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NOTES AND COMMENTS

Administrative Law—Interstate Commerce Commission—Carriers—Blanket Area Rates

The ascertainment of rates offering maximum congruity among the competing interests of producer, carrier and consumer has long been a challenge to the Interstate Commerce Commission. Particularly in the

field where developed natural resources can find a market only at some distant point has the problem of rate regulation been difficult.

In *Ayrshire Collieries Corp. v. United States*[1] the Commission faced the problem of determining a rate structure for coal-producing areas in Illinois, Indiana, and Kentucky, with markets located in northern Illinois and Wisconsin. Sections of each state were grouped together, and all the mines within one section given the same rate to the particular destination. Rates from each such area to the point of consumption were then approved, but the differences in rates assigned to the areas were admittedly not wholly explainable on their respective distances from the destination points.[2]

Grouping all the mines in a particular area and giving each the same flat rate to a given point has long been practiced.[3] So-called blanket areas are frequently set up by the carriers acting on their own inititative, and where this has not been done, it may be required by the Commission.[4]

The Commission has found the blanket areas highly desirable because they encourage a more even and fuller development of the region; simplify marketing by allowing dealers a wider range in their choice of materials; and, by pitting in competition producers throughout the producing district, stimulate rivalry, and thus provide a guaranty against exorbitant prices and undue profits.[5] To the carriers, blanket area rates offer through uniform treatment of all shippers in a large section certain administrative conveniences; through the right to haul at the same rate though the line may be located more distant from the producer than some other railroad, certain competitive advantages; and through resulting production stimuli greater business potential.[6] The propriety of so establishing areas is now firmly settled in the field of administrative rate making.

After the producing area is divided into blanket areas, the Commis-

[1] 69 S. Ct. 278 (1949). The case before the Commission is reported as Coal to Beloit, Wis., and Northern Illinois, 263 I. C. C. 179 (1945).

[2] Coal to Beloit, Wis., and Northern Illinois, *supra* note 1, at 185. For example, rates approved from the Boonville group to Beloit were $2.39 per ton for a distance of 415 miles, while rates from the Fulton-Peoria group were set at $1.80 per ton for a distance of 170 miles. Note that in the former case the distance is almost two and one-half times that of the latter, yet the rate is only one and one-third larger.

[3] Illinois Commerce Commission v. United States, 292 U.S. 474 (1934); Hitchman Coal and Coke Co. v. B. & O. R. R., 16 I. C. C. 512 (1909).

[4] United States v. Ill. Central R. R., 263 U. S. 515 (1924); St. Louis Southwestern Ry. v. United States, 245 U. S. 136 (1917).

[5] Wis. & Ark. Lumber Co. v. St. Louis, I. M. & S. Ry., 33 I. C. C. 33 (1915); Arlington Heights Fruit Exchange v. So. Pac. Co., 22 I. C. C. 149 (1911); Hitchman Coal and Coke Co. v. B. & O. R. R., 16 I. C. C. 512 (1909).

[6] United States v. Ill. Central R. R., 263 U.S. 515 (1924); Arlington Heights Fruit Exchange v. So. Pac. Co., 22 I. C. C. 149 (1911); Hitchman Coal and Coke Co. v. B. & O. R. R., 16 I. C. C. 512 (1909)

sion as a part of the process of establishing flat rates from each to the consuming point, attempts to correlate the charges to be assigned to the different blanket areas in such a manner that the over-all rate making scheme best serves the interests of all concerned.

The fact that rates as finally approved reflect conclusions not premised wholly on consideration of the interests of the producer and carrier does not establish their invalidity. In determining rate differentials the Commission has not only their interests to protect—the consumer is also entitled to consideration.[7] Where he buys in an intensively competitive market, rates assume increasingly significant proportions, because the variance in price of a few cents per ton is often sufficient to divert a contract from one producer to another.[8] To make rates with a primary regard for distance could eventually have the effect of eliminating practically all competition between producers,[9] with obviously undesirable consequences to the consumer.

Recognizing this as an integral phase of the overall rate-making problem, the Commission has consistently given weight to the consumer's interests, even when the resulting rate differentials are disproportionate to those which consideration only of distance and transporatation factors would dictate.[10] This practice is specifically approved by the court in the instant case.[11]

The influence of competition in the Commission's rate fixing process found an interesting but typical[12] application in *Birch Valley Lumber Co. v. S. C. & M. R. R.*[13] There the blanket area of the B. & O. R. R., main line serving the timber-growing region involved, was extended only to lumber producers located on its main or trunk lines. Producers B and D were well within the general blanket area, but were some 7 to 9 miles from the B. & O. They had to pay in addition to the group rate the charges of the S. C. & M., which carried their products to a point on the B. & O. The Commission found that in order to compete with other producers B and D had to base their prices on the group rate and absorb the charges of the S. C. & M., with the undesirable prospect of possibly being driven out of business. The Commission concluded that although the charges of the S. C. & M. were not unreasonable, the refusal of the B. & O. to extend the group rate to B and D was

[7] Coal to Illinois and Wisconsin, 232 I. C. C. 151 (1939); Andy's Ridge Coal Co. v. So. Ry., 18 I. C. C. 405 (1910).
[8] Coal to Beloit, Wis., and Northern Illinois, 263 I. C. C. 179, 195 (1945).
[9] Illinois Coal Traffic Bureau v. Ahnappe & W. Ry., 204 I. C. C. 225 (1934).
[10] *Id.* at 240; Waukesha Lime and Stone Co. v. Chicago, M. & St. P. Ry., 26 I. C. C. 515, 518 (1913).
[11] 69 S. Ct. 278, 288.
[12] See also Indian Creek Valley Lumber Co. v. B. & O. R. R., 126 I. C. C. 161 (1927); Tioga Coal Co. v. B. & O. R. R., 101 I. C. C. 611 (1925); Swift Lumber Co. v. F. & G. R. R., 61 I C. C. 485 (1921).
[13] 144 I. C. C. 419 (1928).

unduly prejudicial to them and unduly preferential to their competitors, and entered an order requiring that their rates not exceed the rates charged other competitors in the same general origin territory.

Decisions of the ICC are not necessarily final and may be taken before the federal courts. But once it is determined that the Commission is acting within its statutory authority, the court's power to review its findings of fact and rulings is extremely limited.[14] Congress intended to commit these problems to a permanent expert body and the courts recognize that they have neither the "technical competence nor the legal authority to pronounce upon the wisdom of the course taken by the Commission."[15] Numerous examples of court deference to the administrative expertise of the Interstate Commerce Commission reveal a marked indisposition even to consider the amount of weight given to each of the factors used in determining the justifiableness of a rate, and this proposition seems particularly applicable where the problem involved concerns fixing of rates for competing areas.[16]

By reaffirming in the instant case its policy of rare interference with the Commission's rulings, the court facilitates the reaching of the soundest possible solution to a problem for which it can hardly be hoped to find a perfect one.

CHARLES L. FULTON.

Anti-trust Laws—Requirements Contracts—Tests of Illegality

Section 3 of the Clayton Act[1] declares, *inter alia,* that "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . whether patented or unpatented . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Since its passage in 1914, the United States Supreme Court, while not always denominating them, has had occasion to deal with two sepa-

[14] I. C. C. v. Mechling, 330 U.S. 567 (1947); United States v. Chicago Heights Trucking Co., 310 U.S. 344 (1939).

[15] Board of Trade of Kansas City v. United States, 314 U.S. 534, 548 (1942).

[16] United States v. Ill. Central R. R., 263 U.S. 515 (1924). Also see the statement of Mr. Justice Douglas in the instant case: "We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it." 69 S. Ct. 278, 289.

[1] 38 STAT. 731 (1914), 15 U. S. C. §14 (1946).

rate and distinct types of contracts[2] which have been attacked as violative of that statute.

The first case to reach the court, *Standard Fashion Co. v. Magrane-Houston Co.*,[3] involved the so-called exclusive dealing arrangement[4] whereby the purchaser agrees to buy all his requirements of a certain product or products from the seller and the seller agrees to fully supply the purchaser. The Fashion company, through such contracts, controlled 40% of the pattern agencies in the country.

The court pointed out that the statute did not prohibit all contracts that created a mere possibility that competition would be lessened, but that a *probable, substantial* lessening had to be shown. However, because the defendant occupied such a dominant position in the industry, it felt that the lower courts were justified in finding that the challenged contracts substantially lessened competition in that they foreclosed competitors of the seller from a large portion of a total market and were, therefore, illegal.

Shortly thereafter the validity of the other type of contract, the tying agreement, was brought into question in the case of *United Shoe Machinery Co. v. United States*.[5] Defendant-patentee leased its patented shoe machinery subject to the requirement that it be used only with other machinery also leased by defendant and that the lessee buy all its supplies from the lessor. Defendant controlled 95% of the business in the industry. *Held:* "Such restrictive and tying agreements must necessarily lessen competition and tend to monopoly. . . . When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants, signed by the lessee and binding upon him, effectually prevent him from acquiring the machinery of a competitor of the lessor. . . ."[6]

In both cases, then, the Supreme Court placed emphasis on evidence that defendant occupied a dominant position in the industry. Until the decision in *International Salt Co. v. United States*[7] this continued to be so. Domination of the market was regarded "as sufficient in itself to support the inference that competition had been or probably would be lessened"[8] by use of the restrictive contract, whether a requirements

[2] Technically, a third type of contract has been attacked in one case. Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568 (1923), in which an agency contract was challenged as being an exclusive dealing arrangement.

[3] 258 U.S. 346 (1922).

[4] Variously called the "requirements contract," Standard Oil Co. of California v. United States, 69 S. Ct. 1051 (1949); and the "exclusive supply contract," Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. Rev. 412, 416 (1948).

[5] 258 U.S. 451 (1922).

[6] *Id.* at 457, 458.

[7] 332 U.S. 392 (1947).

[8] *See* Standard Oil Co. of California v. United States, —— U.S. ——, 69 S. Ct. 1051, 1056 (1949).

or tying agreement. Thus, requirements contracts were held violative of section 3 where defendants employing them did 90%,[9] 60%,[10] 50%[11] and 40%[12] of the business, as were tying clause arrangements where defendants controlled 95%[13] and 81%.[14]

On the other hand, where defendant did but one per cent of the business in the industry, it was held that its requirements contracts were not illegal and the court was significantly careful to point out that in other respects the case fell "fairly within the recent decision of . . . Standard Fashion Co. v. Magrane-Houston Co."[15]

Later, however, the circuit courts discarded the requirement of a showing of dominance in the tying clause cases. Although their users protested that they were either required for the protection of good will[16] or commercially necessary because of contract commitments of repair,[17] the tying agreements were made very vulnerable by the substitution of the more easily satisfied "quantitative" test.[18] Under this standard, a defendant's comparative position in the industry became unimportant if it could be shown that the volume of business done by him was quantitatively large. In the *International Salt* case the Supreme Court unqualifiedly endorsed this view, declaring the tying devices "unreasonable, *per se*" where "any substantial market" is involved.[19]

After the *International Salt* decision, then, the state of the law could be summarized as follows: In both requirements and tying clause agreements a probable substantial lessening of competition had to be shown

[9] Fleischmann Co., 1 F. T. C. 119 (1918).

[10] Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1940).

[11] Q. R. S. Music Co. v. F. T. C., 12 F. 2d 730 (7th Cir. 1926).

[12] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); Butterick Co. v. F. T. C., 4 F. 2d 910 (2d Cir. 1925), *cert. denied*, 267 U.S. 602 (1925).

[13] United Shoe Machinery Co. v. United States, 258 U.S. 451 (1922).

[14] International Business Machines Corp. v. United States 298 U.S. 131 (1936).

[15] B. S. Pearsall Butter Co. v. F. T. C., 292 Fed. 720, 721 (7th Cir. 1923).

[16] International Business Machines Corp. v. United States, 298 U.S. 131 (1936); Pick Mfg. Co. v. General Motors Corp., 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U.S. 3 (1936). The contention that the tying clause was necessary to protect good will was upheld in Pick Mfg. Co. v. General Motors Corp., *supra; cf.* F. T. C. v. Sinclair Refining Co., 261 U.S. 463 (1923).

[17] International Salt Co. v. United States, 332 U.S. 392 (1947); Judson L. Thomson Mfg. Co. v. F. T. C., 150 F. 2d 952 (1st Cir. 1945).

[18] This test required only a showing that the tying clauses covered a substantial market, measured quantitatively. Signode Steel Strapping Co. v. F. T. C., 132 F. 2d 48, 54 (4th Cir. 1942): "If a dealer by such unfair trade practice as is here involved restrains competition with respect to his customers, he ought not be permitted to continue it because his portion of the national business is small . . ." (Where defendant did but from 5% to 7% of the business in the trade.); Oxford Varnish Corp. v. Ault & Wiborg Corp., 83 F. 2d 764, 766 (6th Cir. 1936): "The ratio borne by the defendant's volume of business to the paint and varnish industry is not, we think, the measure by which monopolistic tendency of its contracts is to be determined." (Where defendant did but one-half of one per cent of the business in the trade.); *accord*, Judson L. Thomson Mfg. Co. v. F. T. C., 150 F. 2d 952 (1st Cir. 1945).

[19] 332 U.S. 392, 396 (1947).

to satisfy section 3 of the Clayton Act.[20] Where the former type was concerned nothing less than the inference of a substantial lessening, arising out of the employment of such contracts by companies dominant in their industry would satisfy the requirement, whereas in the latter, a showing that defendant did a quantitatively substantial business would give rise to the same inference and render the contracts illegal.

The justification for dealing less harshly with requirements contracts than with tying clause arrangements has been discussed by many writers.[21]

Whereas both types of agreements lessen competition in the sense that they deprive the seller or lessor's competitors of access to the market provided by the purchaser or lessee for the duration of the agreement, the requirement contracts, as contrasted with the tying agreements, do have legitimate business purposes. They benefit the buyer in that they assure him of a constant and adequate supply and thereby relieve him of the necessity of storing commodities for which his demand varies. Furthermore, by protecting him against rises in prices, they enable him to engage in long-term planning on the basis of known costs. The seller is also benefited in that he is assured of his demand and consequently may cut down on his selling expenses. If he is a newcomer to the field, he may estimate what capital expenses are justified by estimating, on the basis of such contracts, what the demand for his product will be. Still more important is the fact that if competition for the patronage of the ultimate consumer is present, the benefits accruing to the contracting parties must necessarily be passed on to the general public in the form of lower costs and better service.

On the other hand, tying agreements have been used only for the suppression of competition. They are the means of coercing the lessee who needs the patented article into buying all his supplies from the patentee, and thereby, in effect, extending the patent-sanctioned monopoly to unpatented goods which are tied to it. Benefits from the arrangement will rarely accrue either to the lessee or the public, and in the usual case both will suffer since the monopolist has the power to charge what the traffic will bear.

Whether or not this preferential treatment of requirements contracts was justified, the late case of *Standard Oil Co. of California v. United States*[22] has made it clear that they will no longer be accorded it. In that case, defendant, doing business in seven western states, sold 23% of the gasoline purchased in that area during the year 1946. The majority of these sales were made through company-owned service sta-

[20] Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 356 (1922).
[21] *E.g.*, Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. REV. 412 (1948).
[22] 69 S. Ct. 1051 (1949).

tions or to industrial users, and the percentage of the total purchases from all suppliers which were made pursuant to defendant's exclusive supply contracts was but 6.7%. However, the dollar volume of Standard's business in the same year was large, amounting to over $58 million.

The District Court,[23] when presented with these figures, could discover scant authority among the requirements contract cases for a finding that they showed any substantial lessening of competition. Percentages had always controlled, and, as noted above, there was no requirements case where a defendant had been found to occupy a market position sufficiently dominant to make its interference substantial in the absence of a showing that it had done at least 40% of the business in the industry.[24] However, the court was of the opinion that the tying clause case of *International Salt Co. v. United States* controlled,[25] and, finding sales under the exclusive supply contracts quantitatively large, determined that they were illegal. In so doing, it refused to hear testimony as to the commercial merits of the exclusive dealing arrangements or to make findings as to whether Standard's competitive position had improved or deteriorated under the system.[26]

The Supreme Court, after reviewing all section 3 cases with which it had dealt prior to the *International Salt* case, concluded that none controlled since they had stressed the dominant position of defendant in the market and Standard did not occupy such a position. Moreover, the court conceded the economic advantages of the requirements contract and admitted that "since these advantages . . . may often be sufficient to account for their use, the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses. . . ."[27] It therefore felt that it "could not dispose of this case merely by citing International Salt Co. v. United States"[28] which involved the tying agreement.

So, instead of relying on that case, it turned to the statute itself and observed that since the requirements contract is one for the "sale of goods . . . on the condition . . . that the . . . purchaser thereof shall not

[23] United States v. Standard Oil Co. of California, 78 F. Supp. 850 (S. D. Cal. 1948), *aff'd*, 69 S. Ct. 1051 (1949).

[24] See notes 9-15 *supra*.

[25] While perhaps the court felt that the "dominance" test could be met in this case by virtue of the fact that other major suppliers in the area also employed the exclusive supply device and, considered collectively, dominated the market, it rested its decision on the quantitative test, saying, ". . . as I read the latest cases of the Supreme Court, I am compelled to find the practices here involved to be violative [of section three]. For they affect injuriously a sizeable part of interstate commerce . . ." United States v. Standard Oil Co. of California, 78 F. Supp. 850, 875 (S. D. Cal. 1948), *aff'd*, 69 S. Ct. 1051 (1949).

[26] Standard Oil Co. of California v. United States, 69 S. Ct. 1051, 1054 (1949). 1051, 1054 (1949).

[27] *Id.* at 1059.

[28] *Ibid.*

use or deal in the goods . . . of a competitor or competitors of the . . . seller,"[29] it must fall within the prohibitions of section 3 if "the effect of such . . . contract . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."[30]

The court was of the opinion that in determining this "effect" it could give no consideration to the commercial merits and demerits of the contract involved, because it was not faced "with a broadly phrased expression of general policy [leaving it free to apply a more lenient test of illegality to requirements contracts], but merely a broadly phrased qualification of an otherwise narrowly directed statutory provision,"[31] and that the congressional intent behind the legislation had been to outlaw all exclusive dealing contracts which foreclose competion in a quantitatively substantial share of the line of commerce affected.

So interpreted, the statute did not leave room for evidence as to defendant's competitive position in the industry nor for testimony as to the commercial justification of the contract in the particular case. Consequently, the judgment below was affirmed.

Whatever arguments may be advanced against it, the decision in the *Standard Oil* case makes it clear that all restrictive contracts, whether of the tying or requirements variety, are illegal, without regard to surrounding circumstances and without resort to inference, if used by a defendant doing a quantitatively substantial volume of business.[32]

Section 3 does not, of course, deal with the ordinary long-term contract in which the purchaser agrees to buy a denominated amount of goods from the seller rather than all his requirements. Neither does it affect contracts of agency wherein the agent gets all his requirements from the principal. Moreover, the tying clause and requirements contract would likewise seem to be legal if its employer does not do a substantial volume of business in dollars and cents. Thus the small businessman can continue to use them in safety, *if* he can be sure that he is small enough. The difficulty is in the determination of where the line will be drawn between substantiality and insubstantiality.

ROBERT PERRY, JR.

[29] 38 STAT. 731 (1914), 15 U. S. C. §14 (1946).
[30] *Ibid.*
[31] Standard Oil Co. of California v. United States, 69 S. Ct. 1051, 1061 (1949).
[32] "We conclude, therefore, that the qualifying clause of section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected." *Id.* at 1062.

Constitutional Law—Absence of Quorum in Congressional Committee Hearings

Petitioner gave false testimony under oath before a standing committee of the House of Representatives, and was convicted of perjury in the district court.[1] The conviction was affirmed in the Court of Appeals,[2] and the Supreme Court granted certiorari.[3] The Court in a five to four decision[4] reversed the conviction, and held that the committee was not a "competent tribunal" within the meaning of the perjury statute,[5] because a quorum of the committee was not "actually physically present" at the time the perjured testimony was given. In so holding the Court was called upon to examine the appropriate parliamentary rules of procedure of the House of Representatives.

The House rules which have been described as "perhaps the most finely adjusted, scientifically balanced, and highly technical rules of any parliamentary body in the world" emanate from four sources: (1) The Constitution of the United States (2) Jefferson's Manual[6] (3) from the rules adopted by the House itself from the beginning of its existence,[7] and (4) from the decisions of the Speakers of the House, and from decisions of the Chairmen of the Committee of the Whole.[8]

The Constitution gives the power to each House of Congress to determine its rules of procedure;[9] however certain limitations on this grant are also contained therein.[10] Among these is the requirement that a majority of each House shall constitute a quorum to do business.[11]

[1] U. S. v. Christoffel,—App. D. C.—(D. D. C. 1948).
[2] Christoffel v. U. S., 171 F. 2d 1004 (D. C. Cir. 1948).
[3] Christoffel v. U.S., 336 U.S. 934 (1949).
[4] Christoffel v. U.S., 338 U.S. 84 (1949). Justices Black, Frankfurter, Douglas and Rutledge joined with Justice Murphy in the majority opinion.
[5] D. C. CODE, Title 22, Sec. 2501 (1940).
[6] In the years from 1797 to 1801 Thomas Jefferson who was then Vice-President of the U.S. and President of the Senate, prepared the notable work which is now known as JEFFERSON'S MANUAL. This work has contributed much to the procedure of the House, and in 1837 the House passed a rule, which still exists, permitting the provisions of the Manual "to govern the House in all cases to which they are applicable, and . . . not inconsistent" with the House rules. JEFFERSON'S MANUAL §938. The Manual along with other House rules is now published as a public document, the current issue being H. R. Doc. No. 766, 80th Cong., 2d Sess. (1949).
[7] JEFFERSON'S MANUAL §§621-958.
[8] These rulings are to the rules of the House what the decisions of the courts are to the statutes. All of the decisions (more than 11,000 in number) have been embodied in HINDS' PRECEDENTS and CANNON'S PRECEDENTS.
[9] U.S. CONST., Art. 1, §5, cl. 1. Some text writers have expressed the view that the power of a legislative body to make its own rules is an inherent power and no constitutional mandate is necessary. 1 SOUTHERLAND, STATUTORY CONSTRUCTION, §602.
[10] U. S. CONST. Art. 1, §§5, 7.
[11] U.S. CONST. Art. 1, §5, cl. 2. After organization of the House the quorum consists of a majority of those members chosen, sworn and living, whose membership has not been terminated by resignation or by action of the House. IV HINDS' PRECEDENTS §§2889, 2890; VI CANNON'S PRECEDENTS 638. Under Speaker Reed's

Accordingly it has been frequently ruled, that upon failure of a quorum, no business, however highly privileged, is in order, and the only motions entertainable are those for a call of the House or to adjourn.[12] Yet, it seems to be the accepted practice of the House that a quorum is presumed to be present until otherwise determined,[13] and no affirmative duty seems to be placed upon the Chair to ascertain the presence of a quorum unless the point is raised or disclosed.[14] Once absence of a quorum is disclosed on a point of order,[15] or a division,[16] by tellers,[17] or on a yea or nay vote,[18] business is automatically suspended,[19] and no business may be transacted, even by unanimous consent,[20] and there must be a quorum of record before the House may proceed;[21] nevertheless once a proceeding is completed it is then too late to make the point that a quorum was not present when action was taken.[22]

The rules of the House are expressly made the rules of the standing committees in so far as they are applicable.[23] A majority of a committee constitutes a quorum for business,[24] and no measure or recommendation may be reported from a committee unless a majority of the committee is actually present.[25] Contrary to the House practice, there must be a quorum of record before the committee may proceed with business.[26]

In applying these rules the Court seemed to narrow the issue to the question—Once a quorum is ascertained on the record of the committee, does the presumption prevail that a quoroum continues until the point of no quorum is made?

