Court decision file

Appalachian power company, et al

against

American institute of certified public accountants

United States Court of appeals for the second circuit
Memorandum on behalf of appellees in opposition to appellants' motion for injunction pending appeal

May 1959

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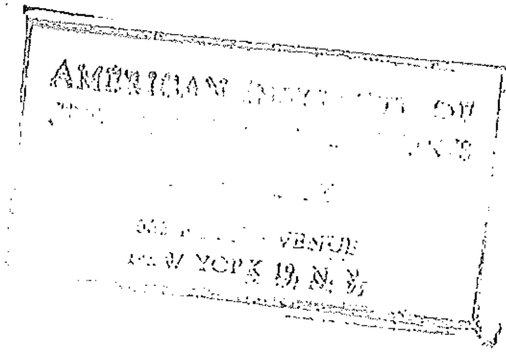
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

APPALACHIAN POWER COMPANY, OHIO POWER COMPANY and INDIANA & MICHIGAN ELECTRIC COMPANY, Appellants, -against- AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, L. H. PENNEY, WILLIAM W. WERNTZ and CARMAN G. BLOUGH, Appellees.	Civil Action No. 145-161

MEMORANDUM ON BEHALF OF APPELLEES
IN OPPOSITION TO APPELLANTS' MOTION FOR
INJUNCTION PENDING APPEAL



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MEMORANDUM ON BEHALF OF APPELLEES IN OPPOSITION TO APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL

QUESTION PRESENTED

Shall this Court enjoin the expression of an opinion to the members of a private voluntary organization of professional accountants by a committee of that organization on a question of the proper balance sheet treatment in corporate financial statements of charges to income on account of deferred income taxes, the injunction to be in force pending the determination of an appeal from a summary judgment dismissing a complaint by non-members of the organization in question which sought to require that the organization follow certain preliminary steps before its committee might express any such opinion?

STATEMENT OF THE CASE

The parties

The appellants, plaintiffs below, are three interrelated electric utility companies.

The appellees, defendants below, are the American Institute of Certified Public Accountants, and three of its officials. The Institute, an incorporated body, is a nonprofit, nation-wide membership organization, membership in which is open to all properly qualified certified public accountants, and the purpose of which is the furtherance of the ideals and principles of the accounting profession. It

is like bar associations, medical associations, and other professional associations which play such an important part in the professional life of the nation, and which are dependent upon the public spirit of their members who contribute extensively in their time and energy to the attainment of professional aims.

The three individual appellees are the President of the Institute (Mr. L. H. Penney), the Chairman of the Institute's Committee on Accounting Procedure (Mr. William W. Werntz), and a member of the Institute's relatively small paid staff, the Institute's Director of Research (Mr. Carman G. Blough).

The appellants are not members of the Institute. Membership is confined to individual accountants.

The relief sought by the complaint

The appellants' complaint seeks a judgment temporarily and permanently enjoining the appellees and anyone acting on their behalf from circulating "to the members of the Institute or to any members of the accountancy profession" a certain letter from the Institute's Committee on Accounting Procedure (hereinafter termed "Committee"), without first having taken certain preliminary procedural steps referred to below. (Complaint, pp. 12-13) The letter in question is as follows:

"AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
"270 Madison Avenue, New York 16, N.Y.

"April 15, 1959

"To the Members of the American
Institute of Certified Public Accountants

"Gentlemen:

"Question has been raised with respect to the intent of the committee on accounting procedure in using the phrase 'a deferred tax account' in Accounting Research Bulletin No. 44 (revised), Declining-balance Depreciation, to indicate the account to be credited for the amount of the deferred income tax (see paragraph 4 and 5).

"The committee used the phrase in its ordinary connotation of an account to be shown in the balance sheet as a liability or a deferred credit. A provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

"Three of the twenty-one members of the committee, Messrs. Jennings, Powell and Staub, dissented to the issuance at this time of any letter interpreting Accounting Research Bulletin No. 44 (revised).

"COMMITTEE ON ACCOUNTING PROCEDURE

"By William W. Werntz, Chairman"

The complaint also seeks to enjoin the appellees and anyone acting on their behalf

"from adopting, issuing, promulgating, circulating, printing or in any manner publishing to the members of the Institute or to any members of the accountancy profession . . . any utterance, opinion, recommendation, promulgation or statement to

> the effect that the Institute or the Committee is of the opinion or recommends that charges made to income in recognition of the deferral of income taxes should not or may not in accordance with generally accepted accounting principles be credited to earned surplus or to any other account included in the stockholders' equity section of the balance sheet, until such time as the Institute and the Committee . . ."

have first taken the procedural steps referred to. (Complaint, pp. 12-13).

The preliminary procedural steps which the appellants thus seek to have the Court require the appellees to follow are that the Institute and Committee must have

> "(a) Submitted a draft of the proposed letter to the persons to whom the exposure draft of Accounting Research Bulletin No. 44 was submitted.
>
> "(b) Permitted such reasonable period of time, not less than 60 days, to have elapsed subsequent to said submission in order that such persons may have the opportunity of submitting for the consideration of the Committee their views and opinions.
>
> "(c) Otherwise complied with the Institute's and the Committee's practices and procedures with respect to the publication of Accounting Research Bulletins."

The complaint likewise seeks "such other, further and different relief" as may seem just and proper.

The proceedings below

The opinion letter in question was about to be sent by the Committee to the Institute's members when, without notice, the appellants secured a temporary restraining order

on April 15, 1959, from Judge Palmieri of the District Court, and an order to show cause why a preliminary injunction should not be issued, returnable on April 17. For the convenience of counsel for both sides, the return date was postponed to May 7, at which time there were brought on for hearing before Judge Levet the appellants' motion for preliminary injunction and the appellees' motion to dismiss for failure to state a claim. Affidavits were filed by both sides together with extensive briefs, and the case was argued orally. In view of the submission of matters beyond the pleadings the Court, acting under Rule 12(b) of the Federal Rules of Civil Procedure, treated the motion to dismiss as a motion for summary judgment.

On May 20 Judge Levet filed a full opinion holding that summary judgment should be granted for the appellees and that the motion for preliminary injunction should be denied. An order to that effect was entered on May 25. On the same date the appellants requested Judge Levet to issue an injunction pending disposition of their appeal. The Judge refused to grant such an injunction, continuing restraint only until the hearing of appellants' motion to this Court for an injunction pending their appeal, provided such a motion were made on or before June 1. The appellants immediately perfected their appeal.

Judge Levet's opinion is reproduced in an Appendix to this Memorandum.

The jurisdiction of the lower court and the theory of the alleged cause of action

The appellants are citizens of Virginia, Ohio, and Indiana, respectively. The appellees are citizens of different states. Jurisdiction is based on diversity and an alleged amount in controversy exceeding the statutory minimum. (Complaint, paragraphs 1-5, 7.)

