DECISIONS NOTED

Army and Navy—Officer on Terminal Leave Is Not Subject to Court-Martial Jurisdiction—Petitioner, a WAC officer, left a separation center under terminal-leave orders relieving her from active duty when such leave expired. Immediately prior to the expiration date Army authorities attempted to revoke these orders. Shortly after the expiration date she was arrested by military police, transported to Germany, and convicted by general court-martial for her part in the theft of the Hesse crown jewels. Through habeas corpus proceedings she was released. While for pay purposes terminal leave is technically active duty, for all other purposes it is inactive duty, and therefore the court-martial was without jurisdiction. [*Durant v. Hironimus,* 73 F. Supp. 79 (S. D. W. Va. 1947).]

A regularly enrolled reserve officer on inactive duty may not be recalled to active duty for the sole purpose of standing trial by court-martial, even for an offense committed while previously on active duty. [*United States* ex rel. *Viscardi v. MacDonald,* 265 Fed. 695 (E. D. N. Y. 1920).] Analogous with this is the opinion of the Judge Advocate General that court-martial jurisdiction over officers of the Army of the United States (a civilian component, as distinguished from reserve) ceases when they are placed on inactive duty status. [5 BULL. J. A. G. 35 (1946).] Despite the fact that the Judge Advocate General has adhered to the ruling that an officer on terminal leave is on active duty status [*see, e. g.,* 4 BULL. J. A. G. 456 (1945)], the effect of the instant holding is to bring A. U. S. officers on terminal leave under the rule of the *Viscardi* case. While this is consistent with the current tendency of civil courts to subject the jurisdiction of courts-martial to close scrutiny and to confine it to narrow limits [E. G., *United States* ex rel. *Flannery v. Commanding General,* 69 F. Supp. 661 (S. D. N. Y. 1946)], on the basis of the administrative rulings of the Judge Advocate General alone the opposite result might have been reached. It has been urged that, since by its terms an A. U. S. commission is in full force for the duration of the national emergency plus six months, unless sooner terminated by the President, it would be practically and legally sound to permit recall during the life of the commission to stand trial by court-martial for offenses committed while on active duty. [Myers and Kaplan, *Crime Without Punishment,* 35 GEO. L. J. 303, 314 (1947).] It may further be argued that, if by geographical accident there is no civil authority with jurisdiction to try the cause, one who has confessed to a crime, as has the petitioner in the instant case, may never be made to answer therefor. It is submitted, however, since the jurisdiction of courts-martial and that of federal courts are closely limited by statute, that the remedy for this anomalous situation lies properly with the Congress. The instant decision, therefore, appears sound as a matter of precedent, on the broad ground that persons in a doubtful area between military jurisdiction and civil jurisdiction should, if possible, have the benefit of the constitutional safeguards and deliberate process provided by civil courts.

Constitutional Law—Constitutionality of 1940 Act Extending Diversity of Citizenship Jurisdiction to Citizens of Territories—A citizen of Hawaii brought suit for an accounting against a citizen of California in the Federal District Court of Hawaii, and judgment was rendered

leaving the parties where the court found them. Defendant's motion to set aside the judgment on the ground of lack of jurisdiction was denied. The statute giving diversity of citizenship jurisdiction for suits between citizens of territories and states [54 STAT. 143, amending 28 U. S. C. § 41 (1) (1940)] is constitutional as to territorial courts. [*Duze v. Wooley* et al., 72 F. Supp. 423 (D. Hawaii 1947).]

The statute had previously been tested only by state district courts, never by a territorial district court. Decisions holding it constitutional [*Winkler v. Daniels,* 43 F. Supp. 265 (E. D. Va. 1942)] were based on the policy argument that since citizens of territories are citizens of the United States they should be given the same privilege to sue in a neutral federal court, to avoid local prejudice, as citizens of states. [H. R. REP. No. 1756, 76th Cong., 3rd Sess. 3 (1940).] Moreover, U. S. CONST. Art. III, § 2, granting diversity jurisdiction only where suits are between citizens of different *states* is not the exclusive source of jurisdiction in the Constitution, since Congress has power to make all rules and regulations regarding the *territories* under U. S. CONST. Art. IV, § 3, cl. 2. On the other hand, the provision has been held unconstitutional [*Behlert v. James Foundation of New York,* 60 F. Supp. 706 (S. D. N. Y. 1945)] on the basis that, however laudable the policy, Art. III, § 2 *is* the exclusive source of jurisdiction for a federal court. Since there is nothing in Art. IV to prevent the extension of diversity jurisdiction, such as there may be in Art. III, even if the view as to unconstitutionality were correct, it would not apply to federal courts deriving their jurisdiction from Art. IV. That territorial courts are such courts is well settled [see *O'Donoghue v. United States,* 269 U. S. 516, 535 (1933)], so it appears the instant court was correct in holding the act to be constitutional as to territorial courts. Thus, even if the statute were to be unconstitutional as to state federal courts, it would seem that an action between a citizen of a state and a citizen of a territory could be brought in a territorial federal court but not in a state federal court. This means that as between two parties to a contract, a citizen of a state and a citizen of a territory, one acquires a right that the other does not. For if the state citizen is plaintiff he may sue in the federal court located in his defendant's jurisdiction (*e. g.,* Hawaii), but if the territorial citizen is plaintiff he may not sue in such a federal court (*e. g.,* D. C. California). This unfair effect of a possible holding that the statute is constitutional as to federal territorial courts and unconstitutional as to state federal courts is an additional potent argument for construing the statute as constitutional in its entirety.

