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Notes and Comments

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Administrative Law—Judicial Review in State and Federal Courts—Determination of Validity of Rules and Regulations Before Their Application in Specific Cases

Whether or not administrative rules and regulations may be reviewed by the courts at the instance of one who is either directly or indirectly affected by them but to whom they have not been applied is a question that has not been presented to the courts very often. The North Carolina Supreme Court considered this question in *Duke v. Shaw*[1] and decided that the statute under which the plaintiff proceeded did not give him the right to have the court determine the validity of these regulations. However, an examination of federal and state authorities reveals several possible remedies not considered in the North Carolina case.

In the *Duke* case the complainant, a hotel operator, filed a petition for review asking the court to proceed under G.S. §§ 143-306 to -316[2] and declare invalid regulations issued by the Commissioner of Revenue which determined that sales of supplies and equipment to hotels, motels, and others renting rooms were sales to consumers and therefore subject to the sales tax. The Commissioner demurred on the ground that the petition did not state a cause of action since it did not allege the payment by or assessment of any taxes against the petitioner. The trial court sustained the demurrer and the supreme court affirmed. In effect the court held that there could be no judicial review under this statute of administrative regulations prior to their application in a specific case.[3]

The state law on this point is conflicting. The collected cases involve "rules," "regulations," "orders," and "resolutions" of administrative agencies, but the designation is of no importance since the substance is the same.

Some of the more liberal states have adopted section 6 of the Model State Administrative Procedure Act.[4] That section provides that one

[1] 247 N.C. 236, 100 S.E.2d 506 (1957).

[2] N.C. GEN. STAT. §§ 143-306 to -316 (Supp. 1957). These statutes will be discussed later herein.

[3] *Cf.* North Carolina Util. Comm'n v. Atlantic Greyhound Corp., 224 N.C. 293, 29 S.E.2d 909 (1944), a case decided before the passage of N.C. GEN. STAT. §§ 143-306 to -316 (Supp. 1957). The supreme court held that the appellants were not entitled to appeal to the courts from the action of the Commission in adopting and promulgating an amended rule. The court said that no appeal could be taken from an order by which the Commission adopts a general regulatory rule of supervisory nature.

[4] 9C UNIFORM LAWS ANN. 179, 181 (1957).

may petition for a declaratory judgment as to the validity of any rule when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. Wisconsin,[5] California,[6] and Missouri[7] have adopted this section of the act, and although no Wisconsin case interpreting the section was found, the Missouri and California courts have interpreted it liberally.[8]

In *Butler v. Rude*[9] the Kansas Supreme Court allowed plaintiff, a licensed embalmer, to maintain an action to enjoin the State Board of Embalming from enforcing a rule made by the Board though he alleged only that he was informed that the Board intended to enforce the rule. The court said that plaintiff was not compelled to await action by the Board suspending his license, or refusing to issue or renew his license, in order to test the Board's power to adopt the rule.

The North Dakota Court justified a contrary decision[10] with the "general rule . . . that an injunction will not be granted to stay criminal or quasi-criminal proceedings . . . ."[11] In that case plaintiff prayed that an order of the Board fixing a schedule of minimum prices be declared void and that the Board be enjoined from enforcing or attempting to enforce the order. The statute under which the Board acted gave it power to issue rules, orders, etc. with criminal sanctions. The court said that plaintiff had an adequate remedy at law since he could use the alleged invalidity of the order as a defense to any prosecution against him under the act.

In *Zangerle v. Evatt*[12] the Ohio court declined to review at the instance of county auditors a rule for the classification of property used in the refining of petroleum. The Tax Commissioner had adopted the rule and the plaintiffs had had it reviewed by the Board of Tax Appeals.

[5] WIS. STAT. ANN. § 227.05 (1955). [6] CAL. GOV'T CODE § 11440 (1955).
[7] MO. ANN. STAT. § 536.050 (Vernon 1953).
[8] Harney v. Contractor's State License Bd., 39 Cal. 2d 561, 247 P.2d 913 (1952). Plaintiff, an engineering contractor, sought a declaratory judgment as to the validity of a regulation of the Contractor's State License Board requiring a separate license for each of thirty-one different classes of specialty work. The court held that, under the statute, the allegation was sufficient to allow plaintiff to contest the regulation. For a discussion of the case and code sections involved see Note, 41 CALIF. L. REV. 341 (1953). See also Knudsen Creamery Co. v. Brock, 37 Cal. 2d 485, 234 P.2d 26 (1951).
In King v. Priest, 357 Mo. 68, 206 S.W.2d 547 (1947), plaintiffs joined a union in violation of a rule of the Board of Police Commissioners and sought a declaratory judgment that the rule was unconstitutional and an injunction restraining defendants from instituting disciplinary action against them. Although no action had been taken against them at the time, the court held that the validity of the rule could be determined.
[9] 162 Kan. 588, 178 P.2d 261 (1947).
[10] Williams v. State Bd. of Barber Examiners, 75 N.D. 33, 25 N.W.2d 282 (1946).
[11] *Id.* at 36, 25 N.W.2d at 284.
[12] 139 Ohio St. 563, 41 N.E.2d 369 (1942).

Plaintiffs contended that the court had jurisdiction to review under a constitutional provision which provided that the court should have "such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law."[13] The court held that "proceedings" meant judicial or quasi-judicial proceedings, pointing out that no concrete application of the rule was involved in the case.

In *Peters v. New York City Housing Authority*[14] the plaintiffs attacked a resolution of the Housing Authority as unconstitutional and sought to enjoin its enforcement. The resolution required residents of federally-aided housing projects to sign a certificate of non-membership in organizations designated as subversive by the Attorney General of the United States. Those who refused were to be evicted. The certificates had been issued for signing but no further action had been taken when petitioner brought the action. The New York Court of Appeals refused to decide the case on the constitutional ground because there were two other possible grounds of decision: (1) that the Authority, in adopting the resolution, acted in excess of statutory authority; and (2) that the resolution was an incorrect interpretation of the statute. Since the lower courts had not considered these questions, the court of appeals remitted the case to the special term for their determination. In effect this amounted to a holding that the plaintiffs could contest the resolution.[15]

At least two states, Minnesota and New Jersey, have held that their Declaratory Judgment Acts permit judicial review of administrative regulations prior to their application to specific parties. In *Minneapolis Federation of Men Teachers v. Board of Educ.*[16] the defendant Board passed a resolution requiring all teachers to sign a written contract for the ensuing year. Some individual plaintiffs had acquired a tenure status and objected to signing such a contract. They sought injunctive relief to preserve the status quo of the parties before they were asked to sign the contracts. The Board contended there was no justiciable controversy. The court held the plaintiffs were entitled to a declaratory judgment although no relief could be claimed beyond that of declaring plaintiffs' rights so as to relieve the uncertainty. They had a judicially protectible right that was being placed in jeopardy by the ripening seeds of an actual controversy.

[13] OHIO CONST. art. IV, § 2 (1912).
[14] 307 N.Y. 519, 121 N.E.2d 529 (1954).
[15] *But cf.* Kent Stores, Inc. v. Murdock, 278 App. Div. 946, 105 N.Y.S.2d 111 (2d Dep't 1951). The facts of the case were not set out, but in a memorandum decision the court said that the purpose of the proceeding was to obtain an opinion essentially of an advisory nature and that neither the Board nor the courts had jurisdiction to entertain such a proceeding.
[16] 238 Minn. 154, 56 N.W.2d 203 (1953).

The New Jersey case of *Sperry & Hutchinson Co. v. Margetts*[17] involved a ruling by the Motor Fuels Tax Bureau to the effect that the issuance of S & H discount stamps by gasoline retailers constituted a violation of a statute. Plaintiff was in the business of licensing retailers to use its stamps. The superior court held that plaintiff was entitled to maintain the action under the Declaratory Judgment Act, saying that there was a "concrete, contested issue" and that there existed a "justiciable controversy." The supreme court affirmed[18] without discussing the right of plaintiffs to maintain the action.[19]

The Supreme Court of the United States has been increasingly liberal in allowing judicial review of administrative regulations before their application to definite parties in specific factual situations. A leading case is *Columbia Broadcasting System v. United States*.[20] The Federal Communications Commission promulgated regulations which purported to require the Commission to refuse to grant a license to any broadcasting station which entered into certain defined types of contracts with any broadcasting network organization. A supplemental "minute" of the Commission allowed stations to contest the validity of the regulations without danger of losing their licenses.

The complaint alleged that many stations, fearing the loss of their licenses, were refusing to negotiate for or renew affiliation contracts and threatened to cancel existing affiliation contracts containing the forbidden provisions, and that as a result plaintiff was going to suffer great financial loss.

The Court held that the Commission's action was an "order" within the meaning of section 402(a) of the Communications Act of 1934[21] and therefore reviewable under the Urgent Deficiences Act[22] and that this plaintiff had stated a cause of action in equity. The theme of the Court's reasoning was that in view of the irreparable injury with which plaintiff was threatened the plaintiff's right to intervene in a proceeding upon an application for a license by a station was not an adequate remedy.

It should be noted that the regulations did not in terms apply to any network and had not been applied to any station. The Court said that these facts did not affect plaintiff's standing to maintain the suit in equity,

[17] 25 N.J. Super. 568, 96 A.2d 706 (Ch. 1953), *aff'd*, 15 N.J. 203, 104 A.2d 310 (1954).

[18] 15 N.J. 203, 104 A.2d 310 (1954).

[19] See Abelson's, Inc. v. New Jersey State Bd. of Optometrists, 19 N.J. Super. 408, 88 A.2d 632 (App. Div. 1952), which involved a regulation of the New Jersey State Board of Optometrists. The plaintiff's right to contest the regulation was not questioned, though it did not appear that the plaintiff had violated the regulation or that the Board had taken steps to enforce it.

[20] 316 U.S. 407 (1942).

[21] 48 STAT. 1093 (1934), 47 U.S.C. § 402(a) (1952).

[22] 38 STAT. 219, 220 (1913).

that it was enough that the regulations purported to operate to alter and affect adversely its contractual rights and business relations with station owners.

Justice Frankfurter was joined by Justices Reed and Douglas in a dissent based on the absence of any immediate, direct effect of the regulations on the plaintiff or station owners. He distinguished the cases relied on by the majority on the ground that in each of those cases criminal prosecution, injunction, or fine could be used immediately to enforce the command of the administrative agency. He was of the opinion that even irreparable loss was not a sufficient ground for judicial review.[23]

Several cases decided since the *CBS* case have extended that decision. In *FCC v. American Broadcasting Co.*[24] the Supreme Court, in a unanimous decision, did not consider or question the plaintiff's right to sue to enjoin and have set aside regulations of the Federal Communications Commission which interpreted a statute prohibiting the broadcasting of so-called "give away" programs. The Commission was to refuse any *station's* application for a construction permit, license, etc., if it broadcast the forbidden programs. The plaintiff was a network that made such programs available to stations for broadcast.

Under the Interstate Commerce Act carriers of agricultural commodities were exempt from the requirement of a certificate of public convenience and necessity. *Frozen Food Express v. United States*[25] was an action to enjoin and have set aside an order of the Interstate Commerce Commission that listed agricultural and nonagricultural commodities. Although the Interstate Commerce Act provided criminal and other sanctions for violation of the act, the order did not command compliance with the order or the act. The Commission merely threatened to enjoin transportation of the commodities which plaintiff claimed were agricultural. The Court held that the plaintiff was entitled to maintain the action under the Administrative Procedure Act.[26] The reasoning of the majority in the *CBS* case was relied upon in part.

The problem in *Frozen Food Express* closely parallels that in the principal case, where the opposite result was reached. The Administrative Procedure Act provides for judicial review of any agency action by any person suffering legal wrong or who is adversely affected or aggrieved by such action.[27] Agency action is defined to include

[23] For a more exhaustive consideration of this and other cases and closely related matters, see DAVIS, ADMINISTRATIVE LAW 640-63, 676-80 (1951); Davis, *Ripeness of Governmental Action for Judicial Review*, 68 HARV. L. REV. 1326 (1955).
[24] 347 U.S. 284 (1954).
[25] 351 U.S. 40 (1956), 70 HARV. L. REV. 156 (1957).
[26] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001-11 (1952).
[27] 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

agency rules and orders.[28] The North Carolina statute[29] provides for judicial review at the instance of any person aggrieved by any final administrative decision. "Administrative decision" is defined as any decision, order, or determination rendered by an administrative agency in a proceeding in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after opportunity for agency hearing.[30] "Administrative decision" as thus defined appears to cover determinations which are judicial in nature rather than regulations.[31]

United States v. Storer Broadcasting Co.[32] was decided a short time after the *Frozen Food Express* case. The regulations in that case provided that licenses for broadcasting stations would not be granted if the applicant had an interest in other stations beyond a limited number. Plaintiff sought review under the Administrative Procedure Act[33] and the statute (hereafter referred to as section 1034) that was the successor to the Urgent Deficiencies Act.[34] In holding that Storer had standing to sue, the Court relied on the *CBS, ABC,* and *Frozen Food Express* cases. The decision emphasized that "the Rules now operate to control the business affairs of Storer."[35]

The Court cited the Administrative Procedure Act[36] for the proposition that this was final agency action and went on to justify review under section 1034. Justice Harlan dissented on the ground that Storer was not a party "aggrieved" by a final "order" within the meaning of section 1034. He did not discuss the review provisions of the Administrative Procedure Act.[37] He distinguished the *CBS* holding that the chain broadcasting regulations were an "order" on the basis of the "coercive effect" of those regulations. He said: "The holding of the Court today amounts to this: that regulations which impose no duty and determine no rights may be reviewed at the instance of a person who alleges no in-

[28] 60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952).
[29] N.C. GEN. STAT. § 143-307 (Supp. 1957).
[30] N.C. GEN. STAT. § 143-306 (Supp. 1957).
[31] This conclusion seems to be strengthened by another factor. At the same session and in successive chapters of the session laws, the legislature passed N.C. GEN. STAT. §§ 143-306 to -316 (1953) and N.C. GEN. STAT. §§ 150-9 to -34 (1953). The latter sections regulate licensing boards. G.S. § 150-32 provides that one may petition for a declaratory judgment as to the validity of any rule adopted by any of the boards covered by the statute when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The fact that such provision was included in the latter act but not the former seems significant. For an explanation of G.S. § 150-32, see JOHNSTON, ADMINISTRATIVE PROCEDURE 124-26 (1953).
[32] 351 U.S. 192 (1956), 44 CALIF. L. REV. 938, 70 HARV. L. REV. 156 (1957).
[33] 60 STAT. 243 (1946), 5 U.S.C. §§ 1009(a), (c) (1952).
[34] 64 STAT. 1130 (1950), 5 U.S.C. § 1034 (1952).
[35] 351 U.S. at 199.
[36] 60 STAT. 237 (1946), 5 U.S.C. §§ 1001(c), (g) (1952).
[37] 60 STAT. 243 (1946), 5 U.S.C. § 1009 (1952).

jury, to settle whether a future application of the regulations that may never occur would be valid."[38] This statement seems to be an accurate appraisal of the decision.

The great difference in the position of the plaintiffs in the several cases becomes obvious when one considers the possible harm that might result to each while waiting for the regulations to be applied. The *CBS* decision was based on the irreparable injury that plaintiff would suffer by reason of contracts lost on account of the regulation.[39] The *Storer* case seemed to require no threat of irreparable injury in order to justify judicial review of a regulation, but merely that the regulation control the business affairs of the party seeking review. Thus the Supreme Court has become increasingly liberal in allowing direct review of administrative regulations without waiting for them to be applied.

