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Bankruptcy: Liability of Drawee Bank in Voluntary Proceedings

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NOTES

Bankruptcy: Liability of Drawee Bank in Voluntary Proceedings: Between August 27, 1963 and September 17, 1963, Marin Seafoods drew and delivered five checks to Eureka Fisheries, totalling $2,318.82. The checks were drawn upon Marin's commercial account in the Bank of Marin. On September 26, 1963, Marin Seafoods filled a voluntary petition in bankruptcy in the District Court for the Northern District of California, and a receiver in bankruptcy was appointed.[1] On October 2, 1963 Eureka Fisheries presented the checks which Marin Seafoods had delivered to them, and these checks were paid by the Bank of Marin. When the bank paid these checks, it had received no notice of the filing of the petition in bankruptcy, and, in fact, it was not so informed until October 3, 1963, when it received a letter dated October 2, 1963. The receiver, John England, was appointed trustee in bankruptcy on October 20, 1963; and when he learned that the bank had honored the checks, he applied to the referee in bankruptcy for a turnover order[2] in the amount of the honored checks, alternatively against the Bank of Marin and Eureka Fisheries. The referee held that the bank and Eureka were jointly liable to the trustee for the amount paid by the bank to Eureka. The District Court affirmed the decision of the referee, and the Ninth Court of Appeals reaffirmed the decision upon the appeal of the Bank of Marin.[3] The United States Supreme Court reversed, holding that a drawee bank is not liable for honoring checks drawn before the filing of a voluntary petition in bankruptcy, but presented for payment after the filing, where it had not received actual notice of the bankruptcy proceedings.[4]

The Bankruptcy Act of 1898 initially provided that the title to the bankrupt's property vested in the trustee as of the date of the first adjudication of bankruptcy.[5] The courts, however, utilized a legal fiction in dealing with the title, reasoning that the title which the trustee re-

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[1] Bankruptcy Act §59, 52 Stat. 868 (1938), 11 U. S. C. §95(a) (1964).

[2] Bankruptcy Act §2(a)(15), 52 Stat. 842 (1958), 11U.S.C. §11(a)(15) (1964).

[3] 352 F.2d 186 (9th Cir. 1965).

[4] Bank of Marin v. England, 385 U.S. 99 (1966). The trustee claimed that the question was moot, since the joint judgment had been paid by the payee, Eureka Fisheries. The Court decided that the question of the bank's liability was still in issue, since the payee had served on the bank a demand for contribution. Mr. Justice Fortas, in his dissenting opinion, took the position that there was no real controversy here, since the payment by the payee removed any element of adversity between the trustee and the bank. His recommendation was to vacate the judgment and remand the case for dismissal. Bank of Marin v. England, 385 U.S. 99, 111 (1966). The effect of such a decision would merely be to cause more litigation, since the payee would then be forced to litigate the issue of the bank's liability.

[5] "Adjudication shall mean a determination, whether by decree or by operation of Law, that a person is bankrupt." Bankruptcy Act §1(2), 73 Stat. 109 (1959), 11 U. S. C. §1(2) (1964).

ceived at the adjudication related back to the date of the filing of the petition.[6] This principle was applied quite literally by the courts, and the date of the filing of the petition was the absolute date of cleavage regarding any transfers: "The filing of the petition in bankruptcy is a caveat to all the world, and, in effect, an attachment and injunction."[7]

It was soon recognized that the filing of the petition in bankruptcy, as a matter of commercial usage, was not an efficient type of notice by which to put third parties on their guard in dealing with the bankrupt. An exception to the general rule began to develop, although the development was, at best, highly confusing. When an otherwise innocent third party would deal with the bankrupt, and have no practical means of ascertaining that a petition had been filed, transfers by the bankrupt were occasionally sustained on equitable grounds.[8] In the case of *Citizens Union National Bank v. Johnson*,[9] the payee had presented checks, drawn by the bankrupt before the filing of the petition, after the filing of an involuntary petition but before there had been an adjudication. The bank had received no notice of the filing, and promptly paid the checks in the normal course of business. The Sixth Circuit Court of Appeals said:

> "We think that the conclusion that the bank is liable for payments made in good faith to third parties and in ignorance of the bankruptcy proceedings is not well founded. Its effect would be that the bank could not protect itself against liability to a trustee in bankruptcy subsequently appointed on account of payments made in good faith in the regular course of business, and in ignorance of the bankruptcy proceedings."[10]