In a vigorous dissent,[27] the minority insisted that the quorum

famous "count," the principle of a present rather than voting quorum was accepted, when Reed counted members present for purposes of a quorum, even though they refused to vote. The constitutionality of this rule was questioned and upheld in U.S. v. Ballin, 144 U.S. 1 (1892), the Court ruling therein that the Constitution prescribed no method of determining the presence of a majority.

[12] JEFFERSON'S MANUAL §768, IV HINDS' PRECEDENTS §2950; VI CANNON'S PRECEDENTS §680.

[13] VI CANNON'S PRECEDENTS §624.

[14] VI CANNON'S PRECEDENTS §565. Even upon convening the House each day it is not incumbent on the Speaker to raise the quorum question. IV HINDS' PRECEDENTS §2733; VI CANNON'S PRECEDENTS §624.

[15] VI CANNON'S PRECEDENTS §662. [16] IV HINDS' PRECEDENTS §2933.

[17] VI CANNON'S PRECEDENTS §707; VIII CANNON'S PRECEDENTS §3097.

[18] IV HINDS' PRECEDENTS §2953; VI CANNON'S PRECEDENTS §624.

[19] IV HINDS' PRECEDENTS §§2933, 2934; VI CANNON'S PRECEDENTS §662.

[20] IV HINDS' PRECEDENTS §2951; VI CANNON'S PRECEDENTS §§660, 686, 689.

[21] IV HINDS' PRECEDENTS §§2952, 2953.

[22] VI CANNON'S PRECEDENTS §655. [23] JEFFERSON'S MANUAL §738.

[24] JEFFERSON'S MANUAL §409; IV HINDS' PRECEDENTS §§4540, 4552.

[25] JEFFERSON'S MANUAL §943. [26] VIII CANNON'S PRECEDENTS §2222.

[27] Justice Jackson writing for the minority was joined by Chief Justice Vinson and Justices Reed and Burton. The dissent was based in part on the fact that the identical issue had been raised in a previous perjury case and the Court denied certiorari. Meyer v. U.S., 171 F. 2d 800 (D. C. Cir. 1948), *cert. denied,* 336 U.S. 912 (1949).

established at the convening of the committee session was presumed to continue in absence of a challenge to the contrary, and contended that the Court in holding otherwise was denying to the records and rules of the Congress the respect and reliance to which they are entitled.

The "presumption" rule unquestionably is the "law" of the House, but a search reveals no incident where the specific point has been dealt with in committee. In the principal case there was a recorded quorum when the committee convened, and the point of no quorum was neither raised by petitioner nor a committee member.[28] The Court places much reliance on the rule that no bill may be reported from a committee unless a majority of the committee was actually present.[29] The rule seems inappropriate for the purposes of this case. Indeed, the very fact that the rule applies on its face only to the reporting of a bill, suggests that a "physically present" quorum is not necessary to the competency of the committee for some lesser purpose such as receiving testimony. Besides, the argument might well be made that since the committee rules are the same as the House rules where applicable, the "presumption" rule prevails in the committee subject to the one condition that a quorum must be on record before the proceeding start. The Court while apparently applying one of these rules, seemingly is unwilling to apply the other. Therefore, the result reached seems to be justified only by a strict, literal interpretation of the committee rule requiring a quorum to do business, and upon the consideration that the Court was satisfying a requirement of a criminal statute. From a practical viewpoint, considering the possible delays and inconveniences to the orderly facilitation of committee business, the requisite of a "physically present" quorum seems extremely harsh if it is to apply to all testimony as distinguished from testimony taken under oath as in the principal case. There is ample evidence of Congressional disapproval with the result reached.[30] In fact a bill has been introduced which would expressly make the "presumption" rule applicable to committees.[31]

Assuming that the decision rendered in the principal case would indicate that an actual quorum must be present in order that a Congressional committee may transact any business, does it follow that the

[28] Can a witness raise a point of no quorum? The Court did not rule on this, but indicated that the privilege is limited to members of the committee. The dissent suggested that a witness might well raise the point, and if the objection be overruled, he would be at liberty to leave the hearing. H. R. 6166, 81st Cong., 1st Sess. (1949), introduced shortly after this decision recognizes the right of a witness to make the point of no quorum.

[29] See note 25 *supra*.

[30] 95 CONG. REC. A4366 (June 29, 1949); 95 CONG. REC. 9845, 9858, 9859, 9884 (July 18, 1949); 95 CONG. REC. A4902 (July 21, 1949).

[31] H. R. 6166, 81st Cong., 1st Sess. (1949). No action was taken during the 1st Session on this measure.

same rule would be made applicable in the House? The possibility that legislation passed without a record vote might be "invalidated" was suggested by the dissent.[32]

If the Court continues to follow the policy of several of its previous decisions,[33] to the effect that the enrolled bill[34] is conclusive evidence of enactment, and that no other evidence is admissable to establish that the bill was not lawfully enacted, such a proposition as is envisioned by the dissent would seem to be without foundation.

LINDSAY C. WARREN, JR.

Constitutional Law—Freedom of Speech—Conflict with Power of State to Control Breaches of the Peace

There are inherent inconsistencies between the power of the state to punish breaches of the peace and the constitutional protections of the First Amendment. The case of *Terminiello v. Chicago*[1] exemplifies the problem of weighing the sometimes conflicting social interests in the maintenance of public order and in the free expression of ideas.

The case arose out of an address by Terminiello before an audience of over eight hundred. About one thousand persons, opposed to his espoused doctrine of racial and religious supremacy, had gathered about the auditorium in protest. A police detail, assigned to the meeting, was unable to prevent several disturbances and minor acts of violence. The speech itself viciously attacked various political and racial groups. The general setting, then, was an address, pseudopolitical in nature, but scurrilous and opprobrious in content, delivered in an auditorium surrounded by an angry and turbulent crowd.

Terminiello, after jury trial, was convicted of violating an ordinance[2] of the City of Chicago by making an improper noise or diversion tending to a breach of the peace.

The trial court charged that "misbehavior may constitute a breach

[32] Christoffel v. U.S., 338 U.S. 84 (1949).

[33] Field v. Clark, 143 U.S. 649 (1891); Lyons v. Woods, 153 U.S. 649 (1894); Harwood v. Wentworth, 162 U.S. 547 (1896); Twin City Bank v. Nebeker, 167 U.S. 196 (1897); Hubbard v. Lowe, 226 F. 135 (S. D. N. Y. 1915); *see* Coleman v. Miller, 307 U.S. 433, 457 (1939) (concurring opinion); Flint v. Stone Tracy, 220 U.S. 107, 143 (1910); *cf.* Leser v. Garnett, 258 U.S. 130 (1922); U.S. v. Ballin, 144 U.S. 1 (1892).

[34] An enrolled bill generally refers to a bill which purports to have passed both houses of the legislature, and which has been signed by the presiding officers of the two houses. The Supreme Court of the U.S. includes not only process of enactment within the legislature itself, but also signature by the President and filing with the Secretary of State.

[1] 69 Sup. Ct. 894 (1949).

[2] "All persons who shall make, aid, countenance, or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace . . . shall be deemed guilty of disorderly conduct . . ." , City of Chicago, REV. CODE 1939, c. 193, §1(1).

of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance." The defendant took no exception to that instruction, but maintained that the ordinance as applied to his conduct violated his right to free speech under the Federal Constitution. The Illinois appellate courts found that the speech was composed of derisive, "fighting" words, which carried it outside the scope of the constitutional guarantees, and affirmed the conviction.[3]

The United States Supreme Court did not reach the "fighting words" issue, but held the trial court's instruction to be a binding construction of state law, permitting conviction of the defendant if his speech invited public dispute or brought about a condition of unrest, and, thus construed, the ordinance was unconstitutional. That defendant took no exception to the charge was held to be immaterial since he had attacked the ordinance as a whole, and the verdict being a general one, it could not be determined that the defendant was not convicted under the unconstitutional construction of the statute.[4]

Mr. Justice Jackson dissented on the ground that the court, in lifting the charge to the jury out of its context, had considered it as an abstraction, and that the charge, when given, took color from the realities surrounding the delivery of the address. Accordingly, the jury had found a breach of the peace of a nature not entitled to constitutional protections.[5]

The First Amendment is unequivocal in its expression that "Congress shall make no law . . . abridging the freedom of speech."[6] And, by virtue of the due process clause of the Fourteenth Amendment, this freedom is protected from impairment by the states.[7]

But all speech is not protected. Certain classes of speech, including the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words are punished because "their very utterance inflict injury or tend to incite an immediate breach of the peace."[8]

[3] Chicago v. Terminiello, 332 Ill. App. 17, 74 N. E. 2d 45 (1947), *aff'd*, 400 Ill. 23, 79 N. E. 2d 39 (1948).

[4] The court relies upon Stromberg v. California, 283 U.S. 359 (1931), where a statute proscribed three types of conduct and a general verdict of conviction followed. There it had been contended throughout the proceedings that one of the proscriptions was invalid under the Fourteenth Amendment. All the *Stromberg* case holds is that where the validity of a statute is successfully assailed as to one of three clauses of the statute, and all three clauses were submitted to the jury, the general verdict has an infirmity because it cannot be assumed that the jury convicted on the valid portion of the statute. The case offers no precedent for searching the record for error that at no time was urged before the state court and that was explicitly disclaimed on behalf of the defendant before the Supreme Court. See Mr. Justice Frankfurter, dissenting in Terminiello v. Chicago, 69 Sup. Ct. 894, 898 (1949).

[5] Terminiello v. Chicago, 69 Sup. Ct. 894, 900 (1949) (dissenting opinion).

[6] U.S. CONST. AMEND. I.

[7] Thornhill v. Alabama, 310 U.S. 88, 95 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925); *cf.* Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

[8] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Since such ut-

Speech of public interest, including words of idea-conveying nature, may be punished if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that (the state) has a right to prevent."[9] This clear and present danger test was first enunciated in an "attempt" case to determine whether the verbal acts came close enough to the acts described in the statute to be punished.[10] It has since been employed to test the validity of a statute on its face[11] and to determine whether a conviction obtained under a statute not found to be invalid could be sustained.[12] It has been applied to test a conviction for common law breach of the peace.[13] However, if the statute itself declares that certain utterances are inimical to the public welfare, idea-conveying speech may be punished without the necessity of satisfying the clear and present danger test.[14]

The propriety of the court's searching the record for error and the question of whether the jury may have convicted Terminiello of merely

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terances do not form an essential part of any exposition of ideas and are of slight social value as a step toward truth, any benefit that may be derived from them is outweighed by the social interests in order and morality. CHAFEE, FREE SPEECH IN THE UNITED STATES 150 (1941). This was the rationale of the Illinois courts' holding that Terminiello's speech was not within the constitutional guarantees; he had referred to certain racial groups as "slimy scum," "bedbugs," and "snakes."

See State v. Warren, 113 N. C. 683, 18 S. E. 498 (1893) (an act of the Legislature making it unlawful to use profane language in certain localities is not an undue interference with freedom of speech).

[9] Shenk v. United States, 249 U.S. 47, 52 (1919).

[10] Shenk v. United States, *supra* note 9.

[11] West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Thornhill v. Alabama, 310 U.S. 88 (1940).

[12] Taylor v. Mississippi, 319 U.S. 583 (1943).

[13] Cantwell v. Connecticut, 310 U.S. 296 (1940). The test was referred to and approved in both the majority opinion and Mr. Justice Jackson's dissenting opinion in the instant case. *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 896, 905 (1949).

The quoted expression from the *Shenk* case has represented the traditional phrasing of the clear and present danger test. It has occasionally been paraphrased to the same general effect: ". . . suppression of expression of opinion is tolerated only when the expression *presents* a clear and present danger . . ." (italics mine). *See* West Virginia Board of Education v. Barnette, 319 U.S. 624, 633 (1943). Mr. Justice Douglas, in the majority opinion, uses the phrasing "*likely* to produce a clear and present danger" (italics mine). *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 896 (1949). This should not represent a departure from the principle that "the degree of imminence of the substantive evil must be extremely high before utterances can be punished." *See* Bridges v. California, 314 U.S. 252, 263 (1941).

[14] Gitlow v. New York, 268 U.S. 652 (1925). Whether the "Gitlow distinction" is still the law is not clear. The Gitlow case was distinguished in Herndon v. Lowry, 301 U.S. 242, 256-258 (1937). The distinction was not applied in Taylor v. Mississippi, 319 U.S. 583, 589 (1943) or Thornhill v. Alabama, 310 U.S. 88, 105 (1940). But the Gitlow distinction was regarded as the law in Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943), *cert. denied*, 320 U.S. 790 (1943), *rehearings denied*, 320 U.S. 814, 815 (1944). However the appeal of the conviction of the Communist leaders may provide a definitive statement as to whether the clear and present danger test must be satisfied for a conviction under an act such as the North Carolina Subversive Activities Statute, N. C. GEN. STAT. 14-11 (1943), discussed in 19 N. C. L. REV. 466 (1941).

"inviting public dispute" are not the fundamental problems posed by the *Terminiello* case. Rather the question is, "To what extent is control of the expression of ideas compatible with dynamic democratic processes?" And, conversely, "How may the order requisite to the functioning of a democratic society be maintained without restrictions upon the abuse of the freedoms of expression?"[15]

We have seen that the constitutional guarantees are not absolute, but that speech of public interest is subject to the clear and present danger restriction; and when the statute itself declares certain speech to be unlawful, even that test may not need to be satisfied. Our right to express ideas of public interest is not unqualified, but may be limited. That is the meaning of the First Amendment as interpreted by the Supreme Court.

This construction is inconsistent with the literal language of the Amendment and perhaps with our traditions.[16] It is incompatible with the interpretation that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information may be kept from (the voting citizen)."[17] There are those who believe that, so construed, the constitutional protection is essentially stripped of its vigor.[18]

But there are others who, with equal sincerity and conviction, feel that if the interchange of ideas contemplated by the First Amendment is to serve its aim, their presentation must be accompanied by order; and that the weapon of either the Facist or Communist who would overthrow democracy is disorder and mob action. Accordingly, they feel that the recent cases, culminating in the *Terminiello* case, in their effort to protect the freedoms of expression, are undermining the police power that is the community's only protection from lawlessness and anarchy.[19]

[15] "The problem which Lincoln cast in memorable dilemma: 'Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?'" *See* Minersville School District v. Gobitis, 310 U.S. 586, 596 (1940).

[16] "If there be any among us who wish to dissolve this union, or to change its republican form, let them stand undisturbed, as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." Jefferson, First Inaugural Address.

But cf. Mr. Justice Jackson's thesis that since the people, in adopting state constitutional provisions, have universally qualified them to make persons responsible for abuse of the liberty of free speech, that is what is meant by the cryptic phrase "freedom of speech" as used in the Federal Constitution. *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 907 (1949) (dissenting opinion).

[17] MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 89 (1948).

[18] See MEIKLEJOHN, *op. cit. supra* note 17 and Rosenwein, *The Supreme Court and Freedom of Speech*, 9 LAW GUILD REV. 70 (1949).

[19] "Streets and parks maintained by the public cannot legally be denied to groups 'for the communication of ideas.' Hague v. C.I.O., 307 U.S. 496 (1939); Jamison v. Texas, 318 U.S. 413 (1943). Cities may not protect their streets from activities which the law has always regarded subject to control as nuisances (handbill distribution cases). Lovell v. Griffin, 303 U.S. 444 (1938); Schneider v. State, 308 U.S. 147 (1939). Cities may not protect the streets or even homes

How to maintain public order without impairing our freedoms of expression is one of the major dilemmas of our time. The public turns to the law and to the lawyer for its solution. The lawyer can help with the answer only when he is aware that every restriction placed upon the free exchange of ideas of public interest, however justified, is a restriction upon a basic right of a citizen in a free society and, further, realizes that those elements which would overthrow our democratic society employ disorder and mob violence as primary weapons.[20]

WILLIAM V. BURROW.

Corporations—Process—Service on Non-Resident Directors of Domestic Corporation

The corporation is a necessary party to a stockholders' derivative suit against the directors for mismanagement.[1] This suit has been held to be an action in personam,[2] service not being allowed by publication on the non-resident directors.[3] Thus a long recognized problem arises:[4] How can service of process be had on non-resident directors in the jurisdiction where the corporation is resident? "* * * * those (directors) who have looted and misappropriated corporate assets will be enabled to escape liability by reason of the fact that the corporation is not doing

of their inhabitants from the aggressions of organized bands operating in large numbers. Douglas v. Jeannette, 319 U.S. 157 (1943). . . . Neither a private party nor a public authority can invoke otherwise valid state laws against trespass to exclude from their property groups bent on disseminating propaganda. Marsh v. Alabama, 326 U.S. 501 (1946); Tucker v. Texas, 326 U.S. 517 (1946). Picketing is largely immunized from control on the ground that it is free speech, Thornhill v. Alabama, 310 U.S. 88 (1940), and police may not regulate sound trucks and loud-speakers, Saia v. New York, 334 U.S. 558 (1948)." *See* Terminiello v. Chicago, 69 Sup. Ct. 894, 907 (1949) (dissenting opinion).

[20] Mr. Norman Thomas, writing out of his rich experience, said very recently, "The heretic has always been the growing point in society. When he is repressed by force society stagnates . . . clearly our danger is not from the honest dissenter, but from the passions of the mob and those who manipulate it in the struggle for profit and power." Thomas, *The Dissenter's Role in a Totalitarian Age,* N. Y. Times Magazine, Nov. 20, 1949, p. 13.

[1] 13 FLETCHER CYC. CORP. (PERM. ED.) §5997.

[2] 3 FLETCHER CYC. CORP. (PERM. ED.) §1283.

[3] Fisher v. Parr, 92 Md. 245, 48 Atl. 621 (1901), Southern Mills Inc. v. Armstrong, 223 N. C. 495, 27 S. E. 2d 281 (1943), *cf.* McNaughton v. Broach, 236 App Div. 448, 260 N. Y. Supp. 100 (1932). *Semble* Bauer v. Parker, 82 App. Div. 289, 81 N.Y. Supp. 995 (1903). *But cf.* Holmes v. Camp, 219 N. Y. 359, 114 N. E. 841 (1916). Note, 148 A. L. R. 1251.

[4] Greer v. Mathieson Alkali Works, 190 U.S. 428 (1903); *see* Freeman v. Bean, 243 App. Div. 503, 276 N. Y. Supp. 310, 311 (1934) (dissenting opinion). *Report of Law Revision Commission for 1941,* N. Y. LEG. DOC. (1941) No. 65 (I). 27 CORN. L. Q. 74 (1941); 22 VA. L. REV. 153 (1935); 33 VA. L. REV. 187 (1947); 44 Y. L. J. 1041 (1934). Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947) discusses this problem in federal jurisdiction.

business within the jurisdiction where the wrongdoers reside and where they alone can be served."[5]

In 1947 the Legislature of South Carolina passed a statute in an attempt to remedy this unwarranted situation as to South Carolina corporations.[6] The statute provides in essence that by becoming or remaining a director in a domestic corporation, a non-resident thereby appoints the Secretary of State of South Carolina his lawful attorney in fact for service of process in the courts of South Carolina for any action *thereafter*[7] arising relating to actions of the corporation which arose while he held office. In a recent case arising under this statute the Supreme Court of South Carolina refused to give the statute retroactive effect, saying: "Not only does the act evince an intent that it should operate prospectively but such is the reasonable inference from the fiction of implied consent upon which it is based."[8] Thus the constitutionality of the statute was not directly in issue, but the inference to be drawn from the opinion is that the court would hold the statute constitutional, a proper case arising.

This South Carolina statute appears to have been patterned after the non-resident motor vehicle laws which have been held constitutional.[9] It provides that notice be mailed to the director by the Secretary of State,[10] that such continuance shall be granted by the court as to afford reasonable opportunity to defend the suit,[11] and that any person who is a director may resign within thirty days and not be subject to this act.[12] The "motor vehicle laws" have been upheld on the theory that "In the public interest the state may make and enforce regulations

[5] Goldberg v. Emanuel, 166 Misc. 610, 613, 2 N. Y. S. 2d 943, 946 (Sup. Ct. 1938) *rev'd* 254 App. Div. 556, 2 N. Y. S. 2d 946 (1st dept. 1938). This problem would also exist where there are resident directors but they are insolvent.

[6] Acts and Joint Resolutions South Carolina, 45 STAT. AT LARGE 277 (May 19, 1947).

[7] Italics added.

[8] Johnson v. Baldwin, 53 S. E. 2d 785, 787 (S. C. 1949).

[9] Hess v. Pawloski, 274 U.S. 352 (1926).

[10] Sec. 2: "...; PROVIDED, the Secretary of State shall forthwith forward one copy of such Summons and Complaint to the non-resident director so served, by registered mail directed to such non-resident director at the last address filed with the Secretary of State as hereinafter provided." This is a requirement under the decision of Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[11] Sec. 5: PENDING ACTIONS.—"That the Court in which any action provided for herein is pending shall order such continuance as may be necessary to afford such non-resident director so served as provided herein reasonable opportunity to defend the action."

[12] Sec. 6: NONRESIDENT DIRECTOR RESIGNING SUCH OFFICE. "That any person now a non-resident director of any such domestic corporation who shall within thirty (30) days from the date of approval of this Act, resign in good faith as such director and shall file with the Secretary of State a copy of such signed resignation shall not be subject to the provisions of this Act; and any person who may hereafter be subject to this Act may terminate its application as to him except for causes of action already accrued, by bona fide resigning as such director and filing a signed copy of said resignation with the Secretary of State;...."

reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways."[13] Following this idea of "in the public interest," statutes have been upheld requiring non-residents "doing business" in a state to appoint agents for service of process.[14] The reasoning behind these statutes is that although a state may not exclude an individual from doing business in the state,[15] it may require that certain conditions be complied with to safeguard its citizens.[16] It is submitted that by participating in the management and direction of a corporation a director is thereby doing business in the state where the corporation is present. Is this "doing business" sufficiently related to the public interest to justify such a statute as South Carolina has passed? In view of the number of "Blue Sky Laws" and regulations governing the sale of securities[17] it would appear that the public is vitally interested in the protection of the investor. Further the Supreme Court of the United States upheld an Iowa statute providing for service on an agent in that state where the non-resident was doing business, his business being the sale of securities.[18] It would appear that the South Carolina statute is a further means of protecting the investor, non-resident as well as resident, by providing him with a practical means of protecting his investment against unwarranted acts of corporate directors.

Another approach to this problem would be via the corporation. A corporation is a creature of the law,[19] and it is not entitled to the "privileges and immunities" clause of the constitution.[20] The privilege of forming a corporation is granted by the state,[21] therefore the state necessarily lays down the regulations and requirements to be complied with in incorporation.[22] Why could not a state require, as South Carolina has in essence done, that all the directors of a domestic corporation must be amenable to process within the state, non-residents

[13] Hess v. Pawloski, 274 U.S. 352, 356 (1926).