The cases from the other states reveal that some of the successful plaintiffs asked for an injunction or a declaratory judgment. No North Carolina case was found in which the plaintiff asked for either of these remedies in seeking review of an administrative regulation. The New Jersey court granted relief to the Sperry & Hutchinson Company[40] under the New Jersey Declaratory Judgment Act.[41] The Minneapolis Federation of Men Teachers[42] also got relief under the Minnesota act.[43] The North Carolina Declaratory Judgment Act[44] does not differ in any material particular from the acts of those states. It might be that a contrary decision would have been reached if the plaintiff in the *Duke* case had sought a declaratory judgment under the North Carolina act.

WILLIAM G. RANSDELL, JR.

Constitutional Law—Congressional Investigations—Contempt of Congress

Defendant, an instructor at Vassar College, was subpoenaed to appear before the House Un-American Activities Committee and was asked by the Committee a series of questions tending to elicit from him whether he was or had been a member of the Communist Party and whether he knew that one Crowley, who had identified defendant as a member of a communist group while the latter was a student and instructor at the University of Michigan, had been a member of the

[38] 351 U.S. at 212.
[39] See Justice Harlan's dissent in the *Storer* case, 351 U.S. at 211.
[40] Sperry & Hutchinson Co. v. Margetts, 25 N.J. Super. 568, 96 A.2d 706 (Ch. 1953), *aff'd*, 15 N.J. 203, 104 A.2d 310 (1954).
[41] N.J. STAT. ANN. § 2A:16-52 (1952).
[42] Minneapolis Federation of Men Teachers v. Board of Educ., 238 Minn. 154, 56 N.W.2d 203 (1953).
[43] MINN. STAT. ANN. §§ 555.01-.15 (1947).
[44] N.C. GEN. STAT. §§ 1-253 and 1-256 (1953).

Communist Party. Defendant refused to answer these questions on the grounds that such interrogation violated the first[1] and fifth[2] amendments. He was convicted[3] of contempt of Congress[4] and the court of appeals affirmed.[5] The Supreme Court granted certiorari, vacated the judgment of the court of appeals,[6] and remanded the case "for consideration in light of *Watkins v. United States.*"[7] On remand, in the case of *Barenblatt v. United States,*[8] the court of appeals again affirmed the conviction.

In the *Watkins* case, the Supreme Court reversed the contempt conviction of Watkins, a labor organizer, who had testified freely and fully about his own past Communist activities, but who refused to answer questions as to whether he had known certain other persons to be members of the Communist Party. The Court found that Watkins was not given sufficient information as to the pertinency of the questions to the subject under inquiry and held that he "was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment."[9]

The *Barenblatt* case is one of several recent cases involving prosecutions for refusal to answer questions propounded by congressional investigating committees which were pending in the federal courts when the *Watkins* decision was rendered. Some of these cases have since been decided.[10] It seemed apparent, in view of the strong language[11]

[1] Defendant maintained that the first amendment prohibition against congressional lawmaking involving the freedoms of speech, press, and assembly includes a like prohibition against any form of congressional intrusion in these areas. The Court in Watkins v. United States, 354 U.S. 178, 197 (1957), seems to approve this contention when it says, "Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking."

[2] Defendant maintained that an indictment under 52 STAT. 942 (1938), 2 U.S.C. § 192 (1953), the contempt statute, was void because the contempt statute, when applied to the Committee's authorizing resolution, is void for vagueness and thus in violation of the due process clause of the fifth amendment. Defendant did not rely on the provision against self-incrimination.

[3] United States v. Barenblatt, Criminal No. 1154-54, D.C.D.C., March 15, 1956.

[4] 52 STAT. 942 (1938), 2 U.S.C. § 192 (1953).

[5] Barenblatt v. United States, 240 F.2d 875 (D.C. Cir. 1957).

[6] Barenblatt v. United States, 354 U.S. 930 (1957).

[7] 354 U.S. 178 (1957).

[8] 252 F.2d 129 (D.C. Cir. 1958).

[9] 354 U.S. at 215.

[10] Sacher v. United States, 252 F.2d 828 (D.C. Cir. 1958), *affirming* 240 F.2d 46 (D.C. Cir. 1957) *on remand in* 354 U.S. 930 (1957) (refusal by lawyer to tell the Senate Internal Security Subcommittee whether he was or had been a member of the Communist Party); Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957) *reversing on rehearing* 244 F.2d 349 (D.C. Cir. 1957) (refusal by teacher to

used by the Court in *Watkins* concerning the House Un-American Activities Committee Charter,[12] that the decision therein would have an important effect on all pending and subsequent prosecutions for contempt of Congress. Apparently the Court itself considered *Watkins* to have such an effect for the Court granted certiorari, vacated the judgments of the court of appeals, and remanded, for consideration in light of *Watkins,* the *Barenblatt,*[13] *Sacher,*[14] and *Flaxer,*[15] cases, the only three contempt cases then pending before the Supreme Court. Two of these three cases have been reheard and decided after remand, yet in both rehearings the court of appeals affirmed its earlier decisions supporting conviction.[16]

In *Barenblatt,* the court was asked to acknowledge that "the Supreme Court in *Watkins* struck down the resolution creating the Standing Committee on Un-American Activities . . . and that prosecution based on refusal to answer questions asked by the Committee or a Subcommittee questioning thereunder must necessarily fall in that the resolution on which the indictment is based fails to meet the requirements of due process; and second, assuming this was not the case, that part of the opinion in *Watkins* relating to pertinency is dispositive of the present

identify for the House Un-American Activities Committee the names of others with whom he had participated in Communist activities); United States v. Peck, 154 F. Supp. 603 (D.C.D.C. 1957) (refusal by newspaperman to identify for the Senate Internal Security Subcommittee the names of others with whom he had participated in Communist activities); United States v. Lorch, — F. Supp. — (S.D. Ohio 1957) (refusal by teacher to tell the House Un-American Activities Committee whether he had been a Communist at a certain time in the past).

[11] "An excessively broad charter, like that of the House Un-American Activities Committee, places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference. It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function. The reason no court can make this critical judgment is that the House of Representatives has never made it. Only the legislative assembly initiating an investigation can assay the relative necessity of specific disclosures." 354 U.S. at 205-06.

[12] "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." H.R. RES. 5, 83d Cong., 1st Sess., 99 CONG. REC. 18, 24 (1953).

[13] Barenblatt v. United States, 354 U.S. 930 (1957).

[14] Sacher v. United States, 354 U.S. 930 (1957).

[15] Flaxer v. United States, 354 U.S. 929 (1957) (refusal by union president to produce union records, including a membership list, for the Senate Internal Security Subcommittee).

[16] Flaxer v. United States, — F.2d — (D.C. Cir. 1958), *affirming* 235 F.2d 821 (D.C. Cir. 1956); Barenblatt v. United States, 252 F.2d 129 (D.C. Cir. 1958), *affirming* 240 F.2d 875 (D.C Cir. 1957).

case."[17] The court held that *Watkins* did not strike down the resolution[18] because 1) the Court would have said so explicitly if it had intended to do so; 2) the Court would have *reversed* on the authority of *Watkins* rather than *remanded* for consideration in light of *Watkins;* and 3) the Court did not repudiate other convictions under the same charter to which it referred in *Watkins.* The court then goes on to hold that Barenblatt had been made fully aware of the subject under inquiry and was thus able to see the pertinency of the questions thereto, the court considering the questions to be pertinent. By rejecting the argument as to the effect of *Watkins* on the resolutions and by deciding the case on the basis of pertinency to subject matter, the court implies that all *Watkins* requires is that the questions be pertinent to the subject matter under inquiry and that the witness be informed of the subject matter in one of five ways[19] so that he can gauge the pertinency of the questions thereto. But a careful reading of the *Watkins* opinion seems to indicate that the Supreme Court is saying a good deal more than this.

First, the Supreme Court seems to say that the congressional instructions to a committee, which are embodied in the authorizing resolution,[20] must spell out that group's jurisdiction with sufficient particularity[21] to enable the courts to ascertain clearly that Congress ordered the specific investigation and desires the particular information which the witness refuses to divulge.[22] This point is especially crucial because if it were decided that Congress had authorized the committees to compel answers to such questions as are involved in these cases, the courts might find it necessary as a last resort to declare unconstitutional the authorizing resolutions as being violative of the first amendment[23] as, indeed, several Justices have implied.[24] To avoid this extremity, the

[17] 252 F.2d at 130.

[18] "We are of clear opinion that *Watkins* did not void [the resolution]." 252 F.2d at 132.

[19] (1) The authorizing resolution; (2) the opening remarks of the chairman, members, or counsel of the committee; (3) the nature of the proceedings; (4) the questions themselves; and (5) the chairman's response to an objection on pertinency. 354 U.S. at 209-14.

[20] "Those instructions are embodied in the authorizing resolution." 354 U.S. at 201.

[21] *Ibid.*

[22] The importance of this prerequisite to a valid committee use of the subpoena power is emphasized by Justice Frankfurter in his concurring opinion in *Watkins,* 354 U.S. at 217. The authorizing resolution in *Barenblatt* and United States v. Lorch, — F. Supp. — (S.D. Ohio 1957), is the same as that in *Watkins.* As Judge Youngdahl lucidly shows in United States v. Peck, 154 F. Supp. 603 (D.C.D.C. 1957), the authorizing resolution of the Senate Committee on the Judiciary, through which the Internal Security Subcommittee derives its authority, is rife with the same vagueness and ambiguity which the Court vigorously condemned in *Watkins,* 354 U.S. at 201-06. This is the same authorizing resolution as is involved in *Sacher* and *Flaxer,* which the Court remanded for consideration in light of *Watkins.*

[23] See note 1 *supra.*

[24] Watkins v. United States, 354 U.S. at 196-98; See also Sweezy v. New

Court has announced that "whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits."[25] If the Court in *Watkins* did not expressly say that it struck down the resolution there involved for vagueness, it went to great lengths in citing vaguenesses for naught. It is possible that the reason the Court did not hold so explicitly is that the Court was obeying the doctrine that required it to decide a case on the constitutional issue only as a last resort. In the *Watkins* case the Court was able to show that the witness had not been apprised even of what the Committee considered to be the subject under inquiry and was thus not accorded due process. Another explanation is offered by Chief Judge Edgerton in his *Barenblatt* dissent when he argues that when "there are two grounds, upon either of which an Appellate court may rest its decision and it adopts both, the ruling on neither is obiter, but each is the judgment of the court and of equal validity with the other. And even if the Supreme Court's demonstration that the Committee on Un-American Activities had no authority to compel testimony were obiter, this court should defer to it."[26] But the clear meaning of the Court's words in *Watkins* is that the resolution is void for vagueness whenever a criminal prosecution is based upon it. In *remanding* instead of *reversing* the *Barenblatt, Sacher,* and *Flaxer* cases, the Court was following the practice of allowing lower courts to rectify their own mistakes, as Chief Judge Edgerton points out in his vigorous dissent in *Barenblatt.*[27]

Secondly, the Supreme Court has indicated that the subject matter of the investigation must be clearly within the congressionally authorized scope of inquiry.[28]

Thirdly, the Court says that the questions asked by the committee must be pertinent to the validly authorized subject of inquiry.[29] Finally, the Court requires that the witness be given such information as will indicate "what is the topic under inquiry" and must have explained to him "the connective reasoning whereby the precise questions asked relate to it."[30] In the *Barenblatt* case, the court found that the statement of committee counsel had informed the defendant of the subject of the hearings and that, therefore, the defendant could see the obvious pertinency of the questions to the announced subject.[31] The court did not discuss at

Hampshire, 354 U.S. 234, 251 (1957); *id.* at 261 (concurring opinion); United States v. Rumely, 345 U.S. 41, 58 (1953) (concurring opinion).

[25] United States v. Rumely, 345 U.S. 41, 46 (1953).
[26] 252 F.2d at 138.
[27] *Ibid.*
[28] United States v. Rumely, 345 U.S. 41 (1953).
[29] 354 U.S. at 208.
[30] *Id.* at 215.
[31] 252 F.2d at 136.

all the question of whether the committee-determined subject falls within the scope of the authorization given the committee by the House of Representatives. By thus placing the entire emphasis of the *Watkins* decision on the application of the pertinency of questions to subject matter requirement, the court of appeals makes it possible for a committee to define its investigation in whatever terms it wishes and then to ask questions pertinent to this self-established subject. This is precisely the evil practice the Court proscribes in *Watkins*.[32]

Hence, it would seem that, given the decision of the Court in *Watkins* and the obvious fact that the Court saw a clear connection between that case and the three remanded cases, the court of appeals might have found one of the following: 1) the witness had not been informed of the subject lawfully under inquiry,[33] 2) the specific questions involved were not pertinent to the lawfully authorized inquiry, 3) the subject under inquiry was not within the Committee's scope of authority,[34] 4) the resolution authorizing the investigation was void for vagueness, this being a criminal prosecution based thereon, as being violative of the fifth amendment, or 5) the resolution authorizing the investigation was void as a violation of the first amendment. Although the Supreme Court in *Watkins* pointed in the direction of the third or fourth choice, the court of appeals, en banc, held in *Sacher* and implied in *Barenblatt* that the resolutions involved were sufficiently definite to authorize the investigations. It would seem that having found in both cases that the questions were pertinent to the subject under inquiry, the court would have been obliged to discuss the question of whether the subject under inquiry was within the committee's authority. The disposition of these two cases seems to be inconsistent with the opinion of the Supreme Court in *Watkins* and, indeed, with the per curiam reversal in light of *Watkins* by the same court of appeals of its decision in the *Singer* case.[35]

In summary, it would seem that *Barenblatt* ignores the *Watkins* requirements for a valid prosecution for contempt: (1) a constitutional grant of authority explicitly inclusive of the investigation rather than simply not exclusive of such investigation;[36] (2) a specific investigation within the grant of authority; (3) questions clearly pertinent to such investigation, the relevance to which must be determined as of the time

[32] 354 U.S. at 205.
[33] This was the express holding in *Watkins*.
[34] This was the holding in the *Rumely* case. 345 U.S. 41 (1953).
[35] Singer v. United States, 247 F.2d 535 (D.C. Cir. 1957), *reversing* 244 F.2d 349 (D.C. Cir. 1957). This case has the identical fact situation as does *Watkins*. The other cases differ in that the information refused was of the defendant's own activities. A careful reading of *Watkins* reveals that the Court did not consider this point sufficiently important to qualify its decision by making such a dichotomy.
[36] 354 U.S. at 204.

when asked and not "looking backwards from the events that transpired";[37] and (4) a witness being fully apprised of the way in which the questions are pertinent. If the main emphasis of *Watkins* is not placed on the requirement of explicit congressional authorization, then that case tells us nothing new other than listing five ways by which a witness may be informed of the subject under inquiry.[38] The requirements of pertinency of questions to subject matter[39] and of pertinency of subject matter to congressional authorization[40] have long been declared to be essential. To read the *Watkins* decision in any other light removes from that case the vital impact the case was expected to have[41] on the entire practice of congressional investigations.[42]

JOEL L. FLEISHMAN

Constitutional Law—Double Jeopardy—Conviction of Murder in the First Degree After Reversal of Conviction of Murder in the Second Degree

In *Green v. United States*[1] the petitioner had been indicted in the District of Columbia for first degree murder. Upon a verdict of guilty of murder in the second degree, he appealed and obtained a new trial.[2] On remand he was again tried for first degree murder, and this time convicted of that charge and sentenced to death. The United States Supreme Court held that the second trial for first degree murder put the petitioner in jeopardy twice for the same offense in violation of the Federal Constitution.[3]

The reasoning of the Court was that the petitioner was not required to waive former jeopardy as to the charge of first degree murder in order to have a new trial of his conviction for second degree murder. The effect of this decision is that when an accused is tried for first degree

[37] *Ibid.*
[38] See note 18 *supra.*
[39] McGrain v. Daugherty, 273 U.S. 135, 176 (1927).
[40] United States v. Rumely, 345 U.S. 41 (1953).
[41] As Justice Clark says in his dissent in *Watkins,* "As I see it the chief fault in the majority opinion is its mischievous curbing of the informing function of the Congress." 354 U.S. at 217.
[42] *Cf.* United States v. Brewster, 154 F. Supp. 126 (D.C.D.C. 1957) (in convicting the President of Western Teamsters Conference for refusal to produce union records subpoenaed by the Investigations Subcommittee of the Senate Government Operations Committee, the court sustained the Committee's power to see the records in order to check the truthfulness of reports filed by the union with the Department of Labor); Federal Communications Comm'n v. Cohn, 154 F. Supp. 899 (S.D.N.Y. 1957) (court held that the F.C.C. had been given sufficient power by Congress to subpoena financial records of television finances in an investigation of radio and television networks).