The theory of the appellants' complaint, as explained in their written and oral argument below, is that the issuance of the letter or of a similar statement of opinion would be a tort under the so-called doctrine of prima facie tort as that doctrine is applied by New York state courts, in that it would result in financial injury to the appellants and that the appellees know that it would result in such injury and therefore "intend" such injury. The injury, it is alleged, would be irreparable; the alleged irreparability of the injury is supported by an affidavit of Mr. Donald C. Cook, a vice president of each of the appellants, stating that the appellees would be financially unable to satisfy a claim for damages sufficient to compensate the appellants for the damage which they allegedly would suffer from the issuance of the letter, even if the amount of damage "could be precisely calculated." (Affidavit of Mr. Cook, paragraph 29; see also paragraph 23.)

The facts

The Institute has some 33,000 members. Like other similar professional organizations, it functions to a large extent through committees of its membership. There is also a "Council" (the governing board), a relatively small paid headquarters staff, and the usual elected officers.

One of the Institute's committees is the Committee on Accounting Procedure. That Committee from time to time issues, to the members of the Institute, Accounting Research Bulletins, which are in printed form and which set forth the Committee's opinions as to what is required by sound accounting principles on various matters arising in the work of certified public accountants, notably the proper treatment of items in corporate financial statements. (Complaint, paragraph 13.)

These Bulletins make clear that they represent only the opinions of the Committee, unless they have been specifically adopted by the Institute's membership. (Affidavit of Mr. William W. Werntz, paragraph 6.)

The Committee is composed of 21 members of the Institute, one of whom is chairman. For an opinion to be adopted it must receive the favorable vote of two-thirds of the members of the Committee. Dissenters are privileged to have their dissents, and reason therefor if they desire, included with the opinions. (Affidavit of Mr. Werntz, paragraph 11, and Exhibit A, pp. 8-9.)

Except for the requirement that the Committee act by two-thirds vote, with the privilege of expression of dissent, and that, unless adopted by the Institute, the Bulletins reflect only the Committee's own opinion, the Committee's discretion determines its procedure. (Affidavit of Mr. Werntz.)

The Director of Research and others on the Institute's headquarters staff assist the Committee in its work.

Often the Committee will circulate a draft of a proposed Bulletin to persons both within and without the Institute's membership to get the benefit of their comments. This process is known as "exposure." (Affidavit of Mr. Werntz, paragraph 8.)

The draft finally proposed for adoption by the Committee is sent to each Committee member with a ballot for his vote. After a vote, the Institute's staff, with the approval of the Chairman of the Committee, may make non-substantive alterations in the "ballot" draft after the vote and before issuance of the Bulletin. (Affidavit of Mr. Werntz, paragraph 9.)

Neither by any law nor under the Institute's own regime do the statements of the Committee have any effectiveness or force save as expressions of opinion by the Committee. (Affidavit of Mr. Werntz, paragraph 6, and Exhibit A, p. 9.)

It is a fact, however, that in the accountancy profession the Committee's opinions are given great weight by

virtue of the professional prestige of the Committee and of the members of the Committee. In the selection of the Committee's members an effort is made to enlist the services of professional men of high standing and conscientiousness.

By virtue of the accelerated amortization provision of section 168 and of the liberalized depreciation provision of section 167 of the Internal Revenue Code, taxpayers, for federal income tax purposes, are permitted in certain circumstances to write off assets (i.e. to take a deduction from income for income tax purposes) at a rate faster than would be permitted under normal rates of depreciation. These are relatively recent tax provisions and as experience with them has been accumulated certified public accountants have become increasingly concerned with problems respecting corporate financial statements arising when such fast write-offs are adopted for tax purposes but when, for other purposes, normal rates of depreciation are retained. The problems stem largely from the fact that, theoretically at least, fast write-offs will diminish taxes payable in earlier years but increase taxes payable in later years--in effect "deferring" from earlier to later years the payment of a portion of "normal" taxes.

State and federal government agencies having regulatory powers with respect to various accounting matters as well as with other matters such as the fixing of reasonable

rates to be charged consumers of goods or services have also become concerned with various problems stemming from the same phenomenon.

In November 1952 the Committee issued its Bulletin No. 42 dealing with the matter of accelerated amortization. This Bulletin, as originally issued, appears as Exhibit E to the affidavit of Mr. Werntz. This Bulletin without changes now appears in codified form as Chapter 9, Section c, of Accounting Research Bulletin No. 43, which appears as Exhibit A to the affidavit of Mr. Werntz. Paragraph 12 of that Section (see p. 78 of the Bulletin) opens with the statement:

> "In accounting for this deferment of income taxes, the committee believes it desirable to treat the charge as being for additional income taxes. The related credit in such cases would properly be made <u>to an account for deferred income taxes</u>." (Emphasis added.)

In July 1958 the Committee issued a revision of another of its bulletins, Bulletin No. 44. (The original Bulletin No. 44 had not been "exposed" but the revision was "exposed." /Affidavit of Mr. Werntz, paragraph 8./) The revision was designed to deal with the matter of liberalized depreciation--generally along the same lines as the treatment of the accelerated amortization matter in the previous Bulletin No. 42 just referred to. As issued, this Bulletin No. 44 (revised) appears as Exhibit B to Mr. Werntz's affidavit. Neither the "exposure" nor the "ballot" draft of this Bulletin, although stating that "recognition should be given to deferred income

taxes if the amounts thereof are material" (see second sentence of paragraph 4 of the Bulletin), made any reference to crediting a deferred tax account such as appeared in the underlined portion of the above quotation from the previous Bulletin No. 42 on the related problem. (Affidavit of Mr. Werntz, paragraph 9.)

Accordingly, with the approval of the Chairman of the Committee, the Institute's staff inserted in the final draft, after the vote, a reference to "crediting a deferred tax account"--that phrase appears in paragraph 5 of Bulletin No. 44 (revised). The insertion was made in the interest of consistency of expression as between the two Bulletins and was not deemed to be a substantive change. Advance copies of the Bulletin were sent to the members of the Committee, with the staff's revision, and no member of the Committee objected. (Affidavit of Mr. Werntz, paragraphs 9 and 10.)

It will be observed that neither of these Bulletins specifically stated where the "deferred tax account" should appear in the balance sheet.