[14] Doherty & Co. v. Goodman, 218 Iowa 529, 255 N. W. 667 (1934) *aff'd* 294 U.S. 623 (1935), Davidson v. Doherty & Co., 214 Iowa 739, 241 N. W. 700 (1932), Doggett v. Peek, 32 F. Supp. 889 (N. D. Tex. 1940), *aff'd* 116 F. 2d 273 (1940), Wein v. Crockett, —— Utah ——, 195 P. 2d 222 (1948). *But cf.* Flexner v. Farson, 248 U.S. 289 (1919). 23 CALIF. L. REV. 482 (1934); 32 H. L. REV. 87 (1918); 20 IOWA L. REV. 853 (1934); 29 MARQ. L. REV. 31 (1945); 32 MICH. L. REV. 909 (1933); 14 TEX. L. REV. 71 (1935); 2 WASH. & LEE L. REV. 75 (1940).

[15] U. S. CONST. ART. IV, §2.

[16] "(Kane v. New Jersey, 242 U.S. 160 (1916)) recognizes power of the state to exclude a nonresident until formal appointment (condition) is made." Hess v. Pawloski, 274 U.S. 355, 356 (1926).

[17] 14 FLETCHER CYC. CORP. (PERM. ED.) §§6734-6780.

[18] Doherty & Co. v. Goodman, 294 U.S. 623 (1935).

[19] Chief Justice Marshall in Dartmouth College v. Woodward, 4 Wheat. (U.S.) 518 (1819).

[20] Blake v. McClung, 172 U.S. 239 (1898).

[21] BALLANTINE, CORPORATIONS (REV. ED.) §8a; CLARK, CORPORATIONS (2D ED.) p. 4; STEVENS, CORPORATIONS c. 1, §1; FLETCHER CYC. CORP. (PERM. ED.) §114.

[22] 1 FLETCHER CYC. CORP. (PERM. ED.) §114.

through service on the Secretary of State? This would not appear to be a discrimination in violation of the constitution, but rather a provision to put nonresidents on an equal footing with residents[23]—amenable to process within the state, the only difference being in the type of service. The Supreme Court of the United States has said, "Literal and precise equality in respect of this matter is not attainable, it is not required."[24]

A closely related problem arose in North Carolina in connection with the "double liability" feature of bank stock.[25] A resident of New York held stock in a North Carolina bank. The bank failed and an assessment was made against the stock of the non-resident and docketed in the local county where the bank was located, in accordance with the North Carolina statute. On failure of the stockholder to pay this assessment, the commissioner brought suit on said assessment in New York,[26] and recovery was allowed on the theory that the non-resident stockholder assented to this type of liability by becoming a member of the corporation.[27] Thus, if a stockholder by becoming a member of a corporation consents to the liability involved, why could this not hold true for a non-resident director in a South Carolina corporation under the statute herein discussed?

From the foregoing discussion it is submitted that this South Carolina statute should be upheld as constitutional and very desirable. Though it is conceded that this type of statute may tend to discourage incorporation in South Carolina,[28] this seemingly disadvantageous aspect is well overcome by the advantage secured to the investing public in being able to better protect its interest.

A. A. ZOLLICOFFER.

[23] Doherty & Co. v. Goodman, 294 U.S. 623 (1935), Kane v. N. J., 242 U.S. 160 (1916).

[24] Hess v. Pawloski, 274 U.S. 352 (1927) quoting from Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553, 561-562 (1919).

It is interesting to note further that the Supreme Court has upheld a statute requiring non-residents to post bond for cost, even though such is not required of a resident. Ownby v. Morgan, 256 U.S. 94 (1921). N. C. GEN. STAT. §28-35 (1943) requires a foreign executor to post bond whereas a local executor does not have to.

[25] N. C. Pub. Laws (1927) c. 113, §13. This statute was held constitutional in Corp. Com. of the State of North Carolina v. Murphey, 197 N. C. 42, 147 S. E. 667 (1929) *aff'd* 280 U.S. 534 (1939).

[26] Said assessment "shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Court of this state **** if not paid execution may ****** issue against the stockholder delinquent." N. C. Pub. Laws (1927) c. 113, §13.

[27] Hood v. Guaranty Trust Co. of New York, 270 N. Y. 17, 200 N. E. 55 (1936). It is interesting to note that the court continually repeated that this assessment was not the same as a judgment, though the Supreme Court of the United States upheld the statute which said that it was, *supra* note 26.

[28] However, it is doubtful whether at the time of incorporation, misfeasance of the directors is anticipated. A possible solution to avoid the "strike suit" would be the requirement that a person seeking to take advantage of the procedure under this statute be required to post a bond to cover the traveling expenses of the non-resident director in defending an unsuccessful suit.

Criminal Law—Constitutional Law—Defendant's Right of Confrontation

In 1776 the first Constitution of North Carolina was adopted. The experiences of that period were naturally conducive to the idea that certain rights and privileges of the governed were fundamental and should be placed beyond legislative, executive, or judicial control. These fundamental rights were so jealously regarded that the North Carolina Constitutional Convention of 1788 refused to ratify the proposed Federal Constitution until the adoption in that instrument of the Bill of Rights, calculated to secure these rights, was assured.[1] Among the rights thus protected, in both Federal and State Constitutions, is that of the accused, in all criminal prosecutions, ". . . To confront the accusers and witnesses with other testimony. . . ."[2] Agreeably to the admonition that "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty,"[3] it is the purpose here to examine the measure of protection this provision affords the accused, its nature and extent, and the circumstances under which it may be lost.[4]

Confrontation may be claimed as of right "In all criminal proceedings . . .", which includes trials of common law and statutory crimes. A question arises, however, as to whether it may be so claimed in cases of a hybrid nature.[5] Proceedings to disbar attorneys,[6] to commit luna-

[1] IV ELLIOT'S DEBATES ON FEDERAL CONSTITUTION, 1788-1836, at 237-242; State v. Love, 187 N. C. 32, 121 S. E. 20 (1923); State v. Dowdy, 145 N. C. 432, 58 S. E. 1002 (1907).

[2] N. C. CONST., Declaration of Rights, §7 (1776); N. C. CONST., Art. I, §11; U. S. CONST., AMEND. VI. The federal right is differently phrased. It is to the effect that, "In all criminal prosecutions the accused . . . shall enjoy the right to be confronted with the witnesses against him. . . ." The terminology varies with different state constitutions. No distinction based on this variance seems to be drawn.

[3] N. C. Const., Art. I, §29 (1868).

[4] This note supplements Coates, *Limitations on Investigating Officers*, 15 N. C. L. REV. 229, 242 (1937). A critical analysis of the rules of evidence and procedure is here impossible. However, those of particular interest in their effect on confrontation will be noted.

[5] At one time, in North Carolina, the begetting of a bastard child was regarded as a criminal offense. State v. Mitchell, 119 N. C. 784, 25 S. E. 783 (1896). Under N. C. GEN. STAT. §49-2 (1943) this act is no longer regarded as a criminal offense. State v. Dill, 224 N. C. 57, 29 S. E. 2d 145 (1944).

[6] *In re* West, 212 N. C. 189, 193 S. E. 134 (1937); *In re* Stiers, 204 N. C. 48, 167 S. E. 382 (1932); *In re* Ebbs, 150 N. C. 44, 63 S. E. 190 (1908).

N. C. GEN. STAT. §84-28 (1943) is the statutory authority for disbarment proceedings. N. C. GEN. STAT. §84-36 (1943) preserves the court's inherent power over its officers. N. C. GEN. STAT. §84-30 (1943) protects accused's right to compulsory process and counsel, but not confrontation.

In re West, *supra*, states that, "It is not after the manner of our courts, however, to deprive a lawyer, any more than anyone else, of his constitutional guaranties or to revoke his license without due process of law." This statement is understood to indicate that the rules applicable to civil actions will be enforced.

tics[7] and alcoholics,[8] and to punish for contempt[9] are not restricted by this constitutional provision. Cases within the jurisdiction of the juvenile courts are not considered to be criminal in nature,[10] and they too may be conducted without recognizing this provision. But the defendant must be accorded the right of confrontation in proceedings before administrative agencies involving criminal sanctions.[11]

The constitutional right of confrontation was designed to prevent the conviction of defendants in criminal cases by the use of ex parte affadavits and extrajudicial testimony.[12] Therefore, confrontation is

[7] N. C. GEN. STAT. §35-2 (1943) relates primarily to guardianship of lunatics and inebriates. Proceedings for commitment to state hospitals for the insane are had under N. C. GEN. STAT. §§122-42 to 68.1 (1947 Supp.). The clerk of court may act on sworn affidavits of two physicians. A jury trial is not available under the commitment provisions. *In re* Cook, 218 N. C. 384, 11 S. E. 2d 142 (1940).

N. C. GEN. STAT. §§122-75, 79 (1945 Supp.) relate to commitment to private hospitals. The presence of the lunatic at the hearing before the clerk is not expressly required by these provisions, nor by those relating to state hospitals. *But see* Bethea v. McLennon, 23 N. C. 523, 526 (1841) (Dictum states that denial of lunatic's right to be present would be grounds for setting aside an inquisition.).

See 5 WIGMORE, EVIDENCE §1400 (3rd ed. 1940). Wigmore condemns statutes which allow the hearing to be held in the absence of the alleged lunatic.

[8] N. C. GEN. STAT. §§35-30 to 35 (1943); N. C. GEN. STAT. §35-35.1 (1945 Supp.).

[9] Contempt proceedings are *sui generis*. If the contempt is direct summary punishment may be inflicted. N. C. GEN. STAT. §5-5 (1943); State v. Little, 175 N. C. 743, 94 S. E. 680 (1918); *In re* Brown, 168 N. C. 417, 84 S. E. 690 (1915); *Ex parte* McCown, 139 N. C. 95, 51 S. E. 957 (1905).

If the contempt is indirect the court makes findings of fact based on testimony or affidavits. *In re* Adams, 218 N. C. 379, 11 S. E. 2d 163 (1940); *In re* Walker, 82 N. C. 95 (1880).

Where acts are punishable as for contempt findings of fact are supported by affidavits. Safie Manufacturing Co. v. Arnold, 228 N. C. 375, 45 S. E. 2d 577; *In re* Deaton, 105 N. C. 59, 11 S. E. 244 (1890).

Where the act is an indirect contempt or is punishable as for contempt it is apparently in the court's discretion to take evidence by affidavit or by testimony at the hearing on the order to show cause. The cases cited do not hold that the contemnor may not present testimony at the hearing.

[10] N. C. GEN. STAT. §§110-21, 24 (1943); State v. Burnett, 179 N. C. 735, 102 S. E. 711 (1920); *In re* Watson, 157 N. C. 340, 72 S. E. 1049 (1911). The jurisdictional age limit of the juvenile court is 16 years, unless the child commits a felony punishable by more than 10 years imprisonment, in which case the age limit is 14 years. N. C. GEN. STAT. 110-29 (1943); State v. Smith, 213 N. C. 299, 195 S. E. 819 (1938).

[11] Helvering v. Mitchell, 303 U.S. 391 (1938); Wong Wing v. United States, 163 U.S. 228 (1895); United States v. Zucker, 161 U.S. 475 (1895). *See* Morgan v. United States, 304 U.S. 1, 14, 18 (1938). See Note 28 N. C. L. REV. 85 (1949).

Helvering v. Mitchell, supra at 402, states that "Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where *civil procedure* is prescribed for the enforcement of remedial sanctions (by administrative agencies), those rules and guaranties do not apply . . . furthermore, the defendant has no constitutional right to be confronted with the witnesses against him . . .". The inference, of course, is that if the agency is enforcing a criminal sanction confrontation must be preserved (italics supplied).

[12] Snyder v. Massachusetts, 291 U.S. 97 (1934); Mattox v. United States, 156 U.S. 237 (1894) (The *Mattox Case* is an excellent example of the manner in which rules of evidence may be shaped to defeat justice. The majority held, first, that the death of a witness was sufficient ground for admitting his testimony given at

regarded as a constitutional embodiment of the common law rule that the accused is entitled to an opportunity to cross-examine the witnesses against him.[13] This, in effect, preserves principally the defendant's right to have the common law hearsay rule of evidence enforced. A derivative, though not insignificant, benefit accruing from the enforcement of the hearsay rule is that witnesses are required to testify in the presence of the jury and the defendant.[14] The jury is thus enabled to form a critical estimate of the witness' credibility as it is affected by his deportment and demeanor.

Since the common law hearsay rule was not absolute, but subject to exceptions, defendant's constitutional right to an opportunity to cross-examine is also subject to exceptions.[15] Among the exceptions recognized in North Carolina in criminal cases are: Testimony at former trial,[16] dying declarations,[17] reputation,[18] pedigree,[19] official statements

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a prior trial, and, second, that defendant was precluded from impeaching the dead witness at the second trial by his statements made after the first trial, on the ground that a proper foundation could not be laid. The latter holding exhibits more interest in protecting the honor of a deceased witness than in giving a live defendant a fair trial. This view cannot be too strongly condemned.).

[13] State v. Perry, 210 N. C. 796, 188 S. E. 639 (1936); State v. Breece, 206 N. C. 92, 173 S. E. 9 (1934); State v. Hightower, 187 N. C. 300, 121 S. E. 616 (1924); State v. Dixon, 185 N. C. 727, 117 S. E. 170 (1923); State v. Thomas, 64 N. C. 74 (1870); State v. Webb, 2 N. C. 103 (1794). *Accord,* Mattox v. United States, *supra* note 12; 5 WIGMORE, EVIDENCE §1395 (3rd ed. 1940).

The North Carolina Supreme Court has excluded hearsay evidence in a number of criminal cases without reference to defendant's right of confrontation. See State v. Kluttz, 206 N. C. 726, 175 S. E. 81 (1934).

The North Carolina view that hearsay may be admitted for the purpose of corroboration lessens the scope of the constitutional protection. See STANSBURY, NORTH CAROLINA EVIDENCE §§51, 52, and 79.

The State's contentions may be stated in the trial judge's charge to the jury in such a manner as to infringe upon defendant's right to confrontation. See State v. Love, 187 N. C. 32, 121 S. E. 20 (1923).

The question as to whether the admission in evidence of a witness' "past recollection recorded" infringes on the right of confrontation has not been decided in North Carolina. Kinsey v. State, 49 Ariz. 201, 65 P. 2d 1141 (1937) holds that the admission of such evidence does not impair the right to cross-examine since the witness may be impeached, and his ability to observe attacked. The witness has already admitted that he has no present recollection of the facts.

[14] State v. Hartsfield, 188 N. C. 357, 124 S. E. 629 (1924); State v. Thomas, *supra* note 13; 5 WIGMORE, EVIDENCE §1395 (3rd ed. 1940). Wigmore terms it "demeanor evidence." For a well-stated opinion as to the value of demeanor evidence see Creamer v. Bivert, 214 Mo. 743, 113 S. W. 1118 (1908).

[15] State v. Dowdy, 145 N. C. 432, 58 S. E. 1002 (1907). *Accord,* Mattox v. United States, 156 U.S. 237 (1894); State v. Springs, 184 N.C. 768, 114 S. E. 851 (1922); State v. Behrman, 114 N. C. 797, 19 S. E. 220 (1894); 5 WIGMORE, EVIDENCE §1397 (3rd ed. 1940).

For an interesting view contra see dissent by Browne, Ch. J., in Blackwell v. State, 79 Fla. 709, 86 So. 224, 15 A. L. R. 465 (1920).

[16] State v. Ham, 224 N. C. 128, 29 S. E. 2d 449 (1944) (Testimony given at habeas corpus proceeding); State v. Casey, 204 N. C. 411, 168 S. E. 512 (1933) (Testimony given at former trial); State v. Maynard, 184 N. C. 653, 113 S. E. 682 (1922) (Testimony given at preliminary hearing); STANSBURY, NORTH CAROLINA EVIDENCE §146 (1946). *Cf.* State v. Levy, 187 N. C. 581, 122 S. E. 386 (1924) (Defendant proffered evidence given at former trial. Witness had died pending second trial. Stenographer remembered direct testimony of dead witness but had

and certificates,[20] entries in the regular course of business,[21] res gestae,[22] verbal acts,[23] statements of mental and physical condition,[24] statements of intent,[25] and spontaneous exclamations.[26] Further, the attitude generally prevails that the constitutional provision did not solidify the common law exceptions, but that other exceptions might be developed.[27] This view, of course, should not be followed to the point of extinguishing the rule by the exceptions. Inherent limitations imposed by the intendment of the provision should be recognized.[28]

Defendant is entitled by confrontation to present such defense as he may have by producing evidence in his own behalf,[29] as distinguished

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forgotten cross-examination by State. *Held;* Proper to exclude evidence offered. All must be offered or none will be admitted.)

[17] State v. Debnam, 222 N. C. 266, 22 S. E. 2d 562 (1942); State v. Puett, 210 N. C. 633, 188 S. E. 75 (1936); State v. Wallace, 203 N. C. 284, 165 S. E. 716 (1932) (This exception applies only to prosecutions for homicide.).

[18] State v. Harrill, 224 N. C. 477, 31 S. E. 2d 353 (1944); State v. Miller, 224 N. C. 228, 29 S. E. 2d 751 (1944); N. C. GEN. STAT. §14-206 (1943); STANSBURY, NORTH CAROLINA EVIDENCE §148 (1946).

[19] State v. Trippe, 222 N. C. 600, 24 S. E. 2d 340 (1943); State v. Hairston, 121 N. C. 579, 28 S. E. 492 (1897); STANSBURY, NORTH CAROLINA EVIDENCE §149 (1946).

[20] State v. Dowdy, 145 N. C. 432, 58 S. E. 1002 (1907); State v. Morris, 84 N. C. 757 (1881); STANSBURY, NORTH CAROLINA EVIDENCE §§153, 154 (1946). *Cf.* State v. Blakeney, 194 N. C. 651, 140 S. E. 433 (1927).

[21] State v. Lippard, 223 N. C. 167, 25 S. E. 2d 594 (1943), *cert. denied* 320 U. S. 749 (1943); State v. Shipman, 202 N. C. 518, 163 S. E. 657 (1932). *Contra:* State v. Thomas, 64 N. C. 74 (1870).

[22] State v. Carraway, 181 N. C. 561, 107 S. E. 142 (1921); State v. Davis, 177 N. C. 573, 98 S. E. 785 (1919); STANSBURY, NORTH CAROLINA EVIDENCE §158 (1946).

[23] State v. Davis, *supra* note 22; State v. Worthington, 64 N. C. 594 (1870); State v. Huntley, 25 N. C. 418 (1843); STANSBURY, NORTH CAROLINA EVIDENCE §159 (1946).

[24] State v. Lagerholm, 208 N. C. 195, 179 S. E. 644 (1935); State v. Jeffreys, 192 N. C. 318, 135 S. E. 32 (1926); State v. Prytle, 191 N. C. 698, 132 S. E. 785 (1926); State v. Cooper, 170 N. C. 719, 87 S. E. 50 (1915); State v. Draughon, 151 N. C. 677, 65 S. E. 913 (1909); STANSBURY, NORTH CAROLINA EVIDENCE §161 (1946). *Cf.* State v. Hargrave, 97 N. C. 457, 1 S. E. 774 (1887).

[25] State v. Rice, 222 N. C. 634, 24 S. E. 2d 483 (1943); State v. Bowser, 214 N. C. 249, 199 S. E. 31 (1938); State v. Lagerholm, *supra* note 24; State v. Bryson, 60 N. C. 477 (1864); STANSBURY, NORTH CAROLINA EVIDENCE §161 (1946). *Contra;* State v. Skidmore, 87 N. C. 509 (1882).

[26] State v. Dills, 204 N. C. 33, 167 S. E. 459 (1932); State v. McCourry, 128 N. C. 594, 38 S. E. 883 (1901); STANSBURY, NORTH CAROLINA EVIDENCE §164 (1946).

[27] Snyder v. Massachusetts, 291 U.S. 97, 107 (1934); State v. Dowdy, 145 N. C. 432, 436, 58 S. E. 1002, 1004 (1907); 5 WIGMORE, EVIDENCE §1397 (3rd ed. 1940). *Contra:* Salinger v. United States, 272 U. S. 542, 548 (1926) ("The purpose of that provision, this Court often has said, is to continue and preserve that right, and not to broaden it or disturb the exceptions.").

N. C. GEN. STAT. §14-206 (1943) is an example of legislative creation of exceptions to the hearsay rule. State v. Barrett, 138 N. C. 630, 50 S. E. 506 (1905) discusses the power of the Legislature to create new rules of evidence.

[28] Wigmore's principles of exceptions to the hearsay rule, "necessity" and "circumstantial probability of trustworthiness," might here be adopted to secure conformance to the purposes of the constitutional provision. 5 WIGMORE, EVIDENCE §§1420-1422 (3rd ed. 1940).

[29] State v. Farrell, 223 N. C. 321, 28 S. E. 2d 560 (1943); State v. Utley, 223 N. C. 39, 25 S. E. 2d 195 (1943).

from, and in addition to, the right to test any testimony produced on behalf of the State by cross-examination. Indeed, a literal interpretation of the constitutional phraseology would seem to emphasize defendant's right to bring in his own evidence for the purposes of contradicting the testimony produced by the State and establishing affirmative defenses rather than his right to test incriminating testimony.[30] Two of the earlier North Carolina cases, while not denying that confrontation preserved defendant's right to cross-examine State's witnesses, took this view.[31] The shift in emphasis from presenting the defense to cross-examination comes with later cases. However, it should not be supposed that confrontation exempts the defendant from the application of the usual rules of evidence in presenting his defense. The blade has two edges. The State is also entitled to test defendant's witnesses by cross-examination.[32]

Not only does defendant's right to confront witnesses require that the hearsay rule be enforced, but it also requires that defendant be allowed a reasonable time, as determined by the facts of the particular case, to prepare his defense.[33] This question is generally raised by a motion for continuance. Ordinarily the action taken on such motion rests in the sound discretion of the trial judge, and will not be reversed in the absence of abuse of discretion.[34] But when it is claimed that a constitutional right has been denied by refusal to grant a continuance the question presented is one of law and is reviewable on appeal.[35] Confrontation, in this respect, duplicates the constitutional right to counsel,[36] but the protection thus afforded is not merely cumulative since the right to an opportunity to prepare his defense is preserved whether

[30] N. C. CONST., Art. I, §11 (1868) (". . . with other testimony . . ").

[31] State v. Tilghman, 33 N. C. 513 (1850); State v. Sparrow, 7 N. C. 487 (1819).

[32] State v. English, 201 N. C. 295, 159 S. E. 318 (1931), Note, 10 N. C. L. REV. 84 (1931) (Confession by third party excluded.); State v. Collins, 189 N. C. 15, 126 S. E. 98 (1924) (Statement by third party of defendant's willingness to surrender excluded.); State v. Levy, 187 N. C. 581, 122 S. E. 386 (1924) (Evidence given at former trial excluded because witness unable to remember State's cross-examination.); State v. Beverly, 88 N. C. 632 (1883) (Evidence of conviction of third party for same crime excluded.).