Constitutional Law—Right of Negroes to Vote in Primary Elections—Plaintiff, a Negro, attempted to vote in a Democratic Party primary in South Carolina to nominate candidates for federal and state offices. He was denied the right to vote solely because, under the rules of the Democratic Party of South Carolina, enrolment in the Party was limited to persons of the White race. To test the legality of this denial to himself and other Negro electors, plaintiff sought a declaratory judgment and injunction against certain election managers and Democratic Party officials, alleging a denial of rights guaranteed by the Fourteenth, Fifteenth, and Seventeenth Amendments and Article 1, Sections 2 and 4,

of the Constitution of the United States. The District Court granted a declaratory judgment and injunction, holding that, notwithstanding the absence in South Carolina of express statutory regulation or recognition of primary elections, the denial of voting privileges to Negroes constituted a violation of constitutional rights [*Elmore v. Rice* et al., 72 F. Supp. 516 (E. D. S. C. 1947)].

Since a primary, as opposed to a general election, was not thought to be the subject of federal jurisdiction [*Newberry v. United States,* 256 U. S. 232 (1921)], until recently the Democratic "white" primary was an almost impregnable bar to the enfranchisement of Negroes in the South. Impetus to legal attack to secure voting rights for Negroes at least in federal primaries was gained from a decision, not involving racial discrimination, which held that Congress was empowered to regulate primaries with regard to election frauds under Article 1, Sections 2 and 4 of the Constitution [*United States v. Classic* et al., 313 U. S. 299 (1941)]. Subsequently the Supreme Court delivered what seemed to be a death blow to "white" primaries when under the Fifteenth Amendment it prohibited the Democratic Party from denying voting rights to Negroes in its primaries, which were regulated by the state [*Smith v. Allwright,* 321 U. S. 647 (1944)]. However, because of the Court's emphasis on state control, a loophole remained to those who still sought to circumvent destruction of the "white" primary. Led by their Governer who blatantly announced that white supremacy would be maintained, the Legislature of South Carolina expunged from their statutes and constitution all reference to primary elections, leaving regulation of primaries entirely in the hands of the Democratic Party. Thus, strategy was introduced whereby it was hoped that exclusion of Negroes by the Democrats, whose primaries were now detached from state supervision, would leave federal courts as powerless as when dealing with restrictions on membership imposed by a purely social club. This hope is dispelled by the instant decision. Recognizing the omnipotent position of the Democratic Party in South Carolina, the court has found enough affinity between that party's regulation of the primary in issue and primaries conducted under state regulation prior to the *Smith v. Allwright* case to conclude that there remains state action sufficient to bring the primary within reach of federal constitutional controls. In any state in which a single party exercises a similar domination, the requisite quantum of affinity between party and state will no doubt always be present in spite of statutory changes and excisions. Here the constitutional requirement of state action might also have been fulfilled either by pointing to the state's inaction in permitting Democratic exclusion of Negroes [See *Catlette v. United States,* 132 F. 2d 902, 907 (C. C. A. 4th 1943)], although the validity of substituting state inaction for action has not yet been thoroughly tested; or by emphasis upon the state's positive action in removing all statutory control of primaries [Note, *Negro Disenfranchisement—A Challenge to the Constitution,* 47 COL. L. REV. 76 (1947)]. Even if other means of disenfranchising Negroes remain available, at least the proponents of white supremacy will find it increasingly difficult to conduct with legal impunity a primary election which is clearly violative of democratic principles. The problem of constitutionality in attempting to draft statutes which embrace both federal and state primaries is a considerable one, yet recent suggestions for Congressional enactment [*To Secure These Rights,* REPORT OF THE PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, 160-161 (1947)] can and should be written to comprehend the situation presented by the instant case.