Just prior to the issuance of Bulletin No. 44 (revised) the Federal Power Commission had promulgated an order applicable to utilities under its jurisdiction which forbade the inclusion of such a deferred tax account in the stockholders' equity section of a balance sheet, as restricted surplus or otherwise, stating that

> "it is evident that classification of tax deferrals as surplus, even though restricted, tends to disregard their essential character as provisions from income committed to the single purpose of providing for future taxes. . . . [W]hat is called for, in our judgment, is a separate balance sheet classification for accumulated deferred taxes. This will assure clear disclosure of this important item and lessen the possibilities of misunderstanding and misinterpretation of the nature and purposes of accumulated tax deferrals." 23 Federal Register, p. 4161 (June 12, 1958). */

In December 1958, some five months after issuance of Bulletin No. 44 (revised), the Securities and Exchange Commission issued a "Notice of Intention to Announce Interpretation of Administrative Policy", which, like the Federal Power Commission regulation, would forbid inclusion of the deferred tax account in the stockholders' equity section of a balance sheet on the ground that such treatment would be deceptive to investors. (The SEC proposal appears as Exhibit T to the affidavit of Mr. George C. Christie.)

A public hearing was held by the SEC on its proposal during April 1959.

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*/ The Commission stated that even if a State regulatory commission should require restricted surplus treatment for its own purposes, the utility involved must nevertheless use the treatment specified by this order for the purposes of the Federal Power Commission. 23 Fed. Reg. 4162 (1958).

Shortly prior thereto the Committee's interpretive letter which has led to the present suit was drafted. The draft of the letter was sent to the Committee members and was voted on. No "exposure" procedure was followed. The Committee members approved the letter, and its circulation to the members of the Institute, by a vote of 18 to 3. Of the 18 members favorably voting, 16 had been members of the Committee when Bulletin No. 44 (revised) was issued a few months before during the previous year. They constituted more than two-thirds of the members of the Committee in office at that time. (Affidavit of Mr. Werntz, paragraph 11.)

On April 8, 1959, the appellee Mr. Blough, as the Institute's Director of Research, appeared as a witness at the SEC's rule-making hearing--a public hearing of which a transcript is available to any member of the public--and testified, among other things, that the Institute's Committee had adopted and was about to send out the letter in question, and read into the record the significant portion of the letter. (See affidavits of Mr. Robert O. Whitman, paragraph 6; and of Mr. Cook, paragraph 18.)

Thereupon this suit was filed and at the same time the restraining order was issued without notice.

It would appear from the affidavit of Mr. Cook that he and his companies are opposing, before the SEC, the adoption of the SEC's proposed statement.

It also appears from Mr. Cook's affidavit (paragraph 28(d)(8)) and from Mr. Werntz's affidavit (paragraph 12(2)) that Indiana & Michigan Electric Company, one of the appellants, has been ordered by the Indiana State Public Service Commission to eliminate from the stockholders' equity section of its balance sheet its account for deferred taxes and has appealed that order to the Indiana courts.

<u>The alleged damage to the appellants</u>

The appellants' complaint and affidavits allege that if the letter is issued the appellants will be injured as follows:

Each of the companies carries in its balance sheet large sums (totaling for the three $65,000,000) in an account for deferred federal income taxes which account appears in a restricted surplus account in the stockholders' equity section of the balance sheet.

It is said that if the letter is distributed then because of the "prestige and authority of the Committee" it will "cause substantial numbers of accountants, financial institutions, investment banking concerns, rating services, financial analysts and governmental agencies to question the continued inclusion of credits for deferred taxes in the earned surplus accounts" of appellants so that appellants "will be seriously interfered with in their dealings and relationships with such persons and institutions." (Complaint, paragraph 29; affidavit of Mr. Cook, paragraph 21.)

As we have noted, <u>supra</u>, p. 6, it is also alleged that the appellees would not be financially able to pay amounts sufficient to meet the damages that the appellants might thus suffer, so that equity should enjoin the letter unless the Committee first follows the procedures which the appellants ask and which are specified <u>supra</u> at p. 4.

<u>The alleged intent to injure appellants</u>

The complaint alleges that:

> "30. The Institute and the Committee know that the foregoing [damage] will result . . . and intend that such . . . injury . . . shall occur . . . . The actions of the defendants . . . are in wanton, reckless and wilful disregard of the said consequences of their proposed action."

The only basis for the allegation that the Institute and the Committee know of the alleged injury to the appellants and "intend" that it shall occur appears in the affidavit of Mr. Whitman, at paragraph 6, wherein it is stated that just before the execution of that affidavit representatives of the appellants met with the Committee Chairman and with the Director of Research but were unable to secure a commitment "to delay the distribution" of the opinion letter.

There is neither allegation nor suggestion that the opinion letter was aimed at the appellants or that it was intended to deal with the appellants except as the appellants, like all other corporations issuing financial statements, might come within the general purview of the letter.

ARGUMENT

The appellants rely on the doctrine of "prima facie tort."

The lower Court's opinion states:

> "This court has been unable to find any precedent under the doctrine of prima facie tort or otherwise for a preliminary or final injunction forbidding a group from publishing and distributing opinions under circumstances equivalent or even similar to these."

This statement was made by the Court although distinguished counsel for the appellants had submitted an exhaustive legal memorandum of 31 pages, and a further memorandum of 5 pages in reply to the appellees' memorandum, although counsel had fully argued his cause, and although the Court itself, as its elaborate opinion makes clear, had carefully and independently researched the cases.

Both authority and reason point to the entirely insubstantial nature of the appellants' claim.

I

We agree that New York law applies. But, as Mr. Justice Botein has said so aptly of the prima facie tort doctrine, a cause of action "must be judged by its allegations, not its label." Knapp Engraving Co. v. Keystone Photo Engraving Corp., 1 A.D. 2d 170, 172, 148 N.Y.S. 2d 635, 637 (1st Dept. 1956). Prima facie tort does not make

actionable every conscious or deliberate act or utterance which has consequences damaging to someone. At most the doctrine makes actionable damaging conduct--otherwise lawful--

> "when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to plaintiff, all without excuse or justification." See Mr. Justice Breitel in Ruza v. Ruza, 286 App. Div. 767, 769, 146 N.Y.S. 2d 808, 811 (1st Dept. 1955).

Thorough combing of precedents has led the appellants to pitch their case on the decision of the New York Court of Appeals in Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79, 70 N.E. 2d 401 (1946).

As the Court below made clear, that case is wide of the mark.

There the Court of Appeals reversed a decision dismissing a complaint brought by a publisher of popular songs against the sponsor, and its advertising agent, of a radio program known as "Your Hit Parade." The complaint alleged that the program falsely represented to its large audience that it had ascertained, on the basis of volume of sales, the nine or ten most popular songs each week, and the order of their sales popularity; that in fact no such ascertainment was made at all; that the plaintiff's songs were consistently excluded from the hits, without justification, or were given an unjustifiably low ranking; that this was done with

intent to injure the plaintiff; and that the plaintiff had, indeed, been injured by a refusal of jobbers and others to distribute plaintiff's songs to dealers because of their omission or low ranking on "Your Hit Parade."

