UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 29 | Number 1 Article 8

12-1-1950

Notes and Comments

North Carolina Law Review

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Contracts—Distinction Between Offer and Preliminary Negotiation

For a proposal to be turned into a binding contract by an acceptance, it must, as a general rule, be made in contemplation of legal consequences. When made with these intentions, it is a good offer; otherwise it becomes what is commonly called a preliminary negotiation. The difficulty of drawing an exact line between these two is recognized by the authorities everywhere.[1] In deciding if legal consequences were contemplated, the courts seek to determine whether the party making the proposal intended to create a contract upon acceptance of the proposal or intended merely to negotiate for one.[2] Fact situations, from which offer-preliminary negotiations difficulties may arise, include those based on (1) invitations to deal, (2) advertising circulars, (3) estimates, (4) oral agreement on terms to be reduced to writing, and (5) agreements with one or more terms left open. In a recent federal case,[3] the court was confronted with this type of problem.

There, the plaintiff expressed an interest in purchasing coal from the defendant for the 1947-48 burning season. The defendant quoted his coal prices, but refused to sign his name on a memorandum on which plaintiff had written these prices, until the word "quotation" was written across the top. Defendant increased price on second shipment. On plaintiff's refusal to pay the increase the defendant stopped shipments and this suit for breach of contract ensued. In holding the defendant's quotations were not an offer, but rather an invitation to make an offer, the court took note of several factors. Among these was the fact that plaintiff had knowledge of the custom and practice of the industry as to contracts of this nature[4] and the pendency of the wage agreement and

[1] "Frequently negotiations for a contract are begun between parties by general expression of willingness to enter into a bargain upon stated terms and yet the natural construction of the words and conduct of the parties is rather that they are inviting offers or suggesting the terms of a possible future bargain, than making positive offers. . . . Language that at first sight may seem an offer may be found merely preliminary in its character." 1 WILLISTON, CONTRACTS §27 (Rev. ed. 1936).

[2] El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N. W. 642 (1920); *In re* Kaufmann's Estate, 137 Pa. Super. 88, 8 A. 2d 472 (1939); Windsor Mfg. Co. v. Makransky & Sons, 322 Pa. 466, 186 Atl. 84 (1936).

[3] Cohen v. Johnson, 91 F. Supp. 231 (M. D. Pa. 1950).

[4] The court found ". . . that the general custom in the anthracite industry was not to enter into contracts for the sale of coal, wholesale, over any long period of time. . . . When price quotations are made it is not considered in the industry as an offer or sale, but as an invitation to the trade to submit orders—offers to buy—which may or may not be accepted." Cohen v. Johnson, 91 F. Supp. 231, 233 (M. D. Pa. 1950).

consequent price increase.[5]

As a general rule, a price quotation, whether in the form of an advertising circular or an invitation to deal, is not an offer. The famous case of *Nebraska Seed Company v. Harsh*[6] clearly sustains this point. However, under some circumstances it may be an offer, particularly is this true where, in answer to a definite request for an offer, a price quotation is sent that accurately describes the property and states definite contractual terms.[7] North Carolina agrees with the above rules,[8] with the possible exception of one case,[9] which is explainable on its facts. In that case, the defendant sent the following telegram: "Can offer you extra force at $65 per month. Will want you at once to ditch D. & N. road and R. & G. Answer quick. Job will last all the year." Plaintiff was discharged eleven days after starting to work. When sued for breach of contract, the defendant contended that the telegram did not constitute an offer, but was a preliminary negotiation and that if a contract existed it should be construed subject to the rules of the company.[10] The jury found for the plaintiff and on appeal, while affirming, the court explained the terminology of the telegram by saying—"The argument . . . that by using the potential 'can offer,' Elmore (defendant's agent) did not make a positive offer of employment, but only intended to open negotiations, is entirely destroyed by the undisputed evidence that the plaintiff accepted the offer by wire, reported for duty and was placed in charge of the work and prosecuted it for eleven days until discharged." While the result in this case is sound, the court's interpretation of the telegram seems wrong. It would appear that the telegram from the defendant's agent was not an offer. The telegram merely informed plaintiff that a certain job for a definite length of time and at

[5] "For sometime prior and subsequent to July 1, 1947, the anthracite coal operators and miners were negotiating a wage contract. It was generally known in the industry that the adjustment would be upward and the wage increase would be immediately absorbed and reflected in the price per ton of anthracite coal." Cohen v. Johnson, 91 F. Supp. 231, 233 (M. D. Pa. 1950).

[6] 98 Neb. 89, 152 N. W. 310 (1915) (quotation of seed price not an offer).

[7] Maedler Steel Products Co. v. Zanello, 109 Ore. 562, 220 Pac. 155 (1923); 1 WILLISTON, CONTRACTS §27 (Rev. ed. 1936).

[8] Clark Manufacturing Co. v. Western Union Telegraph Co., 152 N. C. 157, 67 S. E. 329 (1910) ("Will you accept receivership. . . ?" Held: inquiry as to whether he would take job or not); Cherokee Tanning Co. v. Western Union Telegraph Co., 143 N. C. 376, 55 S. E. 777 (1906) (A to B: "Kindly advise . . . by wire . . . if you can use about 1500 creosote barrels . . . at 95 cents each. . . ." Held: no contract as there was no offer, stating an . . . offer must be distinct as such and not merely an invitation to enter into negotiations upon certain basis . . .); Walser v. Western Union Telegraph Co., 114 N. C. 440, 19 S. E. 366 (1894) ("Will you accept eight one-half all two-fifty drills if we can get offer. . . ?" Held: trade inquiry).

[9] King v. Seaboard Air Line R. R., 140 N. C. 433, 53 S. E. 37 (1906).

[10] The company offered proof that it was their policy not to hire any person for a long period of time, but rather to hire on a month-to-month basis. Plaintiff knew of this policy, but contended and the jury agreed, that this was a special contract not subject to the general rules.

a stated pay was open with the defendant, but on the surface seemed to lack that expression of willingness on defendant's part necessary to make an offer. Plaintiff by appearing for work made the offer, and defendant by putting him to work, accepted the offer creating a contract containing the terms set forth in the telegram, they being the only ones mentioned. By its holding in this case the court sustained its previous rulings that it is the manifested intent that controls, rather than the language used.

Similarly, when a party receives an estimate, he, by the majority rule, cannot by "accepting" the estimate make a binding contract. The word "estimate" is usually construed to mean "more or less"[11] and unless the party makes his estimate in the form of a bid for the work, he has not made an offer which can be accepted. No North Carolina authority on this point has been discovered. However it would seem that our court, in view of its position when confronted with analogous situations,[12] would follow the majority view.

The problem of distinguishing between an offer and a preliminary negotiation presents itself in a somewhat different manner when the person making the proposal *suggests*, before a binding transaction is entered into, that the parol agreement be reduced to writing later. The courts are then called upon to determine if this suggestion makes an otherwise good offer a contract upon acceptance, or makes the complete transaction a preliminary negotiation. When faced with this question, most courts have held that where the material terms[13] of the proposal have been definitely understood and accepted, the subsequent failure to embody such terms in a written contract does not prevent the agreement from being binding on the parties.[14] This is particularly true where a draft is viewed by the parties as merely a convenient memorial or record of their previous contract. However, if a draft be viewed as the final act of their negotiations, there is no contract until its execution. The courts in endeavoring to find which attitude is present in any particular case, should consider numerous factors among which are (1) whether the contract is of that class which is usually found in writing, (2) whether it is of such nature as to need a formal writing for its full expression, (3) whether it has few or many details, (4) whether the amount is large or small, (5) whether it is a common or unusual contract and (6) whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations.

[11] Robbins v. Hill, 259 S. W. 1112 (Tex. Civ. App. 1924).
[12] See note 8 *supra*.
[13] It is beyond the scope of this note to discuss what terms are or are not material to constitute a good offer.
[14] Atlantic Terra Cotta Co. v. Chesapeake Terra Cotta Co., 96 Conn. 88, 113 Atl. 156 (1921); Priest v. Oehler, 328 Mo. 590, 41 S. W. 2d 783 (1931).

The North Carolina court has taken these factors into consideration in several cases.[15]

On the other hand, if a party in the course of his negotiations has omitted or has failed to get an agreement on all the material terms of his proposal, then a contractual relationship cannot come into being.[16] As a general rule, where some material term is left open to be decided upon later, there is no contract.[17] Yet, the existence of an election, to be exercised within prescribed limits by one of the parties, in regard to a term of the offer does not vitiate it for uncertainty.[18] The North Carolina court in agreeing with this rule in *Elks v. North State Insurance Co.*[19] said, "The offer must not merely be complete in terms, but the terms must be sufficiently definite to enable the court to determine ultimately whether the contract has been performed or not."

From these cases and those of other jurisdictions, it appears that in order for the courts to distinguish between an offer and a preliminary negotiation they must be able to answer these questions: first, has the party making the proposal sufficiently named all the material terms needed in the contract; second, has he put his proposal in a form showing no mental hesitation or reservation on his part. In seeking to answer these questions and thereby ultimately arrive at the true intentions of the parties, it is fundamental that the court put itself, as nearly as possible, in the same position the parties were in at the time of their negotiations. To do this will require a complete and thorough understanding of (1) the subject matter of the contract, (2) the contemplated acts of the parties, (3) the relationship between the parties, (4) the general custom and practice of the trade and (5) the circumstances under which the parties were then acting.

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[15] Wilkin v. Vass Cotton Mills, 176 N. C. 72, 97 S. E. 151 (1918) (contract to buy cotton goods held good, the court finding that the negotiations of the parties indicated they expected to be bound before reducing terms to writing); Billings v. Wilby, 175 N. C. 571, 96 S. E. 50 (1918) (contract to put in sewer line held good without being put in formal draft, this being the usual contract made for this type work); Gooding v. Moore, 150 N. C. 195, 63 S. E. 895 (1909) (negotiations showed that parties intended contract should arise immediately, the court stating, "When the parties to an oral contract contemplate a subsequent reduction of it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding upon them, though the intent to formally express the agreement in writing was never effectuated."); Teal v. Templeton, 149 N. C. 32, 62 S. E. 737 (1908) (oral rental contract held good without writing, it being the accepted rule that a lease for three years or less need not be in writing).

[16] United States v. P. J. Carlin Const. Co., 224 Fed. 859 (2d Cir. 1915); Rushing v. Manhattan Life Ins. Co. of N. Y., 224 Fed. 74 (10th Cir. 1915).

[17] Boatright v. Steinite Radio Corp., 46 F. 2d 385 (10th Cir. 1931); A. O. Anderson and Co. v. Texas Co., 279 Fed. 76 (2d Cir. 1922).

[18] McNeely v. Carter, 23 N. C. 141 (1840) (contract to sell cotton under which seller was to set the price by selection of a date and one of three towns, the price at that place to be the selling price).

[19] 159 N. C. 619, 75 S. E. 808 (1912).

Corporations—Stockholder's Action for Declaration of Dividends—Failure to Join Directors

One of the problems facing a stockholder wishing to bring a suit for the declaration of dividends has been to find a forum in which the suit could be brought. In the past such a suit required that a majority of the directors be made parties defendant.[1] With the advent of huge corporations this became an almost impossible task, since it was likely that the board of directors would be made up of men from various states. It has been suggested that suits prosecuted against the directors in their various jurisdictions, holding all of the judgments in abeyance until the final judgment was secured, would produce the desired results.[2] The multiplicity of suits involved, however, makes this plan undesirable. The only alternative, waiting until all of the directors are assembled within one jurisdiction, and then obtaining service of process before they escape, is too uncertain to be practicable.

In *Kroese v. General Steel Castings Corp.*,[3] a solution was laid down which is simple and shows the modern bench's ability to provide a method whereby the ends of justice may be served. Action was brought by the plaintiff, a minority stockholder and a resident of New York, to compel the declaration and payment of accumulated dividends on preferred stock. The federal court decided the case on Delaware law as it would be interpreted by a Pennsylvania court.[4] When the suit was first instituted against the corporation, none of the directors were named as parties defendant; but upon the ruling of the district court that a majority of the board of directors were indispensable parties, three of the twelve members were served. The plaintiff claimed that there was no one state or federal jurisdiction in which a majority could be served. The district court held that the action could go no further without personal jurisdiction over a majority of the directors.[5] It was alleged, and for the purposes of this appeal taken to be true, that 92 per cent of the no-par common shares were held by four large users[6] of the corporation's products. Also outstanding were 100,000 shares of $6.00 cumulative preferred no-par stock. Dividend arrearages on the cumulative preferred no-par stock amounted to $57.75 per share when

[1] BALLENTINE, CORPORATIONS §234 (Rev. ed. 1946); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5326 (Perm. ed. 1932).

[2] Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947); see 61 HARV. L. REV. 1253 (1948).

[3] 179 F. 2d 760 (3rd Cir. 1950), *cert. denied*, 70 Sup. Ct. 1026 (1950); see 98 U. OF PA. L. REV. 753 (1950).

[4] The corporation, with its principal place of business in Pennsylvania, was incorporated under the laws of Delaware.

[5] Kroese v. General Steel Castings Corp., 9 F. R. D. 273 (E. D. Pa. 1949).

[6] American Steel Foundries Corporation, 38.33%; Baldwin Locomotive Works, 33.37%; American Locomotive Company, 13.14%; and Pullman Incorporated, 8.54%.

the complaint was filed. The corporation was in excellent financial condition.[7] In holding that the directors were not indispensable parties to the action, the court of appeals stated that a judgment against the corporation compelling the payment of dividends could be enforced by a judgment against the property of the corporation.

An action for the declaration of dividends is of an equitable nature.[8] In general, the courts will not interfere with the discretion of the directors in declaring dividends,[9] but there may be a contractual relationship which will strictly limit this discretion.[10] A corporation, however, is operated for the benefit of the stockholders; when there is an abuse of this discretion (i.e., the directors act in bad faith, through fraudulent motives, or for the benefit of others than the stockholders as a whole) a court of equity will compel the directors to declare a dividend.[11] In the past the action has been thought of, erroneously it seems, as one in personam against the directors for misconduct.[12] The duty co-relative to the stockholder's right rests on the corporation rather than on the directors as individuals. A noted text writer, in pointing out that the action is neither derivative nor for a wrong done to the corporation, states that the right to be enforced is against the corporation.[13] The wrong in failing to declare dividends is that of the corporation, acting as it must, through its board of directors, which serves most nearly in the capacity of principal, and consequently as the alter ego of the corporation.[14]

Is the judgment for a stated sum in the form of "judgment dividends" collectible from the corporation directly as in the case of a creditor? The scant authority seems to be in disagreement. A nega-

[7] On December 31, 1947, the corporation had a net worth of $28,000,105; a capital surplus of $4,133,449; an earned surplus of $13,410,080; net current assets of $12,114,409; and a ratio of current assets to current liabilities of seven to one.

[8] BALLENTINE, CORPORATIONS §234 (Rev. ed. 1946); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5326 (Perm. ed. 1932); 10 ROCKY MOUNTAIN L. REV. 201 (1938).

[9] Crocker v. Waltham Watch Co., 315 Mass. 397, 53 N. E. 2d 230 (1944); BALLENTINE, CORPORATIONS §232 (Rev. ed. 1946); 11 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5325 (Perm. ed. 1932).

[10] New England Trust Co. v. Penobscot Chemical Fiber Co., 50 A. 2d 188 (Me. 1946).

[11] Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919).

[12] Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947); Dodge v. Ford Motor Co., 204 Mich. 459, 170 N. W. 668 (1919); NY PA NJ Utilities Co. v. Public Service Commission, 23 F. Supp. 313 (1938).

[13] BALLENTINE, CORPORATIONS §234 (Rev. ed. 1946) (in same section writer also states that directors should be joined as parties defendant).

[14] See BALLENTINE, CORPORATIONS §42 (Rev. ed. 1946). The courts in analogous situations have held the corporation liable for crimes and torts committed through its agents. Crimes: Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 P. 924 (1904); State v. Salisbury Ice & Fuel Co., 166 N. C. 366, 81 S. E. 689 (1914); State v. The Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58 (1910). Torts: Nims v. Mt. Hermon Boys School, 160 Mass. 177, 35 N. E. 776 (1893); Hairston v. Atlantic Greyhound Corp., 220 N. C. 642, 18 S. E. 2d 166 (1942).

tive answer can be inferred from those cases requiring that directors be joined as parties defendant.[15] The *Kroese* case holds it collectible from the corporation,[16] pointing out, analogously, that when a creditor receives a judgment, some action is required by the board of directors, officers, or agents of the corporation if it is to comply with the judgment. These acts, however, such as passing a resolution for the payment of the debt, entering payment on the corporate books, and the physical tendering of payment, are purely ministerial. Such ministerial acts do not render the judgment more valid. If the ministerial acts are not performed, the judgment creditor can issue an execution, levy the same upon and sell the property of the corporation to the same extent as if it were a natural person.[17] In like respect if the directors failed to perform the proper ministerial acts necessary to declaring dividends, the stockholder could, through equity, sequester the property of the corporation or have a receiver appointed to carry out the judgment of the court.[18] It is not clear from the instant case whether each stockholder could obtain a judgment against the corporation for his share of dividends in the event the directors failed to declare a dividend as a result of the court's judgment. If the directors failed to declare a dividend, the appointment of a receiver would eliminate a multiplicity of suits, and thus best carry out the judgment of the court.

Indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in.[19] The directors are not indispensable parties to an action for a declaration of dividends. They are required to take no formal action whatsoever in compliance with the judgment of the court. The judgment is sufficient to establish the rights of the stockholder to dividends.