Criminal Procedure—Disposition of Case in District of Arrest—Rule 20 of Federal Criminal Rules—A defendant pleaded guilty and sought disposition of his case in the district of arrest under Rule 20 of the Federal Rules of Criminal Procedure, but the district judge denied that he had jurisdiction to pass judgment and sentence on an indictment found in another state and district, and thus held Rule 20 to be unconstitutional. [*United States v. Bink,* 16 U. S. L. WEEK 2173 (D. Ore. Sept. 30, 1947).]

The right to a trial by a jury of the vicinage is older than Magna Charta and is incorporated in the United States Constitution. If, however, a prisoner voluntarily and deliberately pleads guilty it has long been held that a court has power to sentence him without a jury verdict; and even if a prisoner pleads not guilty he may now waive jury trial. [*Patton v. United States,* 281 U. S. 276 (1930).] Aside from the right to trial in the district where the crime was committed, and other constitutional limitations, here not pertinent, Congress can confer jurisdiction at will on district courts. The judge in the instant case did not deny that Congress has such power, but he declared that Congress has not given jurisdiction to district courts over crimes committed outside their district.

The Supreme Court submitted the present rules to Congress in January, 1945, and by failure of Congress to act upon them during that session they became effective in accordance with prior legislation. [54 STAT. 688 (1940), 18 U. S. C. § 687 (1940).] Such lack of consideration and debate by Congress may possibly be an undesirable method of lawmaking, but it does not seem to be beyond the power of the legislature. The great weakness in the method is disclosed, however, if the judge in the instant case is correct in assuming that prior to the passage of the rules he had no such jurisdiction as is contemplated in Rule 20. The rule is allegedly one of venue, and was submitted under a request for procedural rules. If in fact it seeks to change substantive law it is not what Congress intended to become effective by inaction; it should not be construed as valid legislation, and the court had sound ground for refusing to act under it.

At one time the jurisdiction of the district courts was expressly limited to crimes committed within the district [REV. STAT. § 563 (1875)], but when § 24 of the Judicial Code was enacted no such territorial limitation was set forth. [36 STAT. 1091 (1911), 28 U. S. C. § 41 (2) (1940).] If § 24 may be construed alone, Rule 20 is not substantive law in the guise of "Rules of Criminal Procedure," but merely a provision for venue which should be accepted by the district courts. If the tendency of Rule 20 toward blurring state lines and making the district courts only branches of one nation-wide district court is undesirable, it is the function of Congress to reverse it. This is at least the third occasion on which district courts have refused to accept transfer under Rule 20 [See Strine, *The New Federal Criminal Rules in Action,* 8 F. B. A. J. 190, 192 n. 10 (1947)]. Thus it seems imperative that the Justice Department get a decision from an appellate court as to the validity of the rule.

Income Tax—Deduction for Medical Expenses Not Barred by Receipt of Disability Benefits—Taxpayer excluded from income the disability payments received by him through "personal accident" insurance policies. He then deducted for medical expenses under Section 23 (x) of the Internal Revenue Code, which permits deduction of such medical expenses "not compensated for by insurance or otherwise" as exceed five

per cent of the adjusted gross income. The Tax Court, holding that disability indemnity is not compensation for medical expenses, approved the deduction. [*Deming v. Commissioner,* CCH TAX CT. REP. (REG.) Dec. 16,018 (1947).]

