Doeskin Products, Inc. v. Levinson, 132 F. Supp. 180 (S.D.N.Y. 1955).

[28] See supra, note 2.

[29] See supra, note 20, Campbell Soup Co. v. Armour & Co.

[30] 4 F. Supp. 319 (E.D.N.Y. 1933).

[31] 200 Fed. 720 (6th Cir. 1912).

[32] 51 F. Supp. 493 (S.D.N.Y. 1943).

was established. The bases for the decisions were that the defendant was either attempting to "palm off"[33] his wares as the plaintiff's or was practicing an actual deception[34] on the public. Actual deception was shown where the plaintiff perfected an article of religion which consisted of a round transparent ball with a "Mustard Seed Remembrancer." The defendant copied the product exactly with the exception that the mustard seed was darker and called his product "Your Mustard Seed Charm." This, the Courts enjoined.[35] Further, relief has been granted where there was a violation of the plaintiff's property rights.[36]

It is apparent from the holding in this case that the Court continues to adhere to the principles established in prior cases. The protection of the consumer from deceptive business practices still remains as the foremost goal in unfair competition cases. However, the Courts will not enjoin a similar competing product merely because there is a slight possibility of confusion by a person not equalling the reasonable man standard.

R. S. E.

FEDERAL COMMUNICATIONS COMMISSION—POWER OF COMMISSION TO DENY APPLICATION FOR USE OF FREQUENCIES WITHOUT HEARING.—In a recent decision,[1] the District of Columbia Circuit Court of Appeals upheld a decision of the Federal Communications Commission denying an application for use of certain radio frequencies without hearing, and such denial without hearing was based on changes in the Commission's rules adopted without prior notice.

The FCC on April 16, 1958 adopted without prior notice, and on April 18, 1958 released its Memorandum, Opinion, and Order[2] effecting immediate changes in its rules regulating the use of radio frequencies. This order reassigned many bands of frequencies, *reserved some for exclusive use of the government* and some exclusively for non-government use, and others on a shared basis.

The restricted use and reassignment of frequencies without prior public notice under the FCC's rule-making power arose out of a request from the Office of Defense Mobilization acting in behalf of the Executive Branch of Government pursuant to Executive Order 10460[3] asking that certain frequencies be set aside for exclusive use of the government for military radiopositioning requirements.

The *Bendix* case[4] affected two such bands—one in 420-450 megacycle band, the other in the 8500-9000 megacycle band. On May 9, 1958, the Bendix Aviation Corporation sought authorization to use the 430 megacycle frequency on an experimental basis in two of its aircraft for the development of an airborne aircraft collision avoidance system. Its application was dismissed without hearing and reconsideration of the dismissal was denied.[5]

[33] See supra note 13, Upjohn v. Schwartz; Santa's Workshop v. Sterling, 2 App. Div. 2d 262, 153 N.Y.S.2d 839 (3d Dept. 1956).

[34] Artype, Incorporated v. Zappula, 228 F.2d 695 (2d Cir. 1956); Avon Periodicals v. Ziff-Davis Pub. Co., 282 App. Div. 200, 122 N.Y.S.2d 92 (1st Dept. 1953).

[35] Flint v. Oleet Jewelry, 133 F. Supp. 459 (S.D.N.Y. 1955).

[36] International News Service v. Associated Press, 248 U.S. 215, 39 S. Ct. 68, 63 L. Ed. 211 (1918).

[1] Bendix Aviation Corporation, Bendix Radio Div. v. FCC, 272 F.2d 533 (D.C. Cir. 1956).

[2] 23 Fed. Reg. 2676 (1958).

[3] 18 Fed. Reg. 3513 (1953).

[4] See note 1, supra.

[5] 17 Pike and Fischer Radio Reg. 1588 (1958).

Bendix appealed the FCC's decision contending that 47 USC 309 entitled them to either a grant or a hearing[6] and that an allocation for exclusive government use for radiopositioning was in conflict with United States treaty obligations resulting from the 1947 Atlantic City Convention.[7]

The Court rejected the Bendix contention that it was entitled to a grant or hearing under 47 USC 309,[8] which essentially provides that if the Commission cannot find that the granting of a request for license would serve the public interest, convenience, or necessity, then the Commission shall formally designate such application for hearing. The Court stated they were not entitled to a hearing *simply because the 430 megacycle frequency had been withdrawn from the field of non-government use.* (Italics ours) Thus Bendix was not entitled to a grant or hearing on its application simply because the Commission in its Order of April 18, 1958[9] had made the requested frequency no longer available for experimental authorization.