One other case, *Schuckman v. Rubenstein*,[20] has been decided on this same point.[21] Only two of the nine members of the board of directors

[15] See Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947); Gesell v. Tomahawk Land Co., 184 Wis. 537, 200 N. W. 550 (1924); NY PA NJ Utilities Co. v. Public Service Commission, 23 F. Supp. 313 (1938).

[16] "The duty of a corporation to pay dividends then and there has been imposed by the judgment of the court. . . . The situation becomes in substance the same as that in which any corporate creditor sues the enterprise in the corporate name to recover from it what it owes him. . . ." Kroese v. General Steel Castings Corp., 179 F. 2d 760, 764 (3rd Cir. 1950).

[17] 10 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §4741 (Perm. ed 1932).

[18] Kroese v. General Steel Castings Corp., 179 F. 2d 760 (3rd Cir. 1950).

[19] American Ins. Co. v. Bradley Mining Co., 57 F. Supp. 545 (N. D. Cal. 1944); MacBryde v. Burnett, 41 F. Supp. 661 (D. Md. 1941); McRanie v. Palmer, 2 F. R. D. 479 (D. Mass. 1942); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES §209 (1929). See FED. R. CIV. P. 19 (b); 3 MOORE, FEDERAL PRACTICE 2150 (2d ed. 1948).

[20] 164 F. 2d 952 (6th Cir. 1947).

[21] Three other cases, while not decided on this same point, raise this question. O'Neall Co. v. O'Neall, 108 Ind. App. 116, 25 N. E. 2d 656 (1940) (action to

were properly before the court. The court held that at least a majority of the board of directors were indispensable parties defendant. By dictum, however, the court indicated that the plaintiff might have a good cause of action against the corporation alone to recover dividends *already declared* without the joining of a majority of the board of directors. This indicates that once the discretion of the directors has been exercised and dividends declared, the courts can then enter a judgment against the corporation for the payment of the declared dividends. Their reasoning is based on the rule that it is within the discretion of the directors to declare dividends; and they must, therefore, be before the court in order that a judgment can be entered compelling them to declare dividends. This fails to consider one of the arguments in the *Kroese* case that the court in declaring dividends in a proper case replaces the discretionary action of the directors with the judgment of the court.

In North Carolina, the situation is somewhat different from that of the principal case because the statute regulating the declaration of dividends[22] requires that a stockholder first apply to the directors for a declaration of dividends, and if refused, an action of mandamus will lie. It must be alleged that such an application was made and refused by the directors before the court will grant relief under the statute.[23]

It is interesting to note that the objections[24] to ordering the declaration of dividends without a majority of the directors present as parties defendant do not arise in North Carolina. The North Carolina court has said in regard to the declaration of dividends that, "By virtue of the statute there is no discretion in the board of directors with respect to the performance of this duty."[25] And yet, in *Southern Mills, Inc. v. Armstrong*,[26] the court reached substantially the same result as those

recover dividends on stock held in one man corporation; held, failure to object in time to lack of directors as parties constituted a waiver). Jones v. Van Heusen Charles Co., 230 App. Div. 694, 240 N. Y. S. 204 (1930) (plaintiff brought stockholder's representative action to compel payment of dividends and for the mismanagement and misconduct of directors; held, the corporation, officers, and directors must be named as defendants). Gesell v. Tomahawk Land Co., 184 Wis. 537, 200 N. W. 550 (1924) (demurrer to complaint was sustained because it did not establish propriety of compelling dividend and on further ground that directors were not made defendants).

[22] N. C. GEN. STAT. §55-115 (1943).

[23] Winstead v. Hearne Bros. & Co., 173 N. C. 606, 92 S. E. 613 (1917).

[24] Schuckman v. Rubenstein, 164 F. 2d 952 (6th Cir. 1947), *cert. denied*, 333 U. S. 875 (1948) (court cannot declare dividend; therefore action is in personam against members of the board); NY PA NJ Utilities Co. v. Public Service Commission, 23 F. Supp. 313 (1938) (suit against directors for misconduct); Gesell v. Tomahawk Land Co., 184 Wis. 537, 200 N. W. 550 (1924) (because declaration of dividends is within good-faith discretion of directors, they are entitled to be heard).

[25] Cannon v. Wiscassett Mills Co., 195 N. C. 119, 123, 141 S. E. 344, 346 (1928).

[26] 223 N. C. 495, 27 S. E. 2d 281 (1943).

cases prior to the principal case. In the *Southern Mills* case, the plaintiff company brought an action for mandamus, mandatory injunction or other appropriate relief, naming the corporation and the three directors as defendants. Service on the two non-resident directors was by publication which was held to be insufficient, and the action was dismissed.

It seems the court could have held that the directors were not necessary parties to the action and that a mandatory injunction could have been granted against the corporation for the declaration of the dividends.[27]

The result of the principal case is commercially sound and conducive of wholesome conduct of corporate affairs. It is unconscionable that the majority stockholders of the voting stock could so choose their directors that a minority stockholder could not bring suit to enforce his rights due to his inability to get personal service of a majority of the widely scattered board of directors. By such a process, the majority stockholders could control the corporation through the directors almost without restriction. This the courts should not allow.[28]

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Criminal Law—Transportation of Alcoholic Beverages

The Turlington Act[1] of 1923 made it unlawful in North Carolina to transport intoxicating liquor in any quantity for beverage purposes.[2] While this act has not been repealed, the Alcoholic Beverage Control Act[3] of 1937 has modified some of its provisions.[4] The basic trans-

[27] Clark v. The Henrietta Mills, 219 N. C. 1, 3, 12 S. E. 2d 682, 683 (1941). The action was, "to have corporate reorganization together with amendments to the charter of defendant, declared invalid as to plaintiff; to protect plaintiff's rights to accrued dividends on preferred stock claimed to be unlawfully invalid or defeated by the reorganization; to compel the payment of such dividends prior to the payment of dividends on reorganization stock; and to restrain defendant from the prior payment of dividends on any stock until dividends on plaintiff's preferred stock are first paid." Injunction was granted to preserve and enforce plaintiff's rights without requiring directors to be joined as defendants, although the question was not raised by the corporation.

[28] Lebold v. Inland Steel Co., 125 F. 2d 369 (7th Cir. 1941), *cert. denied*, 316 U. S. 675 (1942).

[1] The Turlington Act is now N. C. GEN. STAT. §§18-1—18-30 (1943). It was intended to make the North Carolina prohibition law conform substantially with the National Prohibition Act, and in some respects it is more stringent. See State v. Hickey, 198 N. C. 45, 150 S. E. 615 (1929).

[2] N. C. GEN. STAT. §18-2 (1943). "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article. . . ."

[3] N. C. GEN. STAT. §§18-36—18-62 (1943). The A.B.C. Act was intended to establish a uniform system of administration and control of the sale of certain alcoholic beverages in North Carolina. It provides that in counties where an election has been held and a majority of those voting in the election have expressed themselves in favor of the operation of liquor stores, county A.B.C. stores may be established and operated under the supervision of the county A.B.C. Board. For a thorough discussion of the Act see State v. Davis, 214 N. C. 787, 1 S. E. 2d 104 (1939).

[4] See State v. Barnhardt, 230 N. C. 223, 52 S. E. 2d 904 (1949); State v. Wilson, 227 N. C. 43, 40 S. E. 2d 449 (1946).

portation provision of the 1937 Act permits transportation of not more than one gallon of tax-paid liquor from a "wet" county into or through a "dry" county, provided it is not transported for the purpose of sale and the seal or cap of the container has not been broken or opened.[5]

The language of the statute made it uncertain whether the limit of one gallon applied to the sum total which could be conveyed in a vehicle or to the amount of liquor which each person in such a vehicle might convey.[6] This question was before the North Carolina Supreme Court in *State v. Welch*.[7] Defendant and his wife were riding together in defendant's automobile en route from Charlotte to Monroe, North Carolina, with two packages, each containing one gallon of liquor purchased in Charlotte at a county Alcoholic Beverage Control store. While traveling through "dry" Union County they were stopped by two patrolmen who wished to examine defendant's driver's license. One of the patrolmen discovered the two gallons of liquor and arrested defendant for unlawfully transporting intoxicating liquor. Although defendant declared that one package of whisky belonged to his wife and that he had no knowledge that the package contained liquor until it was opened by the patrolman, the jury found him guilty of intentionally transporting intoxicating liquor in excess of one gallon.

The case put directly in issue the meaning of the controversial statutory provision, "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon. . . ."[8] Unanimously affirming the lower court's action, the Supreme Court held that the driver or other person in control of an automobile who knowingly conveys liquor in excess of one gallon, even though it belongs to and is in possession of a passenger, transports such liquor and thereby becomes guilty of illegal transportation. In reaching this conclusion the

[5] "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article to or through another county in North Carolina not coming under the provisions of this article. . . ." N. C. GEN. STAT. §18-49 (1943). See State v. Davis, 214 N. C. 787, 1 S. E. 2d 104 (1939).

[6] Prior to the decision in the instant case the meaning of the statute had been in doubt, some superior court judges adhering to a ruling by the attorney general that the limit was one gallon per car, and others holding that each passenger might own and possess one gallon of liquor without making the driver guilty of illegal transportation. The latter view apparently has been adopted by Virginia, whose transportation laws likewise forbid transportation by any person in excess of one gallon. VA. CODE tit. 4, §72 (1950). No test case seems to have arisen in a court of record in Virginia, but Section 46 of the Virginia Alcoholic Beverage Control Board Regulations provides that intoxicating liquor ". . . may be transported in amounts in excess of one gallon in a vehicle occupied by more than one person, provided that such alcoholic beverages shall have been lawfully acquired and are in the possession of the bona fide owner thereof, and that no person in such vehicle shall have more than one gallon of such alcoholic beverages without a permit from the Virginia Alcoholic Beverage Control Board."

[7] 232 N. C. 77, 59 S. E. 2d 199 (1950).

[8] N. C. GEN. STAT. §18-49 (1943).

court reasoned that since "transport" means to carry about or from one place to another,[9] a person transports liquor not only when he conveys it on his person, but also when he conveys it in a vehicle under his control.[10] Questions of ownership or possession have no bearing on the transportation issue.[11] This argument is based on firm precedent and appears to be legalistically sound.

The decision is of great practical importance if only for the reason that it tends to clarify the confused situation which had existed in connection with the North Carolina transportation law.[12] The extent to which the court's ruling will tend to break up the illegal liquor traffic is a matter of conjecture.[13] The decision is also worthy of attention since our court declared that, although not required by the express terms of the statute, knowledge of the nature of the goods transported is necessary for conviction.

The court amplified its view with respect to the guilty knowledge aspect in the very recent decision of *State v. Elliott*.[14] Defendants, charged with transportation of nontax-paid liquor, pleaded lack of knowledge of the presence of the liquor in their car and offered evidence in support of the plea.[15] Under an instruction that the jury should return a verdict of guilty if they were satisfied that defendants had transported the liquor, defendants were found guilty. In line with its conclusion in *State v. Welch*, the Supreme Court remanded on the

[9] Cunard Steamship Co. v. Mellon, 262 U. S. 100 (1923).

[10] Fitts v. State, 24 Ala. App. 405, 135 So. 654 (1931); Berry v. State, 196 Ind. 258, 148 N. E. 143 (1925); Currie v. State, 102 Tex. Crim. App. 653, 279 S. W. 834 (1925). *See* West v. State, 93 Tex. Crim. App. 370, 371, 248 S. W. 371 (1923).

[11] Green v. Commonwealth, 195 Ky. 698, 243 S. W. 917 (1922) (owner of car permitting whisky therein guilty of transportation, though he did not own whisky or know where it came from); People v. Ninehouse, 227 Mich. 480, 198 N. W. 973 (1924) (taxidriver accepting drink from passenger's bottle held guilty of transportation); Cassius v. State, 110 Tex. Crim. App. 456, 7 S. W. 2d 530 (1928) (owner operating vehicle, knowing it contained liquor, guilty of transportation though he had no pecuniary interest in liquor); Szymanski v. State, 93 Tex. Crim. App. 631, 248 S. W. 380 (1923) (owner operating vehicle, knowing passenger had liquor, guilty of transportation).

[12] This decision clearly limits to one gallon per car the amount which may be transported into or through a "dry" county, but it is not settled whether this ruling applies to transportation into or through a "wet" county.

[13] Interviews with various A.B.C. enforcement officers reveal a wide divergence in opinion as to the effect of the decision on illegal transportation. Most thought the effect would be negligible, in view of the habitual disregard manifested toward the law by liquor peddlers. Nevertheless it seems definite that, given proper law enforcement, the decision at least prevents the bootlegger from raising his transportation "quota" by the simple device of carrying a passenger to claim ownership of each gallon.

[14] 232 N. C. 377, 61 S. E. 2d 93 (1950).

[15] Defendants were in the front seat of the car belonging to one of the defendants, one Riddick being in the back seat, when the sheriff approached and found four gallons of nontax-paid liquor in a bag in the back seat. Defendants testified that they had stopped and picked up Riddick, who was walking along the road with a box under his arm and a bag on his back, and that they knew nothing about the contents of the bag until the sheriff discovered it.

ground that, if the issue of lack of knowledge is raised by the pleadings or evidence, it is error for the court to fail to instruct the jury that defendants would not be guilty unless they had knowledge of the presence of the liquor in the automobile. It should be noted, however, that the court qualified the statements it had made in *State v. Welch* on the guilty knowledge issue by declaring that the state made out a prima facie case of guilty knowledge when it proved that there was more than one gallon of liquor in an automobile in the possession of and operated by the defendant. Thus, if the defendant wishes to avail himself of lack of guilty knowledge as a defense, he incurs the burden of procuring and offering evidence to establish that fact.[16]

TENCH C. COXE, III.

Deeds—Conveyance to the Heirs of a Living Person

By the common law, if an owner of land in fee simple attempted to convey a life estate or an estate in tail, with a remainder to the grantor's heirs, the remainder was void and a reversion was created by operation of law.[1] If, however, the grantor sufficiently indicated that "heirs" meant a class of remaindermen different from his heirs general, the rule had no application.[2] The application of this rule meant that the grantor might subsequently defeat his heirs by conveying the property in question to other persons. The reasons given for the rule were: (1) the maxim that there can be no heirs of a living person,[3] and (2) the reluctance to deprive the grantor's overlord of certain feudal rights which attached only if the property passed by descent.[4] At common law the rule was applied as a strict rule of property,[5] as e.g., the Rule

[16] For a discussion of the wisdom of submitting a case to the jury on the strength of a presumption, see McCormick, *Charges on Presumptions and Burdens of Proof*, 5 N. C. L. REV. 291, 302 (1927). For a recent general discussion of presumptions, see Morgan, *Further Observations on Presumptions*, 16 So. CALIF. L. REV. 245 (1943).

[1] Godolphin v. Abington, 2 Atk. 57, 26 Eng. Reprint 432 (1740); Doctor v. Hughes, 225 N. Y. 305, 122 N. E. 221 (1919); Therrell v. Clanton, 210 N. C. 391, 186 S. E. 483 (1936).

[2] *See* Thompson v. Batts, 168 N. C. 333, 335, 84 S. E. 347, 348 (1915). In Campbell v. Everhart, 139 N. C. 503, 510, 52 S. E. 201, 203 (1905), the court stated, ". . . but it was likewise the rule in regard to a deed that, if anything appeared on its face to indicate that the grantor used the word 'heirs' as *designatio personarum*, or if a preceding estate was created so as to make the limitation to the heirs of the living person a contingent remainder depending for its vesting upon the event of the death of the ancestor before the life estate terminated, the word 'heirs' was construed to mean 'children.'"

[3] Whitley v. Arenson, 219 N. C. 121, 124, 12 S. E. 2d 906, 909 (1941). "'Heir' and 'ancestor' are correlative terms. There can be no heir without an ancestor. Hence, there can be no heirs of the living, *nemo est haeres viventis*. One may be heir apparent or heir presumptive, yet he is not an *heir*, during the life of the ancestor. Consequently, under the strictness of the old law, a limitation to the heirs of a living person was void for want of a grantee."

[4] I SIMES, FUTURE INTERESTS §145 (1936).

[5] *See* Doctor v. Hughes, 225 N. Y. 305, 306, 122 N. E. 221 (1919).

in *Shelley's* case; but the precise nature of the rule in this country is uncertain.[6] The common law rule has been recognized in North Carolina and has been applied as a positive rule of property.[7]

In a recent North Carolina case[8] the grantor, after reserving a life estate, conveyed to her son for life, and at his death to his issue surviving, with the further limitation that if he die without issue, then to the living heirs of the grantor. The court did not invoke the common law rule; instead, they applied N. C. GEN. STAT. §41-6 which reads: "A limitation by deed, will or other writing to the heirs of a living person, shall be construed to be the children of such person, unless a contrary intention appear by the deed or will." The court decided that there was a contingent remainder in the children of the grantor.

It seems to be well settled that the statute is not applicable where there is a precedent estate conveyed to the living person.[9] The primary reason for establishing such a restriction to the application of the statute was to preserve the Rule in *Shelley's* case.[10] Absent this situation, however, the statute is generally applicable, regardless of whether the limitation is to the heirs of the grantor[11] or to the heirs of a third person.[12] The argument of counsel in the principal case that a life estate reserved was comparable to a precedent estate conveyed was not sustained, indicating an emphasis on the *precedent estate conveyed.*

The statute also is inapplicable if the grantor expresses in the instrument an intention that the word "heirs" is used in a sense contrary to that of "children." However, great difficulty may be encountered in trying to determine the grantor's true intention. In *Therrell v. Clan-*

[6] I SIMES, FUTURE INTERESTS §147 (1936).

