Summary Judgement in Federal Courts

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A motion for summary judgment which is set out in the Federal Rules of Civil Procedure is a procedural method of promptly disposing of any civil action in which there is no genuine issue of fact, with the moving party clearly having the law on his side. Its purpose is to eliminate trials which result in unnecessary delay and expense when no true claim or defense is had by one of the parties. It, in effect, peremptorily does away with sham pleas and unfounded actions which are brought for harassing purposes alone. Rule 56 undertakes to accomplish this purpose by providing for a pre-trial inquiry into the good faith and probable merits of the plaintiff's action and the defendant's answer.

Summary judgment is not to be confused with a motion for judgment on the pleadings. In one case use is made of affidavits, depositions, and similar methods of discovery, while in the latter the pleadings as they appear on their face alone are construed to see if a cause of action is stated under the alleged facts. A judgment on the pleadings is actually the equivalent of the common law demurrer.

The use of summary judgment under the Federal Rules is indicative of the procedural advances which have been made in the last fifteen years in order to attain justice with a minimum effort and expense.

It is not to be inferred that the use of summary judgment is a completely modern innovation in adjective law. Summary judgment originated in England in 1855, and was modified in 1873. Originally it was restricted in its application to actions upon bills of exchange and promissory notes. This was because it was believed that the circumstances surrounding this type of action lent itself to speedy adjudication. In addition the sum was liquidated, and no issue as to damages arose. Hence, if a holder of a note due and owing produced the note in court, it is easy to see why, in the face of it as uncontroverted evidence, summary judgment could be rendered. In 1873 the English rule was liberally extended so that only certain tort actions and breach of promise to marry were excluded.
Summary procedure was first introduced into the United States in South Carolina in 1769 and was followed by further ventures in the states of Kentucky, Alabama, Missouri, and Arkansas. Unlike England, where constant progress was made, the adoption of codes in these states resulted in the abandonment of this procedure.

Sporadic but spirited agitation for some form of summary procedure was started in New York in 1885 by David Dudley Field, and finally in 1921 New York adopted its first rule. Its scope was narrow, allowing summary judgment only in an action to recover a debt or a liquidated demand arising out of a contract or on a judgment. By amendment in 1932 its scope was amplified so as to include, in addition to the above, recovery of a statutory claim, recovery of an unliquidated claim arising on a contract, specific performance, recovery of specific chattels, lien or mortgage foreclosure, and accounting. This statute is typical of similar statutes enacted in other states.

Earlier objections to this procedure on grounds of constitutionality have been clearly disposed of by both state courts and the Supreme Court of the United States. The leading contention was that it affected a litigant’s right to trial by jury. In the leading case of *Dwan v. Massarene*, the court pointed out that it does not try any issues of fact in a summary proceeding, but merely determines whether or not there is an issue of fact to be tried. The United States Supreme Court has said that it "prescribes the means of making an issue," and will "preserve the court from frivolous defenses." So, if a triable issue is found, the case will go to the jury and no summary judgment will be granted. In addition, federal courts, sitting in states where summary judgment is available by virtue of statute, have held that under the Conformity Act this procedure is applicable and have not even bothered to concern themselves with the right to trial by jury.

The rule has generally operated quite successfully wherever adopted, and the modern tendency has been to enlarge its scope of operation.

Several features are found in the Federal Rule which are not to be found in most of the state statutes. First, there is no limitation as to the type of action in which the remedy is available. Definite restrictions are imposed on its use in state courts. Secondly, the remedy is available to both plaintiff and defendant alike. On this point some confusion seems to exist as to whether a movee (rather than the movant) is entitled to a summary judgment in a proper case without a cross