In enacting this section [Revenue Act of 1942, § 127, 56 STAT. 825 (1942)], Congress intended to lighten the wartime tax burdens of injured persons [SEN. REP. No. 1631, 77th Cong., 2d Sess. 6, 95 (1942)], but expressly withheld relief from persons insured by medical reimbursement policies. The expenses of such persons are clearly, as the court also held, "compensated" by insurance. By extending relief to recipients of disability indemnity, the court has protected them from a statutory distinction between insured and uninsured taxpayers which seems irrational, and for which no reason is given in the statutes or pertinent regulations. [26 CODE FED. REGS. § 29.23 (x)-1 (Cum. Supp. 1944).] Where the amount of premiums paid is less than that of proceeds received, the insured has not paid for his "income" from insurance, and so sustains a smaller loss than does the similarly-situated uninsured. Since, however, the proceeds of accident insurance are excluded from income [INT. REV. CODE § 22 (b) 5], the insured and uninsured pay the same tax, that on earnings not impaired by injury. Thus deduction for medical expenses increases an advantage which the insured has already obtained over the uninsured by exclusion. While this increase in advantage can be supported as encouraging insurance, deduction is certainly justifiable where premiums paid equal proceeds received. In this situation the insured has paid for his proceeds in premiums which, as such, are not deductible. Having sustained the same loss as that of the uninsured, he must be allowed to deduct for medical expenses lest a penalty of higher taxes be placed upon insurance. The deduction will not include premiums, for the inclusion of premiums in the extraordinary medical expenses covered by Section 23 (x) is limited to premiums paid in the year when such expenses are paid. While the court has avoided creating a further undesirable disparity between the insured and uninsured, revision of the statutes should be undertaken. [See Vickrey, *Insurance Under the Federal Income Tax,* 52 YALE L. J. 554, 556 (1943).] The tax reductions of injured persons should be apportioned to their actual losses as computed with reference to insurance proceeds and premiums. Disability benefits should be included in income. As a replacement of income lost, they may be logically so treated, especially since their nature is inconsistent with the theory on which accident insurance proceeds were first excluded. [31 OPS. ATT'Y GEN. 304 (1918).] The insured may then be protected by allowing deduction, in the year when proceeds are received, of all premiums paid to date, and not in excess of proceeds. Annual deduction of premiums, though administratively simpler, would probably be objectionable as conferring special exemptions upon persons never injured, or upon injured persons on premiums exceeding proceeds. Finally, high living-costs and taxes indicate that the deduction for medical expenses should be retained. It may be granted to taxpayers irrespective of insurance, for the preceding suggested revisions will remove the discriminatory features of present law illustrated by the instant case.

Labor Law—Application of the Fair Labor Standards Act in Case of Failure to Produce Goods for Interstate Commerce—An oil-well driller brought an action against his employer under the Fair Labor Standards Act [52 STAT. 1060 (1938), 29 U. S. C. § 216 (1940)], for

overtime wages alleged to have accrued from employment in the drilling of an oil-well. Only one well was attempted and it failed to produce oil in commercial quantities. In denying relief, the court held that the act does not apply in the absence of goods which may be shipped in interstate commerce. [*Atwater v. Gaylord,* 13 CCH LABOR CASES ¶ 64001 (Wyo. Sup. Ct. 1947).]

The coverage of the Fair Labor Standards Act is not co-extensive with the commerce power of Congress. Application of the statute has been restricted to situations where the particular occupation is either "intimately related to" interstate commerce [*Overstreet v. North Shore Corp.,* 318 U. S. 125, 130 (1943)], or has a "close and intimate relationship with the process of production" [*Kirschbaum Co. v. Walling,* 316 U. S. 517, 525-6 (1942)]. The broader test of activities "affecting commerce" as applied to the National Labor Relations Act [*Labor Board v. Jones & Laughlin,* 301 U. S. 1 (1937)], has been specifically rejected as the criterion of the coverage of this act. [*McLeod v. Threlkeld,* 319 U. S. 491 (1942).] However, in their zeal to give effect to the "humanitarian purposes" of the Fair Labor Standards Act [*A. H. Phillips, Inc. v. Walling,* 324 U. S. 490 (1944)], the courts have, in some cases, so loosely construed the tests of intimate relationship to commerce [*Barrish v. Hertz Drivurself Stations, Inc.,* 5 WH Cases 327 (E. D. Pa. 1945)], or production [*Martino v. Michigan Window Cleaning Co.,* 145 F. 2d 163 (C. C. A. 6th 1944)], as not only to exceed the express limitations upon the coverage of the act, but also to probe the outer periphery of the broader test, coming perilously close to the limit of the Congressional power. The factual situation of the instant case permitted this court to fix a line of demarcation which may to some extent curb the tendency of the courts to overreach the power, if not the purpose, of the statute. An opposite holding upon this factual situation would subject all business operations, however remote from interstate commerce, to the constant hazard of innocently incurring large penalties under § 216 of the Act. It is objected that the holding in the instant case creates a paradox. Employees are entitled under the Act to overtime compensation "payable in the course of employment and as the work proceeds." [*Culver v. Bell & Loffland,* 146 F. 2d 29 (C. C. A. 9th 1943).] Yet, under the instant ruling, it cannot be determined until completion of the work whether it will be payable. Such inconsistency, however, is only a logical and not a practical one, and as such should not be a factor in the determination of any particular case. On the one hand, the Act cannot, where all of the facts are known (as in the instant case), be stretched to accomplish more than its content authorizes. On the other hand, where the facts are uncertain, as a matter of practical administration under compulsion of the express policy of the Act the rulings must favor the employee.