Bendix's argument that the order violated treaty obligations[10] also fell under the reasoning of the Court. Bendix argued that the 1947 Atlantic City Convention provided for international use of the 420-450 megacyle band for aeronautical radionavigation and amateur services. Therefore, an exclusive allocation to the government for radiopositioning was in conflict with that treaty. The Court pointed out, however, that Footnote 211 to the treaty provided for Region 2 (which included the United States) that the allocation for aeronautical radionavigation is temporary and exclusively for altimeters and the Commission had adopted rules[11] giving effect to the treaty provision.

The Court held that the Bendix argument on the treaty aspect must fall in regard to the contention that the FCC had *allocated the 430 megacycle frequency to radiopositioning.* (Which might be construed to be in derogation of the treaty.) The Court held that the order did not make an allocation for radiopositioning, but simply *denied non-government access* to the 420-450 megacycle band. The Court said:[12]

Whatever *assignment* of the permitted government use was to be made depends upon action by the President. If the withdrawn band is to be assigned to radiopositioning, that decision is *his* responsibility, devolving upon him not only as Chief Executive, but expressly by virtue of Section 305.[13]

[6] 47 USC 309, provides:

"a) If upon examination of application provided for in section 308 of this title, the Commission shall find that the public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

b) If upon examination of any such application, the Commission is unable to make the finding specified in subsection (a) of this section, it shall forthwith notify the applicant and other known parties in interest of the grounds and reasons for its inability to to make such finding . . . Following such notice the applicant shall be given an opportunity to reply. If the Commission after considering such reply shall be unable to make the finding specified in subsection (a) of this section, it shall formally designate such application for hearing . . . Any hearing subsequently held . . . shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate."

[7] International Telecommunications Convention, 20 October 1947, 63 Stat. 1399, T.I. AS No. 1901.

[8] See note 6, supra.

[9] See note 2, supra.

[10] See note 7, supra.

[11] 47 CFR § 2.104(a)(5).

[12] See supra, note 1 at 537.

[13] 47 USC 305: This section essentially provides that radio stations belonging to and operated by the United States shall not be subject to the provisions of 47 USC 301 (which deals with licensing for radio communications) and 47 USC 303 (which sets forth the duties and power of the FCC to regulate). It provides that government stations shall use such frequencies as shall be assigned by the President.

The FCC, of course, has discretionary powers of considerable latitude in the control of radio communications. Aside from specific rulemaking powers defined in the Federal Communications Act of 1934, two sections[14] of the act grant general rule making power to implement the act as long as the rules are not inconsistent with the act or law. Clearly, such a provision provides a fertile field for litigation, since in effect, the Commission, in the exercise of its general or specific rule making power, may adopt rules, the effect of which, are to preclude a hearing where applications for licenses are denied.

There are several cases illustrative of this point. In 1952 after protracted and detailed hearings, the Commission adopted a master plan for the allocation of frequencies for television stations throughout the country. The petitioner, Logansport Broadcasting Corporation, which had participated in the hearings before the plan was adopted, was interested in setting aside the Commissions allocation of VHF Channel 10 to Terre Haute, Indiana. The Commission, after having heard petitioners arguments that Channel 10 should be assigned to Logansport, Indiana and Owensboro, Kentucky, made a final decision allocating Channel 10 to Terre Haute, Indiana.[15] The effect of the adoption of this master plan was a summary dismissal without hearing of applications for licenses not conforming to the over-all master plan. The Court upheld[16] the Commission's plan of allocation indicating that it was a lawful exercise of the Commission's general rule making power under Section 303 of the act[17] and that channels may be allocated either by passing upon specific applications or by way of rule making. The Court said:[18]

> Situations are not infrequent in which an administrative agency can properly proceed either through rule making or adjudication: in such a case the choice is one that lies primarily in the informed discretion of the agency.

In *Storer Broadcasting Company v. United States,*[19] the FCC in November 1953 had adopted, after public hearing, under the powers conferred by the FCA,[20] amended rules relating to multiple ownership of standard FM and television stations. These amended rules[21] essentially limited the number of standard and FM (not more than seven) and television broadcast stations (not more than five) that could be owned, operated, or controlled by a single individual or corporation. For purpose of the rules enacted it was also declared that ownership of 1% or more of the voting stock of a corporation shall be equivalent to ownership, operation, or control of such station in determining the existence of a concentration of control contrary to the public interest, convenience, or necessity.

Three months earlier, the Storer Broadcasting Company filed an application for a

[14] 47 USC 303(r); 47 USC 154(i).

[15] The petitioner had a UHF channel available in Logansport, Indiana and Owensboro, Kentucky. However, VHF channels are the most desirable because of their wider area or coverage.