[7] Therrell v. Clanton, 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59 (1936).

[8] Ellis v. Barnes, 231 N. C. 543, 57 S. E. 2d 772 (1950).

[9] Bank v. Snow, 221 N. C. 14, 18 S. E. 2d 711 (1942); Whitley v. Arenson, 219 N. C. 121, 12 S. E. 2d 906 (1941); Jones v. Ragsdale, 141 N. C. 200, 53 S. E. 842 (1906); Marsh v. Griffin, 136 N. C. 333, 48 S. E. 735 (1904).

[10] Starnes v. Hill, 112 N. C. 1, 16 S. E. 1011 (1893) (court held that the statute did not alter or abolish the Rule in Shelley's case). In Marsh v. Griffin, 136 N. C. 333, 334, 48 S. E. 735 (1904), the court says the statute applies ". . . only when there is no precedent estate conveyed to said living person, else it would not only repeal the Rule in Shelley's case, but would pervert every conveyance to 'A and his heirs' into something entirely different from what those words have always been understood to mean." However, consider the case where the conveyance is to A for life, then in trust to the heirs of A. Under the rule set forth by the court the statute is inapplicable; yet the Rule in Shelley's case is also inapplicable.

[11] Thompson v. Batts, 168 N. C. 333, 84 S. E. 347 (1915). The grantor, in contemplation of his second marriage executed a deed to his intended wife conveying to her for life, remainder to her issue of such marriage, and on failure of such issue to revert to the heirs of the grantor; held, N. C. GEN. STAT. §41-6 is applicable and the children of the grantor have a contingent remainder.

[12] Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201 (1905) (conveyance directly to the heirs of a third person, with no intervening estate being conveyed). Smith v. Brison, 90 N. C. 284 (1884) (an intervening estate was conveyed, but the ultimate limitation was to the heirs of a third party).

ton[13] the grantor conveyed to A (only child of grantor, and her husband for their joint lives with remainder to A's children of such marriage; if no such children, then in fee simple to the "right heirs" of the grantor. Instead of the statute, the court applied the common law rule, evidently because it thought the grantor, by using the words "right heirs" in that context, had sufficiently expressed an intention that "heirs" was not to mean "children."[14] By so doing the court defeated the grantor's apparent intent to convey the property to his collateral heirs. Likewise, it seems that the statute would be inapplicable in the case of a direct conveyance to the heirs of a living person who has no children,[15] for the fact that there are no children should be sufficient to indicate that the grantor used the word "heirs" in a sense contrary to that of "children."

The effect of N. C. GEN. STAT. §41-6 seems to be that the presumption arising from the use of the word "heirs" is changed.[16] For, at the common law, where the limitation was simply to the heirs of a living person, nothing else appearing, the presumption was that "heirs" meant "heirs general" thereby creating a reversion in the grantor (if to the heirs of the grantor) or else invalidating the limitation for lack of a grantee (if to the heirs of a third person). Now, by virtue of the statute, a limitation to the "heirs" of a living person, nothing else appearing, is presumed to mean "children." However, both at the common law and under the statute the presumptions are capable of being rebutted by the grantor's expressing a contrary intention in the instrument.

Where the statute, however, is inapplicable either (1) because the living person has no children or (2) because the grantor expresses an intention to the contrary, it is likely, on the basis of *Therrell v. Clanton*, that the court will resort to the common law to reach a solution to the problem. By so doing it seems that the court is applying a rule without a reason, the reason for the rule having vanished.[17] It also appears that the court is defeating the intention of the grantor, for where the grantor expressly conveys an estate, his intention may be inferred to be that the conveyance should be given full effect.[18] The common law

[13] 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59, 61 (1936).

[14] It is possible that the court overlooked N. C. GEN. STAT. §41-6, for it was not mentioned in the decision. However, it seems more probable that the court considered the statute but found it inapplicable, for the reason that if the statute were applied, the conveyance, in effect, would be to A for life, remainder to A's children, and if no children then to A.

[15] If the statute were applied where there was a direct conyevance (no intervening estate being conveyed) to the heirs of a living person who had no children, it seems that the conveyance would be void because it is a class gift, and there are no members of the class in existence at the time the conveyance is to take effect.

[16] *See* Campbell v. Everhart, 139 N. C. 503, 510, 52 S. E. 201, 203 (1905).

[17] I SIMES, FUTURE INTERESTS §147 (1936).

[18] See 4, FOURTH REPORT MADE TO HIS MAJESTY BY THE COMMISSIONERS,

rule was considered so objectionable in England that a statute was passed in 1833 which abolished the rule[19] and permitted the heirs of a living person to take as purchasers. This method of dealing with the rule has also been suggested by the American Law Institute.[20]

An addition to N. C. GEN. STAT. §41-6 permitting the heirs of a living person to take as purchasers where the grantor indicates that "heirs" does not mean "children" would allow the grantor's intention to be carried out and avoid the harshness of the common law rule.

THOMAS M. MOORE.

Federal Courts—Venue—Transfer of Actions Under §1404(a) of New Judicial Code

Section 1404(a)[1] incorporates into the new Judicial Code[2] the doctrine of *forum non conveniens*,[3] but rather than requiring dismissal, permits transfer to a more convenient forum even though the venue of the original forum be proper.[4] The lower federal courts, however, have not agreed in construing and administering the new subsection, and all of the resulting conflicting views have not yet been resolved by the Supreme Court.[5]

(A). One question causing difficulty is whether a plaintiff, the party choosing the forum in the first instance, can invoke §1404(a) to transfer his action to a district where a defendant is not amenable to process. Of the four cases found in which the problem was considered, two federal district courts have denied plaintiffs the use of §1404(a),[6] while

APPOINTED TO ENQUIRE INTO THE LAW OF ENGLAND RESPECTING REAL PROPERTY 74 (1833), reprinted in LEACH, CASES ON FUTURE INTERESTS 3 (2d ed. 1940), Therrell v. Clanton, 210 N. C. 391, 186 S. E. 483 (1936); Note, 15 N. C. L. REV. 59 (1936).

[19] STAT. 3 & 4 WM. IV, c. 106 §3 (1833).

[20] UNIFORM PROPERTY ACT §15. "When any property is limited, in an otherwise effective conveyance inter vivos, in form or in effect, to the heirs or next of kin of the conveyor, which conveyance creates one or more prior interests in favor of a person or persons in existence, such conveyance operates in favor of such heirs or next of kin by purchase and not by descent."

[1] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2] Title 28 U. S. C. (Supp. 1949). Effective September 1, 1948.

[3] For a discussion of this doctrine see Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Barrett, *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

[4] 28 U. S. C. §1404(a), Reviser's Notes at 802-03 (Supp. 1949). This subsection should not be confused with §1406(a) which, in a situation where the original venue is *improper*, gives the court the alternative of dismissing the action or transferring it to a proper venue.

[5] One question, whether §1404(a) applies to actions governed by special venue provisions, appears to have been settled in the affirmative. See Note, 28 N. C. L. REV. 100 (1949).

[6] Bolten v. General Motors Corp., 81 F. Supp. 851 (N. D. Ill. 1949) (personal injury, diversity suit); Barnhart v. J. B. Rogers Producing Co., 86 F. Supp. 595

two district courts have made the subsection available to plaintiffs,[7] one of the latter decisions being recently overturned by a court of appeals.[8]

The courts which permit plaintiff to invoke the subsection construe the "where it might have been brought" clause to mean *where the venue is proper*,[9] without regard to service of process requirements.[10] Support is found by these courts in the following reasoning: (1) the words of the general venue provision, §1391(a),[11] provide that diversity actions may "be *brought* . . . in the judicial district where all plaintiffs or all defendants reside"; (2) the language of the subsection does not distinguish between plaintiffs and defendants;[12] (3) there has long been a need for a device which would permit service of process outside the district of trial.[13] In denying to a plaintiff the use of §1404(a) the Court of Appeals for the Second Circuit,[14] speaking through Judge Learned Hand, reasoned that to construe §1404(a) as permitting a plaintiff to bring a defendant to trial in a district outside the state of the defendant's residence,[15] would be such a revolutionary departure

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(N. D. Ohio 1949) (personal injury, diversity suit), commented on in 63 HARV. L. REV. 708 (1950), 28 TEXAS L. REV. 872 (1950).

[7] Otto v. Hirl, 89 F. Supp. 72 (S. D. Iowa 1950) (personal injury, diversity suit); McCarley v. Foster-Milburn Co., 89 F. Supp. 643 (W. D. N. Y. 1950) (wrongful death, diversity suit, where California plaintiff, unable to effectuate service of process on defendants there, sued them in a federal court in New York where they resided and then moved for transfer under §1404(a) to a district court in California).

[8] Foster-Milburn Co. v. Knight, 181 F. 2d 949 (2d Cir. 1950).

[9] In a proper case the clause would also mean of course, where there is jurisdiction over the subject matter. *See* Tivoli Realty, Inc. v. Paramount Pictures, Inc., 89 F. Supp. 278, 281 (D. Del. 1950). For cases denying transfer to a district in which the action could not have been "brought" in the jurisdictional sense, *cf.* Lucas v. New York Cent. R. R., 88 F. Supp. 536 (S. D. N. Y. 1950) (no diversity in transferee district, the defendant multiple corporation being a citizen there as well as in the state of the transferring district); United States v. 23 Gross Jars of Enca Cream, 86 F. Supp. 824 (N. D. Ohio 1949) (where the subject matter of the libel action under the Federal Drug Act could not be found in the transferee district).

[10] The argument that the word "brought" is synonymous with the word "commenced" in FED. R. CIV. P. 3, which provides that an action is commenced by filing a complaint with the court, seems to prove too much. It would render the clause in question meaningless.

[11] 28 U. S. C. §1391(a) (Supp. 1949).

[12] Compare §1404(a) with the language of the removal statute, §1441(a), ". . . any civil action . . . may be removed by the defendant or defendants, to the district court of the United States. . . ."

[13] See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COL. L. REV. 1, 22 (1945).

[14] Foster-Milburn Co. v. Knight, 181 F. 2d 949 (2d Cir. 1950). The reasoning of the two district courts denying the right to transfer, *viz.* that the plaintiff voluntarily selects his own forum and thereby waives his right to a transfer, is unrealistic, since in these cases the plaintiff has no real freedom of choice.

[15] See 28 U. S. C. §1693 (Supp. 1949) "Except as otherwise provided by Act of Congress, no person shall be arrested in one district for trial in another in any civil action in a district court." And see FED. R. CIV. P. 4(f), which provides that service may be had throughout a state, and beyond state boundaries, "when a statute of the United States so provides." These seem to require an express statutory provision for extending service beyond state boundaries.

from the existing practice that the court should demand that the Congress make plain its desire to effect such an innovation. Besides, it would not be in accord with the doctrine of *forum non conveniens* underlying §1404(a), which doctrine always presupposed at least two forums in which the defendant was amenable to process.[16] But it seems that the same reasons would not apply for requiring a sole *defendant* movant to be amenable to process in the transferee district, where venue was proper, since the defendant in moving to transfer could be said to waive his right to service.[17]

While good policy arguments support the result reached by the courts allowing plaintiffs to invoke §1404(a), nevertheless it is believed that wisdom lies with the Second Circuit in waiting for a clearer expression of intention from the Congress to modify existing procedural law, particularly since the motivating reason behind the enactment of §1404(a) was to afford relief to defendants by placing them on an equal footing with plaintiffs in the selection of a forum.[18]

(B). Another problem involving the interpretation of the "where it might have been brought" clause of the subsection arises when suit is brought against multiple defendants, who move for a transfer to a state in which not all defendants are residents in the venue sense. This problem *inter alia* serves to emphasize the importance of reading §1404(a) in connection with all venue provisions, both special and general.[19] If the action be one requiring that venue be laid in the district wherein the defendants reside, as is provided in many special venue statutes,[20] and in addition said clause has reference to venue, clearly there can be no transfer, in spite of the inconvenience of the original forum. Accordingly, one district court has held that in the case of

[16] *See* Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 506 (1947).

[17] *But cf.* Hampton Theatres, Inc. v. Paramount Film Distributing Corp., 90 F. Supp. 645 (D. D. C. 1950) (anti-trust suit, where the court intimated that fact defendant was not amenable to process in the transferee district was sufficient to preclude transfer under §1404(a), even though the venue there be proper); Tivoli Realty, Inc. v. Paramount Pictures, Inc., 89 F. Supp. 278 (D. Del. 1950) *semble* (anti-trust suit). But it appears more doubtful that defendant could likewise waive improper venue in the transferee forum since this would impute to the "brought" clause absolutely no meaning.

[18] 28 U. S. C. §1404(a), Reviser's Notes at 802-03 (Supp. 1949).

[19] Special: 28 U. S. C. §§1394-1403 (Supp. 1949); 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (Supp. 1949) (FELA); 26 STAT. 209 (1890), as amended, 15 U. S. C. §§1, 2 (1946) (Sherman Anti-Trust Act); 38 STAT. 736 (1914), 15 U. S. C. §22 (1946) (Clayton Act). For a list of other special venue provisions see United States v. National City Lines, 337 U. S. 78, 85 (1949). General: 28 U. S. C. §1391 (Supp. 1949); particularly note §1391(c): "A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." 28 U. S. C. §1406(a) (Supp. 1949), see note 4 *supra*.

[20] *E.g.*, 28 U. S. C. §1400 (Supp. 1949) (copyright and patent suits); 35 STAT. 66 (1908), as amended, 45 U. S. C. §56 (Supp. 1949) (FELA); 38 STAT. 736 (1914), 15 U. S. C. §22 (1946) (anti-trust suits).

multiple defendants, there can be no transfer of the action unless it could have been brought against all defendants, in the venue sense, in the transferee district.[21] Another district court reached a contrary result, holding that even though one corporate defendant was not a resident of (not doing business in) the transferee district and could not have been sued there originally, a transfer would be proper if the defendant consented to the transfer and venue was proper as to the other defendants in the transferee forum.[22]

The court denying its authority to transfer construed the "brought" clause literally and added that since the consent of a defendant who is sued alone would not avail him the right to transfer to a district where he was not a resident, then logically, neither should the consent of one of multiple defendants. The other court, however, construes the statute so as to be consistent with the only Supreme Court case bearing on the problem,[23] and concludes that it can find no practical reason requiring transferee forum to be a proper forum for *all* of several defendants. Although neither court is too clear as to whether the "brought" clause, in addition to proper venue, also requires all defendants to be amenable to process in the transferee jurisdiction, both courts seem to imply that the process obstacle can be hurdled by use of the consent device if venue is proper. The discussion of this problem thus far has been limited primarily to cases governed by special venue statutes. However, in other actions to which the general venue subsections 1391(a), (b)[24] apply, no added difficulty can be foreseen except in so far as courts might find the specific language, "*all* defendants," a deterrent to the use of the consent device.

The legislative history of the statute indicates that little if any thought was given to the problem of multiple defendants.[25] Until the matter is clarified by specific legislation or resolved by the Supreme Court, a district court faced with the problem might choose between (1) denying the transfer entirely and (2) utilizing the consent device. Where the defendant as to whom the transferee forum is improper does not consent, the court could either refuse the transfer, or perhaps require

[21] Tivoli Realty, Inc. v. Paramount Pictures, Inc., 89 F. Supp. 278 (D. Del. 1950) (anti-trust suit, 5 of 14 defendants were neither doing business nor could be found in the state of the transferee district).

[22] Glasfloss Corp. v. Owens-Corning Corp., 90 F. Supp. 967 (S. D. N. Y. 1950) (anti-trust suit); Ferguson v. Ford Motor Co., 89 F. Supp. 45 (S. D. N. Y. 1950) (anti-trust suit), *appeal dismissed sub nom.* Ford Motor Co. v. Ryan, 182 F. 2d 329, 332 n. 7 (2d Cir. 1950) (court expressly by-passed a consideration of the validity of the consent device).

[23] United States v. National City Lines, 337 U. S. 78 (1949) (Supreme Court affirmed a transfer of a case factually similar to the Ford Motor Co. case, though not purporting to make a determination of the validity of the consent device).

[24] Title 28 U. S. C. (Supp. 1949).

[25] *See* Ferguson v. Ford Motor Co., 89 F. Supp. 45, 48 (S. D. N. Y. 1950).

the plaintiff to take a severance of his action.[26] Unless the consent device is employed, the beneficial effect of §1404(a) would appear to be materially lessened by suits involving multiple defendants.

(C). An important question in the administration of §1404(a) is whether an order of a district court directing (or refusing to direct) a transfer under the subsection is reviewable by appeal or by the prerogative writ of mandamus.[27] As to the right of appeal, the cases are in accord that an order transferring or refusing to transfer is interlocutory and not appealable.[28] On the question of whether mandamus will lie to review the interlocutory order the authorities are less certain.[29] As the cases now stand, if a district court *denies* a motion to transfer, then the very nature of this order is such as to call for an extraordinary remedy and mandamus might lie from the court of appeals if the district court erred.[30] On the other hand, if the court *grants* a transfer, the court of appeals of the circuit *a quo* will not entertain a petition for mandamus but will leave the question for the court of appeals of the circuit into which the action was transferred,[31] unless perhaps the impropriety of the transfer order is sufficiently glaring. If the transfer by the district court was clearly unauthorized under §1404(a),[32] mandamus will lie as in the denial situation above.[33]

The rationale of this difference in results between the denial and the granting situations seems to be that where transfer is denied, if defendant movant finally loses on the merits below, any error in the interlocutory order would probably not be correctible on appeal;[34]

[26] FED. R. CIV. P. 21; 3 MOORE, FEDERAL PRACTICE 2911 (2d ed. 1948).

