Recent Decisions

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RECENT DECISIONS

ANTITRUST — SECTION 5 OF THE CLAYTON ACT — GUILTY PLEA TO CONTEMPT CHARGE FOR VIOLATION OF CONSENT DECREES AVAILABLE AS PRIMA FACIE EVIDENCE IN LATER ACTION. — Plaintiff Simco Sales Service Corp. alleged in its complaint that it had suffered certain damages by reason of the unlawful conduct of defendants in violation of Sections 1 and 2 of the Sherman Act and in contempt of a lawful court order. In 1961 the defendants had been held in criminal contempt for violation of a 1952 consent decree which had enjoined price fixing agreements, information exchanges, and competitor interferences. Upon defendants' motion to strike all references to the decree, to violations thereof, and to the contempt proceeding pursuant to Rule 12(f) of the Federal Rules of Civil Procedure and to Section 5 of the Clayton Act, it was held: motion granted as to Chemetron Corp., which had entered a nolo contendere plea to the criminal contempt charge, and denied as to Air Reduction Co., which had pleaded guilty to the same charge. A subsequent motion to certify for interlocutory appeal pursuant to 28 U.S.C. section 1292(b) was also denied. Simco Sales Service of Pennsylvania v. Air Reduction Co., 213 F. Supp. 505 (E.D. Penna. 1963).

The most dramatic consequence of the court's holding is that a consent decree may no longer be entered into with the assurance that it will forever be inaccessible to treble damage claimants seeking a prima facie case. The ever-increasing use of consent decrees, and the anxiety this decision may cause users, requires a careful reappraisal of Section 5 of the Clayton Act.

This case once again brings into controversy the meaning of section 5. Ostensibly seeking to ease the evidentiary burden of treble damage plaintiffs, Congress made it possible for a private litigant to introduce a prior final criminal judgment and equity decree entered against a defendant in government antitrust suits as prima facie evidence of all matters necessarily determined by the judgment or decree. A proviso excepts "consent judgments or decrees entered before any testimony has been taken." This exception has had the effect of inducing defendants to enter into consent decrees in order to avoid the many treble damage claims that spring from the head of a litigated judgment.

The interpretation and implementation of section 5 has been the subject of heated comment by legal writers. Transference of the evidentiary gift outright, however, is not without some well-settled guidelines. Particularly is this true of the nolo contendere plea in a criminal antitrust action. A judgment based on such a plea comes within the proviso and thus cannot be used by a private litigant as prima facie evidence. The defendant is not estopped in any other action from denying

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A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws ... as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto:
Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken ... AB

2 See generally 31 Notre Dame Lawyer 265 (1956).

3 Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951).


5 See Timberlake, The Use of Government Judgments or Decrees in Subsequent Treble Actions under the Antitrust Laws, 36 N.Y.U.L. Rev. 991 (1961); R. Hardy Sr., The Evisceration of Section 5 of the Clayton Act, 49 Geo. L.J. 44 (1960); and Seeley, The Pitfalls Which Lurk in Government Litigation for Defendants Who May Be Subjected to Treble Damage Actions, 4 Antitrust Bull. 17, 19 (1959): "Section 5 ... subverts basic principles of trial procedure which are virtually sacred in other fields of civil litigation."

the facts upon which the prosecution was based. Further, the plea cannot be used as an admission in a civil case grounded upon the same facts.7

It has been argued that the distinction between a nolo contendere plea and a guilty plea is a distinction without difference, and accordingly the legal consequences should be the same.8 However, this appraisal suffers from the rigor of its own logic. In fact the estoppel consequences are not the same and the reason for the difference does not inhere in the nature of the pleas, nor in the assertion that a guilty plea is sensibly less like a consent judgment than is a nolo contendere plea,9 but rather in the felt necessity that a defendant in a criminal prosecution ought not to be able to avoid the prima facie effect of an adverse judgment by his unilateral "consent" to it.10 The defendant cannot unilaterally avoid the prima facie effect of section 5 by pleading nolo contendere, since the entrance of that plea is at the discretion of the court, nor by entering into a consent decree, since the government must be a consensual party to the decree; therefore it should not be open to the defendant to accomplish with a guilty plea that which otherwise would require either the consent of the court or the government.