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12 199 App. Div. 872, 192 N. Y. S. 577 (1st Dep’t 1922).
14 17 Stat. 197 (1872).
15 3 Moore, Fed. Prac. §56:01, n. 18 (1st ed. 1938) and cases cited therein.
16 See note 10 supra.
motion. Some courts have adhered to the doctrine that only a moving party is entitled to such judgment.\(^{17}\) The better view is that a summary judgment may be granted to either party regardless of who makes the motion.\(^{18}\) This is the rule that has been adopted by statute in New York.\(^{19}\) A third feature found under the federal summary judgment procedure which is unlike practice in most other jurisdictions, is the availability of including depositions and admissions, as well as, or in lieu of affidavits in support of or in opposition to the motion.\(^{20}\) This liberality is indicative of the whole tenor of federal practice in general. Since the deposition-discovery procedure in state practice is not as liberal as the "wide open" policy used under the Federal Rules, it is necessary to make use of sworn affidavits in the state proceedings.\(^{21}\) State courts are limited in ascertaining what real issues present themselves within the facts of the case, since an affidavit of one of the parties is only one of several methods available and utilized in the federal courts.\(^{22}\) The use of the federal discovery procedure has afforded an entirely new basis as to what means can best be used to obtain substantial justice in a lawsuit. Under the old philosophy, (and this is still prevalent in most courts) the lawsuit is looked upon as a contest with each party trying to deal a knockout blow to the adversary. In the federal courts, however, the spirit underlying pleading and procedure is one of candor and openness. The court encourages both parties to disclose to each other their respective lines of attack and defense, so that a just decision may be more expeditiously reached. Procedure, therefore, is used as a means to an end, rather than an end in itself.

Rule 56(c) provides that a summary judgment:

shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.\(^{23}\)

It is obvious that no general rule can be elicited which would be a catch all for any case, so as to determine whether or not a true issue of fact exists. Each determination must necessarily depend upon the circumstances surrounding the

\(^{17}\) *Pinkus v. Reilly*, 71 F. Supp. 993 (D. N. J. 1947), aff'd., 170 F. 2d 786 (3rd Cir. 1948), aff'd., 338 U. S. 269 (1949). Court was satisfied from evidence before it that summary judgment should enter for the plaintiff, but no cross-motion for such judgment had been filed, entry of summary judgment would be withheld until such motion was made. Accord *Truncali v. Blumberg*, 8 F. R. D. 492 (S. D. N. Y. 1948).


\(^{19}\) N. Y. R. Civ. P. 113, as amended 1944.

\(^{20}\) See Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 Col. L. Rev. 1436 (1938); see note 21 infra.


\(^{22}\) Fed. R. Civ. P. 56 contemplates the hearing of the motion in four ways: (1) wholly upon affidavits and the pleadings; (2) upon the pleadings, depositions, and admissions on file, without any supporting or opposing affidavits; (3) upon affidavits and upon the pleadings, depositions, and admissions on file; (4) wholly or partly on oral testimony or depositions, the pleadings and such facts, as admissions which may appear of record.

\(^{23}\) Fed. R. Civ. P. 56(c).
case. As was heretofore stated, the court is not trying a case on affidavits submitted to it. Nor does the court pass upon questions of credibility or weight of evidence.

What the courts deemed to be or not to be genuine issues of fact to be submitted to a jury, is well illustrated by the following cases.

In stockholders' derivative actions against officers and directors of a corporation, the court requires clear and convincing evidence of the plaintiffs to sustain their claim, or a summary judgment will be granted for the defendant. If the stockholders sustain their burden and show that directors' individual interests conflicted with their corporate duties, the defendant's motion for summary judgment will be denied.

In an insurance action the court held that under the war risk policy in question the deceased seaman's loss of life and personal effects by shell fire from an enemy submarine were questions of fact as to coverage under the policy and a motion for summary judgment was denied. This is consistent with the general rule that summary judgment is rarely granted in actions on policies of insurance. Almost always in this class of cases the facts are not within the knowledge of the defendant company and they are, therefore, entitled to have the plaintiff's claim submitted to the rest of cross examination. The company should submit what knowledge it has of the subject or set forth his lack of knowledge. Usually by the very nature of the case the facts alleged in the moving affidavit demonstrate that a trial rather than a summary judgment is appropriate.