But equity protected innocent third parties, including drawee banks, only if the transfer occurred before an adjudication.[11]

Questions concerning the validity of the relation-back principle, the sustaining of transfers between filing and adjudication, and the summary invalidation of all transfers after adjudication upon action by the trustee, contributed to a wide-spread confusion in court decisions. In an effort to provide a uniform rule, the Bankruptcy Act was amended in 1938 by the Chandler Act.[12] Section 70(a) of the Bankruptcy Act now provided that the title to the property of the bankrupt vests in the trustee ". . . upon his appointment, . . ." as of the date of the filing of the

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[6] Everette v. Judson, 228 U.S. 474, 478 (1913); Andrews v. Partridge, 228 U.S. 479, 481 (1913); Fairbanks Shovel v. Wills, 240 U.S. 642, 649 (1916).
[7] Mueller v. Nugent, 184 U.S. 1, 14 (1901). *Cf.* May v. Henderson, 268 U.S. 111, 117 (1925); Lazarus v. Prentice, 234 U.S. 263, 266 (1914).
[8] See *In re* Retail Stores Delivery Corp., 11 F. Supp. 658, 659 (D.C. S.D. N.Y. 1935); *In re* Mertens, 144 Fed. 818, 823 (2d Cir. 1906); *In re* Perpall, 271 F. 466, 468 (2d Cir. 1921); *In re* Zotti, 186 F. 84, 86 (2d Cir. 1911).
[9] 286 F. 527, (6th Cir. 1922).
[10] *Id.* at 528.
[11] See note 8 *supra*.
[12] 52 Stat. 840 (1938).

petition.[13] Although this was an obvious effort to eliminate any relation-back principle, by providing that filing and adjudication would be simultaneous, the effort was not totally successful. Because of the use of the phrase ". . . upon his appointment," there is still an interval when there is no title. The effect of the section is to have the trustee's title relate back to the date of the filing of the petition, despite the efforts of the writers of the new section.

The draftsmen included section 70(d)[14] in the new Bankruptcy Act to provide for this interval. This section spells out the exceptions to the general rule, by providing that the types of transfer there enumerated would be valid in the interval between the filing and the adjudication. The section is exclusive, and the courts have quite generally refused to extend the protection of the section past its literal wording.[15] In an attempt to extend the protection to an insurance company which had made a transfer of the cash surrender value of a bankrupt's life insurance policy to the bankrupt after the filing of a petition, but before an adjudication, the court said:

> "There is almost always some injustice or hardship which attends transactions occuring after the filing of a petition in bankruptcy. Whether the line which has been drawn is the best possible solution of the problem is not for the courts to say. The line in fact has been drawn by competent authority and it is no longer necessary for the courts to make the attempt, which has not been conspicuously successful in the past, to decide cases on the facts as they arise."[16]

The courts have recognized that there are inequities whenever an arbitrary cut-off point is adopted, but they have all agreed that the equities in such a situation weigh more heavily in favor of the trustee.

In 1959 Section 18(f),[17] dealing with voluntary petitions in bankruptcy, was added to the Bankruptcy Act. The purpose of this section is, in all cases of a voluntary petition, to make the date of the filing operate as the date of the adjudication. The seeming effect of this merger is to remove voluntary petitions from the operation of section 70(d). Since there is no longer any interval between the filing and the adjudication in a voluntary proceeding, it seems that the exceptions in section 70(d) are not applicable to a voluntary proceeding. If this were the case, there could never be a valid transfer by a bankrupt after a voluntary petition has been filed. But the Marin case goes one step beyond

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[13] Bankruptcy Act §70(a), 52 Stat. 882 (1938), 11 U.S.C. §110(a) (1964).
[14] Bankruptcy Act §70(d), 52 Stat. 883 (1938), 11 U.S.C. §110(d) (1964).
[15] "Except as provided in this subdivision, no transfer by or on behalf of the bankrupt after the date of the bankruptcy shall be valid against the trustee." Bankruptcy Act §70(d)(5), 52 Stat. 884 (1938), 11 U.S.C. §110(d)(5) (1964).
[16] Lake v. New York Life Insurance Co., 218 F.2d 394, 399 (4th Cir. 1955). *Cf.* Kohn v. Myers, 266 F.2d 353, 357 (2d Cir. 1959).
[17] Bankruptcy Act §18(f), 73 Stat. 109 (1959), 11 U.S.C. §41(f) (1964).

this reasoning, and provides an exception for the seeming iron-clad rule of sections 70(d)(5) and 18(f).