The Advance Music case was thus a perfectly clear case of wanton misrepresentation of fact, and came very close to a case of common law unfair competition. The present case is completely different. As pointed out in the opinion of the District Court, the proposed letter of the Committee on Accounting Procedure is simply an expression of opinion on a general accounting question. Moreover, it is not alleged that the opinion is not honestly held by the members of the Committee who voted to issue the letter. In fact, as found by the lower Court, the Committee's view is supported by most respectable authority.*/

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*/ The Committee's position is followed by Arthur Andersen & Co., which audits the accounts of one-third of the electric and gas utility companies in the country; based on a survey of the 1957 published stockholders reports of 353 utilities, of 226 reporting an accumulated credit resulting from the use of liberalized depreciation under Section 167 of the Internal Revenue Code, 176 treated the credit outside the equity-capital section of the balance sheet and only 50 companies treated the credit as either earned surplus or restricted surplus. (Affidavit of Mr. F. Merrill Beatty, passim). Also, the Public Service Commission of the State of Indiana has ordered all companies subject to its regulations, including plaintiff Indiana & Michigan Electric Company, to cease treating the credit for deferred income taxes as a surplus account; the Federal Power Commission issued on May 29, 1958, an order that all public utility companies subject to its regulation shall not include credit for deferred income taxes in a surplus account. (Affidavit of Mr. William W. Werntz, paragraph 12). The SEC has promulgated a proposed policy in accord with the Committee's views and many public utility and other companies have endorsed the SEC proposal. (Affidavit of Mr. George C. Christie, passim).

The Advance Music case relied for support primarily upon Aikens v. Wisconsin, 195 U.S. 194 (1904), a case in which Mr. Justice Holmes held that "maliciously injuring"-- the basis for prima facie tort--means "doing a harm malevolently for the sake of the harm as an end in itself, and not merely as a means to another end legitimately desired." (195 U.S. at 203). The New York Court of Appeals itself has taken the same position in the recent decision of Reinforce, Inc. v. Birney, 308 N.Y. 164, 124 N.E.2d 104 (1954):

> "If the doers, by means not in themselves unlawful, of acts not in themselves unlawful, have any proper purpose to serve, they are not liable for the damage they cause /citing cases/. Unions, as well as everyone else, may claim the benefit of the settled rule that 'the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another' /citing cases/." 308 N.Y. at _____, 124 N.E.2d at 106.

In the present case there is no semblance of an allegation that the Committee has reached its view of the proper treatment of deferred income taxes, of universal application in the business world, with the aim of effecting injury to the plaintiffs.*/

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*/ Appellants have also invoked a case in which defendant made a false statement of fact concerning plaintiff in a credit rating of the plaintiff, U.S. Aluminum Siding Corp. v. Dun & Bradstreet, Inc., 163 F. Supp. 906 (S.D.N.Y. 1958), and two labor cases in which the New York Court of Appeals found, respectively, that persuading members not to work for plaintiff employer or with members of a rival plaintiff organization were not justified by a lawful labor objective. Opera on Tour, Inc.

II

Apart from the question of intent to injure, the plaintiff in a prima facie tort case can get no relief where there is "justification" for the defendant's act, as was recognized by the court in the Advance Music case. (296 N.Y. at ____, 70 N.E.2d at 403). In the present case the District Court said, "The purposes of the defendant Institute are adequate justification, if justification, indeed, be required, to permit the proposed communications." As is said in Prosser, Torts § 106 (2d ed. 1955), at page 720, "In general, any disinterested motive of a socially desirable kind will serve as a justification." That the proposed letter is an expression of opinion on a matter of great public concern is conclusively shown by the current interest taken in this matter by the Securities and Exchange Commission and the Federal Power Commission. It is difficult to conceive of a matter on which it would be more appropriate for a committee of accountants to express their professional opinion.

(Continued from p. 19).
v. Weber, 285 N.Y. 348, 34 N.E.2d 349 (1941); American Guild of Musical Artists, Inc. v. Petrillo, 286 N.Y. 226, 36 N.E.2d 123 (1941). For out-of-state support, appellants rely primarily on Mr. Justice Holmes' opinion in American Bank & Trust Co. v. Federal Reserve Bank, 256 U.S. 350, 358 (1921), in which defendant Federal Reserve Bank, motivated by "disinterested malevolence," was pursuing a course of action which, in effect, amounted to a run on plaintiff banks. We need not elaborate upon the point that all these cases, involving words and action specifically aimed solely at the plaintiffs concerned, have nothing to do with the present case.

III

Particularly when a plaintiff requests drastic equitable relief, a court will not recognize merely speculative or incidental injury.

The appellants do not claim that anything forces accountants to agree with the position taken by the Committee on Accounting Procedure; Mr. Donald C. Cook, or other officers of the appellants, are free to persuade accountants who review appellants' books that the Committee is wrong. When the Federal Power Commission adopted a rule along the lines of the Committee's opinion it made the point that exclusion of provision for deferred taxes from surplus accounts "will not foreclose financial analysts, investors and others from considering these amounts as part of equity capital if they think proper, with such consequential benefits to the rating of the company's securities and costs of financing as may result therefrom." 23 Federal Register, page 4161 (June 12, 1958).

Mr. Cook has already argued to the Securities and Exchange Commission concerning the matter; in the future he may or may not be able to persuade that Commission, and other regulatory bodies, that the Committee's view is ill-considered. If he fails he cannot complain that the appellees' acts are the legal cause of appellants' difficulties. The New York Court of Appeals has very recently ruled out any such complaint

in a case far more appealing than the appellants'. Brandt v. Winchell, 3 N.Y.2d 628, 148 N.E.2d 160 (1958).*/

IV

A special reason why a court of equity should not grant relief in this case is that the court is being asked to interfere with the internal procedure of a private, voluntary, professional organization at the behest of persons who are not even members of that association.

The District Court found, "There is no adequate proof (even if the plaintiffs had any right to insist on the Committee procedures they mention) that the Institute's rules have been or are about to be violated. In fact, the contrary appears."

The fact of the matter is that when the appellees pointed out, in their motion to dismiss, that the appellants had not alleged that the Committee was violating the rules of the Institute the appellants replied in their legal memorandum to the District Court that, "The power or lack of power to commit the acts complained of is an irrelevant consideration." (See Plaintiffs' Memorandum in Support of Application for Preliminary Injunction and in Opposition to Motion to Dismiss

*/ In that case the Court assumed that defendant acted with an "evil motive." (3 N.Y.2d at ____ , 148 N.E.2d at 164).