The motion has frequently been resorted to in patent infringement suits. The general rule in plagiarism suits is that the motion will be denied. When it is based solely on affidavits it is usually denied. This is not an invariable rule and in a proper case where the court finds no issue of fact the motion may be granted. A stated rule which courts have tried to follow is that a summary judgment may be entered in a patent suit when it clearly appears that the moving party is entitled to judgment as a matter of law, but such judgment should be entered on the issue of patent validity only where the matter is free from doubt and where the invalidity so clearly appears that no testimony can change its legal aspect. The affidavits used in patent cases, therefore, must state evidentiary facts and not conclusions of law,

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26 Lopata v. Handler, 37 F. Supp. 871 (D. Okla. 1941), appeal dismissed 121 F. 2d 938 (10th Cir. 1941); Brooks v. Utah Power & Light Co., 151 F. 2d 514 (10th Cir. 1945); Toebelman v. Missouri—Kansas Pipe Line Co., 130 F. 2d 1016 (4th Cir. 1942).
30 Arnstein v. Porter, 154 F. 2d 464 (2nd Cir. 1942), aff'd, 158 F. 2d 795 (2nd Cir. 1947).
and in addition, under Federal Rule 56(e)\(^{34}\) must be made on the personal knowledge of the affiant.\(^{35}\) A flagrant violation of this principle may be noted in *La Prise v. Smith*,\(^{36}\) where the affidavit merely stated that the plaintiff had a good and meritorious cause of action against the defendant, without alleging any further facts. This was clearly held to be insufficient and the motion was properly denied. One court has aptly stated that such claims and arguments are no more than "phantom issues" which usurp and waste the time of the court.\(^{37}\)

In contract actions where the issue of existence of a contract is raised the motion will usually be denied.\(^{38}\) But the motion is proper where a contract is proved and defenses and denials are contradicted by an unambiguous writing.\(^{39}\) In *Minor v. Washington Terminal Company*,\(^{40}\) former railroad employees brought an action against the defendant railroad for breach of a collective bargaining agreement. The court held that whether the railroad furnished employees copies of the agreement, or whether employees had notice of the agreement if not furnished with copies was a genuine issue of fact and precluded the railroad's motion for summary judgment. Generally, the motion will be granted in cases involving a promissory note,\(^{41}\) or a sealed instrument\(^{42}\) where no substantial defense is interposed such as, whether or not the plaintiff acquired the note from a holder in due course.\(^{43}\)

In tort actions where issues of negligence and, or proximate cause are not resolved by the pleadings or affidavits, the case must proceed to trial and a motion for summary judgment will be denied.\(^{44}\) It has been held otherwise where a defendant could prove that he was not operating an unseaworthy vessel as charged, and that he was not the cause of the plaintiff's injury.\(^{45}\) In the great majority of

\(^{34}\) Fed. R. Civ. P. 56(e).

\(^{35}\) Fed. R. Civ. P. 56(e). The Rule provides that the affidavits filed in support of or opposing a motion for summary judgment "shall" be made on the personal knowledge of the affiant. This is mandatory and requires that an affidavit state matters personally known to the affiant. *Sartor v. Arkansas Natural Gas Co.*, 321 U. S. 620 (1944), rehearing denied 322 U. S. 767 (1944). "Belief" no matter how sincere is not knowledge and does not satisfy the requirement of the statute. *Jameson v. Jameson*, 176 F. 2d 58 (D. C. Cir. 1949).


\(^{38}\) *Aronson v. Arakelian*, 154 F. 2d 231 (7th Cir. 1946) holding matters in affidavit true to the best of affiant's knowledge and belief sufficient to meet statute, but distinguished from matters alleged merely on "information and belief" which is not sufficient. Accord, *Mellen v. Hirsch*, 8 F. R. D. 248 (D. Md. 1948), aff'd, 171 F. 2d 127 (4th Cir. 1948).


\(^{40}\) 180 F. 2d 10 (D. C. Cir. 1950).


\(^{42}\) *Port of Palm Beach Dist. v. Goethals*, 104 F. 2d 706 (5th Cir. 1939).


\(^{44}\) *Chicago, R. I. & P. R. R. Co. v. Consumers Co-op Assn.*, 180 F. 2d 900 (10th Cir. 1950).