[16] Logansport Broadcasting Corporation v. United States, 210 F.2d 24 (D.C. Cir. 1954); See also Peoples Broadcasting Co. v. United States, 209 F.2d 286 (D.C. Cir. 1954).

[17] 47 USC 303, provides in part:

". . . make such regulation not inconsistent with law as it may deem necessary . . . to carry out the provision of this act."

[18] See supra, note 16, Logansport Broadcasting Corporation v. United States at 27.

[19] Storer Broadcasting Co. v. United States, 220 F.2d 204 (D.C. Cir. 1955), Rev. 351 U.S. 192, 76 S.Ct. 763, 100 L. Ed. 1081 (1956).

[20] 47 USC 303, 311, 313, 314.

[21] 47 CFR 3.35, 3.240, 3.636.

new television station in Miami, Florida. In November 1953 when the Commission's amended rules relating to multiple ownership were adopted, Storer owned and operated five standard stations, five FM stations, three television stations plus two additional standard broadcast and television stations being operated by two wholly owned subsidiaries. On the same day the amended multiple ownership rules were adopted, the Storer application filed in August 1953 was dismissed without a hearing on the ground that a grant of a license would be in violation of the spirit and purpose of the recently amended multiple ownership rules.

The Commission's position was struck down by the Circuit Court of Appeals[22] which reasoned that the Commission did not have the power to decide "in vacuo that there can never be an instance in which public interest, convenience, or necessity would be served, by granting an additional license to one who is already licensed for five television stations."[23] The Court reasoned that the language of section 309 was mandatory in requiring the Commission to either find that a grant of a license would serve the public interest, or if this cannot be found, then to grant a hearing.[24] The Supreme Court, on appeal, reversed the decision.[25] The Court rested its reversal on the ground that the Commission, under other rules,[26] had not foreclosed the prospect of giving consideration to applicants who, although not complying with the rules, could show valid reason for deviating therefrom. The court said, citing the *National Broadcasting Co. v. United States*[27] as controlling:[28]

> The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it, the Commission must still exercise an ultimate judgment whether the grant of a license would serve the public interest, convenience or necessity. If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

The *National Broadcasting Case*[29] had dealt with a similar problem. Here the Commission, after public hearings, adopted rules known as the Chain Broadcasting Regulations.[30] These regulations proposed to deny licenses to those who engaged in certain practices condemned by the rules. The plaintiff, joined by the Columbia Broadcasting System brought an action to enjoin the enforcement of these rules. The

[22] See supra, note 19, 220 F.2d 204.

[23] See supra, note 19, 220 F.2d at 208.

[24] See note 6, supra.

[25] See supra, note 19, 351 U.S. 192, 76. S. Ct. 763, 100 L. Ed. 1081.

[26] 47 CFR § 1.361(c) provides:

(c) "Applications which because of the nature of the particular rule . . . are patently not in accordance with the Commission's rules . . . will be considered defective and will be dismised unless accompanied by a request of the applicant for waiver of, or exception to any rule . . . with which the application is in conflict . . . ;" 47 CFR § 1.702 provides:

"Any interested person may petition for issuance, amendment, repeal or waiver of any rule or regulation . . ." (Such petition must show the proposed change and the reasons in support thereof).

[27] National Broadcasting Company v. United States, 319 U.S. 190 at 225, 63 S. Ct. 997 at 1013, 87 L. Ed. 1344 at 1367 (1943).

[28] See supra, note 19, 351 U.S. at 205, 76. S. Ct. at 771, 100 L. Ed. at 1092.

[29] See note 27, supra.

[30] 47 CFR § 3.101 thru 3.108 (1941), a typical provision is expressed in § 3.101:

"No license shall be granted to a standard broadcasting station having any contract, arrangement, or understanding, express or implied with a network organization under which the station is prevented from, or penalized for broadcasting the programs of any other network organization."

action was dismissed by the lower Court;[31] the plaintiff appealed and the decision of the lower Court was affirmed by the United States Supreme Court.[32] The court held that the Commission acted within its authority. The effect of this decision was that the Commission could adopt rules even though they might have the effect of a denial of licenses without hearing, as long as the denial was not absolute.

It should be noted, however, that other judicial restraints have been imposed on the Commission's rule making power insofar as the adoption of certain rules have the effect of denying an application for license or modification of existing facilities without hearing. The City of New York Municipal Broadcasting System (WNYC) made application to the FCC for authority to install a single transmitter having both a five kilowatt and a one kilowatt capacity. FCC rules forbid Class II Stations from installing a transmitter with a maximum rated power of more than one kilowatt; however, the application was accompanied by a request for waiver[33] of this rule stating the reasons therefor.