The court in Atlantic City Electric Co. v. General Electric Co.,11 whose role in the instant action will be discussed later, was concerned with succoring the injured third party. But other courts, no less eager to see justice done to the private litigant, are more apprehensive about the possibilities for excessive punishment. Adequate punishment of the guilty pleader is not necessarily dependent upon expediting the private litigant's claim. Punishing the wrongdoer and remedying wrongs are socially desirable objectives but they are best served when not confused. Section 5's welding of the two in effect creates a mathematically precise rule of damages and penalties (i.e., the punishment of the conspirator should be three times the pecuniary injury suffered by the injured) based upon notoriously imprecise statutes and imaginatively documented injuries. This is improvement with a vengeance upon the less sophisticated "eye for an eye" doctrine. The treble damage rule in section 5, designed to satisfy contradictory policy thrusts involving punishment or regulation of the defendant on the one hand and relief to the third party plaintiff on the other, in fact satisfies neither while compounding the problem by requiring a court confronted with the admissibility of a guilty plea to choose between alternatives that either do too much or do nothing.12

In a civil antitrust action by the government the problem of pleas in the usual case does not arise. One either contests or consents. If contested, either actively by attempted refutation in court or passively by refusing to answer the complaint and

11 Supra note 10.
12 See United States v. Standard Ultramarine & Color Co., supra note 7, at 172:

The defendants urge that there is no obligation upon the Government to assist or encourage litigants. But a fair reading of the debates and the Committee Reports indicates that such was the very purpose of the clause. It was fashioned as a powerful weapon to aid private litigants in their suits against antitrust violators by reducing the almost prohibitive costs and staggering burdens of such litigation in making available to him the results of the Government's successful action, whether an equity suit or a criminal prosecution. And the hoped for by-product of the benefit to a plaintiff was increased law enforcement. (Footnotes omitted, emphasis added.)

Compare: Twin Ports Oil Co. v. Pure Oil Co., supra note 9, at 371:
Congress apparently intended to encourage consent judgments and decrees. It sought to induce a prompt surrender to the Government's demands by excluding consent judgments and decrees from the prima facie rule.
forcing the government to sustain its burden of proof, an adverse judgment can be introduced as prima facie evidence in a subsequent treble damage suit. For purposes of the proviso to section 5 a contested action is not limited to cases in which "testimony" is taken, but includes actions in which any evidence is taken. If a decree is consented to by both the government and the defendant, before any testimony has been taken, then that decree comes within the proviso of section 5 and, in the past, has not been available for prima facie evidentiary purposes. Unlike a nolo contendere plea, which in a criminal action can be entered over the government's objection at the discretion of the court, governmental acquiescence is a condition precedent to a consent decree. All of this is beyond dispute. But it is otherwise when, as in the instant case, violations of the decree are alleged in the complaint and an attempt is made to introduce for prima facie effect a prior consent decree by the catalyst of a contempt proceeding.

A court's approach to the problem of a contempt citation will be influenced by its prior assessment of legislative intent in framing section 5. It might, therefore, be possible to predict the probable direction of the court based upon its identification with the views of legislative intent and public policy expressed by either United States v. Standard Ultramarine & Color Co., that section 5 was "fashioned as a powerful weapon to aid private litigants," or Twin Ports Oil Co. v. Pure Oil Co., that section 5 was meant "to induce a prompt surrender to the government's demands by excluding consent judgments and decrees from the prima facie rule."

In the instant case Judge Luongo relied upon the interpretation of Standard Ultramarine. In holding the guilty plea of Air Reduction Co. admissible the court singled out the Atlantic City case as persuasive. That court held that one who has been guilty of criminal conduct should not be able by his unilateral "consent" to avoid the prima facie effect of section 5. Judge Luongo did permit Chemetron Corp. to avoid the prima facie effect when he ruled the striking of all challenged references to that corporation's nolo contendere plea. Chemetron had not been "originally a party to the proceedings in which the consent decree was entered" and thus was not in pari delicto. In effect the court recognized a distinction between Chemetron's nolo contendere plea and Air Reduction's guilty plea based not on formal niceties but upon apparent degree of culpability.

It might have been helpful if the court had gone a step farther and recognized that all guilty pleas are not alike. There is a difference between a guilty plea in a criminal antitrust action based upon an indictment alleging specific violations of the antitrust laws and a guilty plea in a criminal contempt proceeding based upon violations of certain imperatives which conduct may or may not be also violative of the antitrust laws.

Apart from the special problem of guilty pleas in the context of a contempt citation, there remains the question of section 5's use of the plea vis-à-vis the use permitted by the common law rules of evidence.