[1] 355 U.S. 184 (1957).
[2] 218 F.2d 856 (D.C. Cir. 1955).
[3] U.S. CONST. amend. V provides in part, "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

murder, but is convicted only of second degree murder or manslaughter and obtains a new trial, that trial must be limited to the offense of which he was convicted in the first trial. A second trial of the higher offense of first degree murder places him in double jeopardy.[4]

Although the cases are distinguishable, the Court had previously reached the opposite conclusion in *Trono v. United States*,[5] saying that when a defendant at his own request "has obtained a new trial he must take the burden with the benefit, and go back for a new trial of the whole case."[6] This holding had been regarded as binding by the lower federal courts.[7]

North Carolina has an interesting history regarding this question.[8] Prior to 1948, there were eight instances in which a defendant in such a situation appealed to the North Carolina Supreme Court.[9] In only one of these, *State v. Groves*,[10] was the appeal successful and a new trial granted. In that case the defendant made no objection on the ground of double jeopardy, and the court simply said, "The case goes back for

[4] This fact situation must be distinguished from one where the defendant has been convicted of the *same* offense for which he was indicted. In the latter case it is conceded that he waives his defense of former jeopardy if he is granted a new trial. United States v. Ball, 163 U.S. 662 (1896). This situation must also be distinguished from one where the defendant, charged under an indictment with two or more counts, is only convicted on one count. In that case North Carolina holds that if he is granted a new trial, he may be retried on all the counts. State v. Beal, 202 N.C. 266, 162 S.E. 561 (1932). As to mutually exclusive counts, see Note, 36 N.C.L. REV. 84 (1957).

[5] 199 U.S. 521 (1905). The *Trono* case arose in the Philippine Islands shortly after they were annexed by the United States. On a charge of first degree murder the defendants had been convicted of assault. They appealed to the Supreme Court of the Philippines. That court, exercising the jurisdiction possessed by it at the time, reversed the judgment of the trial court and convicted the defendants of second degree murder.

Although the *Green* case does not expressly overrule *Trono*, but limits it to its facts, certainly it overrules it in effect, for in the *Trono* opinion the Court said, "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country . . . ." *Id.* at 530.

[6] *Id.* at 534.

[7] Carbonell v. People of Porto Rico, 27 F.2d 253 (1st Cir. 1928); United States v. Gonzales, 206 Fed. 239 (W.D. Wash. 1913).

[8] Although there is no express double jeopardy provision in the North Carolina Constitution, it is prohibited under the "law of the land" clause. N.C. CONST. art. I, § 17, State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954).

[9] State v. Davis, 175 N.C. 723, 95 S.E. 48 (1918); State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Gentry, 125 N.C. 733, 34 S.E. 706 (1899); State v. Freeman, 122 N.C. 1012, 29 S.E. 94 (1898); State v. Groves, 121 N.C. 563, 28 S.E. 262 (1897); State v. Craine, 120 N.C. 601, 27 S.E. 72 (1897); State v. Bridgers, 87 N.C. 562 (1882); State v. Grady, 83 N.C. 643 (1880). In connection with these cases it should be noted that in North Carolina it is not necessary that the indictment specifically allege first degree murder in order that the accused may be convicted of that offense. N.C. GEN. STAT. § 15-144 (1953), State v. Kirksey, 227 N.C. 445, 42 S.E.2d 613 (1947). Rather, he is indicted for murder, and the jury determines in its verdict whether it is in the first or second degree. N.C. GEN. STAT. § 15-172 (1953), State v. Bagley, 158 N.C. 608, 73 S.E. 995 (1912).

[10] 121 N.C. 563, 28 S.E. 262 (1897).

trial *de novo* for the offense charged in the bill of indictment."[11] In five of the seven cases in which the appeal was unsuccessful, the court expressed the opinion by way of dicta that had a new trial been awarded, the defendant could be lawfully convicted of first degree murder.[12] Finally in 1948 the issue was for the first time put squarely before the North Carolina court. In *State v. Correll*[13] the defendant had been convicted of manslaughter on an indictment for murder and had obtained a new trial. In the second trial he was convicted of second degree murder, and again he appealed, this time on the theory that he was put in double jeopardy. Relying on assorted dicta in its previous cases and the *Groves* case (in which the defendant had not raised the question), the court said, "It appears . . . from former decisions of this Court that it is an accepted principle of law in this State that when on appeal by defendant from judgment on a verdict of guilty in a criminal prosecution a new trial is ordered, the case goes back to be tried on the bill of indictment as laid."[14] Thus there has evolved in North Carolina a holding which is directly opposed to that of the *Green* case.[15]

There is no clear majority rule regarding the question presented by the *Green* and *Correll* cases.[16] One of the earliest decisions in-

[11] *Id.* at 568, 28 S.E. at 264. The court relied on State v. Craine, 120 N.C. 601, 27 S.E. 72 (1897). In that case the defendant was not granted a new trial, but there was dictum that had he been, it could have been for the greater offense.

[12] State v. Davis, 175 N.C. 723, 95 S.E. 48 (1918) (concurring opinion); State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Gentry, 125 N.C. 733, 34 S.E. 706 (1899); State v. Freeman, 122 N.C. 1012, 29 S.E. 94 (1898); State v. Craine, 120 N.C. 601, 27 S.E. 72 (1897).

[13] 229 N.C. 640, 50 S.E.2d 717 (1948).

[14] *Id.* at 641, 50 S.E.2d at 718. The court cited State v. Matthews, 142 N.C. 621, 55 S.E. 342 (1906); State v. Gentry, 125 N.C. 733, 34 S.E. 706 (1899); State v. Freeman, 122 N.C. 1012, 29 S.E. 94 (1898); State v. Craine, 120 N.C. 601, 27 S.E. 72 (1897). But in none of these was a new trial awarded. The court also cited State v. Bridgers, 87 N.C. 562 (1882), and State v. Grady, 83 N.C. 643 (1880). In these two cases, not only was a new trial not granted but the court expressly refused to state an opinion on this question. Finally, the court cited State v. Beal, 202 N.C. 266, 162 S.E. 561 (1932), and State v. Stanton, 23 N.C. 424 (1841). These two cases involved the situation where a defendant, indicted on several counts, is convicted on one or more but not all of them. Therefore they are distinguishable. See note 4 *supra*.

[15] The *Correll* case was followed in State v. Chase, 231 N.C. 589, 58 S.E.2d 364 (1950).

[16] The opinion has been expressed that murder and manslaughter are different crimes. In Weighorst v. State, 7 Md. 442 (1855), the court said, "Although both are within the general term homicide, yet, legally speaking, they are not different degrees of the same offense, because one is not murder at all . . . ." *Supra* at 451. The Maryland court seems to have missed the point. Homicide is not necessarily a crime. It may be justifiable, Hammond v. State, 147 Ala. 79, 41 So. 761 (1906), or excusable, Gill v. State, 134 Tenn. 591, 184 S.W. 864 (1916). The crime is felonious homicide, and it may be either murder or manslaughter, People v. Austin, 221 Mich. 635, 192 N.W. 590 (1923), the difference being that malice is an essential element for a killing to constitute murder, State v. Baldin, 152 N.C. 822, 68 S.E. 148 (1910). Blackstone put it, "Manslaughter (when voluntary) arises from the sudden heat of the passions, murder from the wickedness of the heart." 4 *Blackstone, Commentaries* *190.

volving this problem was a Louisiana case decided in 1845.[17] By dictum that court took the view represented by the *Green* case; a year later a federal court in *United States v. Harding*[18] took the side of the *Correll* case. Thus the question was weaned on conflict, and the situation is no different today. In at least sixteen states the holding of the *Green* case prevails,[19] but another sixteen are in accord with North Carolina.[20]

Of all the decisions adopting the North Carolina rule, perhaps the classic case is *Brantley v. State*.[21] There the defendant contended that the verdict in the first trial finding him guilty of manslaughter had the legal effect of finding him not guilty of murder, and that therefore he could not be tried for murder at the second trial without being put in double jeopardy. The court said that one may waive his constitutional protection against double jeopardy by obtaining a new trial, and that in this situation the waiver is not limited to the offense for which he was convicted, but extends to the entire offense for which he was indicted. A verdict, the court said, is single, and the defendant cannot divide it into that which favors him and that which does not. Had he allowed it to stand, he could have claimed any legal results flowing from it, including the implication that, as he was only convicted of manslaughter, he was not guilty of the higher offense of murder. But as the court pointed out, once he causes the conviction to be set aside, the implication is left without a basis and so must fall with the conviction.[22]

[17] State v. Hornsby, 8 Rob. 583, 41 Am. Dec. 314 (La. 1845).

[18] 26 Fed. Cas. 131, No. 15301 (C.C.E.D. Pa. 1846).

[19] Rignell v. State, 8 Ala. App. 46, 62 So. 977 (1913); Hearn v. State, 212 Ark. 360, 205 S.W.2d 477 (1947); People v. Huntington, 8 Cal. App. 612, 97 Pac. 760 (1908); State v. Naylor, 28 Del. 99, 90 Atl. 880 (1913); McLeod v. State, 128 Fla. 35, 174 So. 466 (1937); People v. Newman, 360 Ill. 226, 195 N.E. 645 (1935); State v. Coleman, 226 Iowa 968, 285 N.W. 269 (1939); State v. Wooten, 136 La. 560, 67 So. 366 (1915); People v. Farrell, 146 Mich. 264, 109 N.W. 440 (1906); State v. Welch, 37 N.M. 549, 25 P.2d 211 (1933); State v. Wilson, 172 Ore. 373, 142 P.2d 680 (1943); Commonwealth v. Deitrick, 221 Pa. 7, 70 Atl. 275 (1908); Reagen v. State, 155 Tenn. 397, 293 S.W. 755 (1927); Taylor v. Commonwealth, 186 Va. 587, 43 S.E.2d 906 (1947); State v. Foley, 131 W. Va. 326, 47 S.E.2d 40 (1948); Radej v. State, 152 Wis. 503, 140 N.W. 21 (1913).

[20] Young v. People, 54 Colo. 293, 130 Pac. 1011 (1913); Brantley v. State, 132 Ga. 573, 64 S.E. 676 (1909); State v. Killigrew, 202 Ind. 397, 174 N.E. 808 (1931); State v. Morrison, 67 Kan. 144, 72 Pac. 554 (1903); Hoskins v. Commonwealth, 152 Ky. 805, 154 S.W. 919 (1913); Jones v. State, 144 Miss. 52, 109 So. 265 (1926); State v. Stallings, 334 Mo. 1, 64 S.W.2d 643 (1933); Pembroke v. State, 119 Neb. 417, 229 N.W. 271 (1930); State v. Teeter, 65 Nev. 584, 200 P.2d 657 (1948); People v. McGrath, 202 N.Y. 445, 96 N.E. 92 (1911); State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956); Turner v. Territory, 15 Okla. 557, 82 Pac. 650 (1905); State v. Gillis, 73 S.C. 318, 53 S.E. 487 (1906); State v. Kessler, 15 Utah 142, 49 Pac. 293 (1897); State v. Bradley, 67 Vt. 465, 32 Atl. 238 (1895); State v. Hiatt, 187 Wash. 226, 60 P.2d 71 (1936).

[21] 132 Ga. 573, 64 S.E. 676 (1909).

[22] There is another view which concurs in the result reached in the *Brantley* case, but which is based on different reasoning. In a dissenting opinion, Justice Holmes said, "It seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end

In the *Green* case the Court said that if the waiver extends to the whole offense for which the defendant was indicted, then he is faced with a dilemma.[23] In order to gain a chance to have corrected what he considers an erroneous conviction of a lesser offense, he must run the risk of conviction of an offense which may be punishable by death. This gives him no meaningful choice. Accordingly, those decisions which are in line with the *Green* case limit the extent of the waiver to the offense of which he was convicted. He is deemed acquitted of any greater offense by the first verdict.[24]

From the foregoing it is seen that there are two opposing camps regarding the question presented by the *Green* case. The two are approximately equal in number and can possibly be equally well supported by logical argument. The danger is that well reasoned logic may obscure the point in conflict. Perhaps the answer to this problem is more a matter of policy than of logic. Justice Holmes said that "in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny."[25] Yet, in the orderly administration of justice that balance is likely as equal as laws can devise. It is therefore submitted that the holding of the *Green* case exemplifies the spirit, if not clearly the letter, of the prohibition against double jeopardy.[26]

RICHARD C. CARMICHAEL, JR.

Criminal Law—Obstructing Justice—Interfering With a Police Officer

Statutes imposing criminal sanctions for obstructing justice[1] contain such descriptive words as obstruct, resist, oppose, assault, interfere, hinder, prevent, intimidate and impede. The question raised is should

of the cause." Kepner v. United States, 195 U.S. 100, 134 (1904). No cases in support of this theory have been found.

[23] 355 U.S. at 193.

[24] Hearn v. State, 212 Ark. 360, 205 S.W.2d 477 (1947); Commonwealth v. Deitrick, 221 Pa. 7, 70 Atl. 275 (1908).

[25] Kepner v. United States, 195 U.S. 100, 134 (1904) (dissenting opinion).

[26] The holding of the *Green* case will affect only the federal courts, as the double jeopardy prohibition contained in the fifth amendment of the Federal Constitution does not apply to the states. Palko v. Connecticut, 302 U.S. 319 (1937). However, an interesting sidelight of the *Green* case is the fact that the majority opinion was written by Justice Black, who has insisted that the fourteenth amendment due process clause incorporates the entire Bill of Rights so as to make its provisions binding on the states. Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting opinion). The majority of the Court has always refused to accept this idea. For a discussion of the majority view, see Justice Frankfurter's concurring opinions in Malinski v. New York, 324 U.S. 401, 412 (1945), and Adamson v. California, *supra* at 59.

[1] ALA. CODE tit. 14, § 402 (1940); ARIZ. REV. STAT. ANN. § 13-541 (1956); IND. ANN. STAT. § 10-1005 (Burns 1956); ME. REV. STAT. ANN. c. 135, § 21 (1954); MINN. STAT. ANN. § 613.56 (1947); NEB. REV. STAT. § 28-729 (1948); N.C. GEN. STAT. § 14-223 (1953); N.J. REV. STAT. § 2A:99-1 (1953); TENN. CODE ANN. § 39-3104 (1955); W. VA. CODE ANN. § 6015 (1955).

these words be interpreted as including conduct which did not involve the use of force or threats to use force and which could not have incited a riot.