Complaint filed with the District Court, at page 19.) In other words, the appellants are attempting to persuade the courts to determine how a committee of a private association should run its affairs. This the courts will not do: the cases to that effect are legion.*/ Even where a bar association admittedly had failed to follow its own organic law, and even at the suit of a member, a Court of Appeals would not entertain an effort to have it supervise the association's procedures, because--

> "It is idle to expect that voluntary public or community service, not involving the administration of property or money, will ever be carried on with the meticulous observance of charters and by-laws required in the administration of property or money. The interest that holds community service organizations together is not property but the unselfish spirit of those willing to sacrifice their time and energy to a public cause. That interest would not be protected but destroyed by strict judicial supervision of elections in such agencies on complaint of their members. The court would find itself a constant intermeddler in community affairs serving no purpose other than to disrupt the morale and good will of voluntary organizations. To make community service as technical as business dealings would be to destroy the spirit which sustains it." United States ex rel. Noel v. Carmody, 80 App. D.C. 58, 60, 148 F.2d 684, 686 (1945); and see Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1027 (1930).

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*/ E.g., Weinstock v. Ladisky, 197 Misc. 859, 98 N.Y.S.2d 85, 101 (Sup. Ct. 1950); McNulty v. Higginbotham, 40 So.2d 414 (Ala. 1944); State ex rel. Smith v. Kanawha County, 78 W.Va. 168, 88 S.E. 662,664, 20 A.L.R. 1030, 1033 (1916); 4 Am. Jur., Associations & Clubs, § 6.

Not only do appellants ask the Court to prescribe what procedures this professional organization shall follow, but a grant of their request would dictate how the opinions of such an organization on matters of public interest should be formulated. A strong reason why appellants should not be granted an injunction pending this appeal is that injunctive relief under these circumstances would violate the Federal and State constitutional guarantees of free expression.

In the leading case of Marlin Firearms Co. v. Shields, 171 N.Y. 384, 64 N.E. 163 (1902), which involved an attempt to enjoin disparagement, by clearly false statements, of the quality and safety of guns manufactured by the plaintiff, the New York Court of Appeals sustained a demurrer to the complaint on the ground that the relief requested would be a prior restraint in violation of the freedom of speech provisions of the New York Constitution. Marlin was a far more persuasive case for injunctive relief than the present one in that there defendant's statements did not concern all enterprises, or even all gun-makers, but were specifically directed at the plaintiff and its products and were deliberately untrue and spiteful fabrications. Nevertheless, the Marlin case states the law not only in New York but in the vast majority of other jurisdictions. See Annotation, Injunction as Remedy in Case of Trade Libel, 148 A.L.R. 854 (1944).

Appellants relied, below, on Chief Judge Cardozo's opinion in Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690 (1930), to belittle the authority of the Marlin case. The Nann case involved a dispute between two competing unions. The Court of Appeals approved an injunction against defendant's picketing, because of a history of violence in connection with previous picketing, but expressly refused to enjoin the defendants' distribution of circulars and handbills which specifically attacked the plaintiff union. In explaining this refusal the eminent Chief Judge said: "Equity does not intervene to restrain the publication of words on a mere showing of their falsity."--citing the Marlin case. (255 N.Y. at ____, 174 N.E. at 694). He went on to explain that equity will act only where essential to preserve a property interest--

> "threatened with impairment by illegal combinations or by other tortious acts, the publication of words being merely an instrument and incident. ... Courts have enough to do in restraining physical disorder without busying themselves with logomachies in which the embattled words are the expression of the opinion of the writer or speaker. If there is redress for such a wrong, unassociated with wrongful acts, the remedy is not in equity." Ibid. "What is wrong must be so clearly wrong that only 'disinterested malevolence' (American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 256 U.S. 350, 358, 41 S.Ct. 499, 500, 65 L.Ed. 983), or something close akin thereto, can have supplied the motive power (Steinert & Sons Co. v. Tagen, 207 Mass. 394, 397, 93 N.E. 584, 32 L.R.A. (N.S.) 1013). If less than this appears, a court of equity will stand aside." (255 N.Y. at ____, 174 N.E. at 695.

The appellants have also suggested that the Marlin case was overruled sub silentio by the Advance Music case, where the New York Court of Appeals sustained a cause of action based upon false representations over the radio. The appellants invoke the court's statement in that case that the complaint disclosed "a case for relief either at law or in equity." 296 N.Y. at ____, 70 N.E.2d at 403. But the very sentence containing that statement referred to the second cause of action in the complaint, and that cause of action was one only for damages. See the opinion of the Appellate Division, 268 App. Div. 707, ______, 53 N.Y.S.2d 337, 339-40 (1st Dept. 1945). And in the sentence preceding the one quoted, the Court of Appeals had said that it was not deciding "anything in respect of the nature of the judgment to which the plaintiff may be entitled." In short, the court decided only the abstract proposition that a cause of action had been alleged--not that a case for equitable relief had been stated. And in at least two authoritative decisions since the Advance Music case the Marlin case is recognized as still stating the law of New York. Donnelly v. United Fruit Co., 4 App. Div. 2d 855, 166 N.Y.S.2d 392 (1st Dept. 1957); Eversharp, Inc. v. Pal Blade Co., 182 F.2d 779, 781 (2d Cir. 1950).*/

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*/ Equity's refusal to interfere with the expression of opinion is emphasized by a recent decision of the Supreme Court of Massachusetts in Krebiozen Research Foundation v.

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This Court has repeatedly held that a party requesting a stay pending appeal, or any preliminary injunctive relief, has the burden of showing that he is likely to prevail on the merits. See, e.g., Eastern Air Lines v. Civil Aeronautics Board, 261 F.2d 830 (2d Cir. 1958); Hall Signal Co. v. General Ry. Signal Co., 153 Fed. 907, 908 (2d Cir. 1907). The appellants fail to meet any such condition. As the District Court stated, there is no "precedent under the doctrine of prima facie tort or otherwise for a preliminary or final injunction forbidding a group from publishing and distributing opinions under circumstances equivalent or even similar to these." Supra, p. 16.

Appellants claim that, without an injunction, their appeal will become moot insofar as injunctive relief is concerned. This is not so. The appellants pray for an injunction not only against the circulation of the Committee's opinion letter to the members of the Institute but also

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(Continued from p. 26).
Beacon Press, Inc., 334 Mass. 86, 134 N.E.2d 1, cert. denied, 352 U.S. 848 (1956). Although Massachusetts has been readier than any other American jurisdiction to enjoin trade libels, the Krebiozen case held that allegedly false statements concerning a drug for use in cancer treatment would not be enjoined, though severely damaging to plaintiff physicians and a cancer foundation, because equity should not attempt to determine what shall and shall not be said on matters of public concern.

against any adoption by the Institute of the Committee's letter or of any other opinion to the same effect. See *supra*, pp. 3 - 4 ; Complaint, pp. 12-13.