[33] State v. Farrell, 223 N. C. 321, 26 S. E. 2d 322 (1943); State v. Utley, 223 N. C. 39, 25 S. E. 2d 195 (1943); State v. Whitfield, 206 N. C. 696, 175 S. E. 93, *cert. denied*, 293 U. S. 556 (1934); State v. Garner, 203 N. C. 361, 166 S. E. 180 (1932); State v. Ross, 193 N. C. 25, 136 S. E. 193 (1926).

This subject has previously been discussed in respect to the right to counsel. Note, 27 N. C. L. REV. 544 (1949). What was there said will not be reiterated here.

[34] State v. Henderson, 216 N. C. 99, 3 S. E. 2d 357 (1939); State v. Green, 207 N. C. 369, 177 S. E. 120 (1934); State v. Whitfield, *supra* note 37; State v. Rhodes, 202 N. C. 101, 161 S. E. 722 (1931); State v. Sauls, 190 N. C. 810, 130 S. E. 848 (1925).

[35] State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948); State v. Farrell, 223 N. C. 321, 26 S. E. 2d 322 (1943); State v. Jones, 206 N. C. 812, 175 S. E. 188 (1934); State v. Garner, 203 N. C. 361, 166 S. E. 180 (1932).

[36] N. C. CONST., Art. I, §11 (1868).

the accused employs counsel, the court assigns him counsel, or whether he conducts his own defense.[37]

Additional protection is derived from confrontation in its assurance to defendant that he may not be tried and convicted in absentia.[38] This assurance that he may be present extends to the selection of the jury,[39] the reception of evidence,[40] the argument of counsel,[41] the charge to the jury,[42] the reception of the verdict,[43] and the imposition of sentence,[44] but not to the return of the indictment in open court,[45] the argument on motions for a new trial and similar motions,[46] or the hearing on appeal in the Supreme Court.[47] In cases involving capital felonies the presence of the accused is required at every step of the actual trial and cannot be waived, either personally or by counsel.[48] In trials for felonies less

[37] *Cf.* State v. Hedgebeth, 228 N. C. 259, 45 S. E. 2d 563 (1947), *aff'd.*, Hedgebeth v. North Carolina, 334 U. S. 806 (1948) (On procedural grounds). On principle, *State v. Hedgebeth* seems erroneous.

[38] State v. O'Neal, 197 N. C. 548, 149 S. E. 860 (1929); State v. Hartsfield, 188 N. C. 357, 124 S. E. 629 (1924); State v. Freeze, 170 N. C. 710, 86 S. E. 1000 (1915); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 S. E. 404, 2 S. E. 185 (1887); State v. Jenkins, 84 N. C. 812, 37 Am. Rep. 643 (1881); State v. Blackwelder, 61 N. C. 38 (1886); State v. Craton, 28 N. C. 164 (1845).

[39] State v. Dry, 152 N. C. 813, 67 S. E. 1000 (1910).

[40] While there are no North Carolina cases directly in point, the solicitude of the Court in protecting the accused's right to be present at other stages of the trial warrants the inference that a jury view would constitute taking evidence and that defendant would have the right to be present. Note, 12 N. C. L. REV. 267 (1934). See State v. Perry, 121 N. C. 533, 27 S. E. 997 (1897); *Cf.* State v. Stewart, 189 N. C. 340, 127 S. E. 260 (1925).

6 WIGMORE, EVIDENCE §1803 (3rd ed. 1940) takes a contrary view to the effect that a jury view does not constitute taking evidence.

[41] State v. Pierce, 123 N. C. 745, 31 S. E. 847 (1898); State v. Paylor, 89 N. C. 539 (1883).

[42] State v. Hardee, 192 N. C. 533, 135 S. E. 345 (1926); State v. Matthews, 191 N. C. 378, 131 S. E. 743 (1926); State v. Sheets, 89 N. C. 543 (1883); State v. Blackwelder, 61 N. C. 38 (1866).

[43] State v. O'Neal, 197 N. C. 548, 149 S. E. 860 (1929); State v. Freeze, 170 N. C. 710, 86 S. E. 1000 (1915); State v. Jenkins, 84 N. C. 813 (1881); State v. Epps, 76 N. C. 55 (1877). *Cf.* State v. Austin, 108 N. C. 780, 13 S. E. 219 (1891).

In capital cases the trial judge cannot delegate to the clerk the duty to receive the verdict in the judge's absence. See State v. Bazemore, 193 N. C. 366, 137 S. E. 172 (1927).

[44] State v. Brooks, 211 N. C. 702, 191 S. E. 749 (1937); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887).

[45] State v. Stanley, 227 N. C. 650, 44 S. E. 2d 196 (1947).

[46] *See* State v. Hartsfield, 188 N. C. 357, 360, 124 S. E. 629, 631 (1924); State v. Dry, 152 N. C. 813, 814, 67 S. E. 1000, 1001 (1910).

[47] State v. Dalton, 185 N. C. 606, 115 S. E. 881 (1923); State v. DeVane, 166 N. C. 281, 81 S. E. 293 (1914); State v. Moses, 149 N. C. 581, 63 S. E. 68 (1908); State v. Jacobs, 107 N. C. 772, 11 S. E. 962 (1890).

When the defendant becomes a fugitive pending appeal the Supreme Court may, in its discretion, hear the appeal, dismiss the appeal on motion by the State, or continue the case from term to term.

[48] State v. Matthews, 191 N. C. 378, 131 S. E. 743 (1926); State v. Dry, 152 N. C. 812, 67 S. E. 1000 (1910); State v. Blackwelder, 61 N. C. 38 (1866). *But cf.* State v. Hardee, 192 N. C. 533, 135 S. E. 345 (1926) (Verdict of "murder in the second degree" cured any error. Rule is to be applied only when verdict is "guilty of murder in the first degree.") and State v. Trull, 169 N. C. 363, 85 S. E. 133 (1915) (Defendant under influence of opiates during trial of capital offense.).

than capital the right can be waived by defendant personally.[49] In misdemeanor cases the right to be present may be waived personally or by counsel.[50] Notwithstanding the rules as to waiver, no valid sentence imposing corporal punishment may be rendered in the absence of the accused.[51]

Actual physical presence, alone, is insufficient. Confrontation demands mental, as well as physical, presence.[52] The most frequent causes of mental absence are insanity, deafness, and inability to understand the English language. A defendant who is insane at the time of the trial may not be tried.[53] Deafness and inability to understand English, however, do not prevent a trial of accused, consistently with his right of confrontation, if adequate steps are taken to assure his mental presence.[54] It would seem preferable, when it appears to the trial court that such action is necessary, to require the court to furnish such means of communication as is needed to enable defendant to understand the proceedings,[55] in the absence of a prior express waiver.[56] Analytically, the rules of waiver applicable to mental presence should conform to those applicable to physical presence. But since physical presence is a material, tangible fact, and in many cases mental presence is not, greater

[49] State v. Freeze, 170 N. C. 710, 86 S. E. 1000 (1915); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887). State v. Freeze *supra,* and State v. Cherry *supra,* state the rule to the effect that counsel, in less than capital felony cases, cannot waive accused's right to be present "unless expressly authorized thereto."

Dicta in State v. Matthews, *supra* note 48 and State v. Dry, *supra* note 48 state the rule to the effect that only defendant may waive the right. *Accord,* State v. Pierce, 123 N. C. 745, 31 S. E. 847 (1898) (By implication).

[50] State v. O'Neal, 197 N. C. 548, 149 S. E. 860 (1929); *See* State v. Matthews, 191 N. C. 378, 384, 131 S. E. 743, 747 (1926).

[51] State v. Brooks, 211 N. C. 702, 191 S. E. 749 (1937); State v. Cherry, 154 N. C. 624, 70 S. E. 294 (1911); State v. Paylor, 89 N. C. 539 (1883). *Cf.* State v. Kelly, 97 N. C. 404, 2 S. E. 185 (1887) (Defendant fled as the jury was returning to court with the verdict. The verdict was received but no sentence imposed. Several months later defendant was arrested and sentenced to corporal punishment under the original verdict. Held: Affirmed.).

[52] Garcia v. State,—Tex.—, 210 S. W. 2d 574 (1948); State v. Vasquez, 101 Utah 444, 121 P. 2d 903 (1942), Note, 16 So. CALIF. L. REV. 56 (1942); Terry v. State, 21 Ala. App. 100, 105 So. 386 (1925), Note, 24 MICH. L. REV. 305 (1926); The King v. Lee Kun (1916), 1 K. B. 337, 9 B. R. C. 1121. *Cf.* Marker v. State, 25 Ala. App. 91, 142 So. 105, *cert. denied,* 225 Ala. 141, 142 So. 108 (1932), Note, 66 U. S. L. REV. 523 (1932).

[53] State v. Vann, 84 N. C. 722 (1881); State v. Harris, 53 N. C. 136 (1860); Ashley v. Pescor, 147 F. 2d 318 (8th Cir. 1945); Howie v. State, 121 Miss. 197, 83 So. 158 (1919). *See* People v. Perry, 14 Cal. 2d 387, —, 94 P. 2d 559, 564 (1939).

[54] The cases cited in note 52 *supra* decide this point by implication.

[55] Such a course has been adopted in the Superior Court and approved by the North Carolina Supreme Court. See State v. Early, 211 N. C. 189, 189 S. E. 668 (1936).

Evidence received through an interpreter is not hearsay. State v. Hamilton, 42 La. App. 1204, 8 So. 304 (1890).

[56] *Contra:* Gonzalez v. People, 109 F. 2d 215 (3rd Cir. 1940) (Waived by failure to insist on right to interpreter).

care should be exercised to determine whether an intelligent waiver of the right to be mentally present has been made.[57] To dispel doubt, the waiver required should be express and before the jury has been selected.

It not infrequently occurs that a conflict arises between the right of confrontation and the various privileges of witnesses. The issue in such case is whether the right to confront is paramount or is subject to such privileges. In the North Carolina case of *State v. Perry*[58] a conflict arose between confrontation and the constitutional right to refuse to give self-incriminating testimony. It was held reversible error to refuse to strike the direct testimony after the witness claimed the privilege, on the ground that the right to confront is a right to inquire freely and fully into any relevant subject matter. A defendant claiming a constitutional right should not be prejudiced by half-truths. This decision is sound, and the principle should be applied regardless of the nature of the privilege claimed[59] and regardless of the status of the witness, whether he is a co-defendant, is to be separately tried, or is otherwise disinterested.

The importance of *State v. Perry* lies in its limitation of prior decisions to the effect that co-defendants are competent and compellable to testify, though they may not be required to incriminate themselves. The result of this case is that witnesses, including co-defendants, may be required to testify[60] by the State,[61] but if a privilege is claimed by a witness on cross-examination defendant is entitled as of right to have the direct examination striken.[62]

As is true with various other protective devices, defendant may waive his right to confrontation "By express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it."[63] This observation is subject to the qualification previously noted of the requirement of defendant's presence at a trial for a capital offense.

[57] It is not intended here to intimate that no duty devolves upon counsel to call the court's attention to accused's physical or mental defects. Of course, when accused has no counsel the burden should be on the court to protect his rights in this respect.

[58] 210 N. C. 796, 188 S. E. 639 (1936).

[59] State v. Condry, 50 N. C. 418 (1858) (Attorney-client privilege disallowed).

[60] State v. Howard, 222 N. C. 291, 22 S. E. 2d 917 (1942); State v. Smith, 86 N. C. 705 (1882). See also N. C. GEN. STAT. §§8-50, 54 (1943).

[61] But defendant may not insist that a co-defendant testify in his behalf if the co-defendant claims a privilege against self-incrimination. State v. Medley, 178 N. C. 710, 100 S. E. 591 (1919). This view likewise preserves both constitutional rights.

[62] *Cf.* State v. Weaver, 93 N. C. 595 (1885) ("It was not good ground of exception that the court told the co-defendant witness 'That he need not answer any question which tended to criminate himself.'")

[63] State v. Hartsfield, 188 N. C. 357, 360, 124 S. E. 629, 631 (1924). *Accord,* State v. Harris, 181 N. C. 600, 107 S. E. 466 (1921); State v. Mitchell, 119 N. C. 784, 25 S. E. 783 (1896); Gonzalez v. People, 109 F. 2d 215 (3rd Cir. 1940).

The recent North Carolina case of *State v. Gibson*[64] retreats from the commendable position taken by *State v. Farrell*[65] in regard to constitutional rights and revives the doctrine of prejudicial error. Though *State v. Gibson* involved the constitutional right to counsel the application of the doctrine to confrontation may be deduced since the two rights are closely interwoven. The clearest statement of the doctrine is to be found in *State v. Beal*[66] wherein it is said that, "The foundation for the application (for) a new trial is the allegation of injustice arising from error, but for which a different result would likely have ensued. . . . Unless, therefore, some wrong has been suffered, there is nothing to relieve against. The injury must be positive and tangible, and not merely theoretical." Obviously, the question of prejudice cannot arise unless a denial of a right has been assumed without deciding, conceded, or proved, hence such denial itself is only a theoretical injury. Two criticisms may be made in regard to this doctrine. The first is that, logically, the doctrine would sanction a star-chamber proceeding if defendant were in fact guilty. In this aspect the doctrine is a negation of the concept that the Declaration of Rights guarantees to every man a fair and just trial. The denial of a fair trial should, of itself, be sufficient prejudice. The second criticism is that an erroneous proceeding deprives defendant of his presumption of innocence, which loss, under the doctrine as stated, is not an actual, but merely theoretical injury.[67] The justification most frequently advanced for the application of this doctrine is the public interest in certain and prompt punishment of criminals. The public interest is not a stable compass when compared with the Declaration of Rights. Further, the Court seems to overlook the fact that the public has a counterbalancing interest in securing to the accused his constitutional rights and that it was the purpose of the Declaration of Rights to secure to the individual rights as against the public.

The approach of *State v. Farrell*[68] is to be preferred. There the view is taken that, "Whether his defense before a jury after full preparation would have availed him is for the present purpose immaterial. The law provides one mode of trial and it is the same for the innocent and for the guilty." The distinction between the approach of *State v.*

[64] 229 N. C. 497, 50 S. E. 2d 520 (1948).
[65] 223 N. C. 361, 26 S. E. 2d 322 (1943).
[66] 199 N. C. 278, 303, 154 S. E. 604, 618 (1930). *Accord,* State v. Heavener, 168 N. C. 156, 83 S. E. 732 (1914); State v. Smith, 164 N. C. 475, 79 S. E. 979 (1913).
[67] This criticism of the doctrine has previously been made. Note, 27 N. C. L. REV. 544 (1949).
[68] 223 N. C. 321, 26 S. E. 2d 322 (1943). The North Carolina Supreme Court has shown no inclination to accord *State v. Farrell* sympathetic treatment. See State v. Hedgebeth, 228 N. C. 259, 265, 45 S. E. 2d 563, 567 (1947), *aff'd* Hedgebeth v. North Carolina, 334 U.S. 806 (1948).

Gibson[69] and that of *State v. Farrell* lies in the purposes for which the facts in the record are analyzed. In *State v. Gibson* the purpose is to determine whether defendant has been prejudiced. The purpose in *State v. Farrell* is to determine whether error has been committed. The one focuses attention on the injury suffered, the other on the nature of the constitutional provision in question. "You were not denied the right" is a better answer to a claim of right than "You fail to show us that the denial injured you."

Despite frequent and vigorous dissents, the United States Supreme Court has uniformly refused to hold that the due process clause of the 14th Amendment of the Federal Constitution incorporates the Bill of Rights as restraints on state action.[70] Instead, the due process clause is interpreted to impose federal prohibition on state deprivation of only those rights which may be considered of ". . . The very essence of a scheme of ordered liberty,"[71] or as ". . . Principle(s) of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[72] It has not been squarely held that confrontation is essential to due process,[73] but dicta in *Snyder v. Massachusetts*[74] indicate that, insofar as it assures an adequate opportunity to be heard and the presence of the prisoner at the trial, it is considered fundamental. To the extent that confrontation duplicates the right to counsel, this protection may also be inferred from the decisions in the right to counsel cases.

The procedure of the United States Supreme Court in appraising the facts of each case and applying a subjective interpretation of due process thereto[75] has made the task of prognostication a matter of chimerical surmise for the state courts,[76] and few objective criteria are perceivable.

A pragmatical approach to constitutional rights, as exemplified by the doctrine of prejudicial error, is not to be desired. In the effort to

[69] 229 N. C. 497, 50 S. E. 2d 520 (1948).

[70] Adamson v. California, 332 U.S. 46 (1946) (Black, Douglas, Murphy, and Rutledge dissenting); Malinski v. New York, 324 U.S. 401 (1944); Betts v. Brady, 316 U.S. 455 (1941) (Black, Douglas, and Rutledge dissenting); Palko v. Connecticut, 302 U.S. 319 (1937).

[71] Palko v. Connecticut, at 325, *supra* note 70.

[72] Snyder v. Massachusetts, 291 U.S. 97, 105 (1933).

[73] West v. Louisiana, 194 U.S. 258 (1903) (The question was here presented but not decided.).

[74] *Supra* note 72, at 105 ("What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it.").

[75] Green, *The Bill of Rights, The Fourteenth Amendment and the Supreme Court*, 46 MICH. L. REV. 869 (1948). (Professor Green thinks this procedure is ". . . The purest and most absolute form of arbitrary and uncontrolled power, a retreat into the deepest jungle of natural law, from the clearing which the Bill of Rights has created." *Id.* at 900.).

[76] Newman v. State, 148 Tex. Cr. App. 645, 652, 187 S. W. 2d 559, 563 (1945) ("If the Supreme Court would prescribe some formula by which we may be guided, our task would be much easier . . .").

dispense criminal justice the means by which that end is to be achieved are worth considering, as well as the end itself. Procedural due process requires that the rules of evidence be shaped to conform to a sound conception of the protective devices of the Constitution rather than altering the concept to fit the rules. In the event the concept appears outmoded change should be made through the prescribed procedure, constitutional amendment, rather than by legislative or judicial erosion.[77]

MARSHALL B. SHERRIN, JR.

Federal Jurisdiction—Interpleader Act—Diversity Requirements—Co-Citizenship of Claimants

The Federal Interpleader Act,[1] provides that the district courts of the United States shall have original jurisdiction of bills of interpleader and bills in the nature of interpleader[2] if "(i) Two or more adverse

[77] However no objection can be made to judicial or legislative prescription of the minima of protection secured by constitutional rights. Chapter 112 N. C. Sess. L. (1949) is to be commended as a step in the right direction. The Legislature might well consider statutory authority for the State to take and use depositions in criminal cases, preserving accused's right to cross-examine deponent when the deposition is taken.

[1] 28 U. S. C. §41 (26) (1936). Chafee, *The Federal Interpleader Act of 1936,* 45 YALE L. J. 963, 1161 (1936). There has been a slight change in the wording of the diversity requirement by 28 U. S. C. §1335 (1948). It now reads: "(i) Two or more adverse claimants, of diverse citizenship as defined in 1332 of this title. . . ." The Reviser's Notes to §1335 do not indicate that any change in the requirement was meant to be effected by this change in phraseology and the substituted language does not seem to require a change therein.

[2] Interpleader was a remedy which developed in the equity courts. It would lie only if—(1) The same debt, duty or thing was claimed by all parties against whom relief was demanded; (2) All adverse titles or claims were dependent upon or derived from a common source; (3) The person seeking the relief did not have or claim any interest in the subject matter; (4) The person seeking the relief was a stakeholder, standing perfectly indifferent between the claimants.

Later, a plaintiff was permitted to bring a bill in the nature of interpleader, though he claimed an interest in the subject-matter, did not admit all of the defendants' claims or the defendants claimed different amounts (and hence strict interpleader would not lie) if there was some basis for equitable jurisdiction other than double liability or vexation. Both bills of interpleader and bills in the nature of interpleader can be obtained under 28 U. S. C. §41(1) (1936) as amended by 28 U. S. C. §1332 (1948), as any other civil action and are subject to the limitations therein (i.e. the sum in controversy must exceed $3,000, exclusive of interest and costs; process may be served only within the territorial limits of the state in which the district court is held; there must be diversity between plaintiff stakeholder and defendant claimants; the only proper venue is the judicial district in which all the plaintiffs or all the defendants reside). The Interpleader Act (*supra* note 1) also permits bills of interpleader and bills in the nature of interpleader but the relief is thereby made more accessible by: (1) making the crucial diversity of citizenship that among the adverse claimants; (2) reducing jurisdictional amount to $500; (3) allowing process to run throughout the United States; (4) making the district where one or more of the claimants resides or reside a proper venue; (5) allowing the suit to be entertained though the titles or claims of the adverse claimants do not have a common origin, or are not identical but adverse to and independent of each other. 2 MOORE'S FEDERAL PRACTICE §§22.02, 22.03 (1938). See Chafee, *Modernizing Interpleader,* 30 YALE L. J. 804 (1921).

claimants, citizens of different states, are claiming to be entitled to such money or property. . . ." The federal courts have been confronted with a variety of situations in which it has been necessary to determine whether or not jurisdiction exists under this section.

Situation 1. *S* stakeholder, citizen of State *W*, is contesting none of the claims involved. He brings interpleader against Claimant *1* of State *X* and Claimant *2* of State *Y*. The federal courts have jurisdiction under the Act.[3] This situation presents no jurisdictional problem because whether diversity between the stakeholder and the claimants or diversity between the claimants be required, it is present.

Situation 2. *S* stakeholder, citizen of State *W*, is contesting none of the claims involved. He brings interpleader against Claimant *1* of State *X*, Claimant *2* of State *X*, and Claimant *3* of State *Y*. The federal courts take jurisdiction.[4] In this group of cases the problem of whether co-citizenship among some of the claimants defeats jurisdiction under the Act is encountered. The courts have taken jurisdiction in these cases without difficulty. Here there is an apparent conflict with the requirement of complete diversity between all plaintiffs and all defendants pronounced by *Strawbridge v. Curtis*[5] as a prerequisite to jurisdiction of the federal courts in other controversies between citizens of different states. Since the stakeholder here is of a different citizenship from all the claimants, it might be said that the requirement of that case was satisfied, in fact, though the Interpleader Act as construed in *Treinies v. Sunshine Mining Co.*[6] did not require such diversity.

Situation 3. *S* stakeholder, citizen of State *W*, is contesting none of the claims involved. He brings interpleader against Claimant *1* of State *W*, Claimant *2* of State *X*, and Claimant *3* of State *X*. It is held that the requisite diversity of citizenship is present,[7] even though complete diversity of citizenship is absent. In fact some of the claimants are co-citizens, and even if the citizenship of the stakeholder be considered it would be found that he was a co-citizen of one of the claimants.

Situation 4. *S* stakeholder, citizen of State *W*, is contesting part of the conflicting claims against him. He brings a bill in the nature of

[3] Massachusetts Mutual Life Ins. Co. v. Weinress, 47 F. Supp. 626 (N. D. Ill. 1942); Metropolitan Life Ins. Co. v. Skov, 45 F. Supp. 140 (D. C. Ore. 1942); Metropolitan Life Ins. Co. v. Richardson, 27 F. Supp. 791 (W. D. La. 1939).