In *Andersen v. United States*[2] a police officer was issuing a double parking ticket to another party when Andersen, a bystander, protested the officer's authority to issue the ticket. The officer, in arresting Andersen for being disorderly, tore Andersen's shirt. Andersen in turn pushed the officer but then submitted to the arrest. Andersen admitted in the trial court that he protested the officer's right to issue the parking ticket but denied being disorderly or interfering with the officer. For the act of pushing the officer, Andersen was convicted of assault.[3] He appealed on the ground that he had not committed the misdemeanor of interfering with or obstructing justice and for that reason he was justified in using reasonable force to resist an unlawful arrest. Although there was no indication in the report that Andersen was indicted for interfering with a police officer, the court said it appeared from the defendant's admissions in the trial for assault that he had committed the misdemeanor of interfering with a police officer[4] as a matter of law; therefore, his arrest was lawful and his resistance unjustified.

Should an orderly protest to a police officer be an obstruction of justice? An annotation[5] and the treatises[6] take the position that remonstrating with an officer on behalf of another or questioning an officer while he is performing his duty does not constitute an obstruction, hindrance or interference.

From a general search of the annotated state statutes on obstructing justice, no other case was found where a court had interpreted its statute so liberally. On the contrary citizens were found not guilty of obstructing justice where they merely questioned, commented to, or remonstrated with police officers concerning arrests.

In *People v. Magnes*[7] the defendant asked why certain persons were placed in custody. A lower New York court found that the inquiries propounded in a gentlemanly manner did not amount to an interference

[2] 132 A.2d 155 (D.C. Mun. Ct. App. 1955).

[3] D.C. CODE ANN. § 22-504 (1951): *"Assault or threatened assault in a menacing manner.* Whoever unlawfully assaults or threatens another in a menacing manner, shall be fined not more than five hundred dollars or be imprisoned not more than twelve months or both."

[4] D.C. CODE ANN. § 22-505(a) (Supp. VI 1958): *"Assault on a member of police force.* (a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than five years or both."

[5] Annot., 48 A.L.R. 753 (1927).

[6] 39 AM. JUR., *Obstructing Justice* § 10 (1942); 67 C.J.S., *Obstructing Justice* § 2 (1950). See also 6 ARK. L. REV. 46 (1951).

[7] 187 N.Y. Supp. 913 (N.Y. County Ct. Gen. Sess. 1921).

with a police officer. The court went on to say that the defendant had a perfect right to make the inquiries of a police officer. In *Chicago v. Brod*[8] the defendant at the scene of another's arrest commented, "Well, he [referring to the arresting officer who had his gun in hand] doesn't have to shoot him."[9] The court, reversing the conviction for interfering with justice, asked: "If this pronouncement of the trial judge is sustainable, where are our boasted liberties? Must the citizen be beholden to the whim and humor of the police for his freedom . . . ?"[10] In *District of Columbia v. Little*[11] the defendant refused to unlock the door of her home for a health officer and remonstrated on constitutional grounds. The defendant's actions were held not to be an interference. The court said that although force or theatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duties, mere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference. In *People v. Pilkington*,[12] while the police officer was putting prisoners into the patrol car, the defendant advised the prisoners to keep their mouths shut and a lawyer would soon be on the way. The court held this not to be a violation of the city ordinance which states that it is unlawful to harm, obstruct, or resist any officer in the performance of his duties.

Under the court's interpretation in the principal case, a police officer cannot be questioned by an innocent bystander. The statute[13] so interpreted makes orderly protests to a police officer punishable as a matter of law by $5,000 fine or five years imprisonment or both.

NICK J. MILLER

Domestic Relations—Custody—Contests Between Parent and Nonparent

Probably one of the most important and yet most unsettled areas of the law today is that of custody of children, particularly in a contest between a parent and nonparent. As early as 1876[1] the North Carolina Supreme Court held that the trial judge erred when he was of the opinion that in law the mother had a *primary* right (as against the

[8] 141 Ill. App. 500 (1908).
[9] *Id.* at 501.
[10] *Id.* at 502.
[11] 339 U.S. 1 (1950). Although not squarely in point, this case was included because it arose in the same jurisdiction. Also, it should be pointed out that in 1953 D.C. CODE § 22-505(a) (1951) was amended; the phrase, "personal violence upon an officer," was deleted, and the phrase, "assaults, resists, opposes, impedes, intimidates or interferes with any officer," was inserted. D.C. CODE § 22-505(a) (Supp. VI 1958).
[12] 199 Misc. 665, 103 N.Y.S.2d 64 (County Ct. 1951).
[13] D.C. CODE ANN. § 22-505 (Supp. V 1956).

[1] Spears v. Snell, 74 N.C. 210 (1876).

child's uncle) to the custody of the child. On the other hand, as recently as 1949, the court in the case of *In re Cranford*[2] held that "where the fitness of the petitioner [mother] is unchallenged the natural right of the parent to the custody of the child cannot be denied because a more suitable custodian or a more advantageous environment is available . . ." and that "the question of unsuitability is one which must be advanced and shown by the [nonparent] respondent."[3] Since this decision there have been three rather significant opinions indicating that the court is abandoning the rule of the *Cranford* case and returning to its 1876 position. These culminate in the principal case of *In re Gibbons*.[4]

The first of these cases is *Wall v. Hardee*,[5] in which the mother sought the custody of her six year old illegitimate son from the child's aunt. The trial court found the mother to be of good moral character and to bear a good reputation at that time. The trial judge concluded that as the natural mother of the child, she had the primary, natural, and legal custody and control of the child and that the burden of showing her unsuitability was on the aunt. Since the aunt failed to sustain the burden, the court awarded the child to the mother. The supreme court remanded the case to find further facts, citing the rule in *In re Cranford*, but adding: "This rule is not absolute. There have been, and will be, cases where the best interests of the bastard child required that its custody be taken from the mother, and placed elsewhere. While the courts are reluctant to do this, for reasons real as well as apparent, they do not hesitate, where it clearly and manifestly appears the best interests and welfare of the child demand it."[6] Thus the rule set out in *In re Cranford* was substantially weakened.

The second of these cases, *Holmes v. Sanders*,[7] came about one year later. The father sought the custody of his minor child from the child's maternal grandparents. The supreme court in a per curiam opinion affirmed an award of custody to the grandparents without requiring the grandparents to establish the unsuitability of the father. In fact, no mention was made of the suitability or unsuitability of the natural parent.[8]

The third and principal case, *In re Gibbons*, has been before the supreme court two times.[9] Both trial judges made detailed findings

[2] 231 N.C. 91, 56 S.E.2d 35 (1949), 28 N.C.L. REV. 323 (1950).
[3] *Id.* at 95, 56 S.E.2d at 39.
[4] 247 N.C. 273, 101 S.E.2d 16 (1957).
[5] 240 N.C. 465, 82 S.E.2d 370 (1954), 33 N.C.L. REV. 193 (1955).
[6] *Id.* at 466, 82 S.E.2d at 372.
[7] 243 N.C. 171, 90 S.E.2d 382 (1955), 35 N.C.L. REV. 225 (1956).
[8] The court in its two sentence opinion stated it is a "well settled principle in North Carolina that in matters pertaining to their custody, the welfare of children is 'the polar star by which the discretion of the courts is to be guided' . . . ." *Ibid.*
[9] The case was first reported in 245 N.C. 102, 86 S.E.2d 759 (1955). It was remanded because the trial judge privately examined several of the witnesses, including the child, and refused to allow the child to be examined in open court.

of fact which showed that the respondent and his wife adopted the child in April 1949. One month later respondent's wife died. The child after several months was placed with petitioners, a college professor and his wife who had no children of their own. The child remained with them until August 1954,[10] when the respondent forcibly took the child from a Sunday school room which resulted in his trial and conviction for disturbing religious worship. From the time of the death of his first wife until his remarriage in 1952, the respondent was excessive in his use of alcohol. After his remarriage he began to control his drinking but occasionally he would drink excessively. Both trial judges found both respondent and petitioner fit and proper persons to have the custody of the child. After finding the facts, the trial judge in the principal case concluded that this is " 'a contest between one who has the legal custody, and one who does not, and the rule of law in such cases is that it must appear that the welfare of the child clearly requires that he be taken away from the one who has the legal custody.' Upon the foregoing facts the court is of the opinion that it does not appear that the best interests of the child clearly require that he be taken away from respondent who has legally adopted him."[11]

On appeal the supreme court reversed. One basis[12] for the reversal was the feeling "that the learned Judge felt so 'cramped by his opinion that in law' the respondent had a primary right to the custody of the boy, that he overlooked the interest and welfare of the boy."[13] Had the

[10] One factor on which the supreme court relied in its decision in the principal case was that the parent voluntarily permitted the child to remain continuously in the custody of others in their home for such lengths of time that "the love and affection of the child and the foster parents have become mutually engaged, to the extent that a severance of this relationship would tear the heart of the child, and mar his happiness." 247 N.C. at 280, 101 S.E.2d at 21. In the past the North Carolina courts seem to have considered only the question of whether the child had been abandoned, but the view in the principal case seems more in line with the modern trend in custody controversies. Brickell v. Hines, 179 N.C. 254, 102 S.E. 309 (1920); Newsome v. Branch, 144 N.C. 15, 56 S.E. 509 (1907); Latham v. Ellis, 116 N.C. 30, 20 S.E. 1012 (1895); 67 C.J.S., *Parent and Child* § 12(e) (1950).

[11] 247 N.C. at 277, 101 S.E.2d at 19.

[12] The second was that there was nothing in the record of the findings of fact to indicate that the trial judge gave any consideration to the wishes of the child. There have been many cases touching on this point in North Carolina, and there is no set age limit at which a child may or may not be heard, but its age and intelligence go to the weight of the evidence. Raper v. Berrier, 246 N.C. 193, 97 S.E.2d 782 (1957); James v. Pretlow, 242 N.C. 102, 86 S.E.2d 759 (1955); Harris v. Harris, 115 N.C. 587, 20 S.E. 187 (1894); Spears v. Snell, 74 N.C. 210 (1876).

[13] 247 N.C. at 282, 101 S.E.2d at 23. "It is an entire mistake to suppose the court is at all events bound to deliver over a child to his father, or that the latter has an absolute vested right in the child. Doubtless, parents have a strict legal right to have the custody of their infant children as against strangers. However, courts will not regard this parental legal right against strangers as controlling, when circumstances connected with the present and prospective welfare of the child clearly exist to overcome it, or when to enforce such legal right will imperil the personal safety, morals or health of the child." *Id.* at 278, 101 S.E.2d at 20.

supreme court followed the *Cranford* rule, it undoubtedly would have held otherwise as to this point, since the nonparent had not proved the parent to be unsuitable. In fact, the trial court found the parent to be suitable.

Two justices dissented in that they believed a correct statement of the governing law is found in *James v. Pretlow*,[14] which is interpreted by them to mean "that a parent, who has legal responsibility for his child and who is a fit and proper person to have custody, is entitled to custody unless for the most substantial and sufficient reasons the interests and welfare of the child clearly require that custody be awarded to another."[15]

The gist of the majority opinion in the *Gibbons* case seems to be to retain the distinction between custody controversies involving only parents and those involving parents and nonparents. It still recognizes the right of a natural parent to his child but makes the custody determination on the basis of what will be in the best interest and welfare of the child. This is a fine distinction, but one which is made according to the modern American rule.[16] The common law right[17] of the parent to the primary consideration is thereby changed to a lesser consideration as a basis for a custody award as between a parent and a nonparent.

This modern American rule has been stated by the courts in at least three different ways. Some courts describe the parent as "prima facie entitled to custody of his minor child."[18] Others say that "although it is presumed the child's welfare will be best subserved in the care and

[14] 242 N.C. 102, 86 S.E.2d 759 (1955) (a controversy between the natural mother and a stepmother of 16 year old twins). The case stated the following rule: "Where one parent is dead, the surviving parent has a natural and legal right to the custody and control of their minor children. This right is not absolute, and it may be interfered with or denied but only for the most substantial and sufficient reasons, and is subject to judicial control only when the interests and welfare of the children clearly require it." *Id.* at 104, 86 S.E.2d at 761. Both the majority and the dissent in the *Gibbons* case cite and rely to a great degree upon this statement.

[15] 247 N.C. at 285, 101 S.E.2d at 25. It is interesting to note that neither the majority nor the dissent cite the *Cranford* case. This could indicate that none of the justices desire to follow the *Cranford* rule any longer.

[16] Armstrong v. Green, 260 Ala. 39, 68 S.W.2d 834 (1953); Dunavant v. Dunavant, 31 Tenn. App. 634, 219 S.W.2d 910 (1949); Note, 19 So. CALIF. L. REV. 72, 73 (1945).

[17] EVERSLEY, DOMESTIC RELATIONS 412 (5th ed. 1937) states: "By the common law of England, the father had the right to the custody of his infant children as against third parties, and even as against the mother, though the child were an infant at the breast." However, in 2 KENT, COMMENTARIES ON AMERICAN LAW § 205 (Lacy's rev. ed. 1889), it is said: "The strict custody of the father at common law was later modified so that the courts of justice may, in their sound discretion, and when the morals, or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere." See also United States v. Green, 26 Fed. Cas. 30, No. 15, 256 (C.C.D.R.I. 1824); State v. Smith, 6 Greenleaf 462 (Me. 1830).

[18] *In re* Jackson, 164 Kan. 391, 397, 190 P.2d 426, 431 (1948).

custody of a parent the presumption is rebuttable."[19] Still other courts make no finding of the parent's fitness or unfitness but award the custody of the child on the basis of its welfare and best interests.[20] On the whole, the courts today seem to be carefully weighing the facts, giving some consideration and weight to the fact that one party is a parent, and then making a decision as to what is best for the child, as in the principal case.

In view of the full and complete findings in the principal case by the trial courts and the discussion and application of the modern American view of custody controversies between parent and nonparent by the supreme court, it is hoped that the common law view of the primary right of a parent to his child (which must prevail unless the parent is shown to be unsuitable) is now overruled in North Carolina.

FRANCIS O. CLARKSON, JR.

Domestic Relations—Divorce—Abandonment as a Defense to Divorce on the Ground of Two Years Separation

In order to illustrate clearly one problem in North Carolina divorce law, this hypothetical situation is posed: a married man living in North Carolina decides that he can no longer live with his wife in harmony, although she has not been guilty of any misconduct which would be grounds for divorce. He desires a divorce but his wife is not willing to give him one. Could this husband separate from his wife for a period of two years, continue to support her throughout this period, and then obtain a divorce on the ground of two years separation under G.S. § 50-6?[1]

The legislative history of divorce on the ground of two years separation in North Carolina seems to demonstrate that the legislature intended to authorize a divorce by either party upon living separate and apart for a period of two years irrespective of how the separation came about.[2]

[19] Finken v. Porter, 246 Iowa 1345, 1348, 72 N.W.2d 445, 446 (1955).

[20] Henry v. James, 222 Ark. 89, 257 S.W.2d 285 (1953); Prince v. Carrington, 62 So. 2d 77 (Fla. 1952); Holmes v. Sanders, 243 N.C. 171, 90 S.E.2d 382 (1955). This has led at least one writer to say, "Moreover, a divorced spouse would do well not to allow the children to become overly fond of the baby sitter." Note, 7 ARK. L. REV. 405, 408 (1953).

