In the instant case, while it is arguable that since the prior dealings of the parties resulted in formal agreements, the parties here intended not to be bound unless a similar formal agreement was executed;[17] it would be preferable to hold there was a binding contract, since all the details had been agreed upon, and the formal writing contained no terms other than those to which the defendant had assented, and since the statement, "This memo becomes void when sale is covered by contract," most likely contemplated the binding effect of the memorandum, and certainly not an intention not to be bound.

Corporations—Right To Withdraw a Registration Statement Filed with the Securities and Exchange Commission—[Federal].—A corporation, attempting to register 35,000 shares of its common stock, filed a registration statement with the Securities and Exchange Commission. The day after the registration statement became effective, but before any of the registered stock had been sold, the commission notified the registrant that a hearing was to be held to determine whether a stop order should issue suspending the effectiveness of the statement. After several hearings had disclosed that shares of the same stock, issued before the Securities Act of 1933, were outstanding in the hands of the public, the corporation moved for leave to withdraw its registration statement. The commission denied the application to withdraw on the grounds that withdrawal would not be consistent with the public interest and the protection of investors. The respondents, officers of the corporation, refused to testify further, and the commission applied to the federal district court for an order requiring the respondents to comply with the terms of a subpoena. *Held*, order will issue. The respondent cannot withdraw as of right under the circumstances of this case. *Securities and Exchange Commission v. Hoover.*[1]

Whether or not a registrant can withdraw his registration statement was considered by the United States Supreme Court in *Jones v. Securities and Exchange Commission.*[2] In that case the Court held that since the registration statement had not yet become effective and since no stock had actually been issued, the commission could neither deny registrant the right to withdraw nor compel the giving of testimony and the producing of evidence at public hearings. In reaching its decision the Court relied upon the general rule of law that a plaintiff can withdraw his complaint at any time before final decree[3] unless withdrawal will prejudice the defendant in some way other than mere vexation from future litigation.[4] The Court denounced further investigation as an unlawful "fishing expedition."[5] Although the decision in the *Jones* case

[17] See cases cited in notes 14 *supra.*

[1] 25 F. Supp. 484 (Ill. 1938). See Resources Corp. Internat'l v. S.E.C., C.C.H. Sec. Act Serv. ¶30,099 (App. D.C. 1939).

[2] 298 U.S. 1 (1936).

[3] See *Ex parte* Skinner and Eddy Corp., 265 U.S. 86 (1924); McGowan v. Columbia River Packers' Ass'n, 245 U.S. 352, 358 (1917).

[4] See Pullman's Palace Car Co. v. Central Transportation Co., 171 U.S. 138, 145–6 (1898); Welsbach Light Co. v. Mahler, 88 Fed. 427 (C.C. N.Y. 1898).

[5] For condemnation by the Court of investigations made with the hope that a violation of the law will be discovered see Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); Ellis v. Interstate Commerce Commission, 237 U.S. 434, 445 (1915). For general discussion see Mechem, Fishing Expeditions by Commissions, 22 Mich. L. Rev. 765 (1924).

can be attacked as to both the applicability of the court's stilted analogy to dismissal by a plaintiff[6] and the justification for its denunciation of the commission's investigation as an unlawful "fishing expedition,"[7] such attack is unnecessary to uphold the decision in the instant case. The cases are distinguishable, for in the *Jones* case no hearings had been held, the registration statement had not yet become effective, and issues similar to the one registered were not outstanding.

No analysis of the problem of withdrawal, however, can be divorced from an inquiry into the purpose of the Securities Act. If the statutory requirement of full and adequate disclosure was designed only to protect potential purchasers of the registered stock, the *Jones* case was correctly decided, and the instant case would seem to be wrong.[8] If, however, the legislature intended to aid those who purchased securities of the type sought to be registered, whether registered or not, both cases are probably right. The broader interpretation should be adopted. For even if none of the securities sought to be registered has been sold, if similar issues of the same stock are outstanding, full disclosure would seem to be desirable in order to protect potential purchasers of such stock. A similar view was emphasized by the commission in *In the Matter of Oklahoma Texas Trust.* In that case stock covered by the registration statement was issued and outstanding; permission to withdraw was nevertheless denied on the grounds that the rights of future potential investors to adequate and accurate information had come into being.[9] Disclosure might leave depreciated securities in the hands of present holders, but this fact does not justify permitting withdrawal. The fraud necessitates eventual loss to someone; disclosure and resultant present loss to a few are preferable to building an economic structure on undisclosed misrepresentations. Moreover, disclosure may aid the holder of the non-registered securities; it

[6] The upholding of specific court rules to the effect that dismissal without prejudice may be refused if the court deems such action in the interest of justice would tend to show that dismissal is a procedural question, and not one of substantive right. For cases of this type see Bronx Brass Foundry, Inc. v. Irving Trust Co., 297 U.S. 230 (1936); Young v. Southern Pacific Co., 25 F. (2d) 630 (C.C.A. 2d 1928). Since an administrative body is charged with enforcing the act while a court is merely a disinterested umpire, it would seem even more desirable for the former to exercise that power. Moreover, administrative bodies should not be hampered by technicalities of common law procedure. 34 Mich. L. Rev. 1031, 1033 (1936). See also I.C.C. v. Baird, 194 U.S. 25, 44 (1904).