[27] MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE ¶0.03(28)5 (1949); Note, 58 YALE L. J. 1186 (1949).

[28] Ford Motor Co. v. Ryan, 182 F. 2d 329 (2d Cir. 1950) (order denying transfer); Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950) (order transferring); Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F. 2d 360 (4th Cir. 1949) (order transferring); MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 210 (1949); Braucher, *supra* note 3, at 938. *But see* Magnetic Engineering Co. v. Dings Manufacturing Co., *supra* at 869, 870 n. 1 (appeal treated as petition for mandamus).

[29] *See* R. R. v. Wiswall, 23 Wall. 507, 508 (U. S. 1874) (order remanding a removed action could be reviewed by mandamus even though interlocutory); Larsen v. Nordbye, 181 F. 2d 765 (8th Cir. 1950) (mandamus did not lie to review order denying plaintiff's motion to dismiss under FED. R. CIV. P. 41(a)(2)); Notes, 58 YALE L. J. 1186, 1188 (1949), 33 MINN. L. REV. 738, 746 (1949).

[30] Ford Motor Co. v. Ryan, 182 F. 2d 329 (2d Cir. 1950) (Judge Swan dissenting).

[31] Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950) (Judge Frank dissenting).

[32] Foster-Milburn v. Knight, 181 F. 2d 949 (2d Cir. 1950) (court did not have power to order transfer on plaintiff's motion when defendant not amenable to process in transferee district).

[33] While the Supreme Court has not yet passed upon the appropriateness of this prerogative writ procedure, the question has been before the Court in one case. Ex parte Collett, 337 U. S. 55 (1949) (petition for writ of mandamus and prohibition).

[34] The reasoning is that if petitioner loses he could not show that a different result would have ensued if the case had been transferred.

whereas if he won below he would be unable to recover his added expense resulting from the court's refusal to transfer. Hence the need for an extraordinary remedy. On the other hand, where the court directs a transfer, the court of appeals of the circuit *ad quem* would be in a better position to decide the question of whether mandamus will lie, since it can best determine whether, in that court, any other remedy is available to the plaintiff.[35]

It would appear that the same reasons for granting a petition for mandamus should apply both where motions to transfer are granted and where denied. However, to permit the use of mandamus to review every disposition by a trial court of a motion to transfer, would seemingly result in unnecessary delay.[36] Perhaps the petition for this exceptional writ should be granted only to correct extreme inequities or a clear abuse of the trial court's discretion.[37]

(D). Another problem in the administration of the new venue statute arises where state courts have been given jurisdiction concurrent with federal courts, *e.g.*, suits under Federal Employers Liability Act.[38] To what extent may a plaintiff in such an action, while defendant's motion to transfer to a more convenient forum is pending, avoid a transfer by dismissing his action[39] and bringing it in an equally inconvenient state court where §1404(a) is not available? The problem really materializes if the action is one which by statute cannot be removed to a federal court.[40] In the only case found which was directly concerned with this problem[41] the court of appeals affirmed an order of the trial court granting plaintiff's motion to dismiss his action. The court held dismissal was not prejudicial error even though it left the plaintiff free to bring his suit in any state court where he could get service of process

[35] *But see* Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866, 870 (2d Cir. 1950) (dissenting opinion).

[36] See Note, 58 YALE L. J. 482, 488 (1949).

[37] MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 197 (1949).

[38] Other examples of statutes conferring concurrent jurisdiction are the Jones Act, the Fair Labor Standards Act, certain portions of the Bankruptcy Act, and the Securities Act. See MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 398 (1949).

[39] FED. R. CIV. P. 41(a)(1) (voluntary dismissal by the plaintiff as a matter of right where notice of dismissal filed before answer or motion for summary judgment). Rule 41(a)(2) (where plaintiff's motion made after answer, etc., no dismissal save upon order of the court and upon such terms and conditions as the court deems proper).

[40] 28 U. S. C. §1445(a) (Supp. 1949) (FELA suits); 28 U. S. C. §1445(b) (Supp. 1949) (suits against trustees of common carriers for damaged shipments); see MOORE, COMMENTARY ON THE U. S. JUDICIAL CODE 262 (1949) for other non-removable actions.

[41] New York C. & St. L. R. R. v. Vardaman, 181 F. 2d 769 (8th Cir. 1950) (FELA suit, the trial court denying plaintiff's motion to dismiss made after the court's order transferring the action but within the period of stay); *cf.* White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948) (where plaintiff dismissed as a matter of right).

on the defendant, and notwithstanding such subsequent suit in a state court would not be subject to transfer under §1404(a).

This anomaly, whereby concurrent jurisdiction and non-removability of certain actions can be used to circumvent[42] the purposes for which the subsection was enacted, would largely disappear if state courts were authorized to use the *forum non conveniens* doctrine to decline jurisdiction of these actions clearly inconvenient in that forum. But even if federal law is no bar to such a use of the doctrine, it is still not absolutely clear that a state court has this discretionary power in the absence of statutory authority.[43] Hence legislation by states empowering their courts to use the doctrine would seem necessary to cure the situation. There is some authority to the effect that the district court under Federal Rule of Civil Procedure 41(a)(2) has discretion to deny plaintiff a voluntary dismissal,[43a] but the weight of the decisions does not support this construction of the Rule. If this view were adopted, however, and defendant files his answer before moving for transfer, plaintiff's subsequent motion to dismiss could be denied where it appeared he was seeking to evade §1404(a).[43b] However, where the plaintiff sues initially in an inconvenient state court, and that court is powerless to utilize the doctrine, he may clearly thwart §1404(a) and its underlying purposes.[44]

[42] See Hayes v. Chicago, R. I. & P. Ry., 79 F. Supp. 821, 826 (D. Minn. 1948) (where plaintiff threatened to dismiss if defendant's motion to transfer granted).

[43] Mooney v. Denver & R. G. W. R. R., 221 P. 2d 628 (Utah 1950) (under Utah statute the court can decline jurisdiction of FELA suit under doctrine of *forum non conveniens*); *Accord*, Herb v. Pitcairn, 324 U. S. 117 (1945); Douglas v. New York, N. H. & H. R. R., 279 U. S. 377 (1929); *cf.* Chambers v. Baltimore & Ohio R. R., 207 U. S. 142, 148 (1907) (subject to restrictions of Federal Constitution, state may determine limits of the jurisdiction of its courts). *But cf.* State v. Mayfield, 359 Mo. 827, 224 S. W. 2d 105 (1949) (without such a statute a Missouri court refused to exercise its judicial discretion to decline jurisdiction of a FELA suit on the sole ground of *forum non conveniens*). See Note, 44 ILL. L. REV. 80 (1949) (if a state legislature has power to determine the jurisdiction of its own courts, why cannot a state court by its own declaration of rule employ *forum non conveniens* without interference, even in FELA cases?).

[43a] Henjes v. Aetna Ins. Co., 39 F. Supp. 418 (E. D. N. Y. 1941) (plaintiff's motion to dismiss for purpose of re-entering state court and thereby defeating court's removal order denied); Colonial Oil Co. v. American Oil Co., 3 F. R. D. 29 (E. D. S. C. 1943). *Contra:* Bolten v. General Motors Corp., 180 F. 2d 379 (7th Cir.), *cert. denied*, 71 Sup. Ct. 41 (1950) (plaintiff has absolute right to dismiss, restricted only by the requirement that it be done "upon such terms and conditions . . .").

[43b] It is arguable that the court could order the plaintiff not to bring the same suit in a state court as one of the "terms and conditions" of dismissal. *But see*, McCann v. Bentley Stores Corp., 34 F. Supp. 234, 235 (W. D. Mo. 1940) (compensating defendant for costs and expenses are the only "terms and conditions" conceivable).

[44] Since the preparation of this note the Supreme Court has decided that a state court is not prevented by federal law from utilizing the doctrine of *forum non conveniens* to dismiss FELA actions, provided such court adopts the doctrine for all causes of action and does not discriminate against citizens of sister states. Missouri v. Mayfield, 71 Sup. Ct. 1 (1950), *reversing* 359 Mo. 827, 224 S. W. 2d 105 (1949). Most states rejecting the doctrine, the need for state legislation remains.

(E). The final question to be considered concerns the effect of state law under the *Erie* doctrine on the administration of the subsection. Suppose the plaintiff sues in a district court where the law of the state in which it sits requires, on the alleged facts, a judgment for the plaintiff under the *Erie* rule; and the defendant moves for a transfer under §1404(a) to a district court in a state whose law is such that the defendant would win. Assuming transfer is granted, what law should the transferee forum apply? There are at least three cases[45] to the effect that the law of the transferring district applies, and that a change of venue affects the place of trial only. Or, in the terse language of the Court of Appeals for the 10th Circuit, when a removed case[46] is transferred from a New Mexico district court to a California district court under §1404(a), "there is no logical reason why it should not remain a New Mexico case, still controlled by the law and policy of that state."

Although this result places upon a transferee district court the additional burden of deciding each transferred case under a foreign law, this is an easier task than that which would be forced upon the court having to decide the question of transfer if the law of the transferee district were held to control. In this latter situation, if the motion was to transfer to a district in a state having a public policy opposed to that of the state of the instant district, the trial judge would have the unhappy duty of determining the propriety of defeating one state's policy and applying another.[47] Finally, if the law of the transferee district were to control, this would undoubtedly encourage a defendant to "shop around" the states of proper venue for the best state law available before moving for a transfer on the grounds of inconvenience. This, of course, runs counter to one of the reasons for which the *Erie* rule was adopted. Wisdom clearly lies with the existing law.

DON EVANS.

Federal Jurisdiction—Interpleader—Cross-Claims

Plaintiff insurance company (a disinterested stakeholder) brought an interpleader action to determine the proper recipient of an escrow fund placed in its possession by one of the defendant-claimants. The suit was instituted in the United States District Court for Southern

[45] Headrick v. Atchison, T. & S. F. Ry., 182 F. 2d 305 (10th Cir. 1950); Magnetic Engineering Co. v. Dings Manufacturing Co., 178 F. 2d 866 (2d Cir. 1950); Greve v. Gibraltar Enterprises, Inc., 85 F. Supp. 410 (D. N. M. 1949).

[46] The removal of an action by a defendant to the federal court is no waiver of his right to move for transfer under §1404(a). White v. Thompson, 80 F. Supp. 411 (N. D. Ill. 1948); Stewart v. Atchison T. &. S. F. Ry., 92 F. Supp. 172 (E. D. Mo. 1949); Chaffin v. Chesapeake & O. Ry., 80 F. Supp. 957 (E. D. N. Y. 1948).

[47] See Griffin v. McCoach, 313 U. S. 498 (1941) (fact situation where disregard of policy of transferring state would be clearly substantive).

California under the Federal Interpleader Act of 1936.[1] The two claimants, one a citizen of California (hereinafter called C-1) and the other, a corporation of Arizona (hereinafter called C-2) had made adverse claims on plaintiff for the full amount of the fund.[2] C-2 was served in Arizona under authority given for nation-wide service in interpleader actions.[3] He neither answered nor appeared, and the court awarded the fund to C-1. Meanwhile C-1 had filed a cross-claim against C-2 for money damages contending that this was permissible under Rule 13(g) of the Federal Rules of Civil Procedure since the cross-claim grew out of the same contract which had given rise to the escrow fund.[4] C-2 appeared specially and objected to the court's jurisdiction over it regarding the cross-claim.[5] The court dismissed the added controversy and on appeal the dismissal was affirmed.[6]

The majority of the court, apparently not satisfied with stating the law applicable to the facts before them, went far beyond the necessities of the case and said: "It would be a startling conclusion, we think, to give to Rule 13(g) and the Interpleader statute the effect of enlarging the jurisdiction of a court to create rights going beyond those to the fund which is the subject of the interpleader action."[7]

Since C-2 had defaulted on the interpleader action and had not appeared (other than specially), there is little ground for argument so far as the actual holding of the case is concerned.[8] However, there is

[1] 28 U. S. C. §1335 (1948).

[2] Professor Z. Chafee, Jr., in his article, *Federal Interpleader Since the Act of 1936*, 49 YALE L. J. 377 (1940) says, "The main purpose of the Federal Interpleader Act of January 20, 1936, was to give the United States courts power to protect any stakeholder who was threatened with conflicting claims asserted by citizens of different states."

[3] 28 U. S. C. §2361 (1948).

[4] Rule 13(g) of the Federal Rules of Civil Procedure states "A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. . . ."

[5] As pointed out in Stitzel-Weller Distillery v. Norman, 39 F. Supp. 182 (W. D. Ky. 1941) the civil process of a Federal District Court does not run outside the district, and service outside the district is void except where specifically authorized by a Federal statute. The court also points out that, although the Interpleader Act will confer jurisdiction over those served outside the district with respect to their claims against the subject matter of the interpleader, it does not confer jurisdiction over those defendants for purposes of a personal judgment.

Rule 4(f) provides for service anywhere within the *state* in which the district court sits.

[6] Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502 (9th Cir. 1950).

[7] Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 503 (9th Cir. 1950).

[8] "A special appearance, while not regarded as an appearance at all for some purposes, is one which is made for the sole purpose of objecting to the jurisdiction of the court over the person of defendant." Hale v. Campbell, 40 F. Supp. 584 (N. D. Iowa 1941), *rev'd on other grounds*, 127 F. 2d 594 (8th Cir. 1942).

"By repeated decisions in this Court it had been adjudged that the presence of the defendant in a suit *in personam* . . . is an essential element of the jurisdiction of a district court . . . and that in the absence of this element the court is powerless to proceed to an adjudication." Employers Reinsurance Corp. v. Bryant, 299 U. S. 374 (1937).

ground on which to question the breadth of the language quoted above. Especially is this true if such language has as its only basis a restrictive attitude regarding the controversial question of permitting adjudication of other matters than the res at the second stage of interpleader.[9]

The first ground for criticism is that set forth in the concurring opinion of the principal case: It is simply that the fact situation which was before the court did not call for a determination of the question of whether the Interpleader Act and Federal Rule 13(g) could ever be used in conjunction to secure jurisdiction over a defendant-claimant to a cross-claim. The opinion suggests that an entirely different problem might have been before the court had there been any necessity for a determination of the claimants' rights and obligations under the escrow instructions which had set up the fund.[10]

A second ground upon which to question the broad language of the majority is found in *Bank of Neosho v. Colcord*,[11] a prior decision by a district court. In that case both claimants had formally asserted their claims in the fund which was the subject of the interpleader action. One of the defendant-claimants had filed a cross-bill for specific performance of the contract which had given rise to the entire proceeding. The court refused the other defendant's motion to dismiss the cross-bill for lack of jurisdiction. The basis for refusal was solely that the subject matter of the cross-claim arose out of the transaction that was the subject matter of the original action. This court, taking an opposite view from the position set forth in the principal case said, "Federal Rules of Civil Procedure, rule 22, 28 U. S. C. A., provides inter alia that all actions of interpleader 'shall be conducted in accordance with' the Rules of Civil Procedure promulgated by the Federal District Courts. The effect of such provision in Rule 22, is to make said Rules of Civil Procedure, and particularly Rule 13(g) relating to cross-claims against co-parties, applicable to interpleader actions."[12]

The majority opinion in the principal case distinguishes the *Neosho* case on the valid ground that the parties had already appeared to claim the fund deposited by the stakeholder. But then, apparently in support of its own attitude, the opinion states, "But the court in that case [*Neosho*] gave broader scope to Rule 13(g) than we think proper."[13]

[9] A strict interpleader action may be said to have two stages. The first includes the plaintiff and all defendant-claimants; the second includes only the defendant-claimants, the plaintiff having dropped out. During this second stage the court decides which of the claimants is entitled to the *res*, or thing, which was the subject of the interpleader.

[10] *See* Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 505 (9th Cir. 1950) (concurring opinion).

[11] 8 F. R. D. 621 (W. D. Mo. 1949).

[12] Bank of Neosho v. Colcord, 8 F. R. D. 621, 622, 623 (W. D. Mo. 1949).

[13] *See* footnote 6 in Hagan v. Central Avenue Dairy, Inc., 180 F. 2d 502, 506 (9th Cir. 1950).

The only other decisions cited by the majority opinion are one English case,[14] and *Stitzel-Weller Distillery, Inc. v. Norman*.[15] The *Neosho* case distinguished the *Stitzel* case by saying that there the court was not concerned with the effect of Rule 13(g) on interpleader proceedings.[16] Whether this is accepted as completely accurate or not, it can safely be said that the *Stitzel* case does not stand for the proposition that a district court could not, under any circumstances, be faced with a situation in which the combination of the Interpleader statute and Rule 13(g) would confer jurisdiction over a cross-claim arising in the second stage of an interpleader action between defendant-claimants of different states.[17]

The most recent federal case in which there appears an objection to the court's jurisdiction over a cross-claim defendant in the second stage of interpleader is *Coastal Air Lines, Inc. v. Dockery*.[18] In this case plaintiff insurance company, a Pennsylvania firm, brought interpleader to settle claims made upon it for the insured value of an airplane which had crashed while in possession of a lessee (Coastal Airlines). Both the owner, who was a citizen of Arkansas, and the lessee claimed the insurance, the owner cross-claiming against the lessee for back rent on the contract of lease which also included the option to buy. At trial the claimants stipulated the questions to be decided. They were: (1) Whether the lessee had exercised his option to buy, and (2) whether lessee owed lessor any rent. After the decision went for the lessor on both points, the lessee appealed on grounds, among others, that the District Court of Arkansas had no jurisdiction over the cross-claim. The court of appeals held, after quoting extensively from the principal case, and considering the *Neosho* and *Stitzel* cases, that the stipulations and lack of objection waived any objections the lessee might have raised to venue, or to jurisdiction over the person. This case, as pointed out in the opinion, is clearly distinguishable from both the principal case and the *Neosho* case, but if the decision could be said to lean in either direction it seems to be toward the *Neosho* case.[19]

[14] Eschger, Ghesquirer and Co. v. Morrison, Kekewich and Co., 6 T. L. R. 145 (C. A. 1890).