\(^{45}\) *Thomas v. Furness (Pacific Limited)*, 171 F. 2d 434 (9th Cir. 1948), cert. denied 337 U. S. 960 (1949); accord, *Mabardy v. Railway Express Agency*, 26 F. Supp. 25 (D. Mass. 1939), where in a motorist's action against owner of auto driven by employee for injuries sustained in collision, owner was entitled to summary judgment, where prior judgment for employee in employee's action against motorist in state court established that motorist was negligent.
tort actions issues of fact are necessarily present, and it is much more difficult to have a summary judgment rendered than in other actions.\textsuperscript{48}

There have also been attempts to have a summary judgment granted in actions against a decedent's estate but the motion will generally be denied, notwithstanding insufficiency of opposing affidavits. This is because the facts upon which the plaintiff's claim is based are usually within his exclusive knowledge and are properly provable at trial.\textsuperscript{47}

In injunction proceedings the courts are reluctant to grant summary relief because of the drastic nature of the ultimate remedy.\textsuperscript{46} But where the court clearly finds that the plaintiff has adduced sufficient evidence to prove a prima facie case, and the defendant cannot controvert with his own evidence, a summary judgment can be granted in an action for a permanent injunction.\textsuperscript{49}

In regard to the pleadings it may be said that the courts are critical of the moving papers, since the remedy is a drastic one. All doubts as to the existence of a genuine issue of fact as resolved against the moving party.\textsuperscript{50} It may be noted, however, that such extreme scrutiny is not taken of opposing papers, and even though a pleading is defective so as not to state a meritorious claim or defense, the party may amend if the opposing papers show a genuine issue.\textsuperscript{51}

Some conflict has arisen as to what amount of evidence is needed to defeat a motion for summary judgment. One group of cases hold that a party need only indicate an access to the necessary supporting evidence. Other cases hold that proof of the existence of some evidence to resist the motion is required. The issue has become somewhat personalized in the United States Court of Appeals for the Second Circuit. Judge Frank's view, which is in accord with the views of the state courts, would preclude granting of a plaintiff's motion for summary judgment if the defendant merely is able to show that he has an access to evidence which he can produce at trial.\textsuperscript{52} Judge Clark, on the other hand, would require a defendant to produce more than a formal denial. If the defendant does not show facts "in detail and with precision," the plaintiff is entitled to an award of summary judgment.\textsuperscript{53} The divergent views clearly show the controversy which still exists as to just


\textsuperscript{47} Quigley v. Fitts, 57 N. Y. S. 2d 16 (1945).


\textsuperscript{50} Walling v. Fairmount Creamery Co., 139 F. 2d 318 (8th Cir. 1943); Weisser v. Mursam Shoe Corp., 127 F. 2d 344 (2nd Cir. 1942).

\textsuperscript{51} Kane v. Chrysler Corp., 80 F. Supp. 360 (D. Del. 1948).


how far courts can go in granting a motion for summary judgment. Judge Frank would keep it limited, while Judge Clark feels that the conflict stems from a failure of his opponents to fully comprehend the intergration of federal pre-trial practice with summary procedure. In *Griffin v. Griffin*, the United States Supreme Court indicated its approval of the view, that proof of existing evidence would be required to resist the motion. If the stricter view is adhered to, much of the effect of Rule 56 is nullified.

The Federal Rules provide that a summary judgment may be rendered when no issue of material fact exists, except as to damages. Unlike some of the state statutes, Rule 56 does not provide a procedure for the ascertainment of unliquidated claims. Since the defending party is really in default for failure to present a sufficient defense, an assessment as in the case of a default judgment is applied by the court. This gives the court power to conduct such hearings as it sees fit and accords a right to trial by jury if required. Cases have continually held that a right to a hearing on the question of damages must be preserved.