Therefore the sending of the Committee's letter does not eliminate the controversy which the appellants have posed. And even if no further action were ever to be threatened by the Committee or the Institute, the appellants would still have their argument for a declaratory judgment that the appellees' acts in the promulgation of their opinion were tortious. In addition to injunctive relief the complaint seeks "such other, further and different relief" as may seem just and proper; and declaratory relief may be granted regardless of whether such has been specifically requested in the complaint. See Rule 54 (c), F.R.C.P.; *Becker* v. *Buder*, 88 F. Supp. 609, 611 (E.D.Mo. 1949), *affirmed*, 185 F.2d 311 (8th Cir. 1950), *cf.*, *Truth Seeker Co., Inc*. v. *Durning*, 147 F.2d 54 (2d Cir. 1945); *Carmichael* v. *Mills Music, Inc*., 121 F. Supp. 43 (S.D.N.Y. 1954). Indeed, as a practical matter, such a declaration would have virtually the same value to the appellants as the injunction they seek -- in that it could be used to effective purposes in connection with any questions that might be raised by accountants, financial institutions, or otherwise with respect to the appellants' balance sheets or even in connection with the position the appellants have taken at the SEC. Also, either under

a declaratory judgment or otherwise, a court still could grant damages in this lawsuit even after events had made the granting of injunctive relief nugatory. Subin v. Goldsmith, 224 F.2d 753, 761-62 (2d Cir.), cert. denied, 350 U.S. 883 (1955).*/

But even if mootness were threatened, an injunction is not issuable as of right. In Jimenez v. Barber, 252 F.2d 550 (9th Cir.), application for stay of deportation denied, 355 U.S. 943 (1958), an injunction against a deportation order, pending an appeal, was sought; absent the injunction the case obviously would be mooted for the appellant would be physically deported from the country. But the court refused to enjoin because of the lack of merit in the appellant's case.

Here, it is submitted, the appellants' case is wholly devoid of merit. Nowhere in the books is there the slightest basis for the contention that a court of equity should or can impose a gag upon a committee of professional men as to their opinion on a matter of obvious public concern. That the gag is to be imposed as an incident to

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*/ "It is suggested that, as apparently the transfer of ... assets ... was completed after denial of the preliminary injunction, a final injunction will serve no purpose, and therefore plaintiff, if he wins, can obtain no relief. ... The complaint asks 'for such other and further relief as may be just and proper.' Accordingly, the court can award damages if they will afford adequate relief. See F.R.C.P. 54 (c)." 224 F.2d at 761-62.

prescribing for a private, voluntary association a course of procedure as to how its committee is to arrive at an opinion makes it all the more unprecedented and obnoxious to elementary conceptions of chancery jurisdiction.

Finally, as the affidavit of Mr. John L. Carey, Executive Director of the Institute, filed by the appellees with this Court shows, the Committee is to go out of existence as of September 1, 1959, as a result of the adoption by the Institute of a new program which has long been under study. The Institute, understandably, proposes that the Committee wind up its affairs before the new program goes into effect. An injunction pending appeal would be an obvious impediment to the completion of this transition and could even lead to such confusion and delay in the Institute's processes as to accomplish the appellants' aim without ever being brought to a final determination on the appeal.

Issuance of the injunction would create the spectacle of the SEC's having been advised of the Committee's opinion in a public hearing but the Institute's own members being deprived of that same knowledge unless they happen to read the advance sheets reporting the lower Court's opinion in which the letter is quoted in full. It is unthinkable that equity should create any such state of affairs.

CONCLUSION

The injunction should be denied. Indeed, on its own motion, this Court should dismiss the appeal as insubstantial as did the court in Jimenez v. Barber (252 F.2d at 554).

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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APPALACHIAN POWER COMPANY, OHIO POWER COMPANY
and INDIANA & MICHIGAN ELECTRIC COMPANY,

Plaintiffs,

-against-

Civil 145-161

AMERICAN INSTITUTE OF CERTIFIED PUBLIC
ACCOUNTANTS, L. H. PENNEY, WILLIAM W.
WERNTZ and CARMAN G. BLOUGH,

OPINION
#25150

Defendants.

- -

APPEARANCES:

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LEVET, D.J.

This is a motion for preliminary injunction to restrain the defendants from the promulgation or distribution of certain opinions

recommending certain accounting practices which allegedly affect plaintiffs' financial statements, unless a waiting period of 60 days elapses, and certain other prerequisites are complied with.

The above-named plaintiffs, public utility companies, engaged in the sale of power, seek a preliminary injunction to enjoin the defendant American Institute of Certified Public Accountants (hereinafter called "Institute") and the individual defendants, certain officers or Committeemen of said Institute, from adopting, issuing, promulgating, circulating, printing or in any manner publishing to the members of the defendant Institute or to any members of the accountancy profession a certain proposed letter. This letter is to the effect that the said defendant Institute or its Committee on Accounting Procedure (hereinafter called "Committee") is of the opinion or recommends that charges made to income in recognition of the deferral of income taxes should not, in accordance with generally accepted accounting principles, be credited to earned surplus or to any other account included in the stockholders' equity section of the balance sheet. The plaintiffs seek to enjoin the distribution of said letter until such time as the defendants and the Committee shall have submitted a draft thereof to certain persons; a period of not less than 60 days shall thereafter have elapsed, and the Institute's and its Committee's practices and procedures with respect to the publication of accounting research bulletins shall otherwise have been complied with.

The Letter in dispute is as follows:

"AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
"270 Madison Avenue, New York 16, N.Y.

"April 15, 1959

"To the Members of the American
Institute of Certified Public Accountants

"Gentlemen:

"Question has been raised with respect to the intent of the committee on accounting procedure in using the phrase 'a deferred tax account' in Accounting Research Bulletin No. 44 (revised), Declining-balance Depreciation, to indicate the account to be credited for the amount of the deferred income tax (see paragraph 4 and 5).

"The committee used the phrase in its ordinary connotation of an account to be shown in the balance sheet as a liability or a deferred credit. A provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet.

"Three of the twenty-one members of the committee, Messrs. Jennings, Powell and Staub, dissented to the issuance at this time of any letter interpreting Accounting Research Bulletin No. 44 (revised).

"COMMITTEE ON ACCOUNTING PROCEDURE

"By William W. Werntz, Chairman"

By cross-motion the defendants have moved for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint on the ground that it fails to state a claim against them upon which relief can be granted. Since matters outside

the pleadings have been presented to the court, and since the parties have submitted such proof, I am treating this motion as one for summary judgment as provided in Rule 56 of the Federal Rules of Civil Procedure.