The law of negotiable instruments has been well settled for some time on the point that the mere issuance of a check is not a transfer as between the drawer and the drawee within the meaning of section 70(d)(5).[18] The transfer occurs when the check is presented for payment by the payee and is paid by the drawee. In the *Marin* case, under the above rule, the transfer did occur after the filing of the voluntary petition. So, under section 18(f), there was, at least technically, an invalid transfer within the meaning of 70(d)(5), and the trustee would seem to be entitled to avoid it. But the Supreme Court does not so conclude. One of the prime arguments by the Bank of Marin was based on the case of *Rosenthal v. Guaranty Bank & Trust.*[19] In that case the bankrupt had filed a petition for reorganization, which was approved on the same day.[20] Subsequently, the bank honored checks which were drawn by the bankrupt before the filing of the petition. The bank was held not liable to the trustee for the amount of the payments. The theory of the court in that case revolved around the negotiability proviso in section 70(d)(5)[21]. As the dissenting opinion pointed out in the *Marin* case,[22] the *Rosenthal* rationale has been severly criticized on several grounds: the mere presentation and payment of a check by a drawee bank is not strictly a negotiation, and this interpretation of the negotiability proviso is not in accordance with the other provisions of section 70(d)(5). Although the dissenting opinion criticizes the majority upon this point, the fact is that neither the Court of Appeals nor the Supreme Court approached an application of the *Rosenthal* rationale. The Court of Appeals rather summarily dismissed this argument of the bank,[23] and the only reliance which the Supreme Court placed on the case was in its determination that certiorari should be granted because of the importance of the question presented under the facts.[24]

There were two broad grounds upon which the Supreme Court relied in its determination of the issue. The first was the very nature of the deposit contract between the depositor and the bank. Under this

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[18] This point was initially settled, despite some previous doubt, by the Uniform Negotiable Instruments Law, §189, and is now codified in the Uniform Commercial Code, §3-409(1): "A check or other draft does not, of itself, operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it."

[19] 139 F. Supp. 730 (D.C. La. 1948).

[20] The filing and approval of a petition for corporate reorganization is similar to the filing of a voluntary petition in bankruptcy, in so far as the effect of both procedures is the same as that of an adjudication. Bankruptcy Act §102, 52 Stat. 883 (1938), 11 U. S. C. §502 (1964).

[21] "Provided, however, that nothing in this title shall impair the negotiability or currency of negotiable instruments." Bankruptcy Act §70(d)(5), 52 Stat. 884 (1938), 11 U.S.C. §110(d)(5) (1964).

[22] Bank of Marin v. England, 385 U.S. 99, 104 (1966).

[23] Bank of Marin v. England, 352 F.2d 186, 189 (1965).

[24] Bank of Marin v. England, 385 U.S. 99, 100 (1966).

contract, the bank has both the right and the duty to honor all checks which are properly drawn upon it; if it does not fulfill this duty, it may be liable in an action for wrongful dishonor.[25] In conjunction with the nature of the deposit contract, the court applied the following principle:

> ". . . the rule applicable to this and to all similar cases is that the trustee takes the property not as an innocent purchaser, but as the debtor had it at the time of the filing of the petition, subject to all valid claims."[26]

Since the defense of the bank, that without notice of the filing of the petition it had a duty to honor the checks when presented, was valid against the bankrupt before the filing of the petition, it was also valid against the trustee after his appointment. In utilizing this argument, the majority ignored the fact that there are instances in which a trustee's power over the property is far greater than the bankrupt's was before the filing: the trustee can set aside fraudulent conveyances under State or Federal Law or under the Bankruptcy Act, he can avoid certain liens on the bankrupt's property, and he can avoid preferential transfers.[27] Much of the strength of the majority's argument is diluted upon the realization that there are instances when the trustee can do certain things which the bankrupt could never do. The majority would have had a much stronger argument if they would have demonstrated more convincingly that this was not an instance where the power of the trustee was greater than that of the bankrupt. This argument is extremely significant because the Court adopted it in toto from the brief of the California Bankers Association as amicus curiae in the Court of Appeals.[28]

The second argument which the Court used is that of the equities of the situation. Bankruptcy proceedings have long been treated as basically proceedings in equity.