Partial summary judgment in its true sense is not allowed under the Federal Rule 56(d). It is different than those state statutes which do allow a summary judgment for a portion of a single claim. Under the federal practice this spurious partial summary judgment is merely a determination before trial that certain issues shall be deemed established in advance of trial so as to avoid useless trial of facts and issues over which there is no real controversy. The reason for this rule is that a "judgment," as defined in the Federal Rules, includes a decree or any order from which an appeal lies. Since this is a pre-trial adjudication it is on the same level as a preliminary order, which under the policy adopted by the draftsmen of the Federal Rules are interlocutory and not appealable, except where specifically provided for by a statute of the United States.

In accord with the prior line of reasoning, it can be said that a denial of a motion for summary judgment is not appealable. It is not a final judgment because it does not dispose of the case. Denial of the motion, in effect, means there is an issue for

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56 N. Y. R. Civ. P. 113, "If plaintiff or defendant... present any triable issue of fact other than a question of the amount of damages... an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate."
57 Fed. R. Civ. P. 55(b) (2) (f).
63 For example, 28 U. S. C. §227(a) appeal allowed from court order for accounting.
64 Atlantic Company v. Citizens Ice and Cold Storage Co., 178 F. 2d 453 (5th Cir. 1949).
65 See note 57 supra.
67 18 Hughes, Fed. Prac §25213 (1940).
trial. Certain interlocutory orders are appealable by statute, but a denial of this motion does not dispose of any issue upon which a statutory appeal is allowed.\textsuperscript{65} Some states, for example New York, hold otherwise and specifically provide that a denial of the motion is appealable.\textsuperscript{66} It is the order denying the motion from which appeal is made since there has been no final adjudication and judgment from which to appeal. If the motion is granted, it is obvious that an appeal lies since a final judgment will be entered on the proceedings.\textsuperscript{67}

CONCLUSION

The summary judgment has established itself as a formidable constituent of federal practice. It yields speedy disposition of non-meritorious claims at a minimum of cost, beneficial not only to the litigant but also to the court whose docket is always overcrowded.

Nevertheless, the summary process should not replace existing methods of determining issues of fact, for the remedy it affords is a drastic one. Speedy adjudication of unfounded claims and sham defenses is a desirable end. But expediency purchased at the expense of fair trial must be avoided.

WILLIAM F. SONDERICKER

Evolution of the Bill of Attainder in the United States

From time to time, events necessitate the revival and the revitalization of some principle of law which has remained untouched by the judiciary and the legislative factors of government. When the internal security of a nation becomes uncertain and it is beset by unscrupulous enemies from without, drastic measures are required to protect the welfare of the people and the government. The exigencies of the political scene dictate that some methods be taken to secure our system of government. Such has been the fate of the bill of attainder.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial."\textsuperscript{1} This is the definition of a bill of attainder which has been given by United States Supreme Court and adhered to since the time of its definition. In further describing this kind of legislation, the Court said:

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In those cases, the legislative body, in addition to its legislative functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party without any of the forms of safeguards of a trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; it fixes the degree of the punishment in accordance with its own notions of the enormity of the offence.\textsuperscript{2}

Historically, the punishment inflicted by a bill of attainder was the death of the person so accused, the corruption of his blood and the forfeiture of his property.

\textsuperscript{1} Cummings v. Missouri, 4 Wall 277, 323 (U. S. 1866).
\textsuperscript{2} Ibid.
Usually the bill provided for the attainder of the person because of treason or the commission of a felony. The essential elements of a bill of attainder have been prescribed by Mr. Justice Miller in the dissenting opinion in *Ex parte Garland* to be the following:

1) They were judicial convictions and sentences pronounced by the legislative department of the government, instead of the judicial. 2) The sentence pronounced and the punishment inflicted were determined by no previous law or fixed rule. 3) The investigation into the guilt of the accused, if any such were made, was not necessarily or generally conducted in his presence, or that of his counsel, and no recognized rule of evidence governed the inquiry.

With these criteria as a basis for legislation, the question arises whether or not some of the anti-subversive enactments of modern legislatures meet the standards set out by Mr. Justice Miller. A consideration of the history and the development of the bill of attainder should be of assistance in arriving at a conclusion regarding the question propounded.