There is dicta in Emich Motors Corp. v. General Motors Corp., which suggests that section 5 is not a bar to the use of common law rules of evidence in order

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13 See Bicks, The Department of Justice and Private Treble Damage Action, 4 ANTITRUST BULL. 5, 7 (1959). The author discusses some unusual cases in which prior consent decrees "unqualified under Clayton Act Section 5... nonetheless come in through the back door of judicial notice." See Milgram v. Lowe's Inc., 192 F.2d 579 (3rd Cir. 1951) (admitted as evidence, indicating "practicability to violate the antitrust laws") and Pfotzer v. Acqua Systems, Inc., 162 F.2d 799 (2d Cir. 1947) (admitted as tending to impeach credibility of defendant). The Pfotzer case is criticized in 2 RUTGERS L. REV. 178 (1948).
14 Supra note 7, at 172.
15 Supra note 9, at 371.
18 Supra note 3.
to introduce the contempt judgment and the consent decree. The *Emich* court left open the question of "whether such evidence would establish prima facie" plaintiff's case.\(^{15}\)

Judge Luongo noted that:

Whether or not the guilty plea is admissible under § 5 as prima facie evidence, it may, depending on the terms of the consent decree and the violations thereof alleged in the citation for contempt, be admissible under common law rules of evidence as an admission against interest.\(^{20}\)

It is not clear whether the court will decide in favor of the plaintiff regarding the prima facie effect of evidence thus introduced, but there is no doubt that it should not do this. To permit the plaintiff to accomplish through the simple expedient of the general rules of evidence that which is expressly denied to him by section 5 would be to flout the will of the legislature. Section 5 must be understood as modifying the common law rules of evidence; otherwise it is meaningless.\(^{21}\) To say this much necessarily presupposes a prior judgment concerning which of the discordant themes in section 5 should be regarded as of central importance. The rationale behind the *Emich Motors* dicta suggests that it is of first importance to ease the evidentiary burden of injured third parties. It is submitted that such an objective is subordinate and does not justify an approach to the common law rules of evidence which would do violence to section 5's dominant "invitation to bargain" theme by making it something close to a trap.

Finally, each court when confronted with such a maneuver must weigh the prejudicial effect of such evidence. It is understandable that trial judges are reluctant at these incipient stages to hack away at the plaintiff's case. In many courts the judge may defer a final judgment on admissibility and keep this part of the pleadings from the jury, pending the development of more facts. Such caution would be desirable. If the jury is never apprised of these allegations there can be no danger to the defendant.\(^{22}\)

If the instant case indicates certain technical problems of pleading and evidence, it also reveals substantive problems regarding the relationship between a contempt proceeding and a consent decree. Is a criminal contempt proceeding for violation of a consent decree a proceeding "under the antitrust laws"? Judge Luongo held that in a proper case, such as where contempt proceedings are instituted to compel compliance, or to punish for failure to comply, with the terms of a court decree entered to enforce the provisions of the antitrust laws, the contempt proceedings would be ancillary to and, therefore, a "proceeding under" the antitrust laws. The court felt that it was impossible, short of full development of the circumstances, to rule as a matter of law that the judgment entered in the contempt proceeding on the plea of guilty was not a judgment in an action under the antitrust laws within the meaning of section 5.\(^{23}\)

There is undoubtedly a certain logic to the court's reasoning. Contempt proceedings are generally regarded as *sui generis*, special and original proceedings, collateral to and independent of the case from which the contempt arises.\(^{24}\) Perhaps

\(^{15}\) *Supra* note 3, at 571, n.8.

\(^{20}\) *Simco Sales Service v. Air Reduction Co.*, *supra* note 17, at 507.

\(^{21}\) *See Atlantic City Electric Co. v. General Electric Co.*, *supra* note 10, at 627 (Section 5 has not "altogether displaced common law rules" of evidence); *Los Angeles Department of Water & Power v. Allis-Chalmers Mfg. Co.*, *supra* note 8, at 2377; 71 *YALE L.J.* 686, 689-690, wherein it is argued that Congress did not go through the empty motions of protecting from the prima facie effect of section 5 certain judgments which would have exactly the same weight if left to operate outside the statute. See also *Wigmore, Evidence §§ 815, 1066, 1067* (3rd ed. 1940).