[15] 39 F. Supp. 182 (W. D. Ky. 1941). So far as is determinable, this is the only other federal case on the point which had been decided prior to the principal case.

[16] Bank of Neosho v. Colcord, 8 F. R. D. 621, 624 (W. D. Mo. 1949).

[17] The Stitzel case does, however, stand for what the court cited it (the precise point); and on the same reasoning. There the court stressed the point that since the cross-claim defendants had not appeared there could be no jurisdiction of the person conferred by the Interpleader statutes as regards personal judgments on cross-claims. Rule 13(g) was not specifically mentioned.

[18] 180 F. 2d 874 (8th Cir. 1950).

[19] In language strikingly similar to that found in the Neosho case the court said, "Both claims arose 'out of the transaction or occurrence' which was 'the subject matter . . . of the original action' within the meaning of Rule 13(g) of the Federal Rules of Civil Procedure." 180 F. 2d 874, 877 (8th Cir. 1950).

An extensive argument has been made in favor of permitting the trial judge to exercise his discretion in deciding whether added controversies should be decided between the defendant-claimants at the second stage of interpleader.[20] One of the most appealing reasons given in support of this solution is that such a policy would be in the 'spirit' of the Federal Rules of Civil Procedure, a spirit which would ". . . adjudicate all phases of litigation involving the same parties . . . and avoid multiplicity of suits. . . ."[21]

Whether the solution offered in the aforementioned argument is ever accepted, the very existence of such an argument by such a highly respected writer should be sufficient to demonstrate that the problem does not lend itself to solution by any blanket rule. In the absence of clarity on the point under the Federal Rules, perhaps the best solution is for the courts to restrict their decisions to the facts before them; and not attempt in one stroke to eliminate all possibility of claimants ever combining Rule 13(g) and the Federal Interpleader Act to secure settlement of cross-actions between themselves.

PAUL A. JOHNSTON.

Federal Jurisdiction—Political Question—Justiciability of Political Rights

As a working hypothesis for carrying out the doctrine of "separation of powers" which is implicit in the Constitution,[1] the United States Supreme Court early adopted the "political question" guide.[2] That is, when the issue is one on which final decision rests with the executive or legislative branches, the Court will not take jurisdiction. The controversy is non-justiciable, for the reason that it is a question for the "political departments" and not for the judiciary to decide.[3] It is

[20] Chafee, *Broadening the Second Stage of Federal Interpleader*, 56 HARV. L. REV. 929 (1943).

[21] H. F. G. Co. v. Pioneer Publishing Co., 7 F. R. D. 654, 656 (N. D. Ill. 1947). Rule 1 of Federal Rules of Civil Procedure states ". . . They [the Rules] shall be construed to secure the just, speedy, and inexpensive determination of every action." Although Rule 82 forbids any construction of the Federal Rules which would extend the jurisdiction of the district courts, it is by no means certain that to permit settlement of cross-claims in interpleader actions between claimants of different states would be an extension of jurisdiction.

[1] In the Federal Constitution it is an implicit rather than express doctrine. The North Carolina Constitution has an express provision: "The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other." N. C. CONST. Art. I, §8.

[2] Ware v. Hylton, 3 Dall. 199 (U. S. 1796). See Field, *The Doctrine of Political Questions in the Federal Courts*, 8 MINN. L. REV. 485 (1924).

[3] The fact that a case has been labelled non-justiciable as involving a "political question" does not necessarily mean that a partisan political struggle is intimately involved in that case. For example, it is extremely doubtful that party politics was involved in the case which led the court to say that it is up to Congress to determine the end of a war. See Citizens Protective League v. Clark, 155 F. 2d

apparent that this so-called guide, as stated, does not tell us *what* questions are to be decided by the "political departments" rather than by the Court. This marking off of boundaries has been done by the Court, itself, by a process of judicial self-limitation,[4] or by orthodox interpretation of the Constitution,[5] according to one's view.

For example, the Supreme Court has consistently refused to recognize as justiciable questions involving foreign affairs,[6] or to enforce the Constitutional guaranty of a republican form of government.[7] Policies concerning admission and deportation of aliens are not reviewable,[8] nor are questions on which an executive officer acts within his discretion as prescribed by law.[9]

There is another category of cases on which the label *"political question and non-justiciable"* has been stamped by the federal courts, but not with consistency. These may be called the "political rights" cases; i.e., involving the right to vote, to have the vote honestly counted, to form a new political party, or to have equal voting districts.

The right to vote.—At one time it was held that the right of suffrage was not among the privileges and immunities to which citizens are entitled under the Constitution.[10] Not until 1883 did the Supreme Court rule that there is a Constitutional right to vote for members of Congress, and that Congress has authority to enact laws protecting this right.[11]

290 (D. C. Cir. 1946). Rather, the central idea in such decisions is to make a proper apportionment of governmental functions, in accordance with the "separation of powers" doctrine. Of course, the fact that a decision will be made by Congress or the President is a practical guaranty that party politics will be a factor in some degree.

[4] See Finkelstein, *Judicial Self-Limitation*, 37 HARV. L. REV. 338 (1923) and Finkelstein, *Further Notes on Judicial Self-Limitation*, 39 HARV. L. REV. 221 (1925).

[5] See Weston, *Political Questions*, 38 HARV. L. REV. 296 (1924).

[6] "These are considerations of policy, considerations of extreme magnitude, and certainly entirely incompetent to the examination and decision of a court of justice." Ware v. Hylton, 3 Dall. 199, 260 (U. S. 1796). And it is not for the courts to determine the end of a war declared by Congress. Citizens Protective League v. Clark, 155 F. 2d 290 (D. C. Cir. 1946), *cert. denied*, 329 U. S. 787 (1946).

[7] Pacific States Tel. Co. v. Oregon, 223 U. S. 118 (1912); Luther v. Borden, 7 How. 1 (U. S. 1849). U. S. CONST. Art. IV, §4 reads: "The United States shall guarantee to every state in this union a republican form of government. . . ." It is for Congress and not the Court to enforce this provision.

[8] Japanese Immigrant Case, 189 U. S. 86 (1903). However, this doesn't mean the courts will refuse to intervene where an individual alien is denied certain constitutional protections. United States v. Wong Quong Wong, 94 Fed. 832 (D. C. Vt. 1899) (unlawful search and seizure; held, evidence inadmissable in deportation proceeding).

[9] Chicago & S. Air Lines v. Waterman Corp., 333 U. S. 103 (1947); Ness v. Fisher, 223 U. S. 683 (1911); Wilson v. State of N. C., 169 U. S. 586 (1897).

[10] Minor v. Happersett, 21 Wall 162 (U. S. 1874).

[11] *Ex parte* Yarbrough, 110 U. S. 651 (1883). In this case defendants were convicted in federal district court in Georgia of beating a Negro because he voted in an election for a member of Congress. Application for writ of habeas corpus was denied, holding the federal law under which conviction was obtained as valid.

Then in *Wiley v. Sinkler*[12] it was established that federal courts have jurisdiction of actions for damages because of abridgement of this right of suffrage,[13] and subsequent cases have affirmed this view.[14]

Another possible redress for violation of the individual's right to vote was the granting of equitable relief by the federal courts. This form of relief, in connection with the right to vote, was first directly considered in *Giles v. Harris*.[15] Plaintiff, Negro, sued in equity to compel the registrars of Montgomery County, Alabama, to enroll him, as well as other Negroes, upon the voting lists. It seems clear that the decision denying equitable relief in this case was not based on the ground that the subject matter was non-justiciable,[16] but stands for the principle that the Court should not put itself in the position of attempting to supervise an election by exercising its equity jurisdiction.[17] The *Giles v. Harris* opinion apparently still stands. No Supreme Court decision has been found in which *equitable* remedy was permitted to enforce an individual's right to vote.[18]

Counting the vote.—Not only is there a Constitutional right to cast a ballot in an election for federal officials; there is also the right to have one's vote honestly counted.[19] And *United States v. Classic*[20] extended this to apply to primary elections as well as to general elections. So far, Supreme Court decisions on the protection of the right to an honest count have been concerned with criminal action against the

[12] 179 U. S. 58 (1900).

[13] The earlier case of *Ex parte* Yarbrough, 110 U. S. 651 (1883) was relied upon as establishing such jurisdiction.

[14] *E.g.*, Swafford v. Templeton, 185 U. S. 487 (1902) (reversing federal court below which had dismissed suit solely for want of jurisdiction); Nixon v. Herndon, 273 U. S. 536 (1927) (where defendants acted pursuant to Texas statutes in denying Negroes right to vote); Nixon v. Condon, 286 U. S. 73 (1932) (where after the Nixon v. Herndon decision the State Democratic Executive Committee was given authority, by statute, to prescribe voting qualifications but the Court held this was still action under state law and recovery allowed); Smith v. Allright, 321 U. S. 649 (1949) (allowing recovery of damages where plaintiff was denied right to vote in primary election under authority of resolution by the Democratic Party Convention rather than under a state law). This last named case overruled Grovey v. Townsend, 295 U. S. 45 (1935) which had denied recovery on the ground that plaintiff Negro was refused permission to vote pursuant to a resolution of the state convention of the Democratic Party and not under any state law.

[15] 189 U. S. 475 (1902).

[16] ". . . we are not prepared to say that the decree should be affirmed on the ground that the subject matter is wholly beyond the jurisdiction of the circuit court." *Id.* at 486.

[17] See discussion of this point in Lane v. Wilson, 307 U. S. 268, 272 (1939).

[18] The prominent cases concerning the right to vote did not involve equitable relief. Smith v. Allright, 321 U. S. 649 (1943) (action for damages for refusing to permit plaintiff to vote in primary election; recovery allowed). United States v. Classic, 313 U. S. 299 (1940) (indictment under federal statute charging election commissioners altered and falsely counted ballots in primary election upheld).

[19] United States v. Mosley, 238 U. S. 383 (1915).

[20] 313 U. S. 299 (1940).

wrong-doer rather than individual actions for damages or for relief in equity.[21]

Voting districts.—Three cases involving mandamus proceeding which brought into question the validity of state laws setting up Congressional districts were decided in 1931.[22] In *Smiley v. Holm*,[23] *Koenig v. Flynn*,[24] and *Carroll v. Becker*,[25] the issue was the same.[26] The defendants in each case vigorously contended that these were non-justiciable issues, concerning matters which should be left to the "political departments" to decide. In each case this defense was rejected, jurisdiction was taken, and judgment rendered to the effect that the respective redistricting acts were invalid and that elections be held at large[27] until appropriate state legislation provided for districts. So far as the justiciability of a case involving the validity of state redistricting acts, it would appear that the three cases above conclusively settled the matter.[28] But not so. The later case of *Colegrove v. Green*[29] muddied the waters of justiciability which, if not crystal clear up to this point, were at least less murky. Plaintiffs in this case sought a declaratory judgment to the effect that the Illinois redistricting acts denied them equal protection of the laws. The uncontradicted evidence

[21] But see Caven v. Clark, 78 F. Supp. 295 (W. D. Ark. 1948) (where defendants were charged with illegal possession of poll tax receipts with intent to obtain a fraudulent count of votes; equitable relief denied).

[22] Also in an 1892 case, McPherson v. Blacker, 146 U. S. 1, plaintiff sued for writ of mandamus to order the Secretary of the State of Michigan to disregard a legislative enactment providing for election of presidential electors by districts, instead of by the state at large. Defense of "political question and non-justiciable" was rejected, although decision was for the defendants that the Michigan act was valid under the Constitution.

[23] 285 U. S. 355 (1931) (arising from Minnesota).

[24] 285 U. S. 375 (1931) (arising from New York).

[25] 285 U. S. 380 (1931) (arising rrom Missouri).

[26] In Minnesota, New York, and Missouri, a congressional redistricting act had been passed by the legislatures of those states, and in each instance had been vetoed by the governor and the vetoes had not been overridden by a subsequent vote in the legislature. In each case, a writ of mandamus was sought, either to restrain (in Minnesota) or to compel (in Missouri and New York) giving effect to the legislative action in an election soon to take place.

[27] This was the case in Minnesota and Missouri. In the case of New York, two new representatives were allotted on the basis of increased population. The Court of Appeals of New York had ruled that election be based upon old districts (43), with the two new representatives being elected at large, and this was affirmed by the United States Supreme Court.

[28] Apparently two federal district courts considered the matter of justiciability in such cases had been settled. In Wood v. Broom, 1 F. Supp. 134 (S. D. Miss. 1932), plaintiff sought *equitable* relief on the ground that newly created congressional districts were not composed of compact and contiguous territory or had nearly as practicable the same number of inhabitants. The district court thought the 1929 federal act on reapportionment made such requirements of the states, and gave judgment for the plaintiff. But this was reversed in 287 U. S. 1 (1932) on the sole ground that the 1929 act did not make such requirements, and the Court expressly excluded consideration of justiciability of the controversy. See also Hume v. Mahan, 1 F. Supp. 142 (E. D. Ky.), *rev'd*, 287 U. S. 575 (1932), on same grounds.

[29] 328 U. S. 549 (1946).

was that no change in congressional election districts had been made for forty years, despite great changes in the distribution of population resulting in districts which ranged in population from 112,000 to 900,000. The district court dismissed the complaint on the ground that the federal act[30] on reapportionment of congressional districts contained no requirement that districts be compact and have approximate equality of population. In a 4-3 decision, the Supreme Court affirmed dismissal of the action, three members of the majority[31] for the reason adopted by the lower court, and for the additional reason that the matter was "political" and therefore non-justiciable.[32]

Apparently three justices deciding the *Colegrove* case[33] distinguish between an action to recover money damages, and an action seeking equitable relief (before the damage occurs), although the basis of each suit is a discriminatory state districting law.[34] In the first, the action is considered justiciable and the controversy is decided on the merits; in the second, the action is deemed non-justiciable and the merits of the controversy are not considered. Although this view was set out in the controlling opinion of the *Colegrove* case, it could not be taken as a holding of the Court inasmuch as a majority of the members thought that *Smiley v. Holm*[35] had determined that such cases were justiciable.[36]

Forming a new political party.—That the Court did not accept the doctrine of non-justiciability expressed in the *Colegrove* case seems to be borne out by the later case of *MacDougall v. Green*.[37] The plaintiffs here were members of the Progressive Party in Illinois and sought an injunction against enforcement of a state law[38] requiring signatures of

[30] 46 STAT. 21 (1929), as amended, 2 U. S. C. §2a.

[31] Justice Frankfurter announced the judgment of the Court and wrote an opinion as to non-justiciability in which Justices Reed and Burton concurred. Justice Rutledge (casting the deciding vote) concurred in the result solely on the ground that the Court should of its discretion decline equitable relief in view of the short time remaining until the Illinois election, expressing the opinion that the case was justiciable. Justices Black, Douglas and Murphy were also of opinion the case was justiciable, and in addition, dissented from the result.

[32] This Court has refused to intervene in such controversies ". . . because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination." Colegrove v. Green, 328 U. S. 549, 552 (1946).

[33] Justices Burton, Frankfurter and Reed.

[34] "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity." Colegrove v. Green, 328 U. S. 549, 552 (1946).

[35] 285 U. S. 355 (1931).

[36] The fact that Smiley v. Holm originated in the state court and the Colegrove case in the federal court would not seem to be basis for a distinction on the point of justiciability of controversy. If the court deciding Smiley v. Holm had thought it non-justiciable, there was precedent to so declare even though the case came up on appeal from the highest state court rather than originating in a lower federal court. See Pacific States Tel. Co. v. Oregon, 223 U. S. 118 (1912).

[37] 335 U. S. 281 (1948).

[38] ILL. REV. STAT. c. 46, §10-2 (1947).

200 qualified voters from each of at least fifty counties, contending that this gave voters of the less populous counties the power to block completely nomination of candidates whose support was confined to the populous areas. The defense of "political question and non-justiciable" was raised, but without discussing jurisdiction the Court expressly decided the case on its merits against the plaintiffs.[39] Thus by inference, *MacDougall v. Green* holds that such political rights cases are justiciable, and further, that equity jurisdiction may be exercised.[40]

The most recent political rights case in which equitable relief was sought was *South v. Peters*,[41] in which the Georgia county-unit system was attacked as being unconstitutionally discriminatory.[42] In a per curiam opinion dismissing the appeal the language used seems consistent with the prior cases of *Colegrove v. Green* and *MacDougall v. Green* on the point of justiciability of the controversy,[43] but applies a harsher restriction on the use of equity jurisdiction:

> "Federal courts consistently refuse to exercise their *equity powers* in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[44]

Even so, the opinion may be interpreted as leaving open the possibility that equity jurisdiction could be exercised for the protection of political rights other than those involved in the redistricting cases.[45]

Although the non-justiciable obstacle posed in *Colegrove v. Green* has apparently been definitely rejected by the Court in the later cases, the view seems to have been adopted in lower federal court decisions.[46]

[39] "It is allowable state policy to require that candidates for state-wide office should have support not limited to a concentrated locality." MacDougall v. Green, 335 U. S. 281, 283 (1948).