During the violent and tumultuous days of the government of England in the seventeenth and eighteenth centuries, bills of attainder were not uncommon. Cooley has described one of the most outstanding examples of this type of legislation in the following passage:

The most atrocious instance in history however, only relieved by its weakness and futility, was the great act of attainder passed in 1688 by the Parliament of James II, assembled in Dublin, by which two and three thousand persons were attainted, their property confiscated, and themselves sentenced to death if they failed to appear at a time named.

The United States Supreme Court has given a brief historical outline of other incidents of attainder in England in their opinion in *Cummings v. Missouri*.

Thompson has characterized the political condition of the colonies which gave rise to this type of legislation in America.

The combination of an internal enemy with foreign invaders during the American Revolution intensified the popular feeling to the extent that the feeling crystallized in every state in legal enactments against the loyalists of a confiscatory or attainting nature.

The bitter feeling against the Loyalists was particularly strong in the New England and Middle States. Attempts to disavow the Acts of the Provincial Congress in New York were made in 1775. To counter this action, some of those whose participation in the conspiracy was suspected, were required to appear before the committee and satisfactorily account for their conduct.

This was just the beginning of an attempt by the early Americans to protect whatever security they had. As time progressed, more oppressive legislation was enacted by the law-making bodies of the colonies. Massachusetts led the way for extensive measures by officially providing for the confiscation of Tory property in May 1775. All of the colonial legislatures followed suit and, by 1778, every state

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3 *Ex parte Garland*, 4 Wall. 333, 388 (U. S. 1866).
5 4 Wall. 277, 323, 324 (1866).
6 Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 Ill. L. Rev. 81, (1908).
had passed laws and resolutions providing for oaths of allegiance to the American cause and the confiscation of the property of the Loyalists.  

During this period of great political unrest, the legislatures exercised the highest degree of sovereignty. Their enactments were despotic and expressed emphatically the greatest abuse of the discretion of the legislative function. Political necessity and expediency forced these legislators to enact unjust and inhuman laws because of the fear and suspicions which they harbored. Story has described the justification of these acts in the following passage from his Commentaries on the Constitution:

Some of the most eminent statesmen of the period (American Revolution) defended them as wise and necessary. This is not surprising when we consider that coolness, caution, and a strict regard for the rights and liberties of others, are the accompaniments of conscious security and strength and are not to be looked for in times of great danger, when the people regard their all as being staked upon the issue of a doubtful contest, and when it is of the utmost importance to their cause, that by every possible means they force doubtful parties to take sides with them and lessen the power, number, and means of offences of those opposed.

The memory of this particular brand of legislation was still fresh in the minds of the framers of the Constitution when they met in Philadelphia to draw up the document which has been the source of our government. The need for some type of prohibition against future passage of such legislation was never questioned. These men well understood that in times of peril, such as those which they had just witnessed, the public safety became the goal of the legislature and the private rights of the individual who did not seem disposed to the popular cause was likely to be trampled upon unnecessarily.

... the power to report such acts under any conceivable circumstances in which the country could be placed again was felt to be too dangerous to be left in the legislative hands.

Consequently, there was little debate when the clause, "No Bill of Attainder or ex post facto law shall be passed," was offered as part of the Federal Constitution. The first part of the clause was passed without objection by the members of the Convention. James Madison has commented on this matter in the following passage:

Bills of Attainder and ex post facto laws are contrary to the first principles of the social compact, and to every principle of sound legislation. They are expressly prohibited by the declaration prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against dangers ought not to be omitted. Very properly therefore, have the Convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments, the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which

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7 Thompson, supra note 6, at 147.
9 Cooley, supra note 4, at 371.
10 U. S. Const. Art. I, Sec. 9.
has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the country. They have seen too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They rightly infer, therefore, that some thorough reform is wanting, which will banish speculation on public measures, inspire general prudence and industry, and give a regular course to the business of society.11

The termination of the Civil War precipitated circumstances similar to those which were anticipated by the framers of the Constitution. In order to assure the future security of the Union, state legislatures enacted stringent laws demanding extraordinary affirmation of the loyalty of the individual to the United States. Congress, too, passed a law requiring the taking of an expurgatory oath as a prerequisite to practicing before the United States Supreme Court. The test of these oaths was the past loyalty of the person, and if he had been disloyal, he was barred from the exercise of the rights and privileges which he sought, regardless of his present patriotic disposition.