\(^{24}\) *See 6 TOULMIN, ANTI-TRUST LAWS OF THE UNITED STATES 1071 (1951); see also Moskowitz, *Contempt of Injunctions, Civil and Criminal*, 43 Col. L. Rev. 780 (1943); 57 *YALE L.J.* 83 (1947); 59 GEO. L.J. 83 (1947); 59 GEO. L.J. 283 (1951); 54 Col. L. Rev. 603 (1954).
in the usual case this is true. Thus an attorney or a witness may be held in contempt of court for unseemly conduct. In such a case the contempt proceeding would obviously be collateral to and independent of the case from which the contempt arises. But where the contempt proceeding is such that the content of the "contempt" consists of violations of a court-ordered consent decree, then an "ancillary" relation is established.

Having said this much we are confronted by two problems: (1) how can we even speak of a "court-ordered consent decree"? (2) is the "ancillary" relation that between the contempt proceeding and the consent decree or between the contempt proceeding and a proceeding "under the antitrust laws"? In short, what is a consent decree?

A consent decree has been described as a "solemn contract." Some have gone so far as to suggest that the court's participation is for the sake of adding solemnity to the contract, much like a seal in former times. But the contractual analogy is of limited usefulness. The purpose of the agreement is to effect a public policy, not to achieve private goals. There are certain patent restrictions on the voluntary character of the agreement since frequently a criminal action is held over the head of one of the parties. Nevertheless, the defendant has forborne a constitutional right to a trial on the merits in consideration of section 5's protection. Would the party have entered into the consent decree if he had fairly anticipated the full procedural and punitive implications of a subsequent breach of that agreement? Or was the result in the instant case reasonably foreseeable at the time of the agreement?

The problems suggested by these questions do not alter the logical conclusion that a consent decree is the fruition of a proceeding "under the antitrust law" and that a subsequent contempt proceeding is, also logically, ancillary to that proceeding. However, these troubling questions strike deeper, raising constitutional

25 Dix, Decrees and Judgments under Section 5 of the Clayton Antitrust Law, 30 Geo. L.J. 331, 336 (1942); Peterson, Consent Decrees: A Weapon of Anti-Trust Enforcement, 18 U. KAN. CITY L. REV. 34 (1949); 32 ROCKY Mt. L. REV. 367 (1960).
27 Katz, The Consent Decree in Antitrust Administration, 53 HARV. L. REV. 415, 417 (1940): "In view of the criminal aspect, it requires no extended analysis to demonstrate the danger of thinking of a consent decree in such an action in the terms of bargain-and-trade which customarily mark the settlement of litigation between private individuals."
28 Peterson, supra note 25, at 40-42, discusses various considerations which a party weighs in making this decision to enter into a consent decree. As in the usual contract situation there is every reason to suppose that the party at the time of contracting intends to abide by the agreement. Consequently, there is an obvious tendency to forget to incorporate provisions pertaining to the effect of a "breach" or a violation. Certainly a party to a consent decree would fairly anticipate fines, performance directives, cease and desist orders, or litigation of the issues necessarily postponed by the consent decree.
29 In the instant case plaintiff argued that a consent decree was not a "final adjudication," rather finality attaches in the event the court, in a subsequent contempt proceeding finds that the consent decree was violated. Defendant denied this relationship (which if true apparently makes the contempt proceeding something more than merely "ancillary") by arguing that the consent decree is a "final judgment" and a "final adjudication" differing not at all in this respect from a "full trial of the issues in the case." Defendant also pointed out that the court issuing the 1952 consent decree referred to it as being the "entry of this Final Judgment with respect from a "full trial of the issues in the case." Defendant's Reply Memorandum in Support of a Motion to Strike Immaterial, Impertinent and Scandalous Material, pp. 5-8.

In comment (a) to § 41, "Requirement of Finality," the Restatement authors have observed that a "decrees in equity is not a final judgment if further action by the court is required beyond the supervision of the carrying out of the decree." RESTATEMENT, JUDGMENTS § 41 (1942). This is not helpful since a contempt proceeding could be considered as either part of the supervision or as an extraordinary measure. Nor is it helpful to speak of either the consent decree or the contempt proceeding as being "final adjudication" if we understand the adjudicative process as necessarily involving findings of fact and of law. In a sense both share the
issues. Has the defendant without a trial on the merits found himself laboring under some kind of presumption of guilty vis-à-vis the antitrust laws? The defendant who enters into a consent decree does not confess his guilt thereby but merely expresses a willingness to refrain from exercising his right to a trial on the merits. The reasons motivating such a defendant may range from convenience, to economy, to good public relations, to a healthy respect for the vagaries of an antitrust prosecution. Thus it does not seem adequate to argue that the defendant virtually conceded his guilt by "contracting" away his right to a trial on the merits in return for immunity from civil suit.