[7] The fishing expedition rule would seem to be inapplicable inasmuch as there was to be no general inquiry. The notice of stop order proceedings specified in detail the items as to which information was desired, and the district court ordered Jones to testify only upon pertinent matters. It is clearly settled that investigation will be allowed as to specific charges. Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894). Moreover, hearings were held only after the registrant invoked the commission's jurisdiction by filing the registration statement. In addition, it would seem that the commission's activity would be authorized under its general investigatory power. See 48 Stat. 85 (1933), as amended by 48 Stat. 908 (1934), 15 U.S.C.A. § 77s (b) (supp. 1938).

[8] If securities have been sold under an effective registration statement, withdrawal will be denied the registrant. See In the Matter of National Boston Montana Mines Corp., 1 S.E.C. 639 (1936); In the Matter of Treasure Hill Extension Mines Co. Inc., 2 S.E.C. 134 (1937); In the Matter of Sunset Gold Fields, Inc., 2 S.E.C. 329 (1937).

[9] In the Matter of Oklahoma-Texas Trust, Sec. Act Rel. 1563 (1937), aff'd 100 F. (2d) 888 (C.C.A. 10th 1939).

may provide him with an action against the issuer or seller provided by section 12 of the Securities Act.[10]

Conceivably, however, the statute was designed not only to prevent the sale of poor securities without adequate disclosure, but also to expose those who violate or attempt to violate the act. Section 24 provides that wilfully violating the act or rendering the registration statement misleading by either making an untrue statement of a material fact or omitting material facts is punishable by fine or imprisonment.[11] Thus, even if no stock has been issued and the registration statement has not yet become effective, the registrant is subject to criminal prosecution. Although this section is by no means conclusive upon the question of withdrawal, it does tend to show that the scope of the act comprehends more than the mere sale of securities. The entire statute is pervaded with the idea that full and adequate disclosure is necessary to protect the investing public. It is submitted that exposure though no stock has been sold is consistent with this protection. Such exposure is desirable to inform the investing public as to the character of the registrant who tried to and might again attempt to sell securities. To discourage attempts by registrants to "get by" with defective registration statements would also seem to be consistent with the protection of the investors' interests. It is submitted, therefore, that withdrawal should be denied the registrant even in the *Jones* case situation. In any event the instant case is no doubt a logical and desirable limitation upon that doctrine.

Criminal Law—Power of Judge To Comment on the Guilt of the Accused—[Federal].—The defendants were convicted in a federal district court for the crime of intimidating a witness appearing before a federal commissioner. In his instructions to the jury, the trial judge (1) directed the jury to dismiss the accuseds' version of certain controverted facts from their minds and (2) intimated that he preferred the testimony of a witness for the prosecution because it was probably "the first time that he has ever been in a court, and he meticulously tried to tell the truth," while the accused had much experience in and about courts of law. On appeal, *held*, reversed and remanded. Instruction (1) was in error as withdrawing facts from the consideration of the jury to the prejudice of the accused, and instruction (2) was in error as adding to the evidence. A concurring opinion by two of the court, written by Major, J., advocated a restriction of the power of judicial comment to the jury and concluded that in criminal cases the Supreme Court has never sanctioned comment on the ultimate issue, *i.e.*, the guilt of the accused, except where the facts were uncontroverted. *United States v. Meltzer*.[1]

The concurring opinion departs from what has been the accepted rule of comment in the federal courts. While a majority of the states have delimited or abolished the power to comment by constitutional provision, statute, or judicial decision,[2] the federal

[10] 48 Stat. 84 (1933), 15 U.S.C.A. § 77l (2) (supp. 1938). The seller is civilly liable if he induced the sale by fraudulent or misleading statements even if securities are not registered.

[11] 48 Stat. 87 (1933), 15 U.S.C.A. § 77x (supp. 1938).

[1] 100 F. (2d) 739 (C.C.A. 7th 1938).

[2] See Rest., Code of Criminal Procedure Ann. § 325 (1930); Otis, "Governor of the Trial" or "Referee at the Game," 21 J. Am. Judic. Soc. 105 (1937). See also Sunderland, The Problem of Trying Issues, 5 Texas L. Rev. 18, 32 (1926). For an explanation of the reason for the difference in rules, see Thayer, Preliminary Thesis on Evidence 181n (1898).