The oath required by the Constitution of the State of Missouri, which demanded that a clergyman purge himself of past disloyalty by stating that he had never given aid or comfort to the enemy during the recent conflict between the states, was the first to be declared invalid by the United States Supreme Court.12 On the same day the Court was asked to uphold the validity of a Congressional enactment, requiring that all applicants for the privilege of practicing before the United States Supreme Court take an oath denying any adherence to the cause of the Confederacy in the past.13 The Court held that both of these enactments were bills of attainder within the prohibitions of the Constitution.

In the former case, the Court held that the priest had the inalienable right to practice his calling and any legislative requirement which would hinder the practice of his profession was punishment. The Court stated that:

The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment.14

The Court asserted that the state had the right to prescribe the qualifications as prerequisites to the practice of a profession only when the condition was one which would not inflict punishment for a past act.

The dissent in Ex parte Garland,15 which is also applicable to the Cummings case,16 maintained that these oaths did not meet the requirements of a bill of attainder and further justified the right of the state to prescribe the condition upon

11 The Federalist, No. 44.
12 Cummings v. Missouri, 4 Wall. 277 (U. S. 1866).
13 Ex parte Garland, 4 Wall. 333 (U. S. 1866).
14 Cummings v. Missouri, 4 Wall. 320 (U. S. 1866).
15 4 Wall. 333 (U. S. 1866).
16 4 Wall. 277 (U. S. 1866).
which one might practice his profession as a matter of the internal police power of the state.

The Court applied these precedents in the case of Pierce v. Craskdon. This case dealt with the validity of an expurgatory oath required by a statute of the State of West Virginia. This statute required that a litigant, on appeal, must take an oath denying that he had ever aided or abetted the enemy in any way during the war between the states. Pierce had been defeated in a trespass action, and on appeal, had failed to file the necessary affidavit required by statute, disavowing any assistance to the Confederate cause during the Civil War. The decision of the Supreme Court of the State of West Virginia was overruled by the United States Supreme Court, which held that the affidavit came within the doctrine propounded in the Cummings case, and was a bill of attainder.

It is submitted that the decisions of the Court in these cases may have been the result of very strong subjective factors which emanated from the tenor of the times. It is notable that the highest court of the State of Missouri did not feel bound by the decisions of the United States Supreme Court because it held a similar oath to be valid within the constitutional prohibitions. Blair v. Ridgeley.

The next case of this kind to come before the United States Supreme Court for its determination was that of Dent v. West Virginia. The petitioner was denied the right to practice medicine in the State of West Virginia because of his failure to meet the requirements of the Board of Medical Examiners. The Court refused to apply the doctrine of the Cummings and Garland cases by distinguishing this requirement from the oath in the other cases which pertained to past acts. The Court held that such a right could be abridged if the welfare of the public demanded such protection, saying:

The interest, or as it is sometimes called, the estate acquired in them, that is the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. But there is no such arbitrary deprivation of such right where exercise is not permitted because of failure to comply with conditions imposed by the state for the protection of society.

The United States Supreme Court followed this line of reasoning in Hawker v. New York, wherein the petitioner sought reversal of a judgment of the lower court denying him the right to practice medicine because of the prior conviction of a felony.

The United States Supreme Court relied upon the precedents set by the Cummings and Garland cases in holding an act of Congress to be invalid in

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17 16 Wall. 234 (U.S. 1872).
18 4 Wall. 277 (U.S. 1866).
20 129 U.S. 115 (1889).
21 4 Wall. 277 (U.S. 1866).
22 4 Wall. 333 (U.S. 1866).
24 170 U.S. 189 (1898).
25 4 Wall. 277 (U.S. 1866).
26 4 Wall 333 (U.S. 1866).
United States v. Lovett. In this instance, the Congress of the United States had attached a rider to an appropriation bill, cutting off the salaries of three governmental employees. In extending the doctrine of the prior cases, the Court said:

They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.28

In holding that such acts were bills of attainder, the Court inquired extensively into the intention of Congress in passing such legislation. They found that the reason for the rider was based upon the assumption that the defendants had been affiliated with or had tendencies toward the Communist Party.