[1] N.C. GEN. STAT. § 50-6 (1950) provides: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce."

[2] N.C. GEN. STAT. § 50-5(4) (1950), originally enacted in 1907, authorizes divorce upon a separation for a specified period, but the court has held that the plaintiff had to establish that he was the injured party. Sanderson v. Sanderson, 178 N.C. 339, 100 S.E. 590 (1919). Then in 1931 N.C. GEN. STAT. § 50-6 (1950) authorized divorce on the basis of separation without mentioning that the plaintiff

The court has not so interpreted G.S. § 50-6. It has held that a party should not be allowed to take advantage of his own wrong and that, therefore, the plaintiff will be denied a divorce if it is established that he has abandoned the defendant.[3]

Inasmuch as the court was restricting the broad language used by the legislature in G.S. § 50-6 when it held that a plaintiff who abandoned a defendant would be denied his divorce, would it not have been reasonable to assume that the court would require the abandonment to be criminal in nature?[4] The earlier cases of *Hyder v. Hyder*[5] and *Byers v. Byers*[6] indicated that the court did mean criminal abandonment, but the more recent case of *Pruett v. Pruett*[7] indicates that something short of criminal abandonment will suffice.

The question in the *Hyder* case was whether the jury had been properly instructed as to the elements of criminal abandonment. The court held that the charge was correct and the divorce was properly denied because the defendant had abandoned the plaintiff in the criminal sense and that he could not take advantage of his own criminal misconduct. This case clearly indicates that anything short of criminal abandonment would not have been a defense, since otherwise there would have been no need for the supreme court to consider the correctness of the lower court's charge as to criminal abandonment. It would have been much easier to state that *any* abandonment would be a valid defense.

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had to be the injured party. This tends to indicate that the legislature desired to authorize the divorce irrespective of how separation came about.

This 1931 statute provided, in part, that there could be a divorce on the application of either party if there had been a separation of husband and wife, whether under deed of separation or otherwise, and they had lived separate and apart for a specified period. Our court, relying upon the words "under deed of separation or otherwise," held that the separation had to be by mutual consent. Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936).

In 1937 the statute was amended so that the phrase "either under deed of separation or otherwise" was taken out and only the words "living separate and apart for two years" were left. Thus it would appear again that by taking out of the statute the words causing the court to hold that the separation had to be by mutual consent, the legislature intended to authorize the divorce irrespective of how separation came about.

[3] Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936); Reynolds v. Reynolds, 208 N.C. 428, 181 S.E. 338 (1935). The effect of this interpretation of G.S. § 50-6 and its amendments seems to be to shift the burden from the plaintiff to the defendant to show that the plaintiff is or is not the injured party. If the legislature had intended this it would have been much simpler to amend G.S. § 50-5(4) to add that the burden is on the defendant to establish that the plaintiff is not the injured party.

[4] N.C. GEN. STAT. § 14-32 (Supp. 1957) provides that the two requisites for criminal abandonment are a willful abandonment and a willful failure to provide adequate support.

[5] 215 N.C. 239, 1 S.E.2d 540 (1939).

[6] 222 N.C. 298, 22 S.E.2d 902 (1942).

[7] 247 N.C. 13, 100 S.E.2d 296 (1957).

The *Byers* case also implies that criminal abandonment is required. The court, citing the *Hyder* case, said:

> [A] husband is not compelled to live with his wife if he provides her adequate support. It must, therefore, be conceded that the law under review does not contemplate, as essential to an effectual separation under the statute, a repudiation of all marital obligations, which, of itself, would destroy his remedy.[8]

These two cases would indicate that the husband, in the facts supposed at the beginning of this Note, could get his divorce since he has continued to support his wife and is not guilty of criminal abandonment.

The more recent *Pruett* case indicates, however, that the husband in the supposed situation could not get a divorce, and that a mere separation of the husband from his wife without just cause is sufficient to defeat a divorce. In the *Pruett* case, the husband filed for divorce on the ground of two years separation. The wife filed a cross-action for divorce from bed and board. The jury found that the husband had willfully abandoned the wife and failed to provide her with adequate support and granted her a divorce from bed and board. Subsequently, the case was calendared as an uncontested divorce action, and the court granted the husband an absolute divorce without being aware of the fact that the wife had already been granted a divorce from bed and board in the same action. Thereafter the husband moved to have the divorce from bed and board set aside because, among other things, the wife had failed to allege that the failure to support had existed to her knowledge for at least six months prior to the filing of her pleadings. The court refused to set aside the divorce from bed and board (but did affirm the setting aside of the husband's absolute divorce because it had been granted in the same action in which the divorce from bed and board had been granted), stating that abandonment without a failure to support is sufficient to sustain a divorce from bed and board under G.S. § 50-7(1).[9] Had the court stopped at this point, the rules set out above as being supported by *Hyder* and *Byers* would not have been affected. But, the court went on to say that the jury finding of abandonment by the husband "defeated the plaintiff's action on the ground of such separation."[10] Since the court had said that the abandonment involved did not

[8] 222 N.C. at 304, 22 S.E.2d at 906.

[9] N.C. GEN. STAT. § 50-7 (1950) provides that a divorce from bed and board may be granted "if either party abandons his or her family." There is no doubt, from this wording, that the legislature intended to authorize a divorce from bed and board on the ground of abandonment without regard to a failure to support. This does not, however, appear to indicate that abandonment in this sense was intended to be sufficient to defeat an absolute divorce on the ground of two years separation. It is generally held that a ground for limited divorce is not a recriminatory defense to a ground for absolute divorce. MADDEN, PERSONS AND DOMESTIC RELATIONS § 91 (1931).

[10] 247 N.C. at 23, 100 S.E.2d at 303.

include a failure to support, the intimation is clear that the court considers abandonment without a failure to support to be sufficient to defeat a divorce on the ground of two years separation. This appears to be an unfortunate extension of the *Hyder* and *Byers* rules, which limited the abandonment that will defeat a divorce on the ground of two years separation to criminal abandonment.

The policy of granting a divorce upon the ground of living separate and apart seems to be that it is to the best interests of society and the parties, where the marriage has factually ceased to exist and there is no intention to resume it, to put an end to it legally. The number of jurisdictions which have this provision has grown rapidly in recent years.[11] In some states relief is denied the petitioner on account of his wrongdoing,[12] but in several jurisdictions fault is not decisive.[13] Arkansas has affirmed a decree in favor of a husband although he was alleged to be a deserter living in open adultery.[14] Apparently there is a growing conviction in the United States that a marriage which has ceased to exist as a fact does more harm than a divorce.[15]

It is to be hoped that future decisions will settle the interpretation to be given G.S. § 50-6. In view of the growing liberalization throughout the country and the already liberal wording of the statute, it is submitted that nothing short of misconduct in the criminal sense should be allowed to defeat an action for divorce under this section.[16]

JESSE M. HENLEY, JR.

[11] KEEZER, MARRIAGE AND DIVORCE § 455 (3d ed., Moreland 1946). Nineteen states, the District of Columbia, and Puerto Rico make living apart for a specified period without cohabitation cause for divorce. Of these 21 jurisdictions, 6 have statutes as broadly drawn as North Carolina. They are Arizona, Arkansas, Kentucky, Louisiana, Maryland, and Texas.

[12] Gee v. Gee, 249 Ala. 642, 32 So. 2d 657 (1947); Campbell v. Campbell, 174 Md. 229, 198 Atl. 414 (1938); West v. West, 115 Vt. 458, 63 A.2d 864 (1949); Powless v. Powless, 269 Wis. 552, 69 N.W.2d 753 (1955).

[13] Cotton v. Cotton, 306 Ky. 826, 209 S.W.2d 474 (1948); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946). See Annot., 152 A.L.R. 336 (1944).

[14] Young v. Young, 207 Ark. 36, 178 S.W.2d 994 (1944).

[15] KEEZER, *op. cit. supra* note 10 § 455.

[16] Either husband or wife may get a divorce two years after a divorce from bed and board or two years after a separation agreement, for a separation coupled with continued support under either of these circumstances is legal. Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952). Why should there be a distinction drawn between these "legal separations" and the one supposed at the beginning of this Note, insofar as the husband's right to obtain divorce is concerned?

The answer to this is a practical one. In the cases first put the wife is probably getting alimony and such alimony will survive a divorce decree, while in the latter situation the wife cannot be awarded alimony incident to an absolute divorce. The court seems to be trying to protect the wife's right to alimony in the face of North Carolina's rule as to no alimony as an incident to an absolute divorce. See Note, 31 N.C.L. REV. 482 (1953), for a discussion of this point.

Fair Labor Standards Act—Exemption of Agricultural Employees—The "Area of Production"

Plaintiff, suing for unpaid minimum and overtime wages, was employed as a night watchman in a cotton warehouse located in a town of 6,309 population in an area characterized by a large volume of cotton production. Over ninety-five percent of the cotton regularly received by the warehouse was grown within twenty miles of the warehouse. The defendant, operator of the warehouse, claimed that the plaintiff was exempt from the Fair Labor Standards Act[1] under section 13(a)(10).[2]

This section of the act completely exempts from both the minimum wage and the overtime provisions employees engaged in storing or processing agricultural commodities within the "area of production." And Congress conferred upon the Administrator of the Fair Labor Standards Act the duty to define the "area of production."[3] Therefore, in order to be exempt an employee must not only be engaged in one of the operations enumerated in the act, but his place of employment must fall within the Administrator's definition of "area of production."[4]

The Administrator defines "area of production" as being in open country or in a rural community. He further qualifies this by requiring that in order for a business to be considered as within the "area of production" ninety-five percent of its supply of commodities must come from the immediate vicinity. In the case of cotton compressing, that percentage must come from within a twenty mile radius of the place of business. The most controversial qualification placed in the "area of production" test involves the population of the place where the business

[1] Fair Labor Standards Act, 52 STAT. 1060 (1938), as amended, 29 U.S.C. §§ 201-219 (1952). Sections 1-11 of the act generally provide that all employees engaged in commerce or in the production of goods therefor are entitled to a set minimum wage and certain overtime benefits. The particular employees here in question were found to be in the production of goods for commerce because their occupations were directly essential and closely related to such production. See Kirschbaum v. Walling, 316 U.S. 517 (1942).

[2] Lovvorn v. Miller, 215 F.2d 601 (5th Cir. 1954). See text at note 10 *infra*.

[3] Fair Labor Standards Act § 13(a)(10), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 213(a)(10) (1952), provides that the minimum wage and overtime provisions of the act shall not be applicable to "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

[4] The reasons which prompted Congress to grant this power to define to the Administrator were set out by Justice Frankfurter in the early case of Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944). "In view . . . of the variety of agricultural conditions and industries throughout the country the bounds of these areas could not be defined by Congress. Neither was it deemed wise to leave such economic determinations to the contingencies and inevitable diversities of litigation. And so Congress gave the Administrator power to assess all the factors relevant to the subject matter." *Id.* at 614.

is located. It is expressly provided that no establishment located within a city or town of more than 2,500 population can be exempt.[5]

Tobin v. Traders Compress Co.[6] was the first direct attack on the Administrator's population test in the courts. In this case the Court of Appeals for the Tenth Circuit held that the definition was based on relevant economic conditions. The court pointed out that a population of 2,500 is the popular dividing line between urban and rural communities according to the Bureau of Census and other agencies. Although the court took notice of the fact that over eighty percent of all the cotton-compressing industry would fall outside the exemption because of the population test alone, it ruled that the Administrator's definition is neither arbitrary nor capricious. The court granted that the test is not perfect; however, it pointed out that no better criteria have been advanced and that the power to define was given to the Administrator and not the courts.

In the *Traders Compress* case there was a strong dissent.[7] The dissenting opinion takes the position that a test based on population amounts to an unfair discrimination. It urges that too much emphasis is placed on the mere location of the business establishment and not on the character of the community which may surround it. The dissent brings to light the very strong possibility that two identical agricultural industries may be located not more than a mile apart, yet one might get the advantages of being exempt from paying minimum wages and overtime while the other could still be required to meet these standards. It further states that the population of a town generally has nothing to do with whether or not such town is within a particular "area of production."

In *Jenkins v. Durkin*[8] the Court of Appeals for the Fifth Circuit, by way of dictum, expressed the opinion that the population criterion of the Administrator's definition is an invalid standard. The conclusion of this court is based completely on the reasoning set out by the dissent in the *Traders Compress* case.[9] This dictum set the stage for the holding of the same court of appeals in the case under discussion, *Lovvorn v.*

[5] 29 C.F.R. § 536.2 (1956).

[6] 199 F.2d 8 (10th Cir. 1952). The fact that the courts have the power to declare a regulation of the Administrator to be in excess of the power delegated by Congress was established in Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607 (1944). In that case the Court ruled that a provision in the Administrator's definition requiring that an employer have no more than seven employees if he was to claim the exemption was an arbitrary and capricious criterion for determining "area of production." Having come to this decision, the Court announced that it would refrain from enforcing any part of the regulation until the number of employees test had been removed. The question of the population test was also raised in this case, but the Court reserved any decision concerning it.

[7] 199 F.2d 8, 11 (10th Cir. 1952) (dissenting opinion).

[8] 208 F.2d 941 (5th Cir. 1954).

[9] See note 7 *supra.*

Miller.[10] The court there found that the employer met all the qualifications for the exemption except for the fact that his business establishment was located within a town of 6,309 population, greater than the prescribed maximum of 2,500. The population criterion was held to be a standard which discriminated among businesses located within a single "area" of agricultural production. The court again cited with approval the dissent in the Tenth Circuit case of *Tobin v. Traders Compress Co.* and held that the population criterion was arbitrary, capricious, and invalid.

Within one year from the date of this decision the Fifth Circuit was again faced with the same problem in *Mitchell v. Budd*.[11] Relying on its decisions in *Jenkins v. Durkin* and *Lovvorn v. Miller,* the court again held that the Administrator's definition was invalid. The Supreme Court granted certiorari in the *Budd* case,[12] because of conflicting decisions in the Fifth and Tenth Circuits as to the validity of the population test, and reversed the Fifth Circuit. The Court found that the Administrator was compelled to draw "a line between agricultural enterprises operating under rural-agricultural conditions and those subject to urban-industrial conditions,"[13] that the Administrator had stayed within the allowable limits after a reasoned and objective consideration of all the factors involved, and that his definition was a valid one.

It is understood that prior to the holding of the Court in the *Budd* case the Administrator was in the process of drafting a completely new and different definition of "area of production." However, with the coming of this decision he was able to abandon this new plan and to continue to restrict the applicability of the exemption in those industries storing or processing the products of local agriculture. The growths, shifts, and changes in the population of this country in recent years have affected the farming communities and the towns located in the heart of agricultural areas. In the light of these changes, it seems reasonable to suggest that what was once a proper measure of "area of production" might now require some amending if the intended benefit to the agricultural industry is not to be lost.

WILLIAM W. SUTTLE

[10] 215 F.2d 601 (5th Cir. 1954). See text at note 2 *supra*.
[11] 221 F.2d 406 (5th Cir. 1955).
[12] Mitchell v. Budd, 350 U.S. 473 (1956).
[13] 350 U.S. at 478.