[4] Dugas v. American Surety Co., 300 U.S. 414 (1936), *affirming* 82 F. 2d 953 (5th Cir.); Roberts v. Metropolitan Life Ins. Co., 94 F. 2d 277 (7th Cir. 1938); Fireman's Ins. Co. v. Irwin, 82 F. Supp. 180 (N. D. Ga. 1948); Blackmar v. Mackay, 65 F. Supp. 48 (S. D. N. Y. 1946); American Banking Co. v. Albert & D. Pipe Corp., 52 F. Supp. 486 (D. C. N. J. 1943).

[5] 3 Cranch 267 (1806).

[6] 308 U.S. 66 (1939).

[7] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939); Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141 (8th Cir. 1937), *cert. denied*, 302 U.S. 739 (1937), *rehearing denied*, 302 U.S. 779 (1937); Girard Trust Co. v. Vance, 5 F. R. D. 109 (E. D. Pa. 1946); Globe Indemnity Co. v. Puget Sound Co., 47 F. Supp. 43 (W. D. N. Y. 1942).

interpleader against Claimant *1* of State *X* and Claimant *2* of State *Y*. The courts take jurisdiction.[8] There is no problem here because there is complete diversity whether or not the stakeholder's citizenship be considered.

Situation 5. *S* stakeholder, citizen of State *W*, is contesting part of the conflicting claims against him. He brings a bill in the nature of interpleader against Claimant *1* of State *X*, Claimant *2* of State *X*, and Claimant *3* of State *Y*. The courts will take jurisdiction.[9] The reasoning in *Situation 2 supra* relative to the co-citizenship of claimants is even more strongly applicable here. For it would be unrealistic to treat the plaintiff stakeholder as a nominal party, whose citizenship is immaterial for purposes of diversity of citizenship, when he is denying a part of the claimed liability throughout the case.

In *United States et al. v. Sentinel Fire Ins. Co.*,[10] stakeholder insurance companies (all of different citizenship from all of the claimants but of what citizenship does not appear in the report of the case) brought a bill in the nature of interpleader under the Federal Interpleader Act against six claimants of Mississippi and one claimant of Illinois. Stakeholders denied liability in part. The question of the jurisdiction of the court was raised. It was held by a majority of a five judge court of appeals that requisite diversity of citizenship was present, fulfilling the Constitutional requirement of a controversy between citizens of different states, because plaintiffs were staying in the case to resist some recovery by part of the claimants and they were of diverse citizenship from all claimants. The court further expressly held that there was sufficient diversity among the claimants, disregarding the citizenship of the plaintiffs. The two dissenting judges postulated that the Interpleader Act required complete diversity as set forth in *Strawbridge v. Curtis*. Moreover, they contended that all claimants must be realigned according to interest. The effect of following the view of the dissenters would be to establish two basic conflicting interests in each case. All claimants of one interest would have to be of different citienship from all claimants of the other interest in order to meet diversity requirements for federal interpleader jurisdiction. The authorities are opposed to this.[11]

[8] Standard Surety Co. v. Baker, 105 F. 2d 578 (8th Cir. 1939); John Hancock Mutual Life Ins. Co. v. Kegan, 22 F. Supp. 326 (D. C. Md. 1938).

[9] Railway Express Agency v. Jones, 106 F. 2d 341 (7th Cir. 1939).

[10] —— F. 2d —— (5th Cir. 1949).

[11] In the following cases jurisdiction was assumed under the Interpleader Act, though those claimants who were co-citizens had conflicting interests: Railway Express Agency v. Jones, 106 F. 2d 341 (7th Cir. 1939); Standard Surety Co. v. Baker, 105 F. 2d 578 (8th Cir. 1939); Roberts v. Metropolitan Life Ins. Co., 94 F. 2d 277 (7th Cir. 1938); Cramer v. Phoenix Mutual Life Ins. Co., 91 F. 2d 141 (8th Cir. 1937); Metropolitan Life Ins. Co. v. Richardson, 27 F. Supp. 791 (W. D. La. 1938). This principle was recognized in American Indemnity Co. v. Hale, 71 F. Supp. 529 (W. D. Mo. 1947) but interpleader was refused on the merits.

The principal case falls within *Situation 5 supra*[12] where jurisdiction is normally taken.[13] It is apparent that it is easier to justify jurisdiction in a case falling within *Situation 5* than in one which comes within *Situation 2* or *3* because in *Situation 5* the diverse citizenship of the stakeholder may be used to support jurisdiction. In *Situations 2* and *3* there is not this strong jurisdictional support because in *Situation 2* the stakeholder might be regarded as a nominal party since he is not contesting any of the claims. In *Situation 3* the diverse citizenship of the stakeholder is not available at all because the stakeholder is a co-citizen of some of the claimants.

The dissent raises again the question whether the courts should require complete diversity among adverse claimants before taking jurisdiction under the Interpleader Act. The language of the Act itself does not require such interpretation.[14] Subsection (b) seems to contemplate that some of the claimants may be co-citizens, for it provides: "Such a suit may be brought in the district court of the district in which *one or more of such claimants resides or reside.*" Further, the Supreme Court has held that the Act, thus interpreted, is not unconstitutional.[15] Such a result squares with the rule of *Strawbridge v. Curtis* if looked at in the light of certain observations of Professor Chafee. He suggests that that case involved statutory, not constitutional, interpretation and did not mean that the Constitution did not permit the federal courts to have jurisdiction where there was not complete diversity of citizenship, but merely meant that Congress, by the statute involved, had not so implemented the constitutional grant of power. He further argues that even though the statute being construed in that case was in *ipsis verbis* with the provision in the Constitution for jurisdiction of the Federal Courts in controversies between citizens of different states,[16] the interpretation of the statute should not be determinative of the interpretation of the provision of the Constitution because a constitutional provision is fundamental and intended to be more lasting than a statute.[17]

Persuasive arguments support a policy of opening wide the doors of the federal courts to interpleader. Claimants cannot be forced to become parties to interpleader in a state court unless personal service of process is obtained upon them within that state because the remedy is not treated as *in rem.*[18] Where complex, interstate businesses such

[12] Writing for the United States Supreme Court in *Treinies v. Sunshine Mining Co.*, Mr. Justice Reed expressly left open the question involved in the principal case. He wrote: "Diversity requirements for federal equity jurisdiction to avoid a multiplicity of suits from diverse claimants with claims contested by the debtor (are) not involved." 308 U.S. 66, 72 (1939).

[13] Railway Express Agency v. Jones, 106 F. 2d 341 (7th Cir. 1939).

[14] 28 U. S. C. §1335 (1948).

[15] Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

[16] U. S. CONST. Art. III, §2.

[17] Chafee, *Federal Interpleader Since the Act of 1936*, 49 YALE L. J. 377 (1940).

[18] Hanna v. Stedman, 230 N. Y. 325, 130 N. E. 366 (1921).

as insurance are involved it will be a rare case indeed where all claimants can be personally served with process within one state. Thus, the only way that the stakeholder can be sure that he is protecting himself is to bring suit in the federal courts under the Interpleader Act, thereby making possible service of process anywhere in the United States.[19] The liberal construction placed by the federal courts upon the diversity requirements of the Act is salutary. It would be tragic indeed if the remedial effect envisaged in reducing the jurisdictional amount, allowing process to run throughout the United States, liberalizing venue provisions, and abolishing the historical requirements that the claims be identical and have a common origin,[20] should be practically annihilated in a narrow construction of the diversity provisions of the Act.

MAX OLIVER COGBURN.

Future Interests—Rule of Convenience in Class Gifts

In a recent North Carolina case[1] the following clause of a will was before the court for interpretation:

> "ITEM V 'I will, devise, and bequeath to my beloved nephews[2] and any other children who may be borne to Robert and Peg Cole, my house and lot at 301 Fayetteville together with the contents, and the lot west of the home on Fayetteville Road.' "

At the time of the execution of the will Robert and Peg had three children and at the testator's death, almost three years after the execution, there was a fourth child *en ventre sa mere*. The court was called upon to decide what children of Robert and Peg should be included in the gift. Should the gift go only to those three *in esse* at the testator's death and to the fourth *en ventre sa mere* or should it include also all children born to Robert and Peg after the testator's death? The court held that the roll was not to be called until the possibility of any further issue was extinct by reason of the death of Robert or Peg.

The general rule for the determination of the members of a class where the gift is immediate[3] is that only those members *in esse* or *en ventre sa mere* at the testator's death may take under the gift and any persons who fit the description of the class but are born after the testator's death are excluded unless the clear intention of the testator is shown to

[19] 28 U. S. C. §2361 (1948).
[20] See note 2 *supra*.

[1] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948).
[2] Robert and Peg Cole were testator's nephew and niece. The court interpreted the word "Nephews" to mean "grand-nephews."
[3] A gift is immediate where the conveyor, having present ownership of the subject matter limits the corpus thereof to designated groups, annexing no condition precedent, interposing no period of time before enjoyment and creating no interest prior to that of the takers. RESTATEMENT, PROPERTY, EXPLANATORY NOTE §294 (1940).

include them.[4] This is known as the rule of convenience[5] and is almost[6] universally accepted. The court in the present case recognizes and accepts this rule but refuses to close the class at the testator's death, holding that a clear intention is shown by the words of the testator to include any and all class members born after his death. The reasons behind this rule of convenience are suggested by its name. If the class is allowed to remain open until all possibility of increase is gone the members of the class *in esse* or *en ventre sa mere* at the testator's death, in most cases, would attain only limited and restricted benefits from the gift for a considerable period of time. By application of the rule, however, the present members may utilize and enjoy the gift immediately without restriction and without having to put up costly bonds to indemnify later born members; the quick settlement of the estate in the interest of public policy is facilitated; and the property is more freely alienable without possibility of cloud or defect in title. Even where the rule is inapplicable North Carolina has now by statute[7] provided for the sale, lease, or mortgage of land where there are unborn interests. The unborn interests are represented by guardians *ad litem,* and the proceeds of the sale, lease, or mortgage are held in trust until the class is closed and then distributed to the class. While this makes the land more freely alienable the other objections to holding the class open are still present in that the devisee's enjoyment of his gift is postponed, and the estate is not brought to an early settlement.

A limitation to the applicability of the rule is the legal principle frequently stated by the courts: that where the intent of the testator is clearly shown such intent must govern the construction of the will.[8] It is due to this desire of giving great weight to the testator's intention that the present case and the majority hold the rule of convenience to be nothing more than a rebuttable presumption,[9] while others indicate that it is an inexorable rule of law[10] and apply the rule regardless of any intention shown. In those jurisdictions holding the rule to be a rebuttable presumption the determination of when an intent of the testator is shown so as to permit the courts to disregard the rule has been

[4] Shinn v. Motley, 56 N. C. 490 (1857); Merrill v. Winchester, 120 Me. 203, 113 Atl. 261 (1921); Hepburn v. Winthrop, 83 F. 2d 566 (D. C. Cir. 1936); 2 SIMES, FUTURE INTERESTS §374 (1936).

[5] Long, *Class Gifts in North Carolina,* 22 N. C. L. REV. 297, 314 (1944).

[6] The rule in Kentucky is different in that if the class members are children of a near relative of the testator the class remains open until all possibility of increase is extinct. Patterson's Executor v. Dean, 241 Ky. 671, 44 S. W. 2d 565 (1931).

[7] N. C. SESS. L. 1949, c. 811. Discussed in 27 N. C. L. REV. 415 (1949).

[8] Rigsbee v. Rigsbee, 215 N. C. 757, 3 S. E. 2d 331 (1939).

[9] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948); Sawyer v. Toxey, 194 N. C. 341, 139 S. E. 692 (1927); Shinn v. Motley, 56 N. C. 490 (1857).

[10] Mason v. White, 53 N. C. 421 (1862); Ringrose v. Bramham, 2 Cox 384, 30 Eng. Rep. 177 (1794).

a subject of much controversy both in the United States and England due to the subjectiveness of the question.

In the early case of *Petaway v. Powell*[11] the North Carolina court, by dictum, in a holding which excluded the members of a class born after the testator's death, said that in accordance with the rule of convenience, if a legacy were given to the children of the testator's daughter "begotten or to be begotten" any children born after the testator's death would be excluded.

But in the later case of *Shinn v. Motley*[12] the North Carolina court held that the words "to all their children which now are or hereafter may be" show a clear intent of the testator to include all those children born before or after his death so the rule was not applied. The court cited as a precedent the North Carolina case of *Shull v. Johnson*[13] but there the words "to my nieces and nephews that might be living at or after my death," as used in the will, without doubt showed the testator's intent to include those nieces and nephews born after his death. It might be argued that the words "or hereafter may be" were intended by the testator to mean those children born between the making of the will and his death[14] and thus the rule would apply to close the class at his death since the intention of the testator to take the case out of the rule must be clearly expressed.[15] In two cases[16] decided soon after the *Shinn* case the court, relying on the *Shinn* case, held that the word "hereafter" was intended by the testator to include all members of the class born before or after his death although the gift in each case was immediate. These cases seem to indicate that the court was departing from the construction as stated in *Petaway v. Powell*[17] although the court did not overrule, distinguish, or even cite the *Petaway* case. However, in the later case of *Sawyer v. Toxey*[18] the court, when confronted

[11] 22 N. C. 308 (1839) (there the words in the will were: "to *A* and his children").

[12] 56 N. C. 490 (1857).

[13] 55 N. C. 202 (1855); The court also cited: Scott v. Earl of Scarborough, 1 Beav. 154, 48 Eng. Rep. 898 (1838) (trust with the proceeds for all and every the child and children of testator's children "now born or who shall hereafter be born during the lifetime of their respective parents." Held: this included all class members born as long as there was possibility of increase. This *expressly* includes all such members.).

[14] Butler v. Lowe, 10 Sim. 317, 59 Eng. Rep. 636 (1839) ("begotten or to be begotten." The court held the words "to be begotten" to mean any members born between the date of execution of the will and the death of the testator.).

[15] Shinn v. Motley, *supra*.

[16] Pickett v. Southerland, 60 N. C. 615 (1864) ("—— to the rest of my nieces that Mary now has or may hereafter have"); Roper v. Roper, 58 N. C. 16 (1859) ("*A's* children that she has now or may hereafter have").

[17] 22 N. C. 308 (1839).

[18] 194 N. C. 341, 139 S. E. 692 (1927) (the court found an intent of the testator to close the class at his death in another clause of the will also but said that the words describing the class are alone sufficient to close the class at his death since no intent to keep it open longer is shown by the words.); in the case of

with a will by which the testator left property to the children of two daughters and four sons "or any other of my children who may have children borned to them after the date of this will," held that only those grandchildren *in esse* at the testator's death were entitled to share in the property. The court there recognized the principle that if the testator's intent were clearly expressed to include later born members of the class the rule would not operate to exclude them, but considered that this was not such a case.

The cases from other jurisdictions are as controversial on this subject as are those from North Carolina. The Maine court in *Merrill v. Winchester*,[19] though recognizing the rule of convenience as merely a rebuttable presumption, refused to take the case out of the general rule where the will provided: '—— and to her children, grandchildren, and, great-grandchildren now living or hereafter born, I give and bequeath the sum of three thousand dollars each, to be paid within two years after this will is admitted to probate to those then living; and to those born afterward, within two years from the date of birth." The court held that "to those born afterwards" referred to any children *en ventre sa mere* at the testator's death, and not to any conceived after his death. There it was said that the language must be clear and unambiguous to take the will out of the general rule, since without such a clear expression it was improbable that the testator should wish to postpone the distribution of his estate so long. Other expressions as: "to all my first cousins,"[20] "my nieces and nephews by blood or marriage,"[21] "to *A* and his family,"[22] have been held not to show an intent of the testator to permit the class to increase beyond his death. And yet in a West Virginia case[23] where the words "to *E* and her child or children" were used in a will the court held that the words "or children" included any who should be born after the testator's death.[24]

In England such words as: "to his children begotten or to be be-

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Wise v. Leonhardt, 128 N. C. 289, 38 S. E. 892 (1901), where the words "to my son Lawrences children——to be equally divided among them after the death of my son Lawrence" were used, the court held that only those children of Lawrence in being at the testator's death could take, the reason being that the title to the land would be *in nibubus* until the class closed if left open for later born members. This reason does not seem to be a proper one since the title might vest in those in being subject to open up and let in after born members.

[19] 120 Me. 203, 113 Atl. 261 (1921).

[20] Howland v. Slade, 155 Mass. 415, 29 N. E. 631 (1892).

[21] *In re* Wright's Estate, 284 Pa. 334, 131 Atl. 188 (1925).

[22] Langmaid v. Hurd, 64 N. H. 526, 15 Atl. 136 (1888).

[23] Bently v. Ash, 59 W. Va. 641, 53 S. E. 636 (1906).

[24] Accord: Dean v. Long, 122 Ill. 447, 14 N. E. 34 (1887) (proceeds of trust to *E* and her children); Kilgore v. Kilgore, 127 Ind. 276, 26 N. E. 56 (1890) (now born or which may hereafter be born); Downes v. Long, 79 Md. 382, 29 Atl. 827 (1894) (to wife and children of my son now living and to any other legitimate child or children which may hereafter be born to him.

gotten,"[25] "to every child he hath,"[26] "to each child that may be born to either of the children of either of my brothers lawfully begotten,"[27] "to each of the children of nephews and nieces begotten or to be begotten"[28] have been held to exclude any class members not *in esse* or *en ventre sa mere*. But, on the other hand, "whether now born or hereafter to be born"[29] has been held to include all those children born after the testator's death.

The rule of convenience applies to deeds as well as to wills. So the words "to *A* and his children" in a deed will convey the land jointly to *A* and any children *in esse* or *en ventre sa mere* at the execution of the deed to the exclusion of any other children born after the execution.[30] But if there is an intent clearly shown in the deed to include children. born after the execution they will be included.[31] Some courts have said that in the case of a deed all the grantees must be *in esse* at the date of execution.[32] This does not seem to be a proper reason for the exclusion of after born members since the title by deed may vest in those in being subject to open up and let in later born members by shifting use.[33]

It appears that some courts are more hesitant to include class members born after the testator's death where there is a specified amount left to each member than where there is a total sum left to the class as a whole, since in the former situation the entire estate frequently must be left open until the amount due the class is determined by the closing of the class, while in the latter situation only that share of the estate left to the class must remain open until the possibility of increase is extinct.[34] Another distinction, that between real and personal property, is made by some courts when confronted by a gift to a class. These courts more readily hold the class open after the testator's death where the gift is of realty on the ground that realty is more easily administered while being held in abeyance awaiting the close of the class than is per-

[25] Sprackling v. Rainier, 1 Dick. Rep. 344, 21 Eng. Rep. 302 (1761) This case was cited as a precedent in the North Carolina case of Petaway v. Powell, *supra*.

[26] Ringrose v. Bramham, 2 Cox 384, 30 Eng. Rep. 177 (1794).

[27] Storrs v. Benbow, 2 My. & K. 46, 39 Eng. Rep. 862 (1833).

[28] Butler v. Lowe, 10 Sim. 317, 59 Eng. Rep. 636 (1839).

[29] Defflis v. Goldschmidt, 1 Mer. 417, 35 Eng. Rep. 727 (1816). This case was decided after the *Sprackling* case, *supra*, note 24, but did not overrule, distinguish, or even cite the *Sprackling* case. It was, however, cited as a precedent in the North Carolina case of Shinn v. Motley, *supra*.

[30] Heath v. Heath, 114 N. C. 547, 19 S. E. 155 (1894); Cullens v. Cullens, 161 N. C. 344, 77 S. E. 228 (1913) (land goes to *A* and his children *in esse* or *en ventre sa mere* at the date of the deed as tenants in common.).

[31] Mellichamp v. Mellichamp, 28 S. C. 125, 5 S. E. 333 (1888) (to *W*. and the children she already has and such children as she may hereafter bear.).

[32] Miller v. McAlister, 197 Ill. 72, 64 N. E. 254 (1902) (to *M* and her children, born and to be born).

[33] KALES, ESTATES, FUTURE INTERESTS, §74 (2d Ed. 1920).

[34] Mann v. Thompson, 69 Eng. Rep. 271 (1854).

sonalty.[35] These, however, do not seem to be proper distinctions since the test of inconvenience to the entire estate as compared with the inconvenience to the members of the class then *in esse,* and the test of ease of administration of realty as against personalty do not change the expression of the testator's intention, if any, as set out in the will.

The desirability of the principle of seeking the testator's intention and attempting to follow it in the construction of a will is recognized, yet, in seeking the intention of the testator, it should be remembered that there are two probable intentions: one to admit as many members as possible into the class, the other to give the members the benefit of the gift immediately upon the testator's death and not force them to wait for unknown periods to enjoy their property.[36] Thus when the courts apply the rule of convenience they are upholding one probable intention while destroying the other probable intention of the testator. Further, the courts and legislatures have not hesitated to defeat the testator's *expressed* intention when applying the Rule in Shelley's Case,[37] and by converting *fees tail* into *fees simple*[38] in order to facilitate administration and to further the enjoyment and convenience of the recipients of devises and grants. Why then should the courts hesitate because of ambiguous and doubtful language in a will to exclude class members born after the testator's death? It is submitted that unless the testator *expressly* provides for any member of a class born after his death the court should avoid inconvenience and confusion and refuse to admit such members.

As Justice Browning of the Virginia court said:[39]

> "The written expression of human language has never reached such a state of precision and exactness as to preclude one of mental capacity and ingenuity from saying that one thing is meant, and another of equal versatility saying that something else is intended. Quite frequently confusion ensues from which comes the troublesome element which we call 'doubt' and at that juncture the law, ever wholesome and remedial, provides the way out by supplying its rule of construction."

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[35] Cole v. Cole, 229 N. C. 757, 51 S. E. 2d 491 (1948).
[36] LONG, *supra* note 5, at 314.
[37] Nichols v. Gladden, 117 N. C. 497, 22 S. E. 459 (1895) (the court there said the Rule in Shelley's Case is an inexorable rule of law and the intention of the grantor or testator will not be considered).
[38] N. C. GEN. STAT. §41-1 (1943).
[39] American National Bank and Trust Co. of Danville v. Herndon, 181 Va. 17, 19, 23 S. E. 2d 768, 770 (1943).

Labor Law—U.S. Arbitration Act—Enforceability Thereunder of Agreements to Arbitrate Labor Disputes

At common law, agreements to arbitrate existing or future disputes are revocable by either party at any time before an award is made, and courts will not, in the absence of statutory authority, grant specific performance of such an agreement, or allow it to be pleaded as a bar to an action.[1] In order to abrogate this common law rule, fifteen states[2] and the United States[3] have enacted statutes which make written agreements to arbitrate existing or future disputes irrevocable and enforceable. Four other states[4] have passed the uniform arbitration act which is applicable to existing disputes only, and does not provide for direct enforcement.

The United States Act is based on the draft state arbitration act approved by the American Arbitration Association and presented to Congress by the American Bar Association. Section 2 of the act provides that written agreements to arbitrate existing or future disputes arising out of maritime transactions or transactions involving interstate or foreign commerce shall be "valid, irrevocable, and enforceable." Section 3 provides for a stay of proceedings where suit is brought on any issue referable to arbitration, and Section 4 provides for direct compulsion of arbitration.[5] The remaining sections provide for appointment of arbitrators by the court, entering an award as a judgment of court, vacating or modifying the award, and confirming it by order of the court.