When the validity of the non-Communist affidavit of the Taft-Hartley Act was before the United States Supreme Court for consideration, the Court distinguished it from the oaths in the previous cases, saying:

But there is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for past actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into future conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that §9(h) is intended to prevent future actions rather than punish past actions.29

With the increase of an awareness of the danger which the Communist Party plays in the security of the country, there have been numerous legislative enactments throughout the nation which require the taking of an oath by an applicant for the privilege of obtaining a particular job or exercising some right. Most of the oaths require that the applicant indicate that he is not now or never has been a member of the Communist Party, or does not adhere to a doctrine which advocates the overthrow of the government by the use of force and violence. By a five-four decision, the United States Supreme Court held that such affidavits and oaths were not bills of attainder. Garner v. Board of Public Works of Los Angeles.30 The majority of the Court reiterated the principle that the state may impose such standards and set up whatever qualifications it may deem necessary as a condition precedent to the acquirement of a particular job or the exercise of certain rights. In the exercise of its police power for the good of the public and the general welfare, the state legislatures may determine the requirements which must be fulfilled before the individual may qualify for a certain position.

However, Mr. Justice Black dissenting stated:

The opinion of the court creates considerable doubt as to the vitality of three of our past decisions; Cummings, Garland, Lovett. To this extent it weakens one more of the Constitution's great guarantees of individual liberty.31

27 328 U. S. 303 (1946).
Mr. Justice Douglas held that the deprivation of a man’s right to earn a living is punishment. He further maintained that the deprivation is unconstitutional whether based on one past act of disloyalty or on a series of past acts.

This brief analysis of the history of the bill of attainder indicates that two separate and distinct doctrines may be applied in future determination of whether legislation constitutes a bill of attainder.

The liberal view, supported by the Cummings, Garland, and Lovett cases would apply the bill of attainder more freely to a larger field of legislative activity. The bill of attainder would encompass with equal force both past and future loyalty oaths. Under the doctrine of the Lovett case, which renders a bill of attainder applicable to "legislative acts, no matter what their form," the bill of attainder could be extended to determining the validity of Congressional resolutions. Could not, then, a Congressional resolution permitting the interrogation of individuals before the public and television be stamped a bill of attainder where the individual suffers punishment as a consequence of appearing before a duly constituted committee? Of what consequence would the bill of attainder be, under this view, as a judicial weapon in checking the legislative branch of government?

The strict view, originating with the dissenting opinion of Justice Miller in the Garland case, and espoused by the Dent, Douds, and Garner cases, would limit the application of bills of attainder within a restricted area, thus rendering it an ineffective meaningless constitutional safeguard which has lost most of its historic significance and importance. The constitutionality of the loyalty oath program would be upheld as not constituting a bill of attainder. Congressional resolutions permitting committee hearings would extend the investigatory power of Congress into the sphere of the individual’s right to privacy and good reputation. The judiciary could not check the legislature with a weapon weakened by restriction almost to a point of extinction.

Apparently the Supreme Court is disposed to follow the strict view in the case of "loyalty oaths" which tend to deprive private citizens of valuable property interests. The only alternative effective control for subversive activities appears to be criminal legislation which, in the long run, imposes a far greater restraint on fundamental human rights. This would seem to indicate that, even though a particular enactment of the legislature operates to deprive an individual or group of individuals of certain rights without judicial process, it is not technically a Bill of Attainder in the eyes of the Supreme Court if the public interest involved is distinctly paramount to the interest of the individual. Query: Is this the same view of "attainder" as the founding fathers had?

Mary A. Dolan

32 4 Wall. 277 (U. S. 1866).
33 4 Wall. 333 (U. S. 1866).
34 328 U. S. 303 (1946).
35 Ibid.
36 4 Wall. 333 (U. S. 1866).
37 129 U. S. 115 (1889).