Briefly, WNYC, in order to meet its CONELRAD broadcast responsibility required a transmitter of five kilowatts, and only one kilowatt of power during regular broadcasts. The installation of a single transmitter, having both a five kilowatt and one killowatt capability would result in substantial savings to the City of New York.

The FCC dismissed the application without hearing and indicated that CONELRAD contemplated the use of existing broadcast facilities only; thus no good cause was shown for waiver of its rules. A petition for rehearing was denied by the Commission. The Court reversed the Commission holding that the Commission, when confronted with an application not frivolous on its face but showing good cause for waiver of Commission rules, is duty bound to follow the statutory procedures outlined in Section 309(b)[34] which requires that if the Commission cannot find that a grant would be in the public interest, they must notify the applicant and give opportunity for a reply, and if, after a reply, they still cannot find that a granting of the license would be in the public interest, a formal hearing must be designated.[35]

An area which may be of some concern is the power of the Commission to dispense with public notice required by the Administrative Procedures Act.[36] Aside from other exclusions, the Commission may dispense with public notice in any situation where public procedure thereon would be impractical, unnecessary and contrary to the public interest. The *Bendix* case[37] represents one of the rare instances where the FCC has dispensed with public notice pursuant to statute. Actions by other Federal Agencies, however, illustrate the application of the rule.

In an action to enjoin an employer from violating provisions of the Fair Labor Standards Act and regulations thereto, including certain amended regulations made without general public notice, it was held[38] that where the employer who was being enjoined presented no evidence contrary to the agency's findings which were published with amended regulations to clarify recent court decisions, then prior public notice of the proposed rule change was unnecessary.

Where the Civil Aeronautics Board changed an aircraft traffic pattern without

[31] National Broadcasting Co. v. United States, 47 F. Supp. 940 (S.D.N.Y. 1942).

[32] See note 27, supra.

[33] 47 CFR 1.701 (Rev 1953) provides in part:
"Any provision of the rules may be waived by the Commission for good cause."

[34] See note 6, supra.

[35] City of New York Municipal Broadcasting Co. v. United States, 223 F.2d 637 (D.C. Cir., 1955).

[36] See note 42, infra.

[37] See note 1, supra.

[38] Durkin v. Edward S. Wagner Co., 115 F. Supp. 118 (E.D.N.Y. 1953).

public notice, at Idlewild airport, superseding an earlier pattern which was found to be unsafe, the "impractical, unnecessary, and contrary to public interest doctrine applies" and notice may be dispensed with.[39]

In those instances, however, where the violation of a regulation creates a criminal penalty, the Courts have held that although prior public notice might be dispensed with, a subsequent publication in the Federal Register is a prerequisite to its validity. This is so even if the offender has actual notice of the rule forbidding certain conduct.[40]

In evaluating the *Bendix Case,* it might appear at first that the scope of the decision might have far reaching impact in this area of the law; that the FCC might change its rules without public notice, and on the basis of such rule changes deny subsequent applications for licenses without hearing. A careful review of the facts, however, negates drawing such broad inferences from this decision.

First, the government in meeting the national defense needs of the country required the exclusive use of certain frequencies for military radio-positioning requirements and in its request indicated that the bands requested were the only one which could feasibly be made to meet the requirements. Secondly, the FCC had little choice but to comply with the government's request, for the Federal Communications Act contemplated the defense needs of the country, since 47 USC 305[41] specifically exempts government channels of radio-communication from Commission control. Thus, even if the FCC did not agree with the government's requirement, the Commission would be powerless to refuse since the Commission can only regulate channels of communication not appropriated by the government. Third, as to the 30 day requirement for public notice on proposed rule changes under the Administrative Procedure Act, the act specifically exempts rules affecting any military, naval, or foreign affairs function of the United States from the public notice requirement and also exempts notice in[42]

any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

Thus, it can be readily seen that the Commission's course and the Court's decision in the *Bendix Case*[43] was closely charted by statutory definition and exclusion, and in reality, it appears that the Commission's ruling was upheld by the Court in this case, not so much because it was a proper exercise of the Commission's powers, but because the Commission had no power to regulate channels of radio communications appropriated by the government for defense purposes. C. R. Y.

[39] Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y., 1955).

[40] Hotch v. United States, 107 F. Supp. 159 (D.C. Alaska, 1952), aff'd, 208 F.2d 244 (9th Cir., 1953), Rev. on rehearing, 208 F.2d 249 (9th Cir., 1953), aff'd, 212 F.2d 280 (9th Cir., 1954).

[41] See note 13, supra.

[42] 5 USC 1003, provides:

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States . . .

(a) General notice of proposed rule making shall be published in the Federal Register . . . except in any situation in which the agency for good cause finds (and incorporates the findings and a brief statement of the reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

[43] See note 1, supra.