[1] Executory arbitration agreements, while not illegal or void, would oust the courts of jurisdiction and were therefore held to be against public policy. Specific performance would not be granted since either party could revoke and make the court order useless. Hamilton v. Home Insurance Co., 137 U.S. 370 (1890); Home Insurance Co. v. Morse, 20 Wall. 445 (U.S. 1874); Tobey v. County of Bristol, 3 Story 800, Fed. Case No. 14,065 (1845); Rueda v. Union Pacific R. Co., 180 Ore. 133, 175 P. 2d 778 (1946); RESTATEMENT, CONTRACTS §550 (1932). See generally, Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. OF PA. L. REV. 132 (1934); Simpson, *Specific Performance of Arbitration Contracts*, 83 U. OF PA. L. REV. 160 (1934).

[2] Arizona, California, Connecticut, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

[3] United States Arbitration Act, 43 STAT. 883 (1925), 9 U. S. C. A. §§1-14 (Supp. 1948).

[4] Nevada, North Carolina, Utah, and Wyoming. For an analysis of the uniform act see Sturges, *Arbitration Under the North Carolina Statute—The Uniform Arbitration Act*, 6 N. C. L. REV. 363 (1928).

[5] Section 2, making certain written agreements to arbitrate valid, irrevocable, and enforceable is, of necessity, limited to maritime and interstate commerce transactions, since Congress has no power to legislate with respect to the validity of contracts generally. But sections 3 and 4 are broad and not limited to maritime and interstate commerce transactions, since they deal with procedure in the federal courts, over which Congressional power is complete and not limited. Agostini Bros. Building Corp. v. U.S., 142 F. 2d 854 (4th Cir. 1944); Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 (3rd Cir. 1943).

The act has been successful in changing the common law rule as to written agreements to arbitrate in commercial and maritime contracts, and under it the federal courts now specifically enforce agreements to arbitrate and allow stay of suit until arbitration is had[6] However, section 1 of the act, after defining "maritime transactions" and "commerce," adds a clause, ". . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." This clause has led to a conflict between the circuit courts of appeals, as to whether or not any part of the act applies to arbitration clauses in collective bargaining agreements.[7]

Three decisions of the third circuit[8] have applied section 3 of the act and allowed stay of action, even though the arbitration clause involved was contained in a collective bargaining agreement. In *Watkins v. Hudson Coal Co.*[9] that court held that the exclusion of contracts of employment in section 1 of the act did not apply to section 3, and allowed a stay of suit until arbitration was had.[10] The court reasoned, Judge Goodrich writing the opinion, that the clause excluding employment contracts in section 1 is applicable only to the definitions of "maritime transactions" and "commerce" contained therein, and since these terms appear again only in section 2, section 3 and the remainder of the act are not limited by the clause.[11]

[6] Agostini Bros. Building Corp. v. U.S., 142 F. 2d 854 (4th Cir. 1944); Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 (2d Cir. 1942).

[7] The great majority of collective bargaining agreements now contain a clause providing for arbitration of any disputes arising from interpretation of the contract, which have not been settled through a specified grievance procedure. Of the fifteen states which have statutes similar to the United States act, six, California, Connecticut, Louisiana, Massachusetts, New Jersey, and New York, have made their statutes applicable to labor contracts either by specific provision or court interpretation. Comment, *Arbitration of Labor Contract Disputes,* 43 ILL. L. REV. 678 (1948).

[8] Evans v. Hudson Coal Co., 165 F. 2d 970 (3rd Cir. 1947) (followed the Donahue case without any mention of the exclusion clause); Watkins v. Hudson Coal Co., 151 F. 2d 311 (3rd Cir. 1945), *cert. denied,* 327 U.S. 777 (1946); Donahue v. Susquehanna Collieries Co., 138 F. 2d 3 (3d Cir. 1943) (the court made no mention of the exclusion clause in section 1, but did apply section 3 to a collective bargaining agreement).

[9] 151 F. 2d 311 (3rd Cir. 1945).

[10] One judge dissented and followed the view of the fourth and sixth circuits that the exclusion in section 1 should apply to the entire act.

[11] The argument has also been advanced that collective bargaining agreements should not be excluded from the act since such an agreement should not be considered a "contract of employment" within the sense of the exception. Freiden, *Legal Status of Labor Arbitration,* NEW YORK UNIVERSITY FIRST ANNUAL CONFERENCE ON LABOR (1948) 233, 247. In Levy v. Superior Court, 15 Cal. 2d 692, 104 P. 2d 770 (1940), the court reached a somewhat similar result when it held that an exclusion of "contracts pertaining to labor" from the California Arbitration Act did not exclude collective bargaining agreements. A comment in 29 CALIF. L. REV. 411 (1941) indicates this case was decided on the grounds that public policy favors the settlement of labor disputes by arbitration.

Also, by bringing an action under the Federal Declaratory Judgment Act there

One case in the sixth circuit[12] and one in the fourth circuit[13] have reached results contra to the third circuit opinions, holding that the exclusion clause in section 1 applies to the whole act. The more accurate interpretation of the exclusion clause appears to be that followed by Judge Parker of the fourth circuit in *International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., Inc.*[14] Section 1, which contains the words of exclusion, is introductory only, and contains no substantive provisions of the act. Being placed in such an introductory section, the words "nothing herein contained" seem clearly to indicate that the exclusion was intended to apply to all the substantive provisions of the act, and not just to one particular section. To say, as the third circuit decisions do, that the exclusion applies only to the definition of "commerce" in section 1, and therefore only to section 2 of the substantive portions of the act, would result in the exclusion clause being completely meaningless.[15] By this reasoning contracts of employment would be excluded from the class of contracts made valid, irrevocable, and enforceable in section 2, but would still be indirectly enforceable by stay of action under section 3, and directly enforceable by court order under section 4.

Since there was no consideration of the exclusion clause in the passage of the act through Congress, and no indication as to whether or not Congress intended the act to apply to collective bargaining agreements,[16] none of the decisions could rely on legislative history as evidence of Congressional intention.[17] However, the history of the preparation and submission of the act to Congress by the American Bar Association indicates that, while originally intended to apply to all types of arbitration agreements, it was later amended to exclude collective

may be enforcement of the agreement to arbitrate without resort to the arbitration act. In Northland Greyhound Lines v. Amalgamated Ass'n, 66 F. Supp. 431 (D. Minn. 1937) an action was brought by the company for a declaration of rights under a collective bargaining agreement. The declaratory judgment held that the dispute was subject to arbitration under the contract. See also Oil Workers International Union v. Taxoma Natural Gas Co., 146 F. 2d 62 (5th Cir. 1944).

[12] Gatliff Coal Co. v. Cox, 142 F. 2d 876 (6th Cir. 1944) (defendant's motion to stay the proceedings was overruled since the agreement to arbitrate was in a labor contract).

[13] International Union United Furniture Workers of America v. Colonial Hardwood Flooring Co., Inc., 168 F. 2d 33 (4th Cir. 1948) (refused to allow a stay of proceedings under section 3 of the act).

[14] *Ibid.*

[15] "Unless the excepting language applies to the entire statute, it seems to me rather meaningless." Watkins v. Hudson Coal Co., 151 F. 2d 311, 321 (3rd Cir. 1945), dissenting opinion by Judge McAllister.

[16] In discussions of the bill the committee reports consistently referred to it as a "commercial arbitration act," and there was no consideration of the meaning of the exclusion clause.

[17] The only reference to the intention of Congress was made in the *Colonial Hardwood Flooring Co.* case, in which Judge Parker said, "It is perfectly clear, we think, that it was the intention of Congress to exclude contracts of employment from the operation of all these provisions."

bargaining contracts from its operation. As first prepared by the Association's Committee on Commerce, Trade, and Commercial Law in 1921, the bill did not contain the exclusion.[18] In 1923, to eliminate opposition by a leader of the Seamen's Union,[19] and because of fear that additional labor opposition might threaten passage of the act through Congress,[20] the exclusion clause was added to the end of section 1.

While agreeing that the better reasoned interpretation of the act is that, in its present form, it does not make an arbitration clause in a collective bargaining agreement specifically enforceable, it is submitted that public policy and common sense demand that such agreements should be enforced.[21] Arbitration has become a recognized and effective method for the settlement of industrial disputes, and refusal by courts to enforce an arbitration agreement might cause resort to unnecessary litigation or the use of force in the settlement of disputes, which is the very thing the agreement was intended to prevent.[22] Enforcement would not amount to compulsory arbitration. There would be no compulsion by the courts until the parties had voluntarily agreed in writing that they would arbitrate.[23] In reality, most arbitration clauses in labor contracts are now carried out by both parties without any need for court action. But in situations where one party may now refuse to arbitrate, the knowledge that courts will enforce the agreement would greatly reduce the number of these refusals. In the federal field, an

[18] XLVI A. B. A. REP. 359 (1921).

[19] XLVIII A. B. A. REP. 287 (1923).

[20] "The proviso in it which excepts from its operation workers' agreements, while regarded by its framers as no improvement, was suggested by Herbert Hoover, Secretary of Commerce, a staunch friend of the measure, as a wise sop to the Cerberus of Labor." Gordon, *International Aspects of Trade Arbitration*, 11 A. B. A. J. 717 (1925). Labor opposition was based on a feeling that specific performance of arbitration agreements in labor contracts resembled compulsory arbitration, and a fear that it might lead to forced arbitration of disputes over new contract terms.

[21] "In the field of industry, a chorus of deserved derision would silence declaration that a collective bargaining agreement for arbitration of future issues was violation of public policy. If there ever was public policy against agreements to arbitrate, it has disappeared." Park Construction Co. v. Independent School District, 209 Minn. 182, 186, 296 N.W. 475, 477 (1941). See also Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. OF PA. L. REV. 160 (1934); Fraenkel, *The Legal Enforceability of Agreements to Arbitrate Labor Disputes*, 1 ARB. J. 360 (1937).

[22] This public policy view appears to be the real reason that the third circuit has applied the act to collective bargaining agreements. In Evans v. Hudson Coal Co., 165 F. 2d 970, 974 (3rd Cir. 1947) the court said, "Time, energy, and money have been expended by both Mine Workers and Operators in litigation in the courts of this Circuit. We are of the opinion that these expenditures have been unrewarding. Mine Workers and Operators have made a series of valid and binding agreements for arbitration. They must submit to the arbitration upon which they have agreed."

[23] The parties could specify in the arbitration agreement exactly what type of dispute they will arbitrate, and any court order of enforcement or stay of action would be limited to those disputes only. This would eliminate any danger of forced arbitration of disputes over new contract terms.

amendment to the United States Arbitration Act extending it to embrace written agreements to arbitrate labor disputes would lead to settlement of even more industrial disputes by peaceful arbitration.[24]

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Real Property—Deeds—Requisites to a Valid Delivery in North Carolina

In the recent North Carolina case of *Ballard v. Ballard,*[1] a grantor drafted, signed, sealed, and registered an instrument which purported to convey for a consideration a tract of land to the grantee (son of the grantor), subject to a twenty-one year estate reserved by the grantor. After the grantor's death, the widow, who had married the grantor after the conveyance, filed a petition for dower claiming that the deed was not delivered, and the Superior Court granted this petition, but the Supreme Court reversed the lower court and held that registration in addition to a declaration by the grantor that he had conveyed to the grantee was sufficient evidence of an effective delivery even though it was not shown that the deed was ever physically transferred to the grantee and though the grantor apparently retained possession of the deed until his death. Although the holding of the instant case does not, in itself, change the law on the subject of delivery, there were statements in the opinion indicating, perhaps, a relaxation of the former requirements stated by the court in *Gillespie v. Gillespie,* where it said: "Whether a deed has been delivered in the legal sense is not dependent exclusively upon the question of its manual or physical transfer from the grantor to the grantee but also upon the intent of the parties. *Both the delivery of the instrument and the intention to deliver it are necessary to a transmutation of title.*"[2]

It is the purpose of this note to examine, in the light of past cases, the three requirements of a valid delivery as enunciated by the court in

[24] Such an amendment has been suggested for presentation to Congress. Sturges, *Proposed Amendment of the United States Arbitration Act,* 6 ARB. J. 227 (1942). It has been suggested that the same result could be reached by a court simply limiting the common law rule of revocability to commercial disputes and, on the basis of public policy, refusing to extend the rule into the field of labor disputes. Latter v. Holsum Bread Co., 108 Utah 364, 160 P. 2d 421 (1945); Comment, *Arbitration of Labor Contract Disputes,* 43 ILL. L. REV. 678 (1948). There is very little possibility of the federal courts reaching this result, however, because of the existing line of cases which have refused to make this distinction.

[1] Ballard v. Ballard, 230 N. C. 629, 55 S. E. 2d 316 (1949). The court, however, held that the admission of incompetent testimony by the widow as to nondelivery of the deed under which the grantee claimed title was prejudicial error and set aside the verdict and judgment since the witness did not show that she had had an opportunity to acquire personal knowledge of the facts of delivery.

[2] Gillespie v. Gillespie, 187 N. C. 40, 41, 120 S. E. 822, 823 (1924). Italics added.

the present case and to determine how these requirements might affect the old law. In the instant case the court said:

> "The requisites to the valid delivery of a deed are threefold. They are: (1) An intention on the part of the grantor to give the instrument legal effect according to its purport and tenor; (2) the evidencing of such intention by some *word or act* disclosing that the grantor has put the instrument beyond his *legal* control, *though not necessarily beyond his physical control;* and (3) acquiescence by the grantee in such intention."[3]

First, there must be an intent on the part of the grantor to give the instrument legal effect. The intention of the parties at the time is controlling as to whether there has been an effective delivery;[4] but intention by the grantor has not in the past taken the place of a manual transfer,[5] nor is mere physical transfer without intent a valid delivery.[6] A handing over of the instrument to a third party for examination does not constitute an effective delivery, since the requisite intent for a valid delivery is lacking.[7]

Second, in order to constitute a valid delivery, there must be "the evidencing of such intention by some *word or act* disclosing that the grantor has put the instrument beyond his legal control, though not

[3] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). Italics added.

[4] Blades v. Wilmington Trust Co., 207 N. C. 771, 178 S. E. 565 (1935). In Lee v. Parker, 171 N. C. 144, 88 S. E. 217 (1916), the grantor was confined to her bed and there was evidence tending to show that she was averse to executing the deed, but was afraid to refuse to do so. It was held that the jury should consider the question of whether the grantor had exercised her will and executed the instrument with the intent that it should operate as her deed. In Gaylord v. Gaylord, 150 N. C. 222, 233, 63 S. E. 1028, 1033 (1909), a grantor had prepared, signed, and sealed an instrument and had given it to his brother for the purpose of keeping the instrument until he should get his family affairs corrected. It was held that manual delivery alone is not enough but that there must also be an intent to deliver, the court saying: "And the authorities are uniformly to the effect that, in order to be a valid delivery, the deed must pass from the possession and control of the grantor to that of the grantee, or to someone for the grantee's use and benefit, with the intent at the time that title should pass or the instrument become effective as a conveyance."

[5] In Fortune v. Hunt, 149 N. C. 358, 360, 63 S. E. 82, 83 (1908), where the grantor had given a deed to a third persons with instructions to have it delivered in case of the grantor's death, but to retain it subject to the grantor's control until the grantor's death, it was held that there was no delivery, the court saying: "The intention of the grantor will not take the place of actual delivery, which is essential to the validity of a deed."

[6] "There must not only be a physical delivery of a deed as the final act of execution, but it must be accompanied by an intent of the grantor to perfect the instrument." See Huddleston v. Hardy, 164 N. C. 210, 214, 80 S. E. 158, 160 (1913), (concurring opinion).

[7] Gaylord v. Gaylord, 150 N. C. 222, 63 S. E. 1028 (1909); in Tarlton v. Griggs, 131 N. C. 216, 221, 42 S. E. 591, 593 (1902), a deed by the grantor was given to a third person to hold until certain other deeds should be executed by the grantor; the grantees took possession of the deeds, and the court in holding no delivery said: "There must be an intention of the grantor to pass the deed from his possession and beyond his control. . . . Both the intent and the act are necessary to the valid delivery."

necessarily beyond his physical control."[8] These words taken in their context might appear to mean that intention alone, evidenced by some word or act, is sufficient for a valid delivery. If so, the court has relaxed the requirement of a manual transfer of the instrument in addition to intention to make the deed effective. However, some of the cases cited in support of the court's statement seem to hold that both the intent and the ceremonial passing on of the deed itself are essential to its validity.[9] Also, there is a statement in the case which reads: "But manual possession of the instrument is not essential to delivery. It is sufficient if the grantor delivers the writing to some third person for the grantee's benefit."[10] The first sentence taken alone would seem to bear out the suggested interpretation, but a perusal of the cases cited demonstrates that the first sentence cannot be supported, by itself, but must be read in conjunction with the latter sentence.

The expression "delivery," as applied to written instruments, had its beginning in connection with written conveyances of land, and the manual transfer of the instrument in early times was regarded as the symbolical transfer of the land itself, analogous to livery of seisin. The notion of physically giving the instrument to the grantee applied also in connection with written contracts, the manual transfer of the document being necessary to make it legally operative and effective. While delivery is still required in connection with negotiable and other instruments of an analogous character, the old conception of a manual transfer of the instrument as the only means of making it legally operative has been superseded in most instances by the modern view that delivery is merely a question of intention supplemented by some manifestation of that intention.[11]

In North Carolina, however, insofar as deeds are concerned, the court has in the past spoken as though a physical changing of possession of the deed were indispensable to an effectual delivery. In some North Carolina cases, holding that there was no delivery, the want of a physical transfer of the deed seems unduly emphasized in the face of quite convincing evidence of the intention of both the grantor and the grantee that the deed should become effective. In a recent case,[12] omitted from the cases cited by the court in the case at bar, a grantor placed the deed in his Bible on the dresser in his bedroom. He told his daughter, one of the witnesses, where he was putting the deed and instructed her to

[8] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). Italics added.

[9] Gillespie v. Gillespie, 187 N. C. 40, 120 S. E. 822 (1924); Lee v. Parker, 171 N. C. 144, 88 S. E. 217 (1916).

[10] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[11] Tiffany, *Real Property*, §1033 (3rd ed. 1939).

[12] Barnes v. Aycock, 219 N. C. 360, 362, 13 S. E. 2d 611, 612 (1941). Compare Tarlton v. Griggs, 131 N. C. 216, 221, 42 S. E. 591, 593 (1902).

tell the grantee where it was and to have it recorded, but this message was not delivered. The deed remained in the Bible and never came into the possession of the grantee or anyone for her. It was held that there was no delivery in spite of the fact that the grantor had expressed an intention of giving the land to the grantee and the grantee had had control of the land until the grantor's death. The court said: "To constitute delivery the papers must be put out of the possession of the maker."

In another North Carolina case,[13] deeds were placed in a lock box in a bank with the intention that they should convey to the grantor's children certain land which the grantor owned. The deeds were found after the grantor's death with the names of each of the grantees on them, and although the grantor devised all his land except that which he had purported and intended to convey by the deeds, it was held that there was no delivery since the grantor did not relinquish control of the instruments. In a Pennsylvania case,[14] the grantor put a deed in a safe among his other papers with the intention that the same should be a delivery and later made oral declarations of that intention. It was there held that there was a valid delivery of the deed. A distinguishing feature was the fact that in the latter case, the grantee had access to the safe, but the court indicated that that consideration was not controlling.

In the instant case it was pointed out that there is a presumption of delivery of a deed arising from its registration,[15] but such presumption is subject to rebuttal.[16] It has been held that where a deed is delivered by the grantor to a Register of Deeds, or even to his deputy clerk, to have it registered with the intent that title should pass, there is a sufficient delivery even though the deed is not registered;[17] but where a deed is registered for fear that it might be destroyed, and not with the intention that it should then become a deed, such evidence is sufficient to rebut the presumption of delivery arising out of registration.[18] As was held in the present case, however, mere possession of the deed by the grantor after it has been recorded is not entitled to much consideration in rebutting the presumption of delivery, especially in view of the fact that the grantor reserved an estate for a term of years.[19]

[13] Thomas v. Conyers, 198 N. C. 229, 151 S. E. 270 (1930).
[14] Kanawell v. Miller, 262 Pa. 9, 104 Atl. 861 (1918).
[15] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).
[16] Federal Land Bank of Columbia v. Griffin, 207 N. C. 265, 176 S. E. 555 (1934).
[17] In Robbins v. Rascoe, 120 N. C. 80, 26 S. E. 807 (1897), where an instrument was delivered by the grantor to a deputy clerk with instructions to have it registered before the clerk, who was then absent, the court held the delivery was complete and valid, and the grantor could not afterwards take the deed back from the deputy clerk even though the grantee did not at that time know of the conveyance and the clerk had not then registered the deed.
[18] Ellington v. Currie, 40 N. C. 21 (1847).
[19] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949). See

It was pointed out in the case at bar that delivery made to a third person is effectual to transfer title,[20] and this is so even if the third person is a stranger.[21] When the maker delivers a deed to a third person for the grantee, parting with the possession of it without any condition as to how the third party shall hold it, the delivery is complete and title passes at once, though the grantee be ignorant of the facts, and neither the grantor nor anyone else can later defeat such a delivery.[22]

The present case indicates that mere possession by the grantor of the deed is not sufficient to rebut the presumption of a valid delivery arising from the registration of the deed by the grantor.[23] Further, it has been held that a deed delivered to a grantee by a grantor, but afterwards placed with a third party for safekeeping until they should both call for it is a good delivery and not an escrow.[24] Where a deed is executed and witnessed, and left on a table with both the grantor and grantee present, a presumption of delivery arises,[25] notwithstanding cases that hold contra when only the grantor is present.[26]

The third requisite of a valid delivery as enunciated by the court in the instant case is "acquiescence by the grantee in such intention,"[27] *i.e.,* by acceptance. Acceptance does not ordinarily constitute a problem in delivery, inasmuch as a grantee is presumed to accept provided the conveyance is for the grantee's benefit. The presumption is *not* that he *will* accept, but that he *does* accept,[28] and such acceptance is effectual until a contrary intent is shown.[29]

In spite of the statements and the cases cited in the instant case, which apparently indicate a contrary view, it is to be hoped that the second requirement promulgated by the court has changed North Caro-

also Faircloth v. Johnson, 189 N. C. 429, 127 S. E. 346 (1925); Phifer v. Mullis, 167 N. C. 405, 83 S. E. 582 (1914); Helms v. Austine, 116 N. C. 751, 21 S. E. 556 (1895).

[20] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[21] Wesson v. Stephens, 37 N. C. 557 (1843).

[22] In Buchanan v. Clark, 164 N. C. 56, 80 S. E. 424 (1913), a father purchased lands and had a conveyance made to his illegitimate son, without the son's knowledge, and the son died before the instrument was sent to him, the conveyance was held to be good notwithstanding the father's attempt to obtain a second conveyance from the original grantor himself. In Hall v. Harris, 40 N. C. 303 (1848), a paper was signed, sealed, and handed to a third person, to be delivered to the grantee on a condition which the grantee afterwards complied with, the delivery of the paper was held to be effective and complete and the deed took effect at the time of the original transfer.

[23] Perkins v. Thompson, 123 N. C. 175, 31 S. E. 387 (1898); Williams v. Springs, 29 N. C. 384 (1847).