The complaint herein, seeking permanent injunctive relief, was filed on April 15, 1959. This application apparently is based upon the following assertions of the plaintiffs:

(1) Plaintiffs, three operating electric utility companies have recorded on their books of account, pursuant to certain alleged applicable requirements of state regulatory agencies, an aggregate of more than $65,000,000 in accounts designated as "Earned Surplus Restricted for Future Federal Income Taxes." In this connection plaintiffs contend that these amounts have been so accrued by them in accordance with accounting principles which heretofore have been generally accepted over a period of years by all of the well-known accounting firms experienced in utility accounting.

(2) The defendant Institute, through its Committee, from time to time publishes accounting research bulletins which are allegedly "accepted" by state and federal regulatory agencies, including the Securities and Exchange Commission, members of the accounting profession and interested members of the business community as establishing the accounting principles which must be followed by the accounting profession.

(3) Prior to the present dispute in reference to pertinent accounting procedures, it is said that the Institute had adopted procedures prerequisite to the publication of such opinions and recommendations. These procedures included, it is said, the circulation of so-called "exposure drafts of any proposed opinion" to a certain group so that the members might comment thereon, and a further procedure involving the submission of a so-called "ballot draft" to members of the Committee so that they could vote upon the proposed opinion.

(4) Plaintiffs aver that the defendants have known accounting practices of plaintiffs in reference to these matters and have had full knowledge that plaintiffs have accumulated more than $65,000,000 in these accounts.

(5) It appears that in a proceeding before the Securities and Exchange Commission the Chairman of defendants' Committee and its Director of Research stated that they were about to mail under the authority of the Institute and the Committee to members of the Institute and other recipients of bulletins a letter with respect to the deferred tax account to the effect that "a provision in recognition of the deferral of income taxes, being required for the proper determination of net income, should not at the same time result in a credit to earned surplus or to any other account included in the stockholders' equity section of the balance sheet."

(6) Plaintiffs claim that the defendants in preparing and intending to publishthis letter are "without legal justification," that their acts "bear no reasonable relationship to any benefits which the defendants may be seeking or to any legitimate purpose," and that the actions of the defendants in connection with the proposed distribution of the said letter and the opinion contained therein are "in wanton, reckless and wilful disregard of the said consequences of their proposed action."

(7) As a result, plaintiffs assert that substantial numbers of accountants, financial institutions, etc. will question the plaintiffs' continued inclusion of credits for deferred taxes in earned surplus and as a result plaintiffs "will be seriously interfered with in their dealings.", etc. and, as stated by Donald C. Cook, a vice-president of each of the plaintiff corporations:

> "***The removal of more than $65,000,000 from the common stock equity of the plaintiffs would, in the first instance, have the effect of limiting the short term borrowing power of plaintiffs under applicable statutes so as to decrease the amounts which plaintiffs can borrow from banks by $6,500,000.***" (Affidavit sworn to May 6, 1959, item 21, p. 13)

The defendants in their opposing papers point out that:

(1) The letter, the issuance of which, without certain preliminaries, plaintiffs oppose, was adopted by the Committee in conformity with its established procedures; was specifically approved by over two-thirds of the 21 members of the Committee; that under the Committee's procedure a two-thirdsvote -- that is, 14 out of 21

members -- is sufficient to adopt an opinion or recommendation.

(2) The opinions of the Committee have no official effect.

(3) The Committee procedures do not require the so-called "exposure" in draft form of the proposed letter, though on occasion in the past, this "exposure" procedure has been employed.

(4) a. The Committee's position as to the accounting practice in question is followed by Arthur Andersen & Co., public accountants, who audit the accounts of one-third of the utility companies in the country;

b. Based on a survey of the 1957 published stockholders' reports of 353 utility companies, of 226 companies reporting an accumulated credit resulting from the use of the liberalized depreciation under § 167 of the Internal Revenue Code, 176 treated the credit outside the equity-capital section of the balance sheet and only 50 treated the credit as either earned surplus or restricted surplus;

c. The Public Service Commission of the State of Indiana has ordered all companies subject to its regulations, including plaintiff Indiana & Michigan Electric Company, to cease treating the credit for deferred income taxes as a surplus account;

d. The Federal Power Commission on May 29, 1958, issued an order to the effect that all public utility companies subject to its regulations shall not include credit for deferred income taxes in a surplus account;

e. The Securities and Exchange Commission has promulgated a proposed policy in accord with the Committee's views.

Jurisdiction herein is based upon diversity of citizenship. Hence, the law of the State of New York is applicable. The plaintiffs predicate the validity of their complaint upon the doctrine of "prima facie tort." They rely upon the New York cases of Advance Music Corporation v. American Tobacco Co., 296 N.Y. 79 (1946); Opera on Tour, Inc. v. Weber, 285 N.Y. 348 (1941); American Guild of Musical Artists v. Petrillo, 286 N.Y. 226 (1941).

Subsequently, in other decisions New York courts have discussed this doctrine of so-called "prima facie tort." Among these are Brandt v. Winchell, 283 App. Div. 333 (1st Dept., 1954); Brandt v. Winchell, 286 App. Div. 249 (1st Dept., 1955), affirmed 3 N.Y.2d 628 (1958); Ruza v. Ruza, 286 App. Div. 767 (1st Dept., 1955); Knapp Engraving Co. Inc. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170 (1st Dept., 1956). See also Benton v. Kennedy-Van Saun Mfg. & Eng. Corporation, 2 App. Div. 2d 27 (1st Dept., 1956); Travelers Indemnity Company v. Unger, 4 Misc. 2d 955 (S.Ct., Queens Co., 1956); Green v. Time, Inc., 147 N.Y.S. 2d 828 (S. Ct., N.Y. Co., 1955), affirmed 1 App. Div. 2d 665 (1st Dept., 1955), affirmed 3 N.Y. 2d 732 (1957).

The essential elements of "prima facie tort" include the following:

(1) There must be an intent to injure plaintiff, at least to the extent of infliction of wrongful harm upon plaintiff without

just cause or excuse. Beardsley v. Kilmer, 236 N.Y. 80 (1923); Ruza v. Ruza, 286 App. Div. 767 (1st Dept., 1955); Advance Music Corporation v. American Tobacco Co., 296 N.Y. 79 (1946).