Not having conceded his guilt, it follows that the defendant has tacitly reserved a right to determine at some future date in a trial on the merits whether or not the activity in question constitutes a violation of the antitrust laws. The defendant's expectation, if reasonable, should not be frustrated by permitting a contempt proceeding — which does not provide the defendant with a right to trial by jury, nor with a right to confront the witnesses, nor with a right to an indictment or information — to be determinative of statutory as well as decree violations.

Much of the dissatisfaction voiced by treble damage claimants in the past has centered on the court's willingness to draw a distinction between statutory and decree violations. Such a distinction, it is argued, means that injuries are left unattended and decrees unenforced.

Many a private litigant has sought to obtain section 5's evidentiary advantage by alleging defendant's violation of a prior consent decree only to be told that the "claim for relief must be for violation of the statute, not violation of the decree." Of course this is the central objection to use of the decree as prima facie evidence: how can violation of the decree constitute violation of the statute when the legality of the activities enjoined by the decree was by mutual consent never tested? Several courts have struck references to alleged violations of decrees as irrelevant, immaterial and prejudicial, without ever feeling obliged to examine the nature of the violations in the context of the antitrust laws. Plaintiff attempted to meet this objection by arguing that a final judgment of contempt against defendants who were charged with violating a consent decree, insofar as it dealt with acts violating the antitrust laws, is distinguishable from cases wherein the plaintiff relied only on a consent decree or an alleged violation of a consent decree.

attribute of finality in that a consent decree finally determines what is to be done or not done, while a contempt proceeding finally determines whether or not there has been compliance. See 30 Geo. L.J. 331, 338-340 (1942).

30 For a more extended discussion of the constitutional issues in section 5 see Seeley, supra note 5, at 21-22, and McDowell, Pretrial Procedures: Pretrial v. Procedure, 4 Antitrust Bull. 673, 677 (1959). McDowell observes that "pretrial procedures threaten entirely to supplant adjudication by trial and decision." Unfortunately constitutional safeguards tend to be spatially located in the "trial."

31 See Toummin, supra note 24, at 1071.


34 Peterson, supra note 25, at 45-50, observes that the consent decree prohibitions frequently lead the case law with the result that a particular enjoined activity, doubtfully violative of the antitrust laws, can become in time a recognized per se violation. Similarly, it would seem possible that an expressly permitted activity could undergo the same transformation. Could defendant use the decree as a defense to a government action? Probably not to a criminal action, but possibly to a civil action. See Katz, supra note 27, at 422.

Paul Harrod Company v. A.B. Dick Company is perhaps the only other case in which a plaintiff relied upon an order entered against defendant for contempt (civil) of a consent decree. The court was unimpressed by the order:

The definition of "antitrust laws" in 15 U.S.C.A., § 12, clearly embraces only the statutes described therein. Even without such a definition the term "antitrust laws" could not be construed as pertaining to a judgment or decree entered by a court in connection with an antitrust case filed by the Government. Such decrees do not necessarily reflect the prohibitions of the antitrust laws but may, by their terms, seek to dissipate the effects of the past conduct of the parties and, to this end, frequently enjoin performance of acts lawful in themselves. To permit a private party to recover damages for violation of any provision of such a decree is so obviously beyond the scope of the term "antitrust laws," as used in the statute, as to require no further discussion.

There is only one real difficulty with the applicability of the Harrod holding to the instant case. There the contempt was civil, here criminal. Civil contempt proceedings are remedial in nature while criminal contempt proceedings are punitive. Simco Sales could argue that a presumption of statutory violation can arise when a court is confronted with a criminal contempt citation which implies the punishment of a public wrong. Civil contempts, on the other hand, presumably redress private grievances.

For reasons unstated Judge Luongo chose to be unimpressed by the Harrod case. Instead, he reasoned that failure to take judicial notice of the criminal contempt proceeding's determinations, under cover of section 5's immunity, would be to encourage the very conduct which the legislation was designed to eliminate. Apparently the court felt that the argument of defendant (a violation of a decree is not necessarily a violation of the antitrust laws) suggested no valid reason to refrain from noticing if in fact the decree violation was a per se or otherwise obvious violation of the antitrust laws.