[40] See Note, 62 HARV. L. REV. 659 (1949) for discussion of equity jurisdiction of federal courts in political rights cases.

[41] 70 Sup. Ct. 641 (1950).

[42] Cases contesting the Georgia county-unit system have been before the Court before, but appeals were dismissed. Cook v. Fortson and Turman v. Duckworth, 329 U. S. 675 (1946). Justice Rutledge pointed out that the courts below, Cook v. Fortson, 68 F. Supp. 624 (N. D. Ga. 1946) and Turman v. Duckworth, 68 F. Supp. 744 (N. D. Ga. 1946), based decisions for defendants largely on Colegrove v. Green, and it was his view that the issues of jurisdiction in such cases had not been conclusively adjudicated by that decision.

[43] Justice Douglas in a dissenting opinion writes as if the decision of the court turned on the point of justiciability. See South v. Peters, 70 Sup. Ct. 641, 644 (1950). It is unlikely that the majority would so interpret their decision.

[44] *Id.*, at 642 (italics added).

[45] For example, the right to register and vote in a primary election. See Rice v. Elmore, 165 F. 2d 387 (4th Cir.), *cert. denied*, 333 U. S. 875 (1948). In this case plaintiff sought to enjoin defendants from denying Negro electors right to vote. Judgment of the district court in favor of plaintiff was affirmed by the Court of Appeals.

[46] See Caven v. Clark, 78 F. Supp. 295 (W. D. Ark. 1948); Turman v. Duckworth, 68 F. Supp. 744 (N. D. Ga. 1946); Cook v. Fortson, 68 F. Supp. 624 (N. D. Ga. 1946).

For this reason, a full discussion of the issue by the Supreme Court, as it relates to political rights cases, will likely be necessary to avoid further conflicting opinions in the lower courts.

While it is not clearly known whether the attitude of the Court toward exercising equity jurisdiction in redistricting cases which arose in the federal courts would be equally hostile to such cases originating in the state courts, it is quite probable that both avenues to the Supreme Court were foreclosed by *South v. Peters*. Even though equity jurisdiction is denied in the redistricting cases, there remains a possible redress in an action for damages.[47] In addition, there is the possible use of the writ of mandamus in the state courts, as in *Smiley v. Holm*, by bringing into question the validity of a state law under the Federal Constitution, and thereupon gaining direct appeal to the United States Supreme Court if the highest state court sustains the validity of the state law.

ROBERT E. GILES.

Insurance—Automobile Comprehensive Coverage

The development of the comprehensive automobile insurance policy has been rapid in recent years and the policy has become one of the major coverages in North Carolina. It is an extensive sort of policy including loss of or damage to an automobile from such older causes as fire and theft as well as losses from more novel causes such as missiles, falling objects, explosion, earthquake, windstorm, hail, water, flood, vandalism, and civil commotion. Generally, the clause provides that the coverage extends to any loss or damage except by collision or upset.[1]

The coverage of the comprehensive clause, however, is subject to a number of exclusions and exceptions. In North Carolina, the coverage does not apply (a) while the car is used as a public or livery conveyance, (b) while the car is subject to an undeclared encumbrance, (c) during war or revolution, (d) if the damage to the automobile is caused by mechanical breakdown unless such breakdown would otherwise be covered, (e) to wearing apparel or personal effects, (f) to tires unless they would otherwise be covered, or (g) to loss due to conversion or embezzlement or secretion by anyone lawfully entrusted with possession of the car.[2]

[47] This possibility may be inferred from language in Colegrove v. Green, 328 U. S. 549, 552 (1946). See note 34 *supra*.

[1] Often losses falling within what would commonly be covered under an ordinary collision policy are also included within the comprehensive clause. See Billings, *Present Periphery of Comprehensive Coverage*, 306 INS. L. J. 572 (1948).

[2] North Carolina Automobile Certificate of Insurance Specimen, December, 1947.

There have been very few cases in which this coverage has been construed by the courts, but an interesting case[3] was decided recently under the North Carolina comprehensive clause of the standard form.[4] The policyholder discovered in June, 1949, that beetles had bored into the wood portion of her station wagon and had eaten out and damaged the wooden frame. Insurance policies had been taken out on the 1946 vehicle in 1947, 1948, and 1949, and the last policy was cancelled by the company in September, 1949. The court, in holding that the plaintiff could not recover, rested its decision on the ground that the complaint did not allege that the entry and damage caused by the beetles occurred between the effective dates of the policy. The court further stated that the damage was not the result of "direct and accidental loss" as contemplated in the policy. Apparently relying on the construction adopted in accidental death cases in this state, the court distinguished between accidental "means" and "result."[5] Much respectable authority in other jurisdictions ignores this distinction.[6] It is believed that these cases are founded on sounder policy and that their view is more easily applied.

Even if the distinction is sound in the accidental death cases, however, it seems to have been misapplied in the instant case. In *Fletcher v. Security Life and Trust Co.*,[7] cited by the principal case, the court held that there could be no recovery for death caused by the injection of an anesthetic since the policies only covered "death by accidental means" and not "accidental deaths." In the principal case the policy

[3] Kirkley v. Merrimack Mut. Fire Ins. Co., 232 N. C. 292, 59 S. E. 2d 629 (1949).

[4] There are standard provisions set out in our automobile insurance specimen policy to protect the insured. The policy forms are subject to the approval of the Insurance Commissioner. N. C. GEN. STAT. §58-54 (1943). McNeal v. Life and Cas. Ins. Co. of Tenn., 192 N. C. 450, 135 S. E. 300 (1926).

[5] Courts advocating strict construction argue that "accidental" refers only to the event or occurrence which produces the result and not to the result itself. This view is clearly enunciated by the North Carolina court in Fletcher v. Security Life and Trust Co., 220 N. C. 148, 150, 16 S. E. 2d 687, 688 (1941), where it was stated: "The insurance is not against an accidental result. To create liability it must be made to appear that the unforeseen and unexpected result was produced by accidental means." Other North Carolina cases indorsing this view are: Scott v. Aetna Life Ins. Co., 208 N. C. 160, 179 S. E. 434 (1935); Mehaffey v. Provident Life and Acc. Ins. Co., 205 N. C. 701, 172 S. E. 331 (1934); Harris v. Jefferson Standard Life Ins. Co., 204 N. C. 385, 168 S. E. 208 (1933).

[6] Justice Cardozo aptly expressed this view in a dissenting opinion in Landress v. Phoenix Mut. Life Ins. Co., 291 U. S. 491, 501 (1934): "If there was no accident in the means, there was none in the result for the two are inseparable. No cause that reasonably can be styled an accident intervened between them. . . . There was accident throughout or there was no accident at all." Other cases supporting the above view are: Bukata v. Metropolitan Life Ins. Co., 145 Kan. 858, 67 P. 2d 607 (1937); Mansbacher v. Prudential Ins. Co. of America, 273 N. Y. 140, 7 N. E. 2d 18 (1937); Griswold v. Metropolitan Life Ins. Co., 107 Vt. 607, 180 A. 649 (1935); Ocean Acc. and Guaranty Corp. v. Glover, 165 Va. 283, 182 S. E. 221 (1935).

[7] 220 N. C. 148, 16 S. E. 2d 687 (1941). See also cases cited in note 5, *supra*.

provided for "accidental loss" and not for "loss by accidental means."

The North Carolina Supreme Court in the past has classified a number of events involving automobiles as "accidents." It has held that a person falling from an automobile forced off the road,[8] a tire going flat causing the car to overturn,[9] and lights going out causing a car to go over an embankment[10] are "accidental." A great variety of other situations involving Workmen's Compensation Insurance have also been held to be "accidental" by our court.[11]

The strict construction which the court placed upon the word "accidental" in the instant case defeats the underlying purposes of comprehensive coverage.[12] The words "any direct and accidental loss of or damage to the automobile" were seldom found in the standard policies of other states prior to 1948.[13] Usually in other jurisdictions the clause began with the phrase "any loss or damage to the automobile" rather than with the more restrictive phrase used in our state.[14] The construction adopted by our court in the principal case is not in line with the spirit of comprehensive coverage.[15]

[8] Higgins v. Life and Cas. Ins. Co. of Tenn., 220 N. C. 243, 17 S. E. 2d 5 (1941).

[9] Ingle v. Cassady, 208 N. C. 497, 181 S. E. 562 (1935).

[10] Littrell v. Hardin, 193 N. C. 266, 136 S. E. 726 (1927).

[11] Gabriel v. Town of Newton, 227 N. C. 314, 42 S. E. 2d 96 (1947) (heart attack from exertion); Edwards v. Piedmont Publishing Co., 227 N. C. 184, 41 S. E. 2d 592 (1947) (strain from lifting a plate); Brown v. Carolina Aluminum Co., 224 N. C. 766, 32 S. E. 2d 320 (1944) (push by fellow employee); Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. 2d 834 (1942) (assault); Robbins v. Bossong Hosiery Mill, Inc., 220 N. C. 246, 17 S. E. 2d 20 (1941) (fall when reaching for material); Love v. Town of Lumberton, 215 N. C. 28, 1 S. E. 2d 121 (1939) (lime in eye from pouring); Tscheiller v. National Weaving Co., 214 N. C. 449, 199 S. E. 623 (1938) (illness from eating defective food).

[12] 5 APPLEMAN, INSURANCE LAW AND PRACTICE §3222 (1941).

[13] The restrictive phrase used in North Carolina is also found in Tennessee. Lunn v. Indiana Lumbermens Mut. Ins. Co., 184 Tenn. 584, 201 S. W. 2d 978 (1947). In Alabama the only word used to preface the phrase is "direct." Lockwood v. State Farm Mut. Automobile Ins. Co., 28 Ala. App. 179, 181 So. 509 (1938).

[14] Atlas Assurance Co., Ltd. v. Lies, 70 Ga. App. 162, 27 S. E. 2d 791 (1943); Teitelbaum v. St. Louis Fire and Marine Ins. Co., 296 Ill. App. 327, 15 N. E. 2d 1013 (1938); Hemel v. State Farm Mut. Automobile Ins. Co., 211 La. 95, 29 So. 2d 483 (1947); Wheeler v. Phoenix Indemnity Co., 65 A. 2d 10 (Me. 1949); Roberts v. State Farm Mut. Automobile Ins. Co., 203 S. W. 2d 508 (Mo. 1947); Rea v. Motors Ins. Corp., 48 N. M. 9, 144 P. 2d 676 (1944); Tonkin v. California Ins. Co. of San Francisco, Inc., 294 N. Y. 326, 62 N. E. 2d 215 (1945); Mathews v. Shelby Mut. Plate Glass and Cas. Co., 46 N. E. 2d 473 (Ohio 1939); Fireman's Ins. Co. of Newark, N. J. v. Weatherman, 193 S. W. 2d 247 (Tex. Civ. App. 1946). In 1947, the National Automobile Underwriters Association recommended that the phrase "any direct and accidental loss of or damage to the automobile" be included within the comprehensive clause itself rather than the less restrictive phrase "any loss or damage to the automobile." The words of the new clause had been on the face of the old form before the recommended change. The purpose of the more restrictive phrase was to exclude intentional and remote losses as distinguished from accidental and direct ones. There was no intention to narrow the construction placed on the word "accidental."

[15] A leading writer on insurance states: "Most companies have now adopted the policy of writing what is termed 'comprehensive' coverage, which is for the

It is advocated that North Carolina should place a broader interpretation on the word "accidental" so as to include any unexpected or unusual occurrence. The court's statements in regard to the "accidental" nature of the loss in the principal case may be regarded as dicta in future cases since the outcome of the case rested on other considerations. It is further believed that a preferable construction of the words "direct and accidental" to "direct *or* accidental" would broaden the coverage of the comprehensive clause so as to include losses covered by the same clause in other states.

GEORGE J. RABIL.

Labor Law—Employer Refusals to Bargain Collectively in the Southern Textile Industry

Since 1935, national labor policy has been to encourage the practice and procedures of collective bargaining. The Taft-Hartley Act,[1] though otherwise curtailing union activities and the bargaining process, ostensibly added to[2] the Wagner Act[3] in respect to this stated policy. Section 8(b)(3) creates a new unfair labor practice for unions refusing to bargain collectively. Section 8(a)(5) continues to make the employer's refusal to bargain collectively with the union selected by his employees, an unfair labor practice.[4]

Nevertheless it is still possible for a skillful employer to evade[5] the duty to bargain collectively, at least, temporarily. In *Tower Hosiery Mills*, the North Carolina company

> ". . . went through many of the motions of collective bargaining. It met on numerous occasions with the union, conferred at length regarding contract proposals, made concessions on minor issues, and discussed and adjusted several grievances."[6]

purpose of including all property damage to an automobile, other than mechanical breakdown, exclusive of collision losses. It includes all of the older coverages . . . and in addition many new losses never before contemplated by any coverage whatever. It is a simple and convenient form of insurance. . . . It is not a profitable coverage to the average insurer, as the hazards therein included bring the loss rates above the premium level, but it does possess excellent sales angles, and is simple of analysis and application." 5 APPLEMAN, INSURANCE LAW AND PRACTICE §3222 (1941).

[1] 61 STAT. 136, 29 U. S. C. §141 *et seq.* (Supp. 1947).

[2] §§171 and 174.

[3] 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1946).

[4] The N.L.R.B. first determines whether the union in fact represents a majority of the employees in an appropriate bargaining unit.

[5] But outright refusals to bargain are not uncommon in Southern textiles. Itasca Cotton Mfg. Co., 79 N.L.R.B. 1442 (1948) *enforcement granted*, 179 F. 2d 504 (5th Cir. 1950); Postex Cotton Mills, 80 N.L.R.B. 1187 (1948), *rev'd on other grounds*, 181 F. 2d 919 (5th Cir. 1950); Highland Park Mfg. Co., 84 N.L.R.B. 744 (1949).

[6] 81 N.L.R.B. 658, 662 (1949), *enforcement granted*, 180 F. 2d 701 (4th Cir. 1950).

But despite these "surface indicia of bargaining" during nineteen conferences, held over a period of seven months, it was found that the company's

> ". . . participation in discussions with the union was not intended to lead to the consummation of an agreement with the union, but merely to preserve the appearance of bargaining."[7]

An examination of the general criteria used in determining "good faith" bargaining may indicate how successful this evasion of the obligation to bargain collectively has been in the Southern textile industry.

Characteristics of "Good Faith"

Section 8(d) spells out the obvious requirements of negotiating—meeting at reasonable times, conferring in good faith, and executing a written contract on any agreement reached—standards previously set up.[8] In addition, two affirmative actions are proscribed by decisional law. Unilateral action by an employer on a matter subject to collective bargaining without prior consultation with the union, is a refusal to bargain per se.[9] Individual bargaining with employees, thus by-passing and ignoring the union, is also banned.[10]

Generally decisive in determining whether an employer refused to bargain, is the question of "good faith." The phrases used by the N.L.R.B. and courts in characterizing employer attitude during negotiations, indicate how difficult of legal enforcement are the "good faith" criteria. Is the employer's "mind hermetically sealed"[11] against agreement; does he engage in "Fabian tactics"[12] or "shadow boxing";[13] are the conferences no more than "purposeless talk"[14] or "long and fruitless negotiations"?[15] Such generalizations have delineated "bad faith." But if the employer entered negotiations "with an open and fair mind, and a sincere purpose,"[16] in a "spirit of amity and cooperation,"[17] exhibited

[7] Tower Hosiery Mills, 81 N.L.R.B. 658, 662 (1949), *enforcement granted*, 180 F. 2d 701 (4th Cir. 1950).

[8] H. J. Heinz Co. v. N.L.R.B., 311 U. S. 514, 523-526 (1941); Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir.), *cert. denied*, 313 U. S. 595 (1941); Globe Cotton Mills v. N.L.R.B., 103 F. 2d 91 (5th Cir. 1939); 13 N.L.R.B. Ann. Rep. 59 (1948).

[9] N.L.R.B. v. Crompton-Highland Mills, 337 U. S. 217 (1949); Aluminum Ore Co. v. N.L.R.B., 131 F. 2d 485 (7th Cir. 1942).

[10] N.L.R.B. v. Acme Air Appliance Co., 117 F. 2d 417 (2d Cir. 1941); Note, 27 N. C. L. Rev. 266 (1949).

[11] N.L.R.B. v. Griswold Mfg. Co., 106 F. 2d 713, 723 (3rd Cir. 1939).

[12] Great Southern Trucking Co. v. N.L.R.B., 127 F. 2d 180, 185 (4th Cir.), *cert. denied*, 317 U. S. 652 (1942).

[13] Stonewall Cotton Mills, Inc. v. N.L.R.B., 129 F. 2d 629, 631 (5th Cir.), *cert. denied*, 317 U. S. 667 (1942).

[14] Rapid Roller Co. v. N.L.R.B., 126 F. 2d 452, 459 (7th Cir.), *cert. denied*, 317 U. S. 650 (1942).

[15] N.L.R.B. v. Tower Hosiery Mills, 180 F. 2d 701, 705 (4th Cir. 1950).

[16] Globe Cotton Mills v. N.L.R.B., 103 F. 2d 91, 94 (5th Cir. 1939).

[17] N.L.R.B. v. Reed & Prince Mfg. Co., 118 F. 2d 874, 885 (1st Cir.), *cert. denied*, 313 U. S. 595 (1941).