In Ruza v. Ruza, supra, Mr. Justice Breitel wrote:

> "The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon -- and which it is asserted caused the injury -- are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable. The remedy is invoked when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to plaintiff, all without excuse or justification." (p. 769)

In Knapp Engraving Co. Inc. v. Keystone Photo Engraving Corp., 1 App. Div. 2d 170 (1st Dept., 1956), Mr. Justice Botein, now Presiding Justice of the First Department Appellate Division, wrote of prima facie tort:

> "It attempts to justify the omission of these conventional tort requirements on the ground that the counterclaim should be regarded as a 'prima facie tort'. A cause of action, however, must be judged by its allegations, not its label. A prima facie tort derives from the ancient form of action on the case, covering those situations where intentional harm has been inflicted, resulting in damage, by an act or series of acts which might otherwise be lawful and which do not fall within the categories of traditional tort actions (Aikens v. Wisconsin, 195 U.S. 194; Opera on Tour v. Weber, 285 N.Y. 348; American Guild of Musical Artists v. Petrillo, 286 N.Y. 226; Advance Music Corp. v. American Tobacco Co., 296 N.Y. 79; Brandt v. Winchell, 283 App. Div. 338, amended complaint dismissed 286 App. Div. 249)." (p. 172)

(2) Justification may be viewed as a neutralizing factor that overrides the intent to injure. What constitutes justification is a policy consideration.[1] In Reinforce, Inc. v. Birney, 308 N.Y. 164 (1954), Desmond, J., wrote:

"***If the doers, by means not in themselves unlawful, of acts not in themselves unlawful, have any proper purpose to serve, they are not liable for the damage they cause (Peabody, Jr., & Co. v. Travelers Ins. Co., 240 N.Y. 511, 519; Al Raschid v. News Syndicate Co., 265 N.Y. 1).***" (p. 169)

In Beardsley v. Kilmer, 236 N.Y. 80 (1923) the concept of justification was expressed as follows:

"***The question how far one individual shall be restrained from doing acts which are inherently proper out of respect for the rights of others is bound to be a delicate one. The proposition that a man may not dig a well upon his own land or enter upon a lawful business is one to be advanced with considerable caution and the cases seem firmly to establish the rule that if he digs a well because he really wants the water or starts the business for personal advantage or gain his neighbor is without remedy however much he suffers, and even though the act may also have been tinged with animosity and malice." (pp. 89-90)

In Brandt v. Winchell, 3 N.Y. 2d 628 (1958), Chief Judge Conway stated:

"***The law is now settled in this State that, 'Even a lawful act done solely out of malice and illwill to injure another may be actionable.' (Al Raschid v. News Syndicate Co., 265 N.Y. 1, 4, emphasis supplied; see, also, Beardsley v. Kilmer, 236 N.Y. 80.) This is not to say that the present state of the law is that an act not otherwise tortious will, without exception become actionable when it is done with the blameworthy purpose of injuring another and such other is in fact injured. There are situations where for one of several reasons

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(1) Recent Developments in the New York Law of Prima Facie Tort, 32 St. John's Law Review, 282, 288.

a court is constrained to ignore the wrongful motive of the actor. For example, a court may be prompted to disregard the actor's motive by reason of the paramount consideration of the public welfare. Accordingly, it may fairly be said that whenever the gist of an alleged cause of action (as here) is that an otherwise lawful act has become unlawful because the actor's motives were malevolent, the court is called upon to analyze and weigh the conflicting interests of the parties and of the public in order to determine which shall prevail." (pp. 634-635)

(3) Damages, which must be specially pleaded. Rager v. McCloskey, 305 N.Y. 75 (1953); Brandt v. Winchell, 286 App. Div. 249 (1st Dept., 1955), affirmed 3 N.Y. 2d 628 (1958); Faulk v. Aware, Inc., 3 Misc. 2d 833, 839 (S.Ct., N.Y. Co., 1956) affirmed without opinion 3 App. Div. 2d 703 (1st Dept., 1957).

In Brandt v. Winchell, supra, the Appellate Division, 1st Department, in a per curiam opinion stated:

"***The amended complaint proceeds solely on the theory of prima facie tort. As we previously noted, damage is an essential element in a cause of action for prima facie tort and must be pleaded specially, for it consists of injury due to loss in plaintiff's occupation or business (see 283 App. Div. 338, 342)." (p. 250)

Although "the most conspicuous use of the prima facie tort doctrine has been to create new causes of action where the plaintiff's claim does not fall within a traditional tort category,"(2) as Mr. Justice Breitel said in Ruza v. Ruza, 286 App. Div. 767 (1st Dept., 1955): "A bad complaint is not made good by the blanket assertion that it relies on the doctrine of 'prima facie tort.'" (p. 769)

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(2) The Prima Facie Tort Doctrine, 52 Columbia Law Review 503, 512.

Plaintiffs, although not members of the Institute, seek to force it to follow certain prerequisites to publication of opinions of the Institute's Committee. Plaintiffs, having adhered to certain accounting procedures for several years, have recorded in "restricted earned surplus accounts" some $65,000,000, representing credits for payment of federal income taxes which may have to be paid in the future. Now, urge the plaintiffs, the Institute's Committee's opinion will or may be accepted by the Securities and Exchange Commission in rulings on financial statements.

The facts in the case of Advance Music Corporation v. American Tobacco Co., 296 N.Y. 79 (1946) are basically different from those in the present case:

(1) There, the defendant misrepresented the nature of the survey of the popularity of the songs presented based on sales -- a fact not an opinion.

(2) The defendant's acts and representations definitely and directly affected plaintiff's sales. A business interference resulted.

(3) Damages naturally flowing from the acts and misrepresentations of the defendant and causally affecting the sales of the plaintiff were set forth.

(4) No justification for the defendant's acts appeared.

Here, the communications which defendants intend to promulgate do not mention plaintiffs. The plaintiffs, like other business enterprises which may be affected, may, if they so elect,

appear before the appropriate governmental body to sustain their own contentions. There is no misrepresentation, no fraud. The acts of the defendants can hardly be termed wanton. The purposes of the defendant Institute are adequate justification, if justification, indeed, be required, to permit the proposed communications. There is no adequate proof (even if the plaintiffs had any right to insist on the Committee procedures they mention) that the Institute's rules have been or are about to be violated. In fact, the contrary appears.

There is no allegation that the method of accounting proposed by defendants is inherently false or fraudulent. On the contrary, it is supported by respectable authority. Neither is there any allegation of special damages, except in the most general and speculative terms.

This action is not to prevent interference with plaintiffs' contracts, their sales or their property. It seeks to delay the distribution of an adverse opinion relative to accounting procedures. True, it may ultimately affect plaintiffs' application for credit. However, such a result is collateral, not direct, an effect which incidentally flows from a justifiable act. The plaintiffs may have grievances, but they relate to the distribution of honest opinions, not facts. No threat of intentional, unjustifiable harm to plaintiffs' business rights or property exists.

This court has been unable to find any precedent under the doctrine of prima facie tort or otherwise for a preliminary or final injunction forbidding a group from publishing and distributing opinions under circumstances equivalent or even similar to these.

Accordingly, the application for preliminary injunction must be denied and the complaint dismissed and summary judgment granted.

Settle order on notice.

Dated: New York, N. Y.
May 20, 1959

United States District Judge