The court's holding means that in a proper case a private litigant will have access to a defendant's prior consent decree for prima facie evidentiary purposes in his treble damage suit. The main reason advanced by the court was that failure to take judicial notice of the contempt proceeding, thus depriving plaintiff of an evidentiary benefit, would be to encourage the very activity that the legislation was designed to prevent. In short, the court feels that punishment in any fashion other than through treble damage suits would not be an effective deterrent. It may be that the court was primarily motivated by a desire to do justice to the "injured" third party. At any rate the decision will inevitably have the effect of reducing the incentive to enter into a consent decree. Such an effect does not appear to correspond with legislative intent. Perhaps it is time Congress, for the sake of a coherent antitrust policy, stilled the restless ambiguities in Section 5 of the Clayton Act.

John A. Lucido

Evidence — Hospital Records — Missing Link in Blood Test Supplied by Presumption of Trustworthiness. — Immediately after plaintiff was struck with an automobile driven by the defendant, both were removed to the nearby Navy Dispensary and subjected to a Bogen Test to determine the amount of alcohol.

37 Supra note 36, at 504.
38 Of course this argument is attenuated by the fact that the distinction between civil and criminal contempts is not always easily made. See Moskowitz, supra note 24, at 785-790. Also, it may not be desirable to allow mere presumptions to do so much.
39 Simco Sales Service v. Air Reduction Co., supra note 17, at 507.

1 The Bogen Test is performed by heating the blood sample in a sealed test tube causing the alcohol in the blood to pass in a gaseous state through a connecting tube into another test tube containing a receiving solution. This alcohol causes the solutions to change color, and the discolored solution is then compared visually with a series of test tubes containing discolored solutions having predetermined blood-alcohol ratios.
in the blood. At the trial the defendant attempted to introduce testimony of a doctor who made the analysis, or in the alternative, dispensary records showing the results of this test which demonstrated the plaintiff's high degree of intoxication. The court sustained objections to admitting the doctor's testimony and the record on the grounds that the doctor had not actually seen the corpsman remove the blood or perform the test, nor could he state from his personal knowledge that the tube of discolored solution which he had received was the result of a test performed on the plaintiff's blood. Since the corpsman was not available to testify, the court held the defendant had failed to establish every necessary link in the chain of identification. On appeal to the United States Court of Appeals, Fourth Circuit, it was held: reversed. The court stated that, "the missing link in the chain of identification of the blood sample between the corpsman's taking the blood and Dr. Schwartz's determination of the test result is supplied by the presumption of regularity which attaches under the shop-book statute." Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962).

A record is prepared for all patients who are examined or who receive treatment at a hospital, whether they be actually in the hospital or merely persons utilizing the emergency room or out-patient clinics. The record will contain a variety of facts ranging from the patient's history to observations, analyses, and diagnoses by hospital personnel.

Hospital records are a form of hearsay evidence. It is therefore necessary to bring them within one of the exceptions to the rule excluding hearsay if they are to be admitted as evidence. They have generally been held admissible under either one of two exceptions; to wit, as public or official records and documents, or as business records. At common law, business records were admissible if made in the regular course of the business routine. However, a further requirement was the production of all parties who had a hand in preparing such records or an explanation of their absence. By modern statutes, such as the Uniform Business Records Act and the federal shop-book rule, this requirement of production or explanation has been abolished. The purpose of such an act is to avoid the necessity and the resulting expense, inconvenience, and sometimes the impossibility of calling as witnesses all those who have collaborated to make the hospital record of a patient. The reason for such an exception is based on the presumption of trust-

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2 65 Stat. 206 (1951), 28 U.S.C. § 1732: In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

3 See Hale, Hospital Records as Evidence, 14 So. Cal. L. Rev. 99 (1941), for survey of the various types of hospital records and their contents.
4 Ibid.
5 See McCormick, Evidence 609 (1954). A further distinction that must be kept in mind in this area is made between the shop-book rule (pertaining to records kept by parties) and the "regular entry" rule (pertaining to records kept by third persons). The difference may be important in other cases. See 1 Conrad, Modern Trial Evidence §§ 607-08 (1956).
6 See, e.g., Missouri Forged Tool Co. v. St. Louis Car Co., 205 S.W.2d 298 (Mo. 1947).
9 See generally 31 Notre Dame Law. 502 (1956).
10 Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In this case some of the nurses who made entries on the record were not called to testify.
worthiness which may be attributed to hospital records. One of the main objections to their admission has been the claim that they did not afford the other party the right of cross-examination. The court in Williams v. Alexander based a rebuttal of such a claim on the presumption of reliability.