> "This court has held that for many purposes courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity. A Bankruptcy Court is a court of equity in the sense that in the exercise of the jurisdiction conferred upon it by the Act, it applies the principles and rules of the equity jurisprudence."[29]

The Court then reasoned that the equities in this case are clearly with the bank,[30] since they received no notice of the proceedings before honoring the checks. There is no question that to hold the bank liable in this

[25] Uniform Commercial Code §4-402: "A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item."
[26] Zartmann v. First National Bank, 216 U.S. 134, 138 (1910).
[27] 4 Collier on Bankruptcy §70.14 (14th ed. 1962).
[28] Bank of Marin v. England, 352 F.2d 186, 191 (1965).
[29] Pepper v. Litton, 308 U.S. 295, 304-305 (1939). *Cf.* Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934).
[30] The Court o Appeals also agreed on this point. Bank of Marin v. England, 352 F.2d 186, 190 (1965).

situation would be highly inequitable, yet it seems that the Court disregards one of its former pronouncements in reaching its decision. There are certain limitations placed upon the application of equitable principles in a bankruptcy proceeding, and one of these is that although, "A court of bankruptcy is a court of equity, and is guided by equitable principles, this is only insofar as they are not inconsistent with the Bankruptcy Act."[31] The application of equitable principles here clearly produces a result which is inconsistent with the cumulative effect of 70(d)(5) and 18(f). In a technical sense, the Court should not have applied equitable principles to the controversy in the Marin case. From a purely legal point of view, the statement in the dissenting opinion is correct:

> "The Court, in its haste to alleviate an indisputable inequity to the bank, disregards, in my opinion, both the proper principles of statutory construction and the most permanent interests of bankruptcy administration."[32]

Although the majority's major premises are weak, there is a consideration which is passed over lightly, but is highly determinative. Not only are the equities on the side of the bank in this case, they are almost overbearing in their weight. The effect of a decision to hold the innocent bank liable would be to place an intolerable burden upon banks. If "The bankruptcy of a drawer operates as a revocation of the drawee's authority," and "Such revocation is not dependent upon or subject to notice to the drawee,"[33] the bank's duty would be impossible to perform. They would be forced to maintain a perpetual scrutiny of bankruptcy records in an effort to ascertain the hour-by-hour financial status of their depositors. The speed and efficiency required in present-day banking transactions would be, for all practical purposes, impossible to achieve. One of the possibilities for the banks, recommended by the Court of Appeals, would be that they could keep themselves posted by reading local legal publications. Yet, under the broad sweep of a decision affirming the bank's liability, the bank would be forced to keep itself informed of bankruptcy proceedings in every Federal court in the United States. The loss implicit in such a duty would be borne, not solely by the banks, but by their depositors and other innocent third parties.

The Court of Appeals recognized these inequities, and that the bank could never fully protect itself. It reasoned that since the *Rosenthal* case and the present case were the only two reported involving this unique fact situation, the occasions of the bank's liability would be few. The expenses which the bank would incur due to this liability should ". . .

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31 S.E.C. v. U.S. Realty, 310 U.S. 434, 455 (1939). *Cf.* Bardes v. Hawarden Bank, 178 U.S. 524, 533-534 (1900).
32 Bank of Marin v. England, 385 U.S. 99, 103 (1966).
33 Bank of Marin v. England, 352 F.2d 186, 190-191 (1965).

be taken into account as a cost of the business."[34] This rather weak logic ignores the fact that an injustice would be done if the bank were to be held liable when there is no way for them to avoid the liability. The bank would be forced to bear a burden more logically borne by others, and, in return, the scope of their liability without fault would be extended. In an analogous situation in an involuntary proceeding, where the transfer occured between the time of filing and the time of the adjudication, the Seventh Court of Appeals concluded that the bank would be unable to protect itself in such a situation ". . . except through the impossible

> course of keeping itself advised not only daily, but momentarily, of the filing of the petitions for adjudication of bankruptcy against its depositors."[35]

The same effect would follow if the bank were to be held liable here. The decision of the Court is the only one tenable in any consideration of present banking techniques and the burden placed upon the bank in such a situation.[36]

The Court specifies that the bank will not be liable in such a situation unless they receive notice before the transaction, but the decision does not specify what the notice should be. The Court does say that the notice which is necessary is one ". . . reasonably calculated, under all of the circumstances, to apprise the interested persons of the pendency of the action."[37] In the *Marin* case, there are no guidelines laid down which define "reasonable notice". In a case involving the same requirement of reasonable notice in a different legal setting, the Court has said:

> "Notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable, and whose legally protected interests are directly involved."[38]

The facts in the *Marin* case fall squarely within the elements necessary for the application of the rule in the *Schroeder* case. Since the bankrupt has voluntarily placed himself in the custody of the court, it is only reasonable that the duty to notify the interested parties should fall to

[34] *Id.* at 191.