Labor Law—Pre-emption and State Injunctive Enforcement of the "Right-to-Work" Law

When may a state court validly enjoin picketing that is peaceful in its conduct but is intended to accomplish an unlawful purpose? This is a question that has caused considerable confusion since the Taft-Hartley amendments to the National Labor Relations Act in 1947,[1] which specify that certain activity on the part of labor unions constitutes an unfair labor practice. A state court judge who has a petition for an injunction against picketing usually will have two difficult questions to answer. First, assuming that the picketing is for an unlawful purpose, is it protected by the first and fourteenth amendments to the Constitution as a valid exercise of free speech?[2] Secondly, assuming that the picketing sought to be enjoined is not protected by the free-speech doctrine, is it conduct which amounts to an unfair labor practice under the NLRA, thus leaving the state court without jurisdiction?[3]

The North Carolina Supreme Court was faced with the *second* question of federal pre-emption in the recent case of *Douglas Aircraft Co. v. Local 379, International Brotherhood of Elec. Workers, AFL.*[4] The plaintiff was engaged in the production of guided missiles under a contract with the United States. The Company's plant was surrounded by a chain link fence. The plaintiff company maintained control of all entrances and exits to the tract because of its responsibility for safeguarding secret information concerning its contracts. On the same tract were buildings occupied by other contractors performing work for the government. A construction firm had a contract with the Army for the erection of buildings on the same tract. Defendant union established picket lines at all the entrances to the tract of land occupied by the plaintiff and its subcontractors. The plaintiff alleged that no labor dispute existed between the construction company and its employees or the plaintiff and its employees; that the picketing was the result of a conspiracy intended to compel the plaintiff to deny admittance to the grounds to non-union employees of the construction company, thereby requiring the construction company to confine its employment to members of defendant union in violation of the North Carolina "Right-to-

[1] 49 STAT. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1952) (hereinafter referred to as the NLRA).

[2] See Local 695, Teamsters Union, AFL v. Vogt, 354 U.S. 284 (1957), where Justice Frankfurter summarizes the leading cases involving picketing and freedom of expression. See also Forkosch, *Picketing in Labor Relations*, 26 FORDHAM L. REV. 391 (1957).

[3] See Isaacson, *Labor Relations Law: Federal versus State Jurisdiction*, 42 A.B.A.J. 415 (1956), for a discussion of pre-emption problems arising from the Taft-Hartley amendments to the National Labor Relations Act; Note, 35 N.C.L. REV. 329 (1957).

[4] 247 N.C. 620, 101 S.E.2d 800 (1958).

Work" law;[5] that many of plaintiff's employees had refused to cross the picket line established by the defendant union, thus hampering the plaintiff in the performance of its contracts.

On the evidence and stipulation of the parties that plaintiff was engaged in interstate commerce within the meaning of the NLRA and that the picketing was peaceful, a temporary restraining order was continued until final hearing. The North Carolina Supreme Court reversed on the ground that under the decision of the United States Supreme Court in *Local 429, International Brotherhood of Elec. Workers, AFL v. Farnsworth & Chambers Co.*,[6] the NLRA places exclusive primary jurisdiction in the National Labor Relations Board[7] in such a case and deprives the superior court of authority to issue the restraining order. In view of its decision in *J. A. Jones Constr. Co. v. Local 755, International Brotherhood of Elec. Workers, AFL*[8] and the general tenor of its opinion in the *Douglas Aircraft* case, it would seem likely that the North Carolina Supreme Court would have upheld the restraining order if there had been no controlling decision of the United States Supreme Court in point. After discussing the general case law development of the federal-state jurisdictional question, the court concluded its opinion by pointing to the case of *Farnsworth & Chambers Co. v. Local 429, International Brotherhood of Elec. Workers, AFL.*[9] Here the Tennessee Supreme Court upheld an injunction against picketing which it found to be for the purpose of compelling a violation of the Tennessee "Right-to-Work" law. The United States Supreme Court reversed the Tennessee court in a per curiam opinion.[10] The North Carolina Supreme Court said it could find no distinction in the facts between the *Farnsworth* case and the case before it,[11] and that "the Court having final authority to ascertain congressional intent has declared the law."[12]

The *Farnsworth* case further clarified the "penumbral area" in jurisdiction of labor disputes which the United States Supreme Court has said "can be rendered progressively clear only by the course of litiga-

[5] N.C. GEN. STAT. §§ 95-78 to -84 (1950).
[6] 353 U.S. 969 (1957).
[7] Hereinafter referred to as the NLRB.
[8] 246 N.C. 481, 98 S.E.2d 852 (1957).
[9] 299 S.W.2d 8 (Tenn. 1957).
[10] Local 429, International Brotherhood of Elec. Workers, AFL v. Farnsworth & Chambers Co., 353 U.S. 969 (1957). Despite express congressional authorization to the states to enact "Right-to-Work" laws (see note 14 *infra*), the Court indicates that the states may be prohibited from exercising injunctive relief when violations of such laws are also subject to the jurisdiction of the NLRB.
[11] The only distinction that could be made in respect to the parties in the two cases is that in *Farnsworth* the picketing was directed at the plaintiff, while in the *Douglas Aircraft* case the picketing was primarily directed at a party other than the plaintiff although the plaintiff was adversely affected by the picketing.
[12] 247 N.C. at 630, 101 S.E.2d at 808.

tion."[13] How far has the *Farnsworth* case gone in determining the effect of the pre-emption doctrine on state legislation forbidding or restricting union-security agreements pursuant to section 14(b) of the NLRA?[14] It is submitted that the case has answered the federal-state jurisdictional question in the usual situation where a state court might attempt to enjoin picketing on the basis of a state "Right-to-Work" law but has not rendered the "penumbral area" completely clear.

The per curiam opinion in the *Farnsworth* case cited *Garner v. Local 776, Teamsters Union, AFL*[15] and *Weber v. Anheuser-Busch, Inc.*,[16] which are the leading cases on federal pre-emption under the NLRA. In *Garner,* the Court held that if the alleged conduct of a party to a labor dispute was such that it would constitute an unfair labor practice subject to the jurisdiction of the NLRB, the state court was without jurisdiction to enjoin the conduct, even though the conduct also violated a state statute or judicial policy governing labor-management relations. The *Weber* case further clarified the jurisdictional question by holding that the rule of the *Garner* case would apply even if the alleged wrongful conduct violated state law or policy in a field other than labor relations.[17] As pointed out by the North Carolina Supreme Court in the *Douglas Aircraft* case, "Neither the *Garner* nor the *Weber* case dealt specifically with an act declared by Congress to be an unfair labor practice, and by a State law authorized by Congress, also defined as unlawful."[18]

The question presented in the *Farnsworth* case was whether section 14(b), in effect, ceded to state courts jurisdiction to enjoin the union's peaceful picketing on an interstate employer's complaint that state "Right-to-Work" laws are being violated even though such picketing constitutes either protected activity under sections 7 and 13, or an unfair labor practice under section 8 of the NLRA.[19] The Court, by answering

[13] Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 480-81 (1955).

[14] "Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 61 STAT. 141 (1947), as amended, 29 U.S.C. § 164(b) (1952).

[15] 346 U.S. 485 (1953).

[16] 348 U.S. 468 (1955).

[17] Even if the unlawful conduct is such as to subject it to the jurisdiction of the NLRB, the state may still act under its police power to prevent violence or mass picketing, Allen-Bradley Local No. 1111, United Elec. Workers v. Wisconsin Employment Relations Bd., 315 U.S. 740 (1942), and it may act through an administrative body regulating labor-management relations, United Automobile Workers v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956). However, any injunction must be aimed at the violence or mass picketing complained of and to the extent that an injunction prohibits all other picketing it enters the pre-empted domain of the NLRB. Youngdahl v. Rainfair, 355 U.S. 131 (1957).

[18] 247 N.C. at 630, 101 S.E.2d at 808.

[19] See 25 U.S.L. WEEK 3309 (U.S. April 23, 1957) (No. 891).

this question in the negative, merely indicated that where conduct violates a provision of the NLRA the state court is without jurisdiction even though a state labor policy is involved. This result seems completely in harmony with and goes no further than the results in the *Garner* and *Weber* cases. The decision did not in itself hold that picketing in violation or attempted violation of a "Right-to-Work" law would necessarily constitute an unfair labor practice.[20]

Prior to the decision in the *Farnsworth* case, the decisions of the various state courts were in conflict as to whether a state court could enjoin picketing which it determined to be in violation of a state's "Right-to-Work" law.[21] In many of the cases upholding the authority of the state courts, the question of interstate commerce was not raised or the parties were obviously not engaged in interstate commerce and therefore no question of pre-emption was present.[22] Typically in these

[20] For examples of areas where the state may exercise jurisdiction even if the employer is in interstate commerce, see Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301 (1948). The Court held that since Wisconsin could deny the use of the union shop under the NLRA, it could impose a less severe restriction such as requiring a two-thirds vote of the employees to validate a maintenance of membership agreement. Wisconsin thus had jurisdiction in a damage suit for discharge in violation of the state law regulating union-security agreements. See also Local 232, Automobile Workers, AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949), where the Court held that intermittent work stoppages and slowdowns were conduct neither prohibited nor protected by the NLRA and subject to the jurisdiction of a state labor board.

[21] State court held to have jurisdiction, International Ass'n of Machinists, AFL v. Goff-McNair Motor Co., 223 Ark. 30, 264 S.W.2d 48 (1954) (injunction against peaceful picketing to obtain a closed shop agreement); Mascari v. Local 667, Teamsters Union, AFL, 187 Tenn. 345, 215 S.W.2d 779 (1948) (injunction against recognized union on strike to secure a union-security clause as part of a collective bargaining agreement). Exclusive jurisdiction held to be in NLRB, Leiter Mfg. Co. v. International Ladies Garment Workers Union, AFL, 269 S.W.2d 409 (Tex. Civ. App. 1954) (injunction against discharge of employees because of union membership); Texas Constr. Co. v. Local 101, Hoisting and Portable Engineers Union, AFL, 178 Kan. 422, 286 P.2d 160 (1955) (injunction against picketing by stranger union to compel employer to recognize union).

[22] In Local 10, United Ass'n of Journeymen Plumbers, AFL v. Graham, 345 U.S. 192 (1953), a labor union picketed a general contractor for the purpose (as found by the Virginia court) of inducing the contractor to break contracts with any of his subcontractors who did not employ all union labor. The Court did not discuss the question of jurisdiction. The Court upheld an injunction issued by the Virginia court on the ground that there was no undue restraint of freedom of speech when the picketing was for an unlawful purpose. The dissenting Justice would have remanded the case for a specific finding of fact, stating, "The difficulty here is that we have no finding of fact. We have only the recitation in the decree that the picketing conflicted with the Virginia statute." *Id.* at 202-03. Apparently the dissenter felt that if the Court was to allow the state to enjoin picketing in violation of the Virginia statute, the decree should be limited to that purpose and should not restrain picketing indiscriminately. See Schlossberg, *Current Trends in Labor Law in Virginia*, 42 VA. L. REV. 691, 696 (1956), where the author, in discussing the *Graham* case, said, "While the work in question seems to have been of such a nature as to have had an effect on interstate commerce, it is significant that counsel for the union did not raise the issue of jurisdiction, nor did counsel for the NLRB take part in the appeal." Since this case was decided before the *Garner* case, it is doubtful if the same result would be reached if it arose again.

cases, the picketing was instigated by non-employees and the facts found indicated that the majority of the employees of the picketed employer were either opposed to any unionization in general or to unionization by the union causing the picketing. The findings of fact led to the reasonable implication that often the primary purpose of the picketing was not to "educate" the employees but to compel the employer to recognize the union with or without the consent of his employees. In similar cases, where the parties would have been affecting interstate commerce so as to be under the jurisdiction of the NLRB if an unfair labor practice were committed, state courts have often determined they had power to enjoin the picketing. The courts seemed to reach their conclusion by overlooking the immediate purpose of the picketing. Thus the courts would look to the ultimate purpose of securing a union shop or similar union-security agreement, which is not necessarily violative of the NLRA, and would not sufficiently consider the immediate purpose of the picketing to compel an employer to recognize the union and coerce his employees into membership against their wishes, which under section 8(b)(2)[23] constitutes an unfair labor practice subject to the jurisdiction of the NLRB.[24]

North Carolina would seem to be among those states which prior to the *Farnsworth* case would have determined that the state court had jurisdiction to enjoin picketing in a situation similar to that presented

[23] National Labor Relations Act § 8(b)(2), 61 STAT. 141 (1947), as amended, 29 U.S.C. § 158(b)(2) (1952).

[24] While the *Farnsworth* case indicates the Court is continuing to limit the scope of state jurisdiction in the pre-emption field, the Court at the same time is apparently giving the states greater freedom in regulating picketing where the conduct does not affect interstate commerce so as to be subject to the jurisdiction of the NLRB. Since Thornhill v. Alabama, 310 U.S. 88 (1940), which held a state ban on picketing invalid as denying the right of free dissemination of information guaranteed under the Constitution, and AFL v. Swing, 312 U.S. 321 (1941), where the Court said that organizational picketing per se could not be enjoined, the Court has narrowed the scope of protected picketing activity by expanding the unlawful purpose doctrine of Giboney v. Empire Storage Co., 336 U.S. 490 (1949). In Local 695, Teamsters Union, AFL v. Vogt, 354 U.S. 284 (1957), the Court upheld a state injunction against picketing that was conducted by one or two pickets with no evidence of violence or intimidation, stating, "[T]he circumstances set forth in the opinion of the Wisconsin Supreme Court afford a rational basis for the inference it drew concerning the purpose of the picketing." *Id.* at 295. The dissenting opinion pointed out that the *Vogt* case was another in a series of cases where "the state court's characterization of the picketers' 'purpose' had been made well-nigh conclusive." *Id.* at 296. See Stern, *Enjoinable Organizational Picketing*, 31 TEMP. L.Q. 12 (1957), where the author refers to the *Vogt* case as providing a constitutionally protected "non-right" to stranger picket for organizational purposes. See also Smoot, *Stranger Picketing: Permanent Injunction or Permanent Litigation*, 42 A.B.A.J. 817 (1956). Some of the possible ramifications of the *Vogt* case are indicated by Daugherty v. Commonwealth, 100 S.E.2d 754 (Va. 1957), where the Virginia Supreme Court approved a statute that prohibited *all* picketing by non-employees. The court further said there was no question of pre-emption because the NLRA is limited to disputes between employees and their employers.

in the *Douglas Aircraft* case. In *J. A. Jones Constr. Co. v. Local 755, International Brotherhood of Elec. Workers, AFL*[25] the factual situation was similar to that in the *Douglas Aircraft* case. The plaintiff construction company alleged that the purpose of the picketing was to coerce the plaintiff into compelling his subcontractors to hire only union labor. The defendant union demurred to the jurisdiction of the court on the basis that the conduct complained of would, if true, constitute an unfair labor practice over which the NLRB had exclusive jurisdiction and filed an answer denying the allegations of the complaint. The demurrer was overruled and the restraining order continued, from which the union appealed. The North Carolina Supreme Court affirmed the order of the trial court without determining the question of jurisdiction. The court said that the motion to dismiss for lack of jurisdiction of the subject matter was made as a demurrer and that in such a plea, the lack of jurisdiction must appear on the face of the complaint and may not be raised by extrinsic facts. Since the complaint did not indicate whether or not the plaintiff was engaged in interstate commerce, the alleged lack of jurisdiction did not appear on the face of the complaint. The trial judge, after continuing the restraining order, found the facts on which the order was based at the request of the defendant. One of the facts found, which plaintiff admitted, was that the dollar volume of out-of-state purchases made by the plaintiff was in excess of the minimum volume required by the NLRB before it will exercise jurisdiction.[26]

While deciding the *Jones Construction* case on the pleadings point, it would seem doubtful in the light of the conceded volume of plaintiff's interstate business found by the trial judge whether the court would have allowed the injunction to stand on the pleadings point unless it thought there was a reasonable basis to sustain jurisdiction of the state court, even if the facts alleged in the complaint showed the plaintiff to be in interstate commerce.[27] In the *Douglas Aircraft* case there were no

[25] 246 N.C. 48, 98 S.E.2d 852 (1957).