[24] Gibson v. Partee, 19 N. C. 530 (1837).

[25] Levister v. Hilliard, 57 N. C. 12 (1858).

[26] Baldwin v. Maultsby, 27 N. C. 505 (1845); Kirk v. Turner, 16 N. C. 14 (1826).

[27] Ballard v. Ballard, 230 N. C. 629, 633, 55 S. E. 2d 316, 319 (1949).

[28] Henry v. Heggie, 163 N. C. 523, 79 S. E. 982 (1913).

[29] Smith v. Moore, 149 N. C. 185, 62 S. E. 892 (1908).

lina's obsolete view of "delivery," that in addition to intention there must be a manual transfer of the instrument itself. If such is not the case, certainly there is the possibility that the court in future cases may use this well-considered statement as a springboard toward the modern and majority view that delivery is merely a question of intention to give the deed legal effect evidenced by some *word or act* indicating such an intention.[30]

GEORGE J. RABIL.

Taxation—Effect of Renunciation on the Taxability of Property Subject to Power of Appointment

In order to minimize the estate tax on the passing of property many a testator devises his property to his wife or child for life, giving the devisee the power to appoint by will the ultimate taker of the property. Usually he also provides that in the event of the failure of the donee of the power of appointment to exercise this power, the property, at the death of the donee, will go to a specified beneficiary. Whether or not the property subject to the power is taxable in the donee's estate where the appointee is also a taker in default has been the subject of much litigation and of endless legal writings.[1]

Early in the line of cases, New York declared that where the appointee took a one-fourth interest in an estate under the exercise of a power of appointment instead of the one-seventh interest which would have been his had the power not been exercised, the entire amount was taxable in the estate of the donee.[2] Then, in 1905, where the appointee had renounced all rights under the exercise of the power, the same court declared that an interest given in default of appointment vested at the death of the donor of the power, and that since the appointee would take the same interest under the power as was already vested in her in default, the interest was not taxable in the donee's estate.[3] Much later

[30] Tiffany, *Real Property*, §1033 (3rd ed. 1939).

[1] 1 PAUL, FEDERAL ESTATE AND GIFT TAXATION §9.01 *et seq.* (1942); Eisenstein, *Powers of Appointment and Estate Taxes: I, II*, 52 YALE L. J. 296, 494 (1943) (contains a good collection of legal articles).

[2] *In re* Potter's Estate, 51 App. Div. 212, 64 N. Y. Supp. 1013 (1900); *In re* Chauncey's Estate, 102 Misc. 378, 168 N. Y. Supp. 1019 (1918) (the appointee filed a conditional election whereby she desired to take under the instrument which gave her the larger amount); *In re* Taylor's Estate, 209 App. Div. 299, 204 N. Y. Supp. 367 (1922) (the appointee could not claim part under the donor's will and the excess under that of the donee); *see In re* Delano's Estate, 176 N. Y. 486, 68 N. E. 871 (1903). *Contra:* 3 RESTATEMENT, PROPERTY §369(c) (1940) ("if the total property passing to such appointee differs from his interest in default of appointment only in that it is a larger fractional interest in the . . . thing covered by the power, the property passes . . . in default of appointment so far as the appointed interest is identical to the interest in default.").

[3] *In re* Lansing's Estate, 182 N. Y. 238, 74 N. E. 882 (1905). *But cf. In re* Cooksey's Estate, 182 N. Y. 92, 74 N. E. 880 (1905) where the court held the interests taxable because the donor's will did not allow any default interest to vest unless and until the donee died without exercising the power.

the U. S. Supreme Court in *Helvering v. Grinnell*[4] adopted the view of the New York court and held that where the appointee renounced his interest under the appointment and took the same interest under the will of the donor, the property passing to him was not taxable in the estate of the donee.[5]

Emphasis was placed on the "passing" requirement of the tax statute,[6] the court finding that no property interest passed by virtue of the admitted exercise of the general power of appointment.

Since the *Grinnell* decision, the major problem has been to determine whether that decision was based primarily on the renunciation by the appointees or on the fact that the interests in default and under the power were exactly the same. Both views have received support.[7] Where the appointee received the exact equivalent, or a lesser amount, the majority of the cases, prior to 1943, favored non-taxability.[8]

Although now overruled by statute[9] as to donees dying after Octo-

[4] 294 U.S. 153 (1935).

[5] The same result was reached in *In re* Chauncey's Estate, *supra* note 2, where the appointee took the exact amount under the will of the donor that he would have under the will of the donee, he having previously filed an election to take under whichever will left him the greater amount.

[6] Revenue Act of 1926, §302, 44 STAT. 9 (1926). The value of the gross estate of a decedent shall include the value of property "(f) To the extent of any property passing under a general power of appointment exercised by the decedent. . . ." The three conditions precedent to taxation of the interests were: "(1) The existence of a general power of appointment; (2) an exercise of that power by the decedent by will; and (3) the passing of the property in virtue of such exercise," Helvering v. Grinnell, 294 U.S. 153, 155 (1935).

[7] Renunciation or election is immaterial, Lewis v. Rothensies, 138 F. 2d 129, 132 (3rd Cir. 1943); Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. 2d 758 (3rd Cir. 1940); Morris v. Commissioner, 39 B. T. A. 570 (1939); James C. Webster, 38 B. T. A. 273 (1938). Renunciation or election is inseparable from the Grinnell case, Estate of Rogers v. Commissioner, 320 U.S. 410 (1943); Helvering v. Safe Deposit and Trust Co., 316 U.S. 56 (1942); *see* Estate of Guggenheim, 1 T. C. 845, 852 (1943); Estate of Morris, 38 B. T. A. 408 (1938).

[8] Lewis v. Rothensies, *supra* note 7; Legg's Estate v. Commissioner, 114 F. 2d 760 (4th Cir. 1940); Rothensies v. Fidelity-Philadelphia Trust Co., *supra* note 7; *In re* Duryea's Estate, 277 N. Y. 310, 14 N. E. 2d 369 (1938); James C. Webster, 38 B. T. A. 273 (1938); Eisenstein, *Powers of Appointment and Estate Taxes: I*, 52 YALE L. J. 296, 327 (1943). But Estate of Rogers v. Commissioner, 320 U.S. 410 (1943) held taxable interests which were appointed to the taker in default in a lesser amount than would have passed in default, declaring that the estate tax is aimed at the "exercise of the privilege of directing the course of property after a man's death." This case controlled the decision in Estate of Kerr v. Commissioner, 9 T. C. 359 (1947) (the appointing will was the instrument through which the beneficiary received his interest which was smaller than that given him in default). Prior to Helvering v. Grinnell the theory of "confirmation of a theretofore defeasible title" had allowed taxation. Lee v. Commissioner, 57 F. 2d 399 (D. C. Cir. 1932), *cert. denied* Lee v. Burnet, 286 U.S. 563 (1931) (the appointee took a vested remainder instead of an absolute fee in default); Wear v. Commissioner, 65 F. 2d 665 (3rd Cir. 1933) ("The generating source of the change was the death of the donee without action adverse to them.").

[9] INT. REV. CODE §811. "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal . . . (f) To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment. . . ." or has exercised or released a power in contemplation of death or by a disposition in-

ber 21, 1942, the *Grinnell* rule still affects litigation over taxes on estates of decedents dying before that date. Such was the situation in *Commissioner v. Cardeza's Estate*[10] where A died leaving two-thirds of his estate to his daughter for life, and giving her a general testamentary power of appointment. He also provided that in default of appointment the income was to go to his grandchildren, living at her death, for the life of C, a grandson living at the time of his death, and that the principal was then to be divided among his grandchildren or their issue. The daughter died in 1939 and appointed all the property subject to the power to her son, C, in fee, who, fourteen months after her death, renounced all benefits under his mother's testamentary exercise of the power, he being the sole surviving lineal descendant. *Held:* The property is not taxable in the donee's estate.

The contentions of the commissioner in this case are worth noting, the second being a novel attempt to open another avenue of attack on powers exercised before 1942. The commissioner contended first, that the *Grinnell* rule should be limited to the situation where the interests, appointed and in default, were equal, but this was rejected. The entire court declared it would be "purely fictional" to assert that the property passed by virtue of the appointment as the appointee had rejected all benefits under the power.[11] He also argued that this was not the ordinary default gift and that the word "executed," in the will of A, applied only to those acts of the donee necessary to a valid execution in form of the power; that the power was validly executed by the donee in that she performed all acts contemplated by the donor, and even if the property has not passed because of the renunciation, still the execution itself cut off the gift in default of appointment, and the property passed by intestacy.[12] Leaving this contention unanswered except as the final decision affects it, the two majority judges, in ruling for the taxpayer, based their decision on the theory that since no property passed by virtue of the execution of the power, the default interests, which according to Pennsylvania law vested at the death of the donor subject

tended to take effect in possession or enjoyment after his death. However, if the power of appointment was created on or before October 21, 1942 and is released, or the donee dies without exercising the power, before July 1, 1950, the value of the property subject to the power is not includible in the donee's estate. If the donee was under a legal disability on October 21, 1942 and it continues beyond July 1, 1950, the later date will be extended to six months after the termination of the legal disability. Revenue Act of 1942, §403, 56 STAT. 944 (1942), as amended by Pub. L. No. 137, 81st Cong., 1st Sess. (June 28, 1949).

[10] 173 F. 2d 19 (3rd Cir. 1949).

[11] *Id.* at 24. But property has been declared to have passed under the power even though there was a renunciation. *In re* King's Estate, 217 N. Y. 358, 111 N. E. 1060 (1916).

[12] Commissioner v. Cardeza's Estate, 173 F. 2d 19, 24 (3rd Cir. 1949). The argument for partial intestacy had been unsuccessfully advanced by the beneficiaries in *In re* King's Estate, *supra* note 11.

to be divested by the exercise of the power, were never divested, and thus not taxable in the estate of the donee.

In reality, although the court contends that it is merely applying Pennsylvania law, it is also determining the intention of the donor at the time he used the word "executed," for it was necessary that this intention be determined prior to the application of any local law. There are three steps which the writer believes the court used in arriving at its decision. It decided first, that "execute" means "exercise," second, that "exercise" means "effective exercise to transfer to the appointee the property," and third, that under the Pennsylvania law a gift in default of appointment vests immediately upon the death of the donor, subject to be divested by the "exercise" of the power. Thus, the donor's intention, according to the court, was to vest the gifts, subject to divestment by the effective transfer of the property interest to the appointee, which never happened.

North Carolina probably agrees with the divestment theory of Pennsylvania, having declared that where there is no gift in default, the interest passes by act of law on the death of the donor to the distributees, subject to be divested by the exercise of the power.[13] It is generally conceded that reference must be made to local law to find out whether or not the decedent had an interest in the property.[14] Where the facts do not show clearly that the power was exercised, many states supply the exercise by statute or by interpretation of the acts of the donee. The court here expressly applied the Pennsylvania law. North Carolina has by statute[15] and court decision[16] declared that, unless a

[13] Holt v. Hogan, 58 N. C. 82 (1859). This theory of the interest vesting subject to be divested by the exercise of the power is an old one, Cunningham v. Moody, 1 Ves. Sr. 174, 27 Eng. Rep. 965 (1748); Doe v. Martin, 4 T. R. 39, 65, 100 Eng. Rep. 882, 896 (1790); 2 SUGDEN, A PRACTICAL TREATISE OF POWERS 5, 33, 119 (1837), which is still accepted, Legg's Estate v. Commissioner, 114 F. 2d 760 (4th Cir. 1940); James C. Webster, 38 B. T. A. 273 (1938); *In re* Freeman's Estate, 35 Pa. Super, 185, 189 (1908) approved in 280 Pa. 273, 124 Atl. 435 (1924) and in 281 Pa. 190, 126 Atl. 270 (1924); FARWELL, A CONCISE TREATISE ON POWERS 310 (3rd ed. 1916); 4 KENT, COMMENTARIES ON AMERICAN LAW 369 (10th ed. 1840); 3 WALSH, COMMENTARIES ON THE LAW OF REAL PROPERTY §323 (1947); *see* Estate of Day v. Commissioner, 44 B. T. A. 524, 529 (1941).

[14] Rothensies v. Fidelity-Philadelphia Trust Co., 112 F. 2d 758 (3rd Cir. 1940); Morris v. Commissioner, 39 B. T. A. 570 (1939); Estate of F. R. Shepherd, 39 B. T. A. 38 (1939) ("The Board, like the Federal courts, is bound by decisions of the state courts in regard to property rights and the effect of conveyances executed within the state relating to property situated therein."); James C. Webster, 38 B. T. A. 273 (1938); Cone v. Commissioner, 31 B. T. A. 515 (1934); 1 PAUL, FED. ESTATE AND GIFT TAXATION §9.14 (1942). Where the state court has spoken, the application is simple. Where it has not, the federal court must apply its own interpretation of the state law. 1 PAUL, *supra* at 441; Eisenstein, *supra* note 8, at 304.

[15] N. C. GEN. STAT., §31-43 (1943) ("A general devise of the real estate of the testator . . . shall be construed to include any real estate . . . which he may have power to appoint. . . ." This section also applies to personalty.); N. C. GEN. STAT., §105-2(5) (1943) (This provision taxes the exercise of powers of appointment at the rates based on the relationship between the appointee and the

contrary intent is shown in the will, a power of appointment will be deemed exercised by a general bequest or devise or by a general residuary clause.

The *Cardeza* decision still seems to be limited by *Estate of Kerr v. Commissioners*[17] in which the Tax Court held the entire amount of the interests taxable in the donee's estate even though the new interests, remainders, were merely a smaller part of the default interests, estates in fee. However, the court distinguished its decision in the *Cardeza* case on the ground that there were in that case no new interests created under the power, the appointee taking exactly what he had before the attempted exercise of the power.

ROBERT L. HINES.

Taxation—Income—Family Partnerships

Great difficulty has been encountered in determining the status of family partnerships as a means of effecting tax savings through a division of income among the family members. *Culbertson v. Commissioner,*[1] although more favorable to the taxpayer than prior decisions in the Tax Court, has admittedly produced greater subjectivity and consequently increased uncertainty in an area already extensively litigated. Although provision under the Revenue Act of 1948 for joint returns of husband and wife virtually renders consideration of this type of partnership unnecessary, the problem is still much alive in the formation of parent-child arrangements.

An understanding of the well recognized principles governing tax liability in these family arrangements is essential as a background to *Culbertson. Lucas v. Earl* ruled that the tax burden may not be shifted by an assignment of future income from services rendered by the assignor; income is taxable to the tree which actually bore the fruit.[2] As a corollary, income from property may be taxable to the donor if he re-

donor; if the power is unexercised, the rates are based on the relationship between the beneficiary and the donee.).

[16] Johnston v. Knight, 117 N. C. 122, 23 S. E. 92 (1895) (the intention of the donee to execute the power, however manifested, will make the execution valid and effective, and unless the contrary is shown by the testator's will a general residuary clause will operate as an execution of the power); Taylor v. Eatman, 92 N. C. 601 (1885) ("It is not necessary to refer to the power if the act shows that the donee had in view the subject of the power at the time."); *see* Cone v. Commissioner, 31 B. T. A. 515, 518 (1934) (the Board says the intent to exercise the power must come from reference to the power, direct reference to the subject matter, or it may appear from the facts that the instrument would be inoperative without the exercise of the power).

[17] 9 T. C. 359 (1947) (the fee given in default was decreased to a remainder interest by partial appointment to a stranger, and although there was a renunciation by the appointee, he still took that particular estate under the power).

[1] 69 Sup. Ct. 1210 (1949), *reversing* 168 F. 2d 979 (5th Cir. 1948).

[2] 281 U.S. 111 (1930) (future salary and attorney's fees).

tained the substance of full enjoyment of all rights and benefits even though he assigned the already accrued right to receive the income—*Helvering v. Horst*.[3] *Blair v. Commissioner*, however, drew this distinction: when there is a recognized valid transfer of income producing property, the income from that property must per force be taxable to the transferee.[4] Vigilant to distinguish substance and effect from form and method, *Helvering v. Clifford* refused to recognize a transfer for tax purposes of the beneficial interest where so many strings were retained by the donor-settlor over the trust property that the actual dominion and control of the corpus and the ultimate beneficial use of the income had not shifted.[5] Thus *Clifford* asks: who controls the production and allocation of the income?

The *Earl-Horst, Clifford* doctrines and the *Blair* rule have been viewed as two sometimes conflicting lines of judicial reasoning. It therefore becomes important to determine whether capital or services is the predominant factor in the production of the firm income in order to appreciate the applicability of these principles and the relative significance of the various tests of partnership validity for tax purposes.

The celebrated decisions of *Commissioner v. Tower*[6] and *Lusthaus v. Commissioner*[7] served to decelerate greatly recognition of family partnerships by the Tax Court under the Internal Revenue Code.[8] In both cases the wife's partnership interest was denied where a prior gift by the husband was the basis of her capital contribution. The transactions were viewed as superficial arrangements which did not result in any actual change in the economic relationships in the business or in the family. Practically, more important than what *Tower* and *Lusthaus* said was what the Tax Court, in the ensuing months, thought they said. The tests of original capital contribution, vital services, and, to a lesser extent, control and management, which had been stated as factors evincive of a business purpose, were interpreted to be conclusive. This understandable adherence to stock tests susceptible of some degree of certainty and objectivity proved fatal to countless partnerships.[9]

[3] 311 U.S. 112 (1940) (negotiable coupons for interest detached from bonds); *cf.* Helvering v. Eubank, 311 U.S. 122 (1940) (insurance renewal commissions).

[4] 300 U.S. 5 (1937) (father's gift to his children of part of his interest in a trust of which he was beneficiary).

[5] 309 U.S. 331 (1940) (short term trust, reversionary rights).

[6] 327 U.S. 280 (1946) (conditional gift of stock in predecessor corporation).

[7] 327 U.S. 293 (1946) (gift from husband and notes payable out of her share of profits).

[8] Applicable provisions are INT. REV. CODE §§11, 22(a), 181, 182, 3797.

[9] Circuit courts have been more generous to the taxpayer than the Tax Court. This fact is even more important since the rule of Dobson v. Comm'r., 320 U.S. 489 (1943) has been repudiated by amendment to §1141(a) of INT. REV. CODE. Decisions of the Tax Court are now reviewable "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." See Note, 1 STAN. L. REV. 305 (1949).

In *Culbertson,* therefore, the Court was confronted with the task of correcting misdirected emphasis. At the insistence of a partner bowing out of a cattle firm because of ill health, the four sons of the other partner, the taxpayer, were given a one-half interest in order to preserve intact the brood herd. The sale of this interest to the sons was accomplished by a note which was largely paid by (1) a gift from the taxpayer, and (2) a loan procured by the newly formed Culbertson & Sons partnership. Since the sons were in the Army and in college during the tax years, no substantial services were rendered. The Tax Court taxed the entire income to the father; the Fifth Circuit reversed, holding it enough that the sons intended to contribute their efforts to the business in the future. The Supreme Court rejected both interpretations and remanded the cause to the Tax Court. Tax validity was made to turn on an issue of whether, in consideration of all the facts, "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise."[10] True, absence of evidence of the old determinative factors has the effect of placing a heavy burden in proving bona fide intent, but presence or absence of any or all of these factors is no longer controlling.[11] This much is made clear: *original* capital is not essential; intent may be predicated upon investment of an intra-family gift. It is uncertain how far reaching the effects will be. Significant indeed is the recent statement of a distinguished circuit judge: "The Commissioner asserts that *Culbertson* represents an affirmation of the rationale of *Tower* and *Lusthaus.* We doubt the validity of this contention."[12]

What are the basic criteria, considered separately, which go to prove or defeat a bona fide intent to form a "business purpose" partnership?

Capital contribution. Origination of the capital with the incoming family member, while no longer a requirement, is of great evidentiary value in proving that there is in fact a valid contribution rather than a sham paper reallocation. Capital from the personal estate of the ostensible partner is the most readily acceptable.[13] If the source is a prior

[10] Culbertson v. Comm'r., 69 Sup. Ct. 1210, 1216 (1949).

[11] A reading of a portion of the opinion without reference to the decision in its entirety may well lead to the conclusion that either contribution of capital or rendition of services within the tax year is still essential; to wit: "if it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question . . . it can hardly be contended that they are in any way responsible for the production of income during those years." (p. 1213). Clearly, this is dictum which a literal minded Tax Court could seize upon to justify a continuation of their previous line of reasoning.

[12] Major, Chief Cir. Judge, in Greenberger v. Comm'r., 5 CCH 1949 FED. TAX REP. §9454 (7th Cir. 1949).

[13] Canfield v. Comm'r., 168 F. 2d 907 (6th Cir. 1948) (inheritance); Weizer v. Comm'r., 165 F. 2d 772 (6th Cir. 1948) (insurance policy); Florence R. Miller, 5 CCH 1949 FED. TAX REP. §7184(M) (T. C. 1949) (gift in trust to purchase partnership interest).

gift of money from the taxpayer, recognition seems most often to depend on whether it is anticipatory to the formation of the partnership.[14] It is enough that the contribution to the business was made some years prior to the tax year.[15] Contributions in the form of notes payable out of the profits of the partnership or by a gift from the taxpayer have not generally been held sufficient.[16] Nor have contributions of proceeds from a gift of stock in a predecessor corporation donated in anticipation of the creation of the partnership satisfied the test in most cases.[17]

Vital services.[18] The following considerations are germane to this test: (1) relative importance in the scheme of the business;[19] (2) competence of the family member by way of special training and practical experience;[20] (3) reliance placed on the judgment and position of the alleged partner;[21] (4) status as more than a mere employee who receives wages periodically.

In a partnership which is chiefly one of personal service it is more essential that the family member stand in the shoes of any other partner who holds an interest by his service. At times the Tax Court has been prone, unrealistically, it is believed, to label services of a family member as "wifely assistance" or "voluntary"—a mere filial or marital duty.[22] Thus, it is incumbent on the taxpayer's attorney to negative this impli-

[14] *See* Greenberger v. Comm'r., 5 CCH 1949 FED. TAX REP. §9454 (7th Cir. 1949).

[15] Graber v. Comm'r., 171 F. 2d 32 (10th Cir. 1949).

[16] Lusthaus v. Comm'r., 327 U.S. 293 (1946) (profits); Boyd v. Comm'r., 171 F. 2d 546 (6th Cir. 1949) (gift); Hougland v. Comm'r., 166 F. 2d 815 (6th Cir.), *cert. denied,* 334 U.S. 846 (1948) (profits). But where basis is a loan secured by the partnership, *Culbertson* will direct a different result.

[17] Comm'r. v. Tower, 327 U.S. 280 (1946); Scherf v. Comm'r, 161 F. 2d 495 (5th Cir. 1947); Maudlin v. Comm'r., 155 F. 2d 666 (4th Cir. 1946). Test satisfied where gift of stock was not anticipatory in Lawton v. Commissioner, 164 F. 2d 380 (6th Cir. 1947).

[18] Notice use of phrase, "valuable services," Graber v. Comm'r., 171 F. 2d 32 (10th Cir. 1949); "substantial services," Wilson v. Comm'r., 161 F. 2d 661 (7th Cir. 1947).