[35] Citizens Union National Bank v. Johnson, 286 Fed. 527, 528 (9th Cir. 1923).

[36] In cases of an individual's voluntary petition in bankruptcy, the precise problem in the Marin case would probably never arise. A potential bankrupt has the right to convert a reasonable amount of non-exempt personal property into exempt property, thus avoiding the claims of creditors on this amount. Thus, the money in a bank account could be withdrawn and used to purchase exempt property such as furniture, foodstuffs, an automobile, or to pay the cost of the attoney's fees in the forthcoming bankruptcy proceeding. See Comstock v. Bechtel, 63 Wis. 656, 24 N.W. 465 (1885). *Cf.* Leuterman v. Aschermann, 164 Wis. 162, 159 N.W. 718 (1916); *In re* Wood, 147 F. 878 (7th Cir. 1906).

[37] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). *Cf.* Walker v. City of Hutchinson, 325 U.S. 112 (1956).

[38] Schroeder v. City of New York, 371 U.S. 208, 212-213 (1962).

him. Since the appointment of a trustee is often delayed in a case of a voluntary petition, there is an interval after the adjudication where there is no person, other than the court, whose duty it is to protect the interests of the creditors and of the other parties. In this interval, the bankrupt should assume that duty. The burden of fulfilling that duty will not be onerous for the bankrupt, since all of the pertinent facts are naturally within his knowledge. A personal visit or a short telephone call would be sufficient to fulfill the requirement. This notice would immediately divest the bank, and other parties, of any defense if they subsequently transferred any property of the bankrupt.[39]

Because the rationale behind the Court's decision, as stated, is rather weak, and because the decision is not based upon any statutory interpretation, there is some question as to the relevance of the case as an important precedent. In future cases in this area, it is quite possible that this decision will be designated as a mistake, or limited to the unique fact situation in the *Marin* case. Because the equities in this type of situation are so overwhelming upon the side of the bank, it seems that there should be some sounder basis upon which to rest the decision. One possibility for a more secure ground of decision can be achieved by a fuller and more realistic analysis of the contract relationship between the depositor and the bank.

As the Court states, the deposit of the money in the bank creates the legal relationship of debtor and creditor between the bank and the depositor. The money has been deposited by the creditor in return for the promise of the bank. The bank has the duty to fulfill the contract by paying out the money in the account in accordance with the orders of the depositor. When the depositor issues a check, he is authorizing the bank to pay the money to the named payee. In the *Marin* case, the trustee argued that since the rule is that the issuance of the check, without more, does not constitute an assignment,[40] the honoring of the check by the bank after the adjudication in bankruptcy is a transfer within the meaning of 70(d)(5). Looking at the "no-assignment" rule from both a historical and a realistic point of view, the argument to the contrary is extremely strong.

The doctrine of no-assignment was enacted primarily as a protection for banks and its effect was intended to be limited as between the drawer and the drawee bank. Prior to the adoption of the rule, it was

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[39] In the event of death or incompetence of the drawer, the Uniform Commercial Code has taken a very liberal view of the effect of actual notice upon the drawee bank's duty; Uniform Commercial Code §4-405: "(1). . . Neither death nor incompetence of a customer revokes such authority . . . until the bank knows of the fact of the death or of an adjudication of incompetence and has reasonable opportunity to act on it . . . (2) Even with knowledge a bank may for 10 days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account."

[40] See note 18, *supra*.

often held that the mere issuance of the check was an assignment as between all of the parties, and this is still the law in some of the continental countries.[41] The problems and inequities implicit in such a rule are all such that the drawee bank must bear the heavier burden under the system. How does the bank determine in what order the checks are to be honored—chronologically by presentment or according to the bank's numbering system? What effect, if any, does a stop payment order from the drawer have upon the assignment which occurs at the issuance of the check? To avoid these problems and the possibility of double liability for the bank, the no-assignment doctrine was enacted. This doctrine was never intended to operate in derogation of the rights of the bank, yet that would be the harsh result if the application of the no-assignment doctrine were allowed in the manner argued for by the trustee.