It is this element of trustworthiness, serving in place of the safeguards ordinarily afforded by confrontation and cross-examination, which justifies admission of the writing or record without the necessity of calling all the persons who may have had a hand in preparing it. Therefore, where the records are made in the usual course of the business, and it is the usual course of the business to make such records, they generally are admissible.

The problem thus narrows to the question of the missing link in the chain of identification of the specimen analyzed. When a specimen or part of the human body is taken to be analyzed, and the report of that analysis is later offered as evidence, the courts have required that it be identified as that which was purportedly taken from the party involved. That is, a chain of identification must be established for the specimen from the time taken to the time analyzed. In McGowan v. Los Angeles, the court was of the opinion that a specimen taken from a human body for purposes of analysis must be identified before such specimen or analysis made from it attains standing as evidence of the person's condition.

However, in some cases the chain has not been fully established. One or more of the persons who has handled a specimen may not have been identified or may not have been produced in court. It is argued that the report of the analysis on such a specimen is inadmissible because there is a doubt as to whether it actually belongs to the particular individual in question. And because of this imperfect tracing of the specimen there exists also the possibility of tampering or alteration in the condition of the blood.

In Utah Farm Bureau Insurance Co. v. Chugg, an action to recover on an insurance policy after an automobile accident, the technician who testified concerning the analysis did not know where, how, or from whom she had received the blood sample or how she knew it belonged to the defendant. The Court of Appeals reversed the trial court's admission of this evidence on the ground that the sample analyzed had not been linked with that taken from the defendant, and that the evidence therefore was insufficient to identify the blood sample.

In contrast with this is Wooley v. Hoffner's Wagon Wheel, Inc., where the identity of the person who transported a blood sample from one hospital to another was not established. The court admitted the result of the subsequent test based on the theory that the foundation laid for the introduction of evidence of a blood

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11 6 Wigmore, Evidence § 1707 (3d ed. 1940). There is a Necessity; the calling of all the individual attendant physicians and nurses who have cooperated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness; for the records are made and relied upon in affairs of life and death. Moreover, amidst the day to day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own actions; hence, to call them to the stand would ordinarily add little or nothing to the information furnished by the record alone.

12 309 N.Y. 283, 129 N.E.2d 417 (1955). The court held that hospital records, in general, were admissible, but ruled out statements on the record which were not germane to diagnosis or treatment.

13 Id. at 419.

14 Ulm v. Moore-McCormack Lines, 117 F.2d 222 (2d Cir. 1941). The case involved marine hospital records of an injured sailor.

15 100 Cal. 2d 386, 223 P.2d 862 (1950). The court here was referring to blood tests.

16 6 Utah 2d 399, 315 P.2d 277 (1957).

17 22 Ill. 2d. 413, 176 N.E.2d 757 (1961).
analysis need not preclude every possibility of a doubt as to the identity of the specimen or the possibility of a change in condition of the blood.

In comparing these two cases it should be noted that in Chugg there was a great lack of evidence as to the identification of the specimen. It was not established who had taken the sample, how it eventually wound up in the laboratory, or who identified it as belonging to the defendant. Thus it was clear there could be some doubt as to the identity of the sample. However, in the Wooley case, as in Hogan, the missing link was less significant. A majority of courts have admitted such evidence despite the missing link. They have based their decisions on the presumption of trustworthiness which is ascribed to records made in the regular course of business. Therefore, where a test is performed in the regular course of a hospital’s business, the result should be afforded this presumption of trustworthiness, and the chain of identification need not be entirely established.

Courts in cases involving agencies other than hospitals have accorded this presumption of trustworthiness, based on regularity of performance, to blood tests offered in evidence where there was an imperfection in the chain of identification. Thus, where it was uncertain who had removed a blood sample at a mortuary, the court admitted the testimony regarding the result of the subsequent analysis despite the missing link. Similarly in Nichols v. McCoy, where the blood sample had also been removed at the mortuary and forwarded to the coroner for analysis, the Supreme Court of California overruled the Court of Appeal’s decision and admitted the result of this test. They reasoned that it was a part of regular operations to take such samples and have these tests made, and therefore it was admissible as a business record. The courts have also admitted the results of analyses performed by the board of health and the Public Health Service.