"fair dealings" in his "approach and attitude,"[18] or made a "patient and painstaking effort . . . to reach agreement,"[19] there has probably been no refusal to bargain.

If such short-hand expressions leave a nebulous picture, the task of dissecting the decisions to isolate individual factors in employer conduct is even more uncertain. The holding in each case is based on the employer's total course of conduct.[20] Direct evidence of a purpose to violate the statute is rarely obtainable.[21] Basically, the issues are the employer's intent, motive, or state of mind.[22] The N.L.R.B. early noted that "the indicia of good faith are notoriously elusive."[23] At best, the tests for determining "good faith" cope with the extremes of conduct.[24]

Collective Bargaining in Southern Textiles

It is said that collective bargaining is now accepted by employers as here to stay.[25] Unions today are supposedly so strong and powerful that they dominate the bargaining process, thereby justifying restrictive legislation.[26] To what extent is this true in the Southern textile industry?

The South today is the frontier of collective bargaining. The region's major industry, cotton and rayon textiles, is among the least organized of all manufacturing industries.[27] Although collective bargaining has been established at Erwin Mills, Marshall Field, Dan River and portions of the Cone, Textron, Goodyear, American Enka and Lowenstein chains, fully 80 per cent of Southern textile workers are unorganized,[28] including employees of major companies. The AFL and CIO Southern organizing campaigns, after four years, have substantially

[18] N.L.R.B. v. George P. Pilling & Son, Inc., 119 F. 2d 32, 37 (3rd Cir. 1941).

[19] N.L.R.B. v. Corsicana Cotton Mills, 179 F. 2d 234, 235 (5th Cir. 1950).

[20] N.L.R.B. v. Algoma Plywood Co., 121 F. 2d 602 (7th Cir. 1941); 14 NLRB Ann. Rep. 75 (1949).

[21] Hartsell Mills Co. v. N.L.R.B., 111 F. 2d 291, 293 (4th Cir. 1940).

[22] N.L.R.B. v. Fulton Bag & Cotton Mills, 175 F. 2d 675 (5th Cir. 1949); Singer Mfg. Co. v. N.L.R.B., 119 F. 2d 131 (7th Cir.), *cert. denied*, 313 U. S. 595 (1941); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 19 (1947).

[23] S. L. Allen & Co., 1 N.L.R.B. 714, 727 (1936).

[24] See Hill and Hook, Management at the Bargaining Table 239-261 (1945) (elaborate techniques used in negotiations).

[25] Hill and Hook, Management at the Bargaining Table 15 (1945); Taylor, Government Regulation of Industrial Relations 220 and 228 (1948).

[26] Millis and Brown, From the Wagner Act to Taft-Hartley 271-281 (1950); Denham, *The Taft-Hartley Act*, 20 Tenn. L. Rev. 168, 179 (1948); Torff, *The Taft-Hartley Act and Collective Bargaining: A Management Appraisal*, 43 Ill. L. Rev. 323, 347 (1948).

[27] *Extent of Collective Bargaining and Union Recognition, 1946*, 64 Monthly Lab. Rev. 765, 766 (1947).

[28] Dep't Labor Bull. No. 885, Union Agreements in the Cotton Textile Industry 1 (1946); DeVyver, *The Present Status of Labor Unions in the South —1948*, 16 Southern Econ. J. 1, 13 (1949); Proceedings 5th Biennial Convention TWUA-CIO 73 (1948); Fortune, Nov. 1946, p. 138, col. 1.

failed to organize Southern textiles.[29] Unions are often unable to secure contracts years after certification.[30] For sometime now, non-union mills have either matched or exceeded the economic gains won through union action. This management initiative was recently dramatized by the unilateral announcement by large unorganized Southern textile employers of an 8 per cent general wage increase.[31]

The Winston-Salem, Atlanta and New Orleans N.L.R.B. offices, servicing the Southern textile area, are the only ones in the nation with more unfair labor practice than representation cases.[32] Compared to a national average of 27 per cent "no-union" ballots of all votes cast in representation elections, North Carolina records 57 per cent, Georgia and Alabama 42 per cent, and South Carolina 41 per cent.[33] The textile industry as a whole shows an abnormally high proportion of elections won by "no-union": 42 per cent compared with 29 per cent for all manufacturing industries.[34] Significantly, elections where "no-union" secures a majority vote, in Southern textiles, are often regarded as company victories.[35] This high "no-union" vote is not solely attributable

[29] EXECUTIVE COUNCIL REPORT 5TH BIENNIAL CONVENTION TWUA-CIO 39 (1948); DeVyver, *The Present Status of Labor Unions in the South—1948*, 16 SOUTHERN ECON. J. 1, 18-21 (1949); Textile Bulletin, July, 1950, p. 38, col. 1 (quoting TWUA-CIO as claiming less Southern membership than three years earlier). Compare with original objectives: Amer. Federationist, June, 1946, p. 6 (one million members in next 12 months); Textile Labor, June, 1946, p. 1 (Cannon, Bibb, Calloway and Avondale Mills as immediate goals); Textile Challenger, August, 1946, p. 1.

[30] See N.L.R.B. v. Mexia Textile Mills, Inc., 70 Sup. Ct. 826 (1950); N.L.R.B. v. Union Mfg. Co., 179 F. 2d 511 (5th Cir. 1950); Hillsboro Cotton Mills, 80 N.L.R.B. 1107 (1948), *enforcement granted*, 179 F. 2d 504 (5th Cir. 1950); Itasca Cotton Mfg. Co., 79 N.L.R.B. 1443 (1948), *enforcement granted*, 179 F. 2d 504 5th Cir. (1950). In all four cases, union was certified in 1944.

[31] Greensboro (N. C.) Daily News, Sept. 13, 1950, §2, p. 1, col. 4-6. Same increase set pattern for organized mills. Durham (N. C.) Morning Herald, Oct. 16, 1950, §1, p. 1, col. 1; Winston-Salem (N. C.) Journal, Oct. 6, 1950, §1, p. 2, col. 3; Raleigh (N. C.) News & Observer, Oct. 18, 1950, §1, p. 2, col. 4. Union had not demanded wage increase prior to announcement. Textile Labor, Sept. 2, 1950, p. 1, col. 3; TWUA Contract Reporter, Erwin Chain Council, Sept. 12, 1950, p. 4.

[32] 14 NLRB ANN. REP. 163 (1949). Of all N.L.R.B. orders against unfair labor practices, awaiting enforcement as of August 31, 1949, 32 per cent occurred within the Fifth Circuit's jurisdiction. N.L.R.B. petition for writ of certiorari, N.L.R.B. v. Atlanta Metallic Casket Co., 173 F. 2d 758 (1949).

[33] 14 NLRB ANN. REP. 5 and 179 (1949).

[34] 14 NLRB ANN. REP. 173 (1949). North Carolina elections, involving TWUA-CIO or UTW-AFL, held from October 1946 through July, 1950, eliminating known decertifications and elections where two or more unions were involved, show "no-union" secured a majority in 18 out of 30 cases. Unions lost elections in all units of over 1,500 employees. 3,201 "no-union" ballots of 4,615 valid votes were cast in North Carolina "textile" elections during 1950, through July. From unpublished tables in preparation for M.A. thesis, by Robert Millard, Chapel Hill, N. C., based on records at Winston-Salem, N. C., N.L.R.B. office.

[35] Cedartown Yarn Mills, 84 N.L.R.B. 1, 8 (1949) (paid holiday and parade); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1550 (1948) (street demonstration, bonfire, dancing). See DeVyver, *The Present Status of Labor Unions in the South—1948*, 16 SOUTHERN ECON. J. 1, 16 (1949); Amer. Wool & Cotton Reporter, March

to employer opposition. Other factors are: a working class with an individualistic, rural background, still adjusting to industrial life; no continuous or established trade union tradition; an almost exclusively white working force;[36] community and press hostility; incorrect union policies and strategy.[37] Lost textile strikes in the region are increasing phenomena. Although company sales of housing facilities are increasing,[38] the mill village remains a strongly entrenched characteristic of the industry, with all the implications of the "dominant landlord-employer position."[39] State anti-union legislation, except for South Carolina, blankets the South, much of it drastic,[40] although no Southern state has a labor relations act.

Employer opposition to unionization of Southern mills, by either AFL, CIO or independent unions, presently includes both major producers[41] and small companies; Northern-controlled firms[42] as well as Southern independents; employers with existing collective bargaining relationships in other industries[43] and those having established dealings

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23, 1950, p. 39, col. 1; Textile Bulletin, June, 1950, p. 32, col. 2; July, 1950, p. 38, col. 2; Sept., 1950, pp. 40 and 51, col. 2.

[36] 14 ANN. REP. S. C. DEP'T LABOR 67 (1949); LAHNE, THE COTTON MILL WORKER 81 (1944). TWUA-CIO has Jim Crow locals at Danville, Va., and Leaksville, N. C. KENNEDY, A HISTORY OF THE TEXTILE WORKERS UNION OF AMERICA, C.I.O. 294 (unpublished Ph.D. thesis, University of North Carolina library, 1950). Compare with Southern industries where the racial employment ratio is almost 50-50, and union organization widespread: Alabama coal, steel and iron ore, North Carolina cigarette manufacturing; or industries with largely Negro employment: cotton oil, tobacco leaf processing and fertilizer.

[37] Some weaknesses seem to be: a centralization of organizational structure which smothers the development of Southern local leadership; the lack of any program in regard to work-loads, the major employee grievance; almost no women officials in an industry in which women comprise some 40 per cent of the working force.

[38] HERRING, PASSING OF THE MILL VILLAGE (1949) *passim.*

[39] Bibb Mfg. Co., 82 N.L.R.B. 338, 343 (1949). See 14 ANN. REP. S. C. DEP'T LABOR 41 (1949) (State mill village population of 184,683).

[40] Dodd, *Trends in State Legislation Relating to Unions*, NYU FIRST ANN. CONF. ON LABOR 497, 499-502 (1948).

[41] See Bibb Mfg. Co., 82 N.L.R.B. 338 (1949); Burlington Mills Corp., 82 N.L.R.B. 751 (1949); Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949); Hart Cotton Mills, Inc., 91 N.L.R.B. No. 130, 26 LAB. REL. REP. (Ref. Man.) 1566 (1950) (Ely & Walker); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081 (1949); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949).

Although the textile industry remains competitive, a distinct trend toward corporate integration and monopoly is taking place. Markham, *Integration in the Textile Industry*, 28 HARV. BUS. REV. 74 (1950); Barkin, *The Regional Significance of the Integration Movement in the Southern Textile Industry*, 15 SOUTHERN ECON. J. 395 (1949).

[42] See N.L.R.B. v. Crompton-Highland Mills, 337 U. S. 217 (1949); Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); Chicopee Mfg. Corp. of Ga., 85 N.L.R.B. 1439 (1949); Premier Worsted Mills, 85 N.L.R.B. 985 (1949); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949).

[43] U. S. Rubber Co., 86 N.L.R.B. 3 (1949); Aldora Mills, 79 N.L.R.B. 1, 9 (1948).

with textile unions in other mills.[44] The uniformity of the pattern of employer opposition to unionization of Southern textile mills may be attributable to the fact that most of the employer cases before N.L.R.B. and courts are handled by only five law firms.[45] Employer techniques have occasionally included: use of violence,[46] appeals to race prejudice,[47] and injunctions during strikes.[48]

THE ROLE OF FIRST CONTRACTS

Such regional manifestations must be viewed as the background for the problem of employer refusals to bargain in initial joint dealings.[49] The critical nature of first negotiations is well recognized. Collective bargaining then has more to do with organizational questions than substantive matter. The union, insecure and recently established, is a doubly sensitive "bride" in the "shot-gun wedding" with management. The employer is faced with making a fundamental change in thinking and procedure. From individual bargaining—which usually means employees played no role, while the employer unilaterally fixes conditions[50]

[44] Pacific Mills, 91 N.L.R.B. No. 3, 2 CCH LAB. LAW REP. ¶10, 263 (1950); Chicopee Mfg. Corp. of Ga., 85 N.L.R.B. 1439 (1949); Standard-Coosa-Thatcher Co., 85 N.L.R.B. 1358 (1949); The American Thread Co., Inc., 84 N.L.R.B. 593 (1949).

[45] Located in Greensboro and Charlotte, North Carolina; Atlanta and Decatur, Georgia; and Fort Worth, Texas.

[46] Anchor Rome Mills, Inc., 86 N.L.R.B. 1120, 1146-1153 (1949) (employer procured pistol permits, armed some 75 or 100 persons for attack upon picket line with resultant beatings and violence); Dixie Mercerizing Co., 86 N.L.R.B. 285, 294-297 (1949) (with plant whistle as signal, mob of 50 or 60 persons prevented distribution of union handbills, seized same and forced organizers to leave; employer held responsible); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081 (1949) *passim* (murder threats, planned provocation and physical assaults by employer agents); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1548-1549 (1948) (employer responsible for attempt to run union men down by driving car up on sidewalk, physical assault and attempted provocation).

[47] Bibb Mfg. Co., 82 N.L.R.B. 338, 339-341 and 355-362 (1949); Russell Mfg. Co., Inc., 82 N.L.R.B. 1081, 1107 and 1110 (1949); Macon Textiles, Inc., 80 N.L.R.B. 1525, 1547 (1948); Magnolia Cotton Mill Co., Inc., 79 N.L.R.B. 91, 113 (1948). See Textile Bulletin, June, 1950, p. 31, col. 2; Sept., 1950, p. 42, col. 2; Fortune, Nov., 1946, p. 230, col. 2.

[48] See Hart Cotton Mill, Inc. v. Abrams, 231 N. C. 431, 57 S. E. 2d 803 (1950); Alred v. Celanese Corp., 205 Ga. 371, 54 S. E. 2d 240 (1949), *cert. denied*, 338 U. S. 937 (1950); Safie Mfg. Co. v. Arnold, 228 N. C. 375, 45 S. E. 2d 577 (1947); Corley v. Crompton-Highland Mills, 201 Ga. 333, 39 S. E. 2d 861 (1946); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION, TWUA-CIO 30 (1950).

[49] 14 NLRB ANN. REP. 159 (1949) (26 per cent of all unfair labor practice cases against employers involve refusals to bargain). During this period, fiscal 1949, 23 per cent of all cases filed involving 8(a)(5) allegations, arose in the 13 Southern states (Alabama, Georgia, North Carolina, Tennessee and Texas contributed 14 per cent of the national total). Twenty per cent of all 8(a)(5) charges filed during fiscal 1948-1950 were Southern cases. From statistical chart prepared for writer by N.L.R.B., October 20, 1950. See MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 121, 127, 293 and 448 (1950); Textile Labor, July 22, 1950, p. 11, col. 4.

[50] *See* Holden v. Hardy, 169 U. S. 366, 397 (1898); N.L.R.B. v. Jones & Laughlin Steel Co., 301 U. S. 1, 33 (1937).

—the step is to collective bargaining,[51] with its majority rule principle[52] and the sharing of certain managerial functions with union representatives.[53]

The crux of the statutory protection of employee rights is in Section 8(a)(5), whereby they are enabled through collective bargaining to secure the fruits of self-organization such as grievance procedure and seniority rights.[54] Recognition and negotiation are not ends in themselves but the means of securing these written, industrial constitutions.[55] Collective bargaining is now so generally accepted elsewhere, that the present debate centers on the scope of its subject matter;[56] in the South, however, attention must still be focused on the initial step in the establishment of the collective bargaining process.

CONCLUSIONS

If national labor policy is to work out a peaceful solution[57] in the South, the N.L.R.B. and courts might consider four possible improvements in the approach toward employer refusals to bargain.

(1) To give body to the vague criteria of "good faith" bargaining, conduct should be examined not only in the light of the employer's total course of action,[58] but in the specific context of the particular industry

[51] Collective bargaining contracts add "dignity to the position of labor and remove the feeling on the part of the worker that he is a mere pawn in industry subject to the arbitrary power of the employer. [The contract becomes] the industrial constitution of the enterprise, setting forth the broad general principles upon which the relationship of employer and employee is to be conducted." Parker, J., in N.L.R.B. v. Highland Park Mfg. Co., 110 F. 2d 632, 638 (4th Cir. 1940).

[52] Weyand, *The Majority Rule in Collective Bargaining*, 45 COL. L. REV. 556 (1945).

[53] TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS 61 (1948); Chamberlain, *The Nature of the Bargaining Process*, 11 U. OF PITT. L. REV. 397, 406 (1950). See Barkin, *The Technical Engineering Service of an American Trade-Union*, 61 INT'L. LAB. REV. 609 (1950).

[54] MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 111, 121 and 448 (1950); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 394 (1950.

[55] *See* H. J. Heinz Co. v. N.L.R.B., 311 U. S. 514, 525 (1941); Timkin Roller Bearing Co. v. N.L.R.B., 161 F. 2d 949, 953 (6th Cir. 1947).

[56] Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950) *passim*; Cox and Dunlop, *The Duty to Bargain Collectively During the Term of an Existing Agreement*, 63 HARV. L. REV. 1097 (1950) *passim*.