[26] See 19 NLRB ANN. REP. 2-5 (1955). The NLRB will decline jurisdiction unless the business of the employer involved affects interstate commerce in an amount equal to or greater than specified minimum amounts. An employer who does not meet the minimum requirements of the NLRB may still be subject to its jurisdiction even though it declines to exercise it. The no man's land created by the *Guss* case (see note 50 *infra*) would not be involved in the *Jones Construction* case since the facts admitted by the employer show his business to be of such a volume as to meet the NLRB's jurisdictional requirements.

[27] The court in overruling the demurrer referred to N.C. GEN. STAT. § 1-127 (1953), which provides: "The defendant may demur to the complaint when it appears upon the face thereof . . . that: (1) The court has no jurisdiction of the person of the defendant, or of the subject of the action . . . ." The court then discussed Southerland v. Harrell, 204 N.C. 675, 169 S.E. 423 (1933), where a demurrer to the jurisdiction of the court over the subject matter in a wrongful death action was overruled on the ground that the complaint on its face did not indicate the defendants regularly employed more than five employees so as to give the Industrial Commission jurisdiction. This rule, while a proper procedural device

allegations that the plaintiff was engaged in interstate commerce,[28] and the trial court treated the motion to dismiss for lack of jurisdiction as a demurrer. It is difficult to distinguish the cases on any basis other than that the court in the *Douglas Aircraft* case had the *Farnsworth* case before it.[29]

How far then is the state's jurisdiction over injunctive enforcement of "Right-to-Work" legislation limited by the *Farnsworth* case? As a possible indication that it was not wholly in sympathy with what it determined to be the United States Supreme Court's expression of congressional intent in *Farnsworth,* the court in the *Douglas Aircraft* case said, "Congress has . . . said the states might . . . outlaw union or closed shop agreements . . . ,"[30] and questioned whether Congress intended "to deny to a state a power to enforce a law which it permitted that state to enact?"[31] In answer to its own question as to congressional intent in enacting section 14(b) of the NLRA, the court said the NLRB "has no authority to enforce the laws of North Carolina even though the laws are enacted pursuant to congressional authority . . . . It seems patent to us that Congress did not intend to authorize a state to enact a statute and at the same moment prohibit it from enforcing the statute."[32]

in the ordinary civil action, seems rather a harsh one where the court is giving equitable relief in the stringent form of an injunction granted well before final hearing on the merits. The *Southerland* case was a wrongful death action and no preliminary relief affecting the interests and rights of the parties was being granted. The application of such a rule to the granting of a temporary injunction as in the *Jones Construction* case, where the court had the relevant and conceded jurisdictional facts before it, affects substantial interests of the parties. It is questionable in the light of the *Douglas Aircraft* case whether the court would have applied a technical procedural rule to the granting of an equitable remedy unless it felt at the time that the court would have had jurisdiction even if the facts outside the complaint were taken into account.

[28] The only factual difference that might have been made between the two cases is that in the *Douglas Aircraft* case the plaintiff had contracts with the United States and the complaint so alleged. This fact alone, however, would not seem to be sufficient to determine that the Douglas Aircraft Company was subject to the jurisdiction of the NLRB from the face of the complaint.

[29] The only procedural difference between the *Douglas Aircraft* case and the *Jones Construction* case that appears from the reports is that in the former the trial court made the findings of fact before the order was made, and in the latter the court made the appropriate finding of fact on motion of the defendant after the order was made. In neither case were the jurisdictional facts disputed.

[30] 247 N.C. at 628, 101 S.E.2d at 806.

[31] *Ibid.*

[32] 247 N.C. at 628-29, 101 S.E.2d at 807. The Supreme Court of Kansas, deciding a similar case arising after *Farnsworth,* expresses an attitude similar to that of the North Carolina Supreme Court in the *Douglas Aircraft* case. In Asphalt Paving, Inc. v. Local 795, Teamsters Union, AFL, 317 P.2d 349 (Kansas 1957), the plaintiff argued that § 14(b) of the NLRA granted the states power to prohibit compulsory union agreements and that "as a necessary incident to the full exercise of that power, states may enjoin conduct directed toward the illegal *execution* . . . of such agreements in violation of state law." *Id.* at 359. The Kansas Supreme Court said, "It would appear there is substantial merit in plaintiff's assertion were it not for the decisions of the Supreme Court of the United States in . . . International Brotherhood of Electrical Workers, A.F. of L. v. Farnsworth

In *United Constr. Workers v. Laburnum Constr. Corp.*[33] the United States Supreme Court said, "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case [*Garner*] recognized the Act excluded conflicting state procedure to the same end."[34] The *Farnsworth* case does not enlarge the *Garner* case but rather clarifies it by implication. If a union is picketing an employer to induce him to coerce his employees into joining the union, or to compel him to recognize the union when it does not in fact represent a majority of his employees, or some other purpose unlawful under the NLRA, the state court may not assume jurisdiction because it finds the additional unlawful purpose of violating a state law outlawing or restricting union-security agreements.

The NLRA only permits union-security agreements[35] where a labor organization is the representative designated for collective bargaining purposes by a majority of the employees in an appropriate unit[36] and where the affidavits and reports required by the act[37] have been filed. The NLRA further provides that such union-security agreements, even when valid under federal law, are not valid where they are prohibited by state law.[38] Thus, conduct subject to the jurisdiction of the NLRB which also frequently has a purpose in violation of a state "Right-to-Work" law would be:

(1) Picketing to coerce employees to join a union, which is a violation of section 8(b)(1) as an attempt "to restrain or coerce . . . employees in the exercise of rights guaranteed in section 157 . . . ."[39]

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and Chambers Co. . . .

"The opinions above referred to . . . require us to hold that a district court lacks jurisdiction to enjoin conduct of a labor union directed toward the ultimate purpose of compelling an employer engaged in interstate commerce to enter into an all union agreement. . . ." *Id.* at 359-60. One justice in a concurring opinion, questioning the soundness of the United States Supreme Court's interpretation of legislative intent, said, "It is an unwarranted conclusion, denying the effect of § 14(b), which permits the states to regulate or prohibit on the one hand, and denies enforcement of such regulations or prohibitions on the other . . . .

". . . . *In this area the state acts under the auspices of federal power, and not, as in* Weber v. Anheuser-Busch . . . and in Garner . . . *by attempting to pit state jurisdiction against federal pre-empted jurisdiction.*" *Id.* at 363-64.

[33] 347 U.S. 656 (1954). [34] *Id.* at 665.

[35] National Labor Relations Act § 8(a)(3), 49 STAT. 452 (1935), as amended, 29 U.S.C. § 158(a)(3) (1952).

[36] *Id.*, § 9(a), 49 STAT. 453 (1935), as amended, 29 U.S.C. § 159(a) (1952).

[37] *Id.*, §§ 9(g), (h), 61 STAT. 146 (1947), as amended, 29 U.S.C. §§ 159(g), (h) (1952).

[38] *Id.*, § 14(b), 61 STAT. 151 (1947), as amended, 29 U.S.C. § 164(b) (1952).

[39] *Id.*, § 8(b)(1), 61 STAT. 141 (1947), as amended, 29 U.S.C. § 158(b)(1) (1952). In Teamsters Local 639, 119 N.L.R.B. 33 (1957), the Board said there was nothing in the language of § 8(b)(1)(A) that limited the words "coerce or restrain" to direct application of pressure by a union on employees. The diminution of the employee's financial security is not less damaging because it is achieved indirectly by a preceding curtailment of the employer's business. See also Stacey v. Pappas, 151 Me. 36, 116 A.2d 497, *appeal dismissed,* 350 U.S. 870 (1955).

(2) Picketing to compel the employer (a) to coerce his employees into union membership, or (b) to sign a union-security agreement with a union that does not qualify as authorized to enter into such an agreement under section 8(a)(3). This is a violation of section 8(b)(2) in that it is an attempt "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection [8](a)(3) . . . ."[40]

(3) Picketing one employer to induce his employees to refuse to handle goods or perform services where the purpose is to compel a second employer to recognize a union that does not represent his employees, a violation of section 8(b)(4)(B).[41]

After eliminating all the picketing that would amount to an unfair labor practice under the NLRA, a meager area, if any, is left to state jurisdiction. Assume a case where the picketing is for the purpose of compelling an employer to sign a union-security agreement and the union is the designated representative of a majority of the employees and has otherwise complied with the NLRA.[42] If the state where the picketing takes place has legislation prohibiting union-security agreements or permitting them only under certain conditions or within certain limits, it is conceivable that under the *Farnsworth* case the picketing might validly be enjoined by the state court since there is no specific provision in section 8 of the NLRA making such conduct an unfair labor practice. As the United States Supreme Court said in *Local 232, Automobile Workers, AFL v. Wisconsin Employment Relations Bd.*,[43] there may be conduct that is "neither forbidden by federal statute nor . . . legalized and approved thereby."[44]

The state is not powerless to effectuate legislation invalidating union-security agreements. As the court said in the *Douglas Aircraft* case,

[40] National Labor Relations Act § 8(b)(2), 61 STAT. 141 (1947), as amended, 29 U.S.C. § 158(b)(2) (1952). Picketing to compel an unlawful union-security contract is a violation of § 8(b)(2). Medford Bldg. and Constr. Trades Council, 96 N.L.R.B. 165 (1951). In Associated General Contractors of America, Inc., 119 N.L.R.B. 133 (1957), a union coerced a contractor into removing from a project a subcontractor whose employees were members of a different union. The Board said the prime contractor's succumbing to the union demands constituted a violation of §§ 8(a)(1) and (3) even though no employer-employee relationship existed between the prime contractor and the employees of a subcontractor.

[41] National Labor Relations Act § 8(b)(4)(B), 61 STAT. 141 (1947), as amended, 29 U.S.C. § 158(b)(4)(B) (1952). This section makes it an unfair labor practice for a labor organization to induce conduct by the employees of any employer "where an object thereof is . . . forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of Section 159 . . . ." In the *Douglas Aircraft* case the North Carolina Supreme Court apparently determined that § 8(b)(4)(B) had been violated rather than § 8(b)(2).

[42] See notes 35-37 *supra*.

[43] 336 U.S. 245 (1949).

[44] *Id.* at 265.

"Restraining orders are not the only remedies available to control obedience to a valid statute. Criminal process and tort actions for damages are also . . . used for this purpose."[45] As the *Laburnum* case points out, a state is not prohibited from providing a remedy for unlawful conduct. It is only when the state remedy duplicates the federal remedy for the same conduct that the state remedy must give way. In North Carolina, under the "Right-to-Work" law, a union-security agreement is void and unenforceable.[46] A violation of the law is punishable as a misdemeanor.[47] A person denied employment in violation of the law has a cause of action for damages sustained by the denial of employment.[48]

The problem of federal-state relations in labor disputes threatens to be a continuing one. This Note has dealt with only one aspect of the problem. State court injunctions against picketing have posed a dilemma for the enjoined party who feels that the state court has acted erroneously and that a more favorable result would be available if the NLRB had assumed jurisdiction. However, even if the enjoined party has a valid argument that his conduct should be subject to the jurisdiction of the NLRB, there is no practical way at present to have the question determined except by appealing through the state courts to the United States Supreme Court.[49] Often the issues are moot by the time of final adjudication and even if decided in favor of the enjoined party he will have nothing but a paper right, the purpose of the injunction having been long since accomplished. On the other hand, if the conduct is wrongful, as alleged, irreparable damage may be done to an employer's business unless prompt relief is available. Picketing resulting in a secondary boycott can sometimes drive a small employer out of business while he is waiting for the NLRB to determine his rights, and the state courts have often provided the only source of prompt relief.[50]

[45] 247 N.C. at 629, 101 S.E.2d at 807.

[46] N.C. GEN. STAT. § 95-79 (1950), *In re* Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366 (1950).

[47] N.C. GEN. STAT. § 95-78 (1950), State v. Bishop, 228 N.C. 371, 45 S.E.2d 858 (1947).

[48] N.C. GEN. STAT. § 95-83 (1950).

[49] In Capitol Service v. NLRB, 347 U.S. 501 (1954), the Court held that the NLRB could request a federal court to enjoin a state injunction where the NLRB deemed it necessary to protect its jurisdiction. But in Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511 (1955), the Court held that while the NLRB is authorized to apply to a district court for injunctive relief in certain circumstances, this does not authorize private litigants to apply for such relief. Since the NLRB will not assume jurisdiction over an unfair labor practice until a complaint has been filed, a labor organization whose conduct has been enjoined by a state court has no procedural method of getting the NLRB to exercise its jurisdiction.

[50] Since the decision in Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), and companion cases, many a small business is left not only without an efficient remedy against wrongful conduct by a labor union but without any remedy at all.

Continued litigation in the courts apparently will prove a fruitless method of solving the problem areas of the federal-state jurisdictional question. The United States Supreme Court in *Guss v. Utah Labor Relations Bd.*[51] has indicated it will not step in to fill the no-man's land left in the NLRA by the Congress. The ultimate solution will be for Congress to express its intent as to the proper bounds of the NLRB's jurisdiction.

J. HALBERT CONOLY

Liens—Mechanic's Liens—Acquisition and Priorities—Effect of Regaining Possession

Since *Johnson v. Yates*[1] it has been the rule in North Carolina that a mortgagor in possession with the consent of the mortgagee may subject a mortgaged automobile to a mechanic's lien which will take priority over the chattel mortgagee's interest. In that case it was decided that the statutory term, "owner or legal possessor,"[2] included such a mortgagor, in whom the law implied authority from the mortgagee to contract for necessary and reasonable repairs.

In *Barbre-Askew Finance, Inc. v. Thompson*,[3] the chattel mortgagor of an automobile left it with a mechanic under a contract for repairs at a stated price. After the major portion of the work was completed, the mechanic relinquished possession to the mortgagor with the understanding that the automobile was to be returned for completion of repairs. The automobile was subsequently returned and the repairs completed. While it was in the shop for these latter repairs the mortgagor defaulted

In the *Guss* case the Court held that if a dispute affected interstate commerce so as to be subject to the jurisdiction of the NLRB, the states were precluded from acting even where the NLRB had announced in advance that it would decline jurisdiction unless certain specified amounts of interstate commerce were involved. See note 26 *supra*.

[51] 353 U.S. 1, 10-11 (1957). "We are told . . . that to deny the State jurisdiction here will create a vast no-man's-land, subject to regulation by no agency or court. We are told . . . that to grant jurisdiction would produce confusion and conflicts with federal policy . . . . [B]oth may be right. We believe, however, that Congress has expressed its judgment in favor of uniformity. Since Congress' power in the area of commerce among the states is plenary, its judgment must be respected whatever policy objections there may be to creation of a non-man's-land. Congress is free to change the situation at will." See Henderson, *The "No Man's" Land Between State and Federal Jurisdiction*, 8 LAB. L.J. 587 (1957).

[1] 183 N.C. 24, 110 S.E. 603 (1922).

[2] N.C. GEN. STAT. § 44-2 (1949). "Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid . . . ." This statute further provides for enforcement by sale.