[19] Not sufficiently important: Edwin F. Sandburg, 8 T. C. 423 (1947) (handling invoices, collecting rents, answering phones); Davis v. United States, 5 CCH 1949 FED. TAX REP. §9349 (6th Cir. 1949) (writing occasional letters, making bank deposits); Dewey F. Cobb, 5 CCH FED. TAX REP. §7613 (T. C. 1949) (part time work).

Office work in a supervisory capacity is increasingly being given cognizance. Ron W. Wood, 5 CCH 1949 FED. TAX REP. §7413(M) (T. C. 1949) (maintenance of business records, custody of funds, hiring of personnel); David L. Jennings, 10 T. C. 505 (1948).

Of vital importance: William Grace, 10 T. C. 1 (1948) (employing and discharging personnel, sales promotion, closing sales contracts).

[20] Son received college training for the job: Culbertson v. Comm'r., 69 Sup. Ct. 1210 (1949); Lawton v. Comm'r., 164 F. 2d 380 (6th Cir. 1947). Commerce school partnership valid where wife better qualified than taxpayer husband because of training and experience: Allen v. Knott, 166 F. 2d 798 (5th Cir. 1948).

[21] Woosley v. Comm'r., 168 F. 2d 330 (6th Cir. 1948); S. B. Forsythe, 10 T. C. 417 (1948) (taxpayer illiterate).

[22] *E.g.,* most recently, H. V. Funai, 5 CCH 1949 FED. TAX REP. §7670 (T. C. 1949).

cation with clarity. It is suggested that an inference of "filial aid" is less apparent. Services during the tax year are most acceptable; future services are ineffective, asserts *Culbertson*—although in view of the *Culbertson* standard of bona fide intent this is open to some doubt. There are indications that services prior to tax years are influential.[23]

Receipt and use of the profits. A separate bookkeeping entry and segregation of funds, as by creation of a separate bank account, are persuasive indicia.[24] The partner must have unhampered use of his earnings. Status is doubtful where proceeds though credited to the family member must remain in the business, or cannot be withdrawn without the taxpayer's consent,[25] or where the use of the income is controlled by the taxpayer.[26] Some cases state that if the family member, especially the wife, uses the income to purchase family necessaries, the income is not truly that of the family member[27]—a position not exempt from attack. The rule purported to be followed is that there must be a substantial change in the economic relationship among the family members and in the dominion over the business.

Management and control. What voice does the ostensible partner have in policy formation and the direction of business affairs (as distinguished from services)?[28] Where there has been an outright gift of the interest in the firm, the absence of any participation in the management may serve to defeat division of income.[29] The right to repurchase the interest either at original value or value at the time of repurchase is indicative of lack of control by the alleged partner.[30]

Form of the agreement. The form of the agreement is not so important as the fact of the agreement. It cannot be an afterthought. Oral agreements have been held effective,[31] but the existence of a formal written partnership agreement is of strong evidentiary value to mani-

[23] *E.g.*, Wenig v. Comm'r., 5 CCH 1949 FED. TAX REP. §9348 (D. C. Cir. 1949); Singletary v. Comm'r., 155 F. 2d 207 (5th Cir. 1946) (wife did little during tax year due to birth of child).

[24] Canfield v. Comm'r., 168 F. 2d 907 (6th Cir. 1948); Appel v. Smith, 161 F. 2d 121 (7th Cir. 1947).

[25] Economos v. Comm'r., 167 F. 2d 165 (4th Cir. 1948).

[26] *E.g.*, Jerry Maiatico, 12 T. C. 146 (1949).

[27] Wilson v. Comm'r., 161 F. 2d 661 (7th Cir. 1947); Dewey F. Cobb, 5 CCH 1949 FED. TAX REP. §7613 (T. C. 1949).

[28] Validity upheld: Emanuel Greenwald, 5 CCH 1948 FED. TAX REP. §7428(M) (T. C. 1948) (Even though the agreement provided that the taxpayer should have exclusive control, in actuality the son did large part of buying and selling.); Hewett Grocery Co., 5 CCH 1949 FED. TAX REP. §7264(M) (T. C. 1949). Validity denied: Delong v. Allen, 5 CCH 1948 FED. TAX REP. §9326 (M. D. Ga. 1948) (taxpayer controlled personnel, handled purchasing, borrowed money, disposed of assets—without the consent of the others).

[29] Fletcher v. Comm'r., 164 F. 2d 182 (2d Cir. 1947).

[30] Davis v. United States, 5 CCH 1949 FED. TAX REP. §9349 (6th Cir. 1949) (agreement: "absolute, unquestioned right at any time he [taxpayer] may desire, to purchase the one-tenth interest").

[31] Weizer v. Comm'r., 165 F. 2d 722 (6th Cir. 1948); Walsh v. Shaughnessy, 77 F. Supp. 577 (N. D. N. Y. 1948).

fest an intent to form a partnership.[32] The written agreement, however, may be unfortunate if it includes statements which the Tax Court can seize upon as indicative of a "mere paper reallocation." Also, the court may conceivably look upon the technical intricacies of the articles of agreement as form without substance skillfully drawn to give appearance of reality when the draftsman's purpose is tax avoidance.

Business motive may be further manifested by: (1) proper notification of the existence of the partnership to or recognition by parties doing business with the firm or inclusion of the family member in the trade name, tested by the query: was it known to the world as a partnership?; (2) improvement of credit standing by inclusion of family member's personal liability—absent original contribution of capital;[33] (3) interest in perpetuating the business in the family by training the partner someday to assume full control; (4) interest in securing fuller cooperation in the present operation of the business by giving family member responsibility of partnership standing; (5) request by family member to be made a partner, or demand by other partner or business associate outside of the family;[34] (6) reasonable proportion between share of earnings and the income producing value of the contribution made to the firm;[35] and (7) consistency in treatment of all phases of the purported partnership in regard to the family arrangement.

What is the effect of a tax avoidance motive? The answer is one of uncertainty since the language used by the courts often seems inconsistent with the results reached. Clearly, evidence of a tax avoidance motive has often been the elusive straw that broke the partnership's back. This result may be rationalized by saying that it operates in a negative fashion, militating against bona fide intent to do business in the partnership form; though it may be that freedom from the tax avoidance motive should baldly be listed among the requirements of tax validity. Courts still pay lip service to the principle that the taxpayer may reduce his tax burden by any legal means,[36] but the Tax Court seldom foregoes an opportunity to "pierce the shroud" and lay

[32] Singletary v. Comm'r., 155 F. 2d 207 (5th Cir. 1946); Alexander Jarvis, 5 CCH 1946 FED. TAX REP. §7519(M) (T. C. 1946).

[33] Hartz v. Comm'r., 170 F. 2d 313 (8th Cir. 1948).

[34] Culbertson v. Comm'r., 69 Sup. Ct. 1210 (1949).

[35] A unique development is the reallocation by the Tax Court, in disregard of the express provisions of the articles of partnership, of the income according to the relative income producing value of the partner's contribution. Robinson, *The Allocation Theory in Family Partnership Cases*, 25 TAXES 963 (1947). But in view of the rejection of this judicial contract-writing by the circuit courts in Canfield v. Comm'r., 168 F. 2d 907 (6th Cir. 1948), and Woosley v. Comm'r., 168 F. 2d 330 (6th Cir. 1948), the process of reallocation may have been abated. In addition, the court has recognized certain participants in the agreement and not others, selecting those around whom the halo of bona fide intent glows most brightly. W. F. Harmon, 5 CCH 1949 FED. TAX REP. §7596 (T. C. 1949); R. C. Hitchcock, 12 T. C. 22 (1949).

[36] Gregory v. Helvering, 293 U.S. 465, 469 (1935).

bare an attempt to escape the tax burden.[37] It is submitted that the distinction should be more clearly delineated between tax avoidance as a primary or sole aim, which may negate business purpose, and tax avoidance as a concomitant or secondary result, which is not relevant to Tax Court findings.[38]

It has often been stated that validity of the partnership under state law has no bearing on tax recognition. The effect, however, of validity under commercial rules on tax determination could quite conceivably be changing. It is arguable that, since under a partnership recognized by the local law, the separate property of the family member in the event of insolvency is liable for the satisfaction of partnership debts;[39] and since the member is entitled to his portion of the assets in event of dissolution,[40] there are present the necessary elements of reality, business purpose, and change in domination which are demanded.[41] Mr. Justice Frankfurter in *Culbertson* asserts that *Tower* "did not purport to announce a special concept of 'partnership' for tax purposes differing from the concept that rules in ordinary commercial law cases."[42]

Treatment of the problem by the courts since *Culbertson* is significant. Although many questions are left unanswered, several clear indications are discernible.

1. By and large the courts have accepted the change in emphasis, required by the Supreme Court, from exclusive determinative tests to a consideration of all factors revealing intent.[43]

2. If capital contribution is relied upon, it need not be original with the family member; effect is given though the source is a prior irrevocable gift from the taxpayer.[44]

3. Although the result does not necessarily follow, in practical effect a partnership which would have been valid before *Culbertson* will likely be valid now.

4. Absent other factors, an outright gift of an interest is still ineffective.[45]

[37] *E.g.*, Grayson v. Deal, 5 CCH 1949 FED. TAX REP. §9408 (N. D. Ala. 1949).

[38] It is logically arguable, however, that a real partnership may be intended and formed though the sole motivation is tax avoidance, since the reality of the product is more the issue than the mental attitude which originally led the taxpayer to put the machinery into operation.

[39] UNIFORM PARTNERSHIP ACT, §15 (unless the liability is limited).

[40] UNIFORM PARTNERSHIP ACT, §38.

[41] Note, 46 COL. L. REV. 677 (1946).

[42] Culbertson v. Comm'r., 69 Sup. Ct. 1210, 1218 (1949).

[43] *But cf.* W. S. Barrett, 5 CCH 1949 FED. TAX REP. §7631 (T. C. 1949).

[44] Edw. A. Theurkauf, 5 CCH 1949 FED. TAX REP. §7626 (T. C. 1949) (probably the high water mark of Tax Court liberality—gift of stock to wife; within one month she contributed proceeds to newly formed partnership); Greenberger v. Comm'r., 5 CCH 1949 FED. TAX REP. §9454 (7th Cir. 1949); Atkins v. United States, 5 CCH 1949 FED. TAX REP. §9407 (W. D. La. 1949); Joseph Middlebrook, 5 CCH 1949 FED. TAX REP. §7597 (T. C. 1949). *But cf.* Lowry v. Comm'r., 154 F. 2d 448 (6th Cir. 1946) (pre-*Culbertson*).

[45] Rocco J. Cardone, 5 CCH 1949 FED. TAX REP. §7584(M) (T. C. 1949). *But cf.* Ginsburg v. Arnold, 5 CCH 1949 FED. TAX REP. §9396 (5th Cir. 1949).

5. Evidence of tax avoidance motive may still be fatal.[46]

6. Generally the courts have caught the spirit of *Culbertson* remarkably well. Although numerical weight settles nothing, it may be noted that the majority of decisions since *Culbertson* have been favorable to the taxpayer; decidedly the opposite was true previously.

Two cases which seem to prescribe typically the limits under *Culbertson* deserve special notice. The court in *Morrison v. Commissioner*[47] denied validity where, though the formalities of agreement were indulged in, the taxpayer retained domination over the business, providing no separation of earnings nor power of ostensible partners to draw checks on the account. In *Ginsberg v. Arnold*[48] the interest of the son was a direct gift; the father exercised control over the writing of checks; the son was in the Army during the tax years. Yet on rehearing the circuit court found an intent to create a partnership for the benefit of the business.

In order to encourage this socially desirable method of perpetuating the family business; in order to reduce the inequality in the effect given intra-family transfers within corporations and in partnerships;[49] in order to recognize the very real consequences of a genuine commercial partnership, perhaps parent-child partnership will be viewed more favorably by the courts under the impetus of the *Culbertson* case.[50]

HUBERT B. HUMPHREY, JR.

Torts—Unborn Child—Right of Action for Prenatal Injury

A search through the North Carolina Digest, Reports, and Annotated General Statutes has disclosed no North Carolina case in which an action has been brought by or on behalf of a child for prenatal injuries. A probable reason for this situation is that, by the decided preponderance of case authority, no right of action has been recognized for

[46] Grayson v. Deal, 5 CCH 1949 FED. TAX REP. §9408 (N. D. Ala. 1949).

[47] 5 CCH 1949 FED. TAX REP. §9436 (2d Cir. 1949).

[48] 5 CCH 1949 FED. TAX REP. §9396 (5th Cir. 1949), *vacating on rehearing* 5 CCH 1949 FED. TAX REP. §9381 (5th Cir.); *accord:* O. H. Delchamps, 5 CCH 1949 FED. TAX REP. §7560 (T. C. 1949). *But cf.* Lusthaus v. Comm'r., 327 U.S. 293 (1946).

[49] There is evidence, however, of the beginnings of a movement to reduce the transfer rights within a corporation to the partnership level. See Alexandre, *The Corporate Counterpart of the Family Partnership,* 2 TAX L. REV. 493 (1947).

[50] Congressional action has been suggested to tax the income of parents and minor children as a unit or to deal with the family partnership problem as a whole. See Wales, *The 1949 Relevance of the Revenue Bill of 1948,* 62 HARV. L. REV. 957, 972-74 (1949).

physical disability[1] or wrongful death[2] of a child for injuries received before birth. Legal writers, however, who have discussed the problem have been almost unanimously in favor of recognizing such a right of action.[3] The purpose of this note is to summarize briefly the law on this subject in the light of recent decisions, and to consider the possible effect of these decisions on the law of North Carolina.

The Supreme Court of Ohio has recently held that a viable[4] child which is injured while *en ventre sa mere* and which survives the injury has an action for personal disability suffered by reason of the negligence of another.[5] The Supreme Court of Minnesota, in a decision handed down two days later, held that the personal representative of an unborn viable child whose death is alleged to have been caused by the wrongful acts or omissions of the physician in charge of the mother and of the hospital in which she was confined may maintain an action therefor, under the wrongful death statute[6] of that state, on behalf of the next of kin of such deceased child.[7]

Two reasons are usually advanced by those courts which refuse to allow recovery by the child. First, there is no person in existence at the time of the injury to whom the defendant owes a duty of care.[8] Second, there seems to be a widespread fear of fraudulent suits because of the difficulty of proof of any causal connection between the tortious act and the resulting damage.[9]

[1] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Smith v. Luckhardt, 299 Ill. App. 100, 19 N. E. 2d 446 (1939); Stemmer v. Kline, 128 N. J. L. 455, 26 A 2d 489 (1942); Ryan v. Public Service Coordinated Transport, 18 N. J. Misc. 429, 14 A. 2d 52 (1940); Drobner v. Peters, 232 N. Y. 220, 133 N. E. 567 (1921); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A. 2d 28 (1940); Lewis v. Steve's Sash & Door Co., 177 S. W. 2d 350 (Tex. Civ. App. 1944); Lipps v. Milwaukee Elec. Ry. & Light Co., 164 Wis. 272, 159 N. W. 916 (1916).

[2] Stanford v. St. Louis & S. F. Ry., 214 Ala. 611, 108 So. 566 (1926); Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. St. Rep. 242 (1884); Newman v. Detroit, 281 Mich. 60, 274 N. W. 710 (1937); Buel v. United Ry., 248 Mo. 126, 154 S. W. 71 (1913); Gorman v. Budlong, 23 R. I. 169, 49 Atl. 704 (1901); Magnolia Coca-Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S. W. 2d 944 (1935).

[3] Albertsworth, *Recognition of New Interests in the Law of Torts*, 10 CALIF. L. REV. 461 (1922); Anderson, *Rights of Action of an Unborn Child*, 14 TENN. L. REV. 151 (1936); Frey, *Injuries to Infants En Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85 (1927); Kerr, *Action by Unborn Infant*, 61 CENT. L. J. 364 (1905); Morris, *Injuries to Infants En Ventre Sa Mere*, 58 CENT. L. J. 143 (1904); Straub, *Right of Action for Prenatal Injuries*, 33 LAW NOTES 205 (1930); Notes, 28 CALIF. L. REV. 107 (1939), 6 CORN. L. Q. 341 (1921), 34 HARV. L. REV. 549 (1921), 36 MICH. L. REV. 512 (1938), 20 MINN. L. REV. 321 (1936), [1949] U. OF ILL. LAW FORUM 537, 44 YALE L. J. 1468 (1935).

[4] "Capable of living; physically fitted to live; of a fetus, having reached such a stage of development as to permit continued existence, under normal conditions, outside of the womb." THE NEW CENTUURY DICTIONARY, Vol. II, p. 2143 (1938).

[5] Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N. E. 2d 334 (1949).

[6] MINN. STAT. §573.02 (1945).

[7] Verkennes v. Corniea, 38 N. W. 2d 838 (Minn. 1949).

[8] Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900).

[9] "And it is easy to see on what a boundless sea of speculation in evidence this new idea would launch us." Walker v. Great Northern Ry., 28 L. R. Ir. 69 (1891).

An examination of the first reason indicates that it is not well founded from the standpoint of medical science, especially if a distinction is made between a nonviable child and a viable child. A viable child is more than just a "part" of the mother. It has its own bodily form and members, manifests all the anatomical characteristics of individuality, possesses its own circulatory, vascular and excretory systems, and is at the time of the injury capable of being ushered into the visible world.[10] From the legal standpoint, other fields of law have long recognized the rights of an unborn infant. The criminal law regards it as a separate entity.[11] A posthumous child has been allowed to participate in the recovery for the wrongful death of its father,[12] and in the law of property it is considered *in esse* for all purposes beneficial to it.[13] If an unborn child is, in contemplation of law, considered a human being for these purposes, consistency would seem to require that it be considered a human being for the more important purpose of redressing wrongs committed against it.

Turning to the second reason advanced, difficulty of medical proof in cases of this nature must be recognized. Pathologists readily admit that it is impossible in many instances for medical science to establish with any degree of certainty the causal connection between prenatal injury and subsequent physical disability or death. However, at least in some cases, this connection can be definitely established.[14] It is elementary that if a wrong has been committed, there should be a remedy. A high standard of medical proof would preclude any justifiable fear of fraudulent suits, and at the same time permit recovery in those cases where a causal connection can be shown with reasonable certainty.

It would seem then that the Supreme Courts of Ohio and Minnesota have adopted the better view. They have definitely followed the modern trend.[15] The cases in both courts were decided on demurrer and uphold a right of action in the unborn child for prenatal injuries. The opinions of both cases indicate that the courts were concerned primarily with the

[10] Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946).

[11] Clarke v. State, 117 Ala. 1, 23 So. 671 (1898); State v. Walters, 199 Wis. 68, 225 N. W. 167 (1929).

[12] Herndon v. St. Louis & S. F. Ry., 37 Okla. 256, 128 Pac. 727 (1912).

[13] Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905); Biggs v. McCarty, 86 Ind. 352, 44 Am. Rep. 320 (1882). For discussions of the rights of the unborn child in various fields of law, see Notes, 28 CALIF. L. REV. 107 (1939), [1949] U. OF ILL. LAW FORUM 537, 44 YALE L. J. 1468 (1935).

[14] Rex. v. Senior, 168 Eng. Rep. 1298 (1832); GLAISTER, MEDICAL JURISPRUDENCE & TOXICOLOGY 320 (7th ed. 1942); MALOY, LEGAL ANATOMY & SURGERY 685 (1930); Winfield, *The Unborn Child*, 4 U. OF TORONTO L. J. 278, 293 (1942).

[15] Bonbrest v. Kotz, 65 F. Supp. 138 (D. D. C. 1946); Montreal Tramways v. Leveille, 4 D. L. R. 337 (1933); *See* Allaire v. St. Luke's Hospital, 184 Ill. 359, 368, 56 N. E. 638, 640 (1900); Stemmer v. Kline, 19 N. J. Misc. 15, 17 A. 2d 58 (1940) (allowing recovery), reversed, 128 N. J. L. 455, 26 A. 2d 489 (1942) (9-6 decision).

legal rights involved and that neither the fear of fraudulent suits nor the difficulty of medical proof has influenced these decisions.

The Ohio Court found that an unborn infant is a person within the meaning of Section 16 of Article I of the Ohio Constitution, which requires that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Once this conclusion is reached, there is no need for legislative action to confer on the child a right to sue in tort for prenatal injuries. The North Carolina Constitution has precisely the same provision as that relied on by the Supreme Court of Ohio.[16]

The Minnesota Court recognizes that an unborn viable child is a person by allowing the personal representative of such child to sue under the Minnesota wrongful death statute. That statute provides in part: "When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, for an injury caused by the same act or omission." The Court expresses the view that "it seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises under the statutes cited." The North Carolina wrongful death statute is very similar in its terms to that of Minnesota.[17]

The unborn child is far from a nonentity in North Carolina. The abortion statute[18] was designed to protect the child *en ventre sa mere.* In property law it may take by deed[19] or by descent.[20] A trustee must be appointed to protect the interest of the child *in esse* in the sale of a remainder.[21] The Supreme Court of North Carolina has recognized that an unborn infant may be regarded as having a separate existence. Mr. Justice Winborne states, "The question then arises as to how far the pregnancy should be advanced before the child is capable of being destroyed. The general rule is that the child with which the woman is pregnant must be so far advanced as to be regarded in law as having a separate existence—a life capable of being destroyed."[22]

It is to be noted that the Ohio case decides only that an unborn child

[16] N. C. CONST. Art. I, §35.

[17] N. C. GEN. STAT. §28-173 (1943).

[18] N. C. GEN. STAT. §14-44 (1943); State v. Jordon, 227 N. C. 579, 42 S. E. 2d 674 (1947).

[19] N. C. GEN. STAT. §41-5 (1943); Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905); Heath v. Heath, 114 N. C. 547, 19 S. E. 155 (1894).

[20] Deal v. Sexton, 144 N. C. 157, 56 S. E. 691 (1907).

[21] N. C. GEN. STAT. §41-11 (1943); Butler v. Winston, 223 N. C. 421, 27 S. E. 2d 124 (1943); McAfee v. Green, 143 N. C. 411, 55 S. E. 828 (1906).

[22] State v. Forte, 222 N. C. 537, 538, 23 S. E. 2d 842, 843 (1943) quoting with approval Foster v. State, 182 Wis. 298, 196 N. W. 233 (1923) to the effect that "it is obvious that no death of a child can be produced where there is no living child."

may recover for injuries to it if it was capable of living at the time of the injury and has demonstrated its capacity to survive by surviving. The Minnesota case goes further in allowing an action for the wrongful death of the child. Talks with pathologists have indicated that proof that the injury caused the death of the child would be no more difficult than proof that the injury caused subsequent physical damage. In the latter case, the additional problem arises of determining whether or not the child was viable at the time of the injury; that is, was the child capable of surviving outside the womb so as to bring it within the definition of a person? That problem is not insurmountable, and consistent judicial reasoning would seem to require that there be a right of action for the wrongful death of the child as well as for physical disability.

Medical proof, or the absence of medical proof, must eventually determine whether or not there can be a recovery for physical disability or wrongful death from prenatal injuries. In spite of the fact that on many occasions a causal connection undoubtedly will be impossible definitely to establish, it is submitted that an unborn child which has reached the viable stage in the pregnancy period is more than just a part of the mother but has a separate existence, and that it should not be denied the right to go into the Courts of North Carolina or of any other jurisdiction to claim redress for personal injuries inflicted on it before birth.

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