Looking at the issuance of the check realistically, there is actually an assignment by the drawer to the payee when the check is issued. The drawer is giving up his right to the funds which are in the hands of the bank to the payee. The important consideration here is that this assignment occurs as between the drawer and the payee, while the no-assignment rule is meant to operate as between the drawer and the drawee bank, or as between the payee and the drawee bank. Thus, the no-assignment doctrine would still fulfill its original function while at the same time the realities of the situation would be faced up to. When the bank honors the check, they do not really assign anything to the payee, for they are merely fulfilling their contract duty.

Applying this reasoning to the situation in the *Marin* case, the same equitable result is reached. The transfer as between the drawer and the payee is deemed to have occured at the issuance of the check, which was before the adjudication of bankruptcy. The only event which occured after the adjudication was the honoring of the check by the bank. The bank is obviously not liable for fulfilling their contract duty without notice. Notice of the adjudication of bankruptcy would have the same effect on the bank's rights, that is, they would have no right to honor the checks. If the above rationale is used, a transfer of the funds which is a preference within the meaning of section 60 can still be avoided by the trustee. Thus, the innocent bank would be free from liability and the effect of the reasoning would be ". . . to permit the trustee to obtain recovery only against the party that benefitted from the transaction."[42]

The two primary ends sought to be attained in a bankruptcy proceeding are the protection of the creditors and the speedy and efficient

[41] Farnsworth, *The Check In France & The United States—A Comparative Study*, 36 TUL. L. REV. 245 (1962).

[42] Bank of Marin v. England, 385 U.S. 99, 104 (1966).

settlement of the estate.[43] These should not be deemed as exclusive, and innocent third party banks should not be forced to carry a heavy liability to serve those ends. The *Marin* case loosens the absolute grip of the trustee on the property of the bankrupt, and, in so doing, achieves another end which should be sought in bankruptcy proceedings. If the Court would have placed the decision on surer grounds, we could be sure of further equitable results in this area. As it is, we can only hope that the Court will continue on its present path.

PATRICK M. RYAN

Criminal Law: Self-Incrimination: Right to Counsel: After having been indicted for conspiring to rob a federally insured bank and after counsel had been appointed to represent him, the accused was placed in a lineup for identification purposes. In the lineup he was required to repeat the words used by the robber, as were the others in the lineup. His appointed counsel was not notified and was not present. Although the United States Supreme Court held in *United States v. Wade*[1] that the accused's Fifth Amendment privilege against self-incrimination had not been infringed, it did hold that his Sixth Amendment right to the assistance of counsel had been violated. While the opinion of the Court and the separate opinions of Justices Black, White and Fortas are helpful in clarifying certain questions in the law, they do raise further questions which are left unanswered.

The first part of the Court's opinion relates to the alleged violation of the accused's privilege against self-incrimination. There are two basic theories of what constitutes self-incrimination. The first is that self-incrimination includes any compulsion of an individual to cooperate in any way in his prosecution. The second is that self-incrimination includes only compelled communication from an individual. The Court stated in *Schmerber v. California*[2] that only evidence of a testimonial or communicative nature falls within the privilege. In *Wade* the Court makes it clear that all speech is not necessarily communicative, even when the words uttered are those used by the person who committed the crime: ". . . he was required to use his voice as an identifying physical characteristic, not to speak his guilt."[3] Mr. Justice Black in his dissent from this point relies on his dissent in *Schmerber*,[4] where he suggested that obtaining any evidence from the suspect by compulsion violates the Fifth Amendment privilege. He does not imply, however, that *Schmerber* is

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[43] Kuechner v. Irving Trust, 299 U.S. 445, 452 (1937). *Cf.* Bailey v. Grover, 88 U.S. 342, 346 (1874).

[1] 388 U.S. 218 (1967).

[2] 384 U.S. 757, 761 (1966), where a blood sample was taken from a suspect (over his objection) to determine its alcohol content.

[3] 388 U.S. 218, 222-23 (1967).

[4] 384 U.S. 757, 773 (1966).