If this presumption of trustworthiness for the reports of tests inherent in the operation of a business is imputable to such agencies and organizations as listed above, it would seem logical that such a presumption would likewise be imputable to hospital records. The everyday business of hospitals is caring for their patients, the sick and the injured. One of the tools used to implement this business is the hospital record showing facts, observations, laboratory reports, diagnoses and treatments performed. To attribute to such a record a presumption of trustworthiness seems justifiable, for as was pointed out by a Maryland court:

There could be no more important record than the chart which indicates the diagnosis, the condition, and the treatment of the patient. This record is one of the important advantages incident to hospital treatment... Upon this record the physician depends in large measure to indicate and guide him in the treatment of any given case. Long experience has shown that the physician is fully warranted in depending upon the reliability and trustworthiness of such a record. It is difficult to conceive why this record should not be reliable.

While the foregoing represents the majority opinion as to civil cases, there has been a division of opinion as to the admissibility of such tests involving a missing link in criminal cases. When a criminal sanction is involved, the courts...
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have been more concerned with a protection of the accused's rights. They are more insistent that proof be beyond a reasonable doubt.25

Newton v. City of Richmond,26 an appeal from a conviction for driving while intoxicated, also involved a blood test performed at a hospital. The doctor who analyzed the blood was unable to identify the doctor who took the sample. However, the policeman who arrested the defendant testified that he was present at this taking and had seen the blood so taken placed in a vial with the defendant's name on it. The court nevertheless rejected this test result for failure to properly identify the specimen.

On the other hand, some courts have refused to hold two different rules for civil and criminal cases. Laboratory analyses have been admitted in criminal cases when there was a missing link in the chain of identification, the reason being that it is not necessary to so identify the specimen as to preclude the possibility of a doubt.27 In an appeal from a conviction for driving while intoxicated, where the test was made in the regular performance of duty the report of this analysis was held admissible under the federal shop-book rule. The court stated that the purpose of this act was to make such evidence available "without the necessity of producing as a witness every person through whose hands the sample may have passed in the completion of the established routine."28

The arguments advanced here are the same as in civil cases; the possibility of faulty identification or tampering versus the presumption of trustworthiness of records. But how far is this presumption to be carried? There seems to be good reason for holding to a higher standard in cases of a criminal nature. Here we are more concerned with the individual's rights and the protection of these against an unjust levy of criminal sanction. A higher standard of proof is always required in criminal cases — proof beyond a reasonable doubt as against the preponderance of evidence required in a civil action. The court in People v. Sansalone29 reflects this opinion. In reversing a conviction for driving while intoxicated, where the result of a blood test was entered, the court held:

Where the sole basis, as in this case, for a conviction of driving while intoxicated is the alcoholic content of a blood specimen, it is essential to show the chain of possession of the blood sample and the unchanged condition of the container from the time it is taken from a defendant until it is delivered to a chemist.30

It must be remembered, however, that in cases where the missing link has been supplied by a presumption of trustworthiness, these reports need not then be accepted completely by the jury. Evidence may still be heard to discredit the validity or trustworthiness of the test, the report, or the analyst.31 But such questions shall go to the weight to be accorded the report, rather than to the initial admissibility of the certificates.32 Any discrepancies regarding the testimony or concerning the adequacy of the report will likewise be considered to affect the weight rather than the admissibility of such records.33 It would be the province of the jury then to weigh these records and reports against any questions as to their credibility.

26 198 Va. 869, 96 S.E.2d 775 (1957).
30 Id. at 361 (Emphasis added).
31 In the principal case, the plaintiff attempted to discredit the competency of the doctor who performed the analysis by showing that he was not familiar with the names of the chemicals used in performing the test.
The daily operation of the business in a hospital requires a record of events and observations incident to a patient. This record must be relied upon by hospital personnel in their treatment of the sick and injured. Where the performance of blood tests is an integral part of a hospital's procedure, the results of such analyses should be admissible in a court of law despite the absence of some link in the chain of identification. Their admissibility rests upon the presumption of trustworthiness imputable to hospital records which play such a basic role in a hospital's orderly treatment of patients.

This does not mean to say that the requirement of establishing the chain of identification for a specimen should be done away with. On the contrary, it serves a very definite purpose and operates as a most necessary safeguard. However, where a relatively minor part of this chain is missing in a civil case, the result should be admitted by the court, and the jury allowed to weigh and assess its relative value. In criminal cases this presumption of trustworthiness ought not be disregarded. It is true a higher degree of proof is required, and should be demanded, before the result of an analysis is admitted. Still, this reliability of the record does not change with the legal condition of the patient. And so, where there is some minor link missing in the chain, the court ought give some consideration to this presumption of trustworthiness in determining the admissibility of such test results.

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