[57] The establishment of collective bargaining in steel, auto and rubber was not peaceful. BROOKS, AS STEEL GOES . . ., 130-152 (1940); LEVINSON, LABOR ON THE MARCH c. 7 and 201-209 (1938); ALINSKY, JOHN L. LEWIS c. 5, 6 and 7 (1949); MCKENNEY, INDUSTRIAL VALLEY 275 *et seq.* (1939). For developments in textiles, see DEP'T LABOR BULL. No. 963, WORK STOPPAGES CAUSED BY LABOR-MANAGEMENT DISPUTES IN 1948 17 (union organizational issues involved in 54 per cent of the man-days idle in the textile industry, compared with 17 per cent for all manufacturing industries); EXECUTIVE COUNCIL REPORT 5TH BIENNIAL CONVENTION TWUA-CIO 48 (1948); PROCEEDINGS 5TH BIENNIAL CONVENTION TWUA-CIO 153 (1948); EXECUTIVE COUNCIL ROPORT 6TH BIENNIAL CONVENTION TWUA-CIO 37 (1950).

[58] See footnote 20, *supra*.

and particular area.[59] Prevailing collective bargaining practices therein might provide a helpful measuring rod.[60]

(2) In appraising the conduct of negotiations, the role of compromise, so essential to the establishment of collective bargaining,[61] should be given greater emphasis. The legislative history of Section 8(d) seems to indicate that it is no barrier to a continuing requirement of counter-proposals in negotiations.[62] In *N.L.R.B. v. Tower Hosiery Mills*, the Court of Appeals for the Fourth Circuit, in finding a refusal to bargain, compared concessions by the union and its willingness to compromise with the uncompromising attitude of the employer.[63] While the give-and-take of negotiations admit of no rigid yardstick, more consideration might be given to comparing and evaluating the bargaining attitudes of the two parties.

(3) The Court of Appeals for the Fifth Circuit might well emulate other circuits in cooperating with the N.L.R.B., to implement national labor policy in the South. The labor philosophy expressed in the court's dicta[64] shows an underestimation of the values of collective bargaining. The N.L.R.B. recently had occasion[65] to ask the Supreme Court to admonish the Fifth Circuit[66] for its refusal to enforce certain N.L.R.B. orders without giving any reason. Southern opposition to collective

[59] 1 NLRB ANN. REP. 86 (1936), quoting from M. H. Birge & Sons, Inc., 1 N.L.R.B. 731, on the relevant factors in determining a refusal to bargain: ". . . the labor relations background of the industry and the actions of the other union manufacturers. . . ." See Russell Mfg. Co., Inc., 82 N.L.R.B. 1081, 1098-1101 and 1127 (1949) (use is made of the local sociological setting against which employer conduct occurred); N.L.R.B. v. Stowe Spinning Co., 336 U. S. 226, 230 (1949) ("We cannot equate a company-dominated North Carolina mill town with the vast metropolitan centers. . . .").

[60] *See* N.L.R.B. v. Knoxville Pub. Co., 124 F. 2d 875, 880 (6th Cir. 1942) (prevailing economic conditions); N.L.R.B. v. Tower Hosiery Mills, 180 F. 2d 701, 704 (4th Cir. 1950) (employer's stringent proposal "was apparently previously unheard of in this area"). See MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 117 (1950); Cox and Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 405 (1950).

[61] See Torff, *The Taft-Hartley Act and Collective Bargaining: A Management Appraisal*, 43 ILL. L. REV. 323, 326 (1948).

[62] See VAN ARKEL, AN ANALYSIS OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947 47; MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 448 (1950). *Contra:* Adler Metal Products Corp., 79 N. L. R. B. 219 (1948); Denham, *The Taft-Hartley Act*, 20 TENN. L. REV. 168, 179 (1948). *But cf.* Vanette Hosiery Mills, 80 N.L.R.B. 1116, 1128 (1948), *enforcement granted*, 179 F. 2d 504 (1950).

[63] 180 F. 2d 701, 705 (4th Cir. 1950).

[64] N.L.R.B. v. Red Arrow Freight Lines, Inc., 180 F. 2d 585, 586 (5th Cir. 1950); N.L.R.B. v. Caroline Mills, Inc., 167 F. 2d 212 (5th Cir. 1948); Stonewall Cotton Mills, Inc. v. N.L.R.B., 129 F. 2d 629 (5th Cir.), *cert. denied*, 317 U. S. 667 (1942) (opinion before re-hearing); N.L.R.B. v. Riverside Mfg. Co., 119 F. 2d 302, 304 (5th Cir. 1941); Globe Cotton Mills v. N.L.R.B., 103 F. 2d 91, 94 (5th Cir. 1939).

[65] N.L.R.B. petition for writ of certiorari, pp. 11-23, N.L.R.B. v. Atlanta Metallic Casket Co., 173 F. 2d 758 (5th Cir. 1949).

[66] See N.L.R.B. v. Mexia Textile Mills, Inc., 70 Sup. Ct. 826 (1950); N.L.R.B. v. Pool Mfg. Co., 70 Sup. Ct. 830 (1950) (note dissenting opinion).

bargaining may have been encouraged by the willingness of the Fifth Circuit to set aside N.L.R.B. orders.[67] Although that court has secured compliance by using its contempt power to mediate,[68] it is possible that a sympathetic approach toward the statutory obectives and a stiffening of the contempt penalties might have a more constructive effect upon the willingness of Southern textile employers to bargain collectively.

(4) The discretionary injunction power of the General Counsel[69] might be used to secure the compliance with national policy of especially recalcitrant employers in the region. The speed of injunction could help offset the deadly effects of long delays, often destructive of collective bargaining, regardless of the final legal outcome.[70]

M. H. Ross.

Pleadings—General Allegation of Negligence—Sufficiency Against Demurrer

There has been much confusion in the North Carolina courts concerning the necessary requirements of complaints[1] to withstand demurrer for failure to state a cause of action[2] in actions for negligence. In the recent case of *Davis v. Rhodes*,[3] an action for wrongful death, complaint alleged "that defendant unlawfully, recklessly, and negligently struck and collided" with the motor scooter on which the intestate was riding. Defendant answered, denying negligence. Thereafter, plaintiff was allowed to amend his complaint. This amendment, filed more than one year after the death of the intestate, particularized the acts of negligence relied upon. Defendant then demurred to the original complaint for failure to state a cause of action, and moved to dismiss the action as the amendment was filed more than one year after the death of the intestate.[4] The trial court sustained the demurrer and dismissed the action;

[67] N.L.R.B. petition for writ of certiorari, p. 13, N.L.R.B. v. Atlanta Metallic Casket Co., 173 F. 2d 758 (5th Cir. 1949).

[68] N.L.R.B. v. Corsicana Cotton Mills, 178 F. 2d 344 (5th Cir. 1949), 178 F. 2d 347 (5th Cir. 1949), 179 F. 2d 234 (5th Cir. 1950). Court allowed employer to escape contempt penalty but kept case on docket and read transcripts of negotiations, noting results of its mediation in later opinions.

[69] 61 STAT. 136, 29 U. S. C. §160j (Supp. 1947).

[70] MILLIS AND BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY 119 (1950); EXECUTIVE COUNCIL REPORT 6TH BIENNIAL CONVENTION TWUA-CIO 33 (1950) (court rulings are often "hollow victories"). See footnote 30, *supra*, for length of delays.

[1] A complaint must contain a plain and concise statement of the facts constituting a cause of action. N. C. GEN. STAT. §1-122 (1943).

[2] Defendant may demur to the complaint when it appears upon the face thereof that the complaint does not state facts sufficient to constitute a cause of action. N. C. GEN. STAT. §1-127 (1943).

[3] 231 N. C. 71, 56 S. E. 2d 43 (1949).

[4] N. C. GEN. STAT. §28-173 (1943) (. . . action . . . to be brought within one year after such death). Where the original complaint does not state a cause of action, an amendment, if it be good and available, would relegate the plaintiff to

plaintiff appealed.

The Supreme Court, with Justice Barnhill writing the opinion for a unanimous court, held that the original complaint constituted a defective statement of a good cause of action, and that the defendant's remedy, after answer, was not by demurrer, but by motion to make more definite.

The principle that a complaint which states a good cause of action in a defective manner is not subject to demurrer is well established in the North Carolina courts, but its application to the complaint in the instant case is not consistent with its application in the past, and is inconsistent with other established rules of pleading in our courts.

For purposes of demurrer, the complaint alleged only that the defendant collided with the rear of the vehicle on which the intestate was riding, the averments of negligence, recklessness, and unlawfulness being conclusions of fact or law and not admitted by demurrer.[5] Applying to these allegations the oft quoted maxim that "the allegations in a complaint do not constitute a cause of action for the want of some essential averment,"[6] it can be seen that no facts are stated which give rise to a cause of action. An essential element of an action for negligence is the breach of some duty.[7] The above allegations possibly imply a duty to use due care, but they neither state nor imply facts indicating a breach of this duty. Negligence is not presumed from the mere fact that the intestate was killed, or that there was a collision.[8] The North Carolina Supreme Court has consistently refused to sustain a complaint against demurrer which did not contain facts showing a duty and breach thereof.[9]

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the position of having thereby for the first time stated a cause of action against the demurring defendants, and the fact that the action now sought to be maintained on the amended complaint originated more than one year after the death of the intestate can be taken advantage of by demurrer. George v. Atlanta and Charlotte Airline Ry., 210 N. C. 58, 185 S. E. 431 (1936); Webb v. Eggleston, 228 N. C. 574, 46 S. E. 2d 700 (1948).

[5] The office of demurrer is to test the sufficiency of the pleadings, admitting for the purpose the truth of the allegations of fact contained therein, and ordinarily relevant inferences of fact necessarily deducible therefrom are also admitted, but the principle does not extend to admissions of conclusions or inferencs of law. Ferrell v. Worthington, 226 N. C. 609, 39 S. E. 2d 812 (1946); Newton v. Chason, 225 N. C. 204, 34 S. E. 2d 70 (1945); Smith v. Smith, 225 N. C. 189, 34 S. E. 2d 148 (1945).

[6] Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891). That the pleader must allege all the material ultimate facts upon which his cause of action is based has become axiomatic. If all such facts are not alleged a demurrer will be sustained. Ledwell v. Proctor, 221 N. C. 161, 19 S. E. 2d 234 (1942).

[7] Rountree v. Fountain, 203 N. C. 381, 166 S. E. 329 (1932); Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129 (1907); Thomason v. Seaboard Air Line Ry., 142 N. C. 318, 55 S. E. 205 (1906).

[8] Rountree v. Fountain, 203 N. C. 381, 166 S. E. 329 (1932); Swainey v. Great A. & P. Co., 202 N. C. 272, 162 S. E. 557 (1932); Burke v. Carolina Coach Co., 198 N. C. 8, 150 S. E. 636 (1929).

[9] Harris v. Winston-Salem Southbound Ry., 220 N. C. 698, 18 S. E. 2d 204 (1941); Daniels v. Montgomery Ward & Co., 217 N. C. 768, 9 S. E. 2d 388

The practice of sustaining complaints against demurrer when they contain a defective statement of a good cause of action has been limited to those complaints which contain, expressly or by implication, some recital of specific acts which give rise to the cause of action. This is true of the cases cited in support of the *Davis* decision.[10] This practice has been applied to actions involving negligence,[11] false imprisonment,[12] contract,[13] and many others.[14]

The practical effect of the *Davis* decision is to modify greatly the former requirement as to what factual allegations constitute a cause of action for negligence. The omission of the acts giving rise to the action is not fatal, but is at worst a defective statement of a good cause of action, which allows any required amendments to relate back to the original complaint.[15] The net result is to give the pleader in actions for negligence the privilege of "notice pleading" as allowed by the Federal Rules of Civil Procedure.[16] This is of great importance to the

(1940); George v. Atlanta & Charlotte Air Line Ry., 207 N. C. 457, 177 S. E. 324 (1934); Ballinger v. Thomas, 195 N. C. 517, 142 S. E. 761 (1928); Taylor v. Seaboard Air Line Ry., 145 N. C. 400, 59 S. E. 129 (1907); Thomason v. Seaboard Air Line Ry., 142 N. C. 318, 55 S. E. 205 (1906); Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891).

[10] Presnell v. Beshears, 227 N. C. 279, 41 S. E. 2d 835 (1947) (negligence set out in detail and sufficient allegation of agency); Livingston v. Essex Investment Co., 219 N. C. 416, 14 S. E. 2d 489 (1941) (allegation that brick were improperly encased in mortar); Foy v. Stephens, 168 N. C. 438, 84 S. E. 758 (1915) (allegations were sufficient to give rise to action for fraud, but there was no direct allegation of fraud; held sufficient against demurrer); Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13 (1913) (sufficient allegation of indebtedness); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911) (allegation that judgment had been assigned "for value and without recourse" held sufficient allegation of payment); Gillikin & Gaskell v. Lake Drummond Canal Co., 147 N. C. 39, 60 S. E. 654 (1908) (allegation that barge obstructed canal); Blackmore v. Winters, 144 N. C. 212, 56 S. E. 874 (1907) (allegation of amount of rent, demand, and failure to pay held sufficient allegation of indebtedness); Seaboard Air Line Ry. v. Main, 132 N. C. 445, 43 S. E. 930 (1903) (indirect allegation of necessary facts); Allen v. Carolina Cent. Ry., 120 N. C. 548, 27 S. E. 76 (1897) (allegation of defective brake).

[11] See note 9 *supra*; Cunningham v. Hayes, 214 N. C. 456, 199 S. E. 627 (1938); Piner v. Richter, 202 N. C. 573, 163 S. E. 561 (1932); Lee v. Caveness Produce Co., 197 N. C. 714, 150 S. E. 363 (1929); Gillikin & Gaskell v. Lake Drummond Canal Co., 147 N. C. 39, 60 S. E. 654 (1908); Allen v. Carolina Cent. Ry., 120 N. C. 548, 27 S. E. 76 (1897); Conley v. Richmond & D. R. R., 109 N. C. 692, 14 S. E. 303 (1891).

[12] Brewer v. Wynne, 154 N. C. 467, 70 S. E. 947 (1911).

[13] Hawkins v. Federal Land Bank of Columbia, 221 N. C. 75, 18 S. E. 2d 823 (1942); Sohmer v. Felton Beauty Supply Co., 214 N. C. 522, 199 S. E. 711 (1938).

[14] Jones v. Jones Lewis Furniture Co., 222 N. C. 439, 23 S. E. 2d 309 (1942) (breach of warranty); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911) (action by sureties to set aside conveyances of insolvent defendant); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897) (divorce action).

[15] Bailey v. Roberts, 208 N. C. 532, 181 S. E. 329 (1935); Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915); Eddleman v. Lentz, 158 N. C. 65, 72 S. E. 1011 (1911); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).

[16] ". . . a very brief statement, designed merely to give notice of the claim to the opponent." CLARK, CODE PLEADING §11 (2d ed. 1947); MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE §346 (1929); FED. R. CIV. P., form 9

pleader for two reasons: (1) If, through oversight or lack of sufficient facts at the time of drafting, the complaint contains only a simple allegation that "X negligently drove his automobile and as a result struck Y," this allegation will satisfy any statute of limitations or condition precedent to the action, so that a demurrer interposed after the expiration of the time limit will not cause the action to be dismissed,[17] and plaintiff may or may not be ordered to amend the complaint; (2) if specific acts of negligence are alleged, the proof is likely to be confined to those acts alone,[18] but if a general allegation is made, and the opposing counsel does not object, there will be no confining bounds for the proof that is later presented, and the complaint can subsequently be amended to include any acts of negligence which were proved at the trial.[19] If an objection is made, it will not be fatal, but will only necessitate an amendment.

There was no indication in the *Davis* decision as to how far the Court was prepared to extend this privilege of "notice pleading," but in view of the unequivocal position taken by the Court in dealing with other types of action,[20] it appears that the pleader in the future should not rely on this precedent except in actions involving negligence. Whether the decision will apply to actions other than those for negligent wrongful death will be determined only by subsequent cases.

RICHARD DEY. MANNING.

(. . . defendant negligently drove a motor vehicle against plaintiff . . .); Watson v. World of Mirth Shows, 4 F. R. D. 31 (S. D. Ga. 1944) (. . . to state a cause of action for negligence it is only necessary to allege that defendant acted negligently and as a result plaintiff was injured).

[17] Renn v. Seaboard Air Line Ry., 170 N. C. 128, 86 S. E. 964 (1915); Lefler v. Lane, 170 N. C. 181, 86 S. E. 1022 (1915); Dockery v. Hamlet, 162 N. C. 118, 78 S. E. 13 (1913); Lassiter v. Norfolk & C. R. R., 136 N. C. 89, 48 S. E. 642 (1904); Ladd v. Ladd, 121 N. C. 118, 28 S. E. 190 (1897).

[18] McCoy v. Carolina Cent. Ry., 142 N. C. 383, 387, 55 S. E. 270, 272 (1906). ". . . proof without allegation is as unavailing as allegation without proof." Ingold v. Phoenix Assur. Co., 230 N. C. 142, 52 S. E. 2d 366 (1949); Stafford v. Yale, 228 N. C. 220, 44 S. E. 2d 872 (1947).

[19] N. C. GEN. STAT. §1-168 (1943); Deligny v. Tate Furniture Co., 170 N. C. 189, 86 S. E. 980 (1915).

[20] See notes 6 and 9 *supra*. In one subsequent decision, Steel v. Locke Cotton Mills, 231 N. C. 636, 58 S. E. 2d 620 (1950), an action for mandamus by a stockholder for payment of preferred dividends, complaint alleged surplus and net profits available for dividends on January 1, 1949, but did not allege such surplus and profits at date of commencement of action. Demurrer for failure to state a cause of action was sutained, the court holding that "a fact essential to a cause of action is not alleged when it is only to be inferred as a conclusion from other facts specifically averred, which are not inconsistent with the opposite conclusion."