[3] 247 N.C. 143, 100 S.E.2d 381 (1957).

and the mortgagee brought an action to recover it. The mechanic attempted to assert a lien for the entire amount of the repairs. The court held that by voluntarily surrendering the automobile, the mechanic lost his lien for all work done prior to his subsequent reacquisition of possession even though all repairs were made under one contract.[4]

While the decisions following the common law tend to give the artisan's possessory lien priority over a chattel mortgagee's interest,[5] in some states, by express statutory provision, a duly recorded chattel mortgage has priority over a later lien for repairs.[6]

In jurisdictions where the mechanic's lien prevails, if it is a lien depending upon possession, it is lost when possession is lost.[7] "At common law, a lien (of this general description) is a right to retain. Retention necessarily connotes possession. A lien depends upon an uninterrupted possession, and is lost or waived when possession is voluntarily surrendered . . . ."[8] The North Carolina statute providing for a mechanic's lien[9] has been construed as affirming the common law rights with the addition of a remedy in the form of foreclosure by sale.[10]

As the court indicated in the principal case, there is a split of authority as to whether a mechanic's lien is reacquired when possession is regained.[11] In *Rapp v. Mabbett Motor Car Co.*[12] the mechanic unlawfully retook possession of the automobile and then tried to assert his

[4] "A lien is a right to hold goods until the payment of a debt due thereon. Any agreement, therefore, which contemplates that the goods of the debtor are to be delivered to him before the time of payment arises is inconsistent with and destructive of the lien in question." BROWN, PERSONAL PROPERTY § 110 (2d ed. 1955).

[5] Blackard v. City Nat'l Bank, 142 F. Supp. 753 (D. Alaska 1956); Annot., 36 A.L.R.2d 198 (1954) (conditional sales); Annot., 36 A.L.R.2d 229 (1954) (chattel mortgages).

[6] KY. REV. STAT. § 382.610(4) (1953). "The mortgage provided for in this section shall be a valid lien on the property therein described and conveyed and from the recording thereof shall be superior to the rights of all creditors of the mortgagor and all subsequent purchasers, mortgagees, lienors and encumbrancers, except the landlord's liens provided for in KRS 383.070 and 383.110." LA. REV. STAT. § 9:4501 (1951) provides for a repairman's lien and then says, "This privilege has no effect against a vendor's privilege, a chattel mortgage previously recorded . . . ." S.D. CODE OF 1939 c. 39.0802 provides: "Such lien on personal property shall be subject only to liens, mortgages, and conditional sales contracts properly filed on or before the time that the property comes into the possession of the lien claimant."

[7] Twin City Motor Co. v. Rouzer Motor Co., 197 N.C. 371, 148 S.E. 461 (1929).

[8] Rapp v. Mabbett Motor Car Co., 201 App. Div. 283, 194 N.Y. Supp. 200, 202 (4th Dep't 1922) (dictum).

[9] See note 2 *supra*.

[10] Johnson v. Yates, 183 N.C. 24, 27, 110 S.E. 603, 604 (1922); McDougall v. Crapon, 95 N.C. 292 (1886); Notes, 1 N.C.L. REV. 127 (1922), 23 N.C.L. REV. 357 (1945).

[11] Annot., 36 A.L.R.2d 198 (1954) (conditional sales); Annot., 36 A.L.R.2d 229 (1954) (chattel mortgages); Notes, 15 IND. L.J. 573 (1940), 26 TUL. L. REV. 258 (1951), 16 U. DET. L.J. 202 (1953).

[12] 201 App. Div. 283, 194 N.Y. Supp. 200 (4th Dep't 1922).

lien under a statute providing that the mechanic "may detain such motor vehicle . . . at any time it may be lawfully in his possession . . . ."[13] The court held that by unlawfully retaking the automobile, the mechanic was not within the provisions of the statute and the chattel mortgagee prevailed. It was indicated, however, that had the retaking been lawful, the mechanic's lien would have attached and prevailed. *Commercial Acceptance Corp. v. Hislop Garage Co.*[14] involved a fact situation similar to that in the principal case. In this case, a conditional vendor brought an action of replevin against a mechanic who had reacquired possession and claimed, under a single contract, a lien for repairs made both before release to the conditional vendee and after the return of the automobile to the mechanic. The court held that the agreement to bring the automobile back (with subsequent reacquisition) gave the mechanic sufficient possession to preserve his lien. In *Gordon v. Sullivan,*[15] under a single contract for repairs, the automobile was released to the conditional vendee on his agreement to return it for completion of repairs. It was then taken by the vendee to another garage and stored. The mechanic, claiming authority from the vendee, paid the storage bill and retook possession. The trustee in bankruptcy of the vendee brought an action against the mechanic to recover possession of the automobile. Under a statute providing that mechanics "may detain such motor vehicles at any time they may have lawful possession thereof,"[16] the court held that the mechanic's lien prevailed. "While a garage keeper's lien partakes of the nature of a possessory lien because possession is essential to its enforcement, it differs from the common law lien in that its existence does not depend upon continuance of possession."[17]

The court in *Johnson v. Yates,* in order to show that the mechanic's possessory lien for repairs is an exception to the general rule that a lien prior in time is prior in right,[18] placed great weight on an implied

[13] N.Y. LIEN LAW § 184 (Supp. 1957). "A person keeping a garage . . . or place for the . . . repair of motor vehicles . . . and who in connection therewith . . . repairs any motor vehicle . . . at the request or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise; has a lien upon such motor vehicle . . . for the sum due . . . and may detain such motor vehicle . . . at any time it may be lawfully in his possession until such sum is paid, except that if the lienor, subsequent to thirty days from the accrual of such lien, allows the motor vehicle . . . out of his actual possession the lien provided for in this section shall thereupon become void as against all conditional sales agreements or mortgages . . . executed prior to the accrual of such lien . . . ."

[14] 89 N.H. 45, 192 Atl. 627 (1937). [15] 188 F.2d 980 (D.C. Cir. 1951).

[16] D.C. CODE § 38-201 (1951). "Garage keepers shall also have a lien for their charges for storage, repairs . . . when such charges are incurred by an owner or conditional vendee of such motor vehicles, and may detain such motor vehicles at any time they may have lawful possession thereof . . . ."

[17] 188 F.2d at 981.

[18] United Tire & Investment Co. v. Maxwell, 202 Okla. 476, 215 P.2d 541 (1950); 33 AM. JUR., *Liens* § 33 (1941); 53 C.J.S., *Liens* § 10(b) (1948).

authority from the mortgagee to the mortgagor to subject the automobile to a mechanic's lien for all necessary and reasonable repairs. In the principal case, the court did not mention the point that the repairs must be necessary and reasonable, but if they were not, the priority of the lien over the mortgage might be disallowed for this reason.[19]

JEAN M. LUCK

Military Law—Illegality of Orders

Under the Uniform Code of Military Justice disobedience of an order is punishable only if the order is legal.[1] Illegality, whenever found, voids the order.[2] This Note is intended to illustrate some of the controversies that have arisen in this area.

Disobedience of an order which is palpably illegal on its face, such as an order to commit murder or larceny, would not subject one to punishment.[3] Indeed, compliance with a palpably illegal order cannot usually be justified; and in a trial by court-martial or a suit in damages for an act done in obedience, the order will be admissible only in mitigation of the offense.[4] However, an order not palpably illegal on its face is usually presumed to be legal, and the risk of disobedience is the personal responsibility of the recipient of the order.[5]

[19] This question has received considerable attention in Indiana. See Campa v. Consolidated Finance Corp., 231 Ind. 580, 110 N.E.2d 289 (1953) (could not show necessity of repairs so as to raise implied consent of conditional sales vendor, vendor won over repairman); Personal Finance Co. v. Fecknoe, 216 Ind. 330, 24 N.E.2d 694 (1940) (could not show necessity of repairs, mortgagee won over repairman); Grusin v. Stutz Motor Car Co., 206 Ind. 296, 187 N.E. 382 (1933) (repairman won over mortgagee). In the latter case the court said, "The repairs for which the lien will be enforced must be necessary and add to the value of the property; . . . unless they are clearly beyond this requirement . . ." the mechanic's lien will prevail. *Id.* at 302, 187 N.E. at 384.

[1] Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890 (Supp. IV, 1957).

"Any person subject to this code who—

". . . .

"(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

Article 91, Uniform Code of Military Justice, 10 U.S.C. § 891 (Supp. IV, 1957), provides that any warrant officer or enlisted person who willfully disobeys the lawful order of one senior to him shall be punished as a court-martial may direct.

Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (Supp. IV, 1957), provides that any person subject to the Code who violates or fails to obey any lawful general order or regulation shall be punished as a court-martial may direct.

[2] AVINS, THE LAW OF AWOL 207 (1957).

[3] 1 WINTHROP, MILITARY LAW AND PRECEDENTS 575 (2d ed. 1920).

[4] Beckwith v. Bean, 98 U.S. (8 Otto) 266 (1878); Bates v. Clark, 95 U.S. (5 Otto) 204 (1877); United States v. Kinder 14 C.M.R. 742 (1954); State v. Sparks, 27 Tex. 627 (1864).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 169b. See United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953); United States v. Trani, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952); United States v. Reese, 7 C.M.R. 292 (1953).

In the recent case of *United States v. Milldebrandt*[6] the Court of Military Appeals was confronted with the problem of legality of orders under article 90 of the Uniform Code.[7] In this case an enlisted man was granted a leave in order to permit him to obtain civilian employment and to clear up personal financial problems. The leave was conditioned upon his making weekly progress reports of his financial condition to the officer who authorized the leave. Upon failure to submit the ordered reports, the leave was revoked. When he returned to his station he was charged with willful disobedience of the order. The court held this order to be illegal on the ground that it was too broad. The court pointed out that under such an order a person might be prosecuted for failure to disclose information of a confidential or incriminating nature. Such orders, said the court, must be specific, definite, and certain as to the information to be supplied so that they can be measured for illegality. Otherwise, the only penalty that may be imposed for disobedience is revocation of the leave.

A second question presented in the *Milldebrandt* case was whether such an order had to be complied with during a period of authorized leave. This question was before the court as a matter of first impression. Judge Latimer concluded that when an enlisted man is on leave, he should not be subject to orders requiring him to perform strictly military duties unless such performance is compelled by the presence of some grave danger or unusual circumstance. Judge Ferguson and Chief Judge Quinn concurred only in the result, the former without opinion. The Chief Judge stated, without discussion, that he had serious doubts about the validity of the implications of the opinion as to military personnel on leave.[8] As the case could have been decided on the first point and two judges concurred in the result only, the decision is not clear-cut as to military jurisdiction over personnel on authorized leave.

An order given solely for the purpose of inflicting unauthorized punishment is illegal. Article 15 of the Uniform Code of Military Justice[9] is the only authority for imposing punishment without a trial. Frequently it is contended that certain orders are an attempt to inflict punishment without giving the recipient the benefits of article 15. It is clear that a valid order to perform training can be given without proceeding under this article. The difficulty arises in determining whether an order is for the purpose of inflicting punishment or for training purposes.

[6] 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).
[7] 10 U.S.C. § 890 (Supp. IV, 1957). See note 1 *supra*.
[8] 8 U.S.C.M.A. at 639, 25 C.M.R. at —.
[9] 10 U.S.C. § 815 (Supp. IV, 1957) (Formerly 64 STAT. 112 (1950), 50 U.S.C. § 571 (1952).

In *United States v. Trani*[10] a prisoner was ordered to perform close order drill during normal duty hours until he "shaped up and got a little better discipline [and] better control of himself."[11] The Court of Military Appeals was not convinced that the ordered drill was for punishment purposes. The court said it did not wish to substitute its judgment for that reasonably exercised by an officer in command of personnel. However, the court pointed out that it would not hesitate to declare unlawful the punitive use of close order drill or any other military duty.

The result was different in *United States v. Roadcloud*,[12] where a prisoner was ordered to drill at 10:30 p.m. because he had been disobedient and uncooperative. This drill was conducted when other prisoners were not at work. The order was held to be punitive and unlawful as there did not appear to be any fair and reasonable relationship between the drill and rectification of any of the accused's deficiencies.

In *United States v. Reeves*[13] an enlisted man was "gigged" at an inspection and placed on detail by his first sergeant. A noncommissioned officer in charge of the detail ordered him to mow the grass in the company area. The order was held illegal as being fatigue duty assigned as punishment and not classifiable as training or exercise. It was also pointed out that only officers are authorized to administer company punishment. Illegality has also been found in an order to clean the barracks at 4:00 p.m. on Saturday,[14] an order to take a parachute from room to room and put it down in the proper manner announcing to all present that this was the proper method of handling it,[15] and an order for a one-day absentee to spend the night of his return in a guarded cell.[16]

As the foregoing cases indicate, it is often difficult to determine when punishment is being inflicted. Changing a "K.P." or duty roster in order to put a special burden on a man who has previously been in trouble, or giving a reprimand because of acts which are a clear violation of the Uniform Code would look suspiciously like punishment. But what if the commanding officer directs that these persons practice close order drill during the week-end and claims that this special duty is imposed only to improve their efficiency?[17] The company commander clearly has the authority to assign special training to improve efficiency.

[10] 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952).
[11] *Id.* at 295, 3 C.M.R. at 27.
[12] 6 C.M.R. 384 (1952).
[13] 1 C.M.R. 619 (1951).
[14] United States v. Robertson, 17 C.M.R. 684 (1954).
[15] United States v. Raneri, 22 C.M.R. 694 (1956).
[16] United States v. McCarthy, 23 C.M.R. 561 (1957).
[17] EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 135 (1956).

By taking this position, he has made difficult the burden of proving illegality.

The question of whether or not an order is legal that requires a serviceman to give evidence against himself has been very confusing. The question must be determined under article 31(a) of the Uniform Code of Military Justice,[18] which provides that no person subject to the Code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him. In *United States v. Eggers*[19] the court observed that Congress intended to secure to persons subject to the Code the same rights against self-incrimination secured to civilians under the fifth amendment.

Paragraph 150b of the *Manual for Courts-Martial* interprets the prohibition of article 31(a) of the Code as being limited to compulsion in obtaining verbal or other communications in which an individual expresses his knowledge of the matter. According to this paragraph a person may lawfully be ordered to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice identification, to submit to fingerprinting or bloodtesting, or to expose his body for examination by the court or by a physician who will testify to the result of his examination. However, the court has disapproved some of these *Manual* provisions as being in conflict with article 31(a). Thus, orders requiring a person to read for voice,[20] to give a sample of his handwriting,[21] to print the alphabet,[22] and to submit to a blood alcohol test[23] have been held illegal.

The Armed Services have been plagued with narcotics cases, several of which involve the legality of an order to the narcotic suspect to furnish a urine sample and the subsequent use thereof as evidence against him. In *United States v. Williamson*[24] the court concluded that a urine specimen obtained from the body of an unconscious suspect by means of a catheter was admissible as evidence. In *United States v. Booker*[25] it was held that a urine specimen obtained from a suspect with his consent and full cooperation is admissible even though the suspect had not been informed of the nature of the accusation and had not been advised that he need not give the specimen. In *United States*

[18] 10 U.S.C. § 831 (Supp. IV, 1957) (Formerly 64 STAT. 118 (1950), 50 U.S.C. § 602 (1952)).
[19] 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).
[20] United States v. Greer, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).
[21] United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).
[22] United States v. Rosato, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).
[23] United States v. Musquire, 23 C.M.R. 571 (1957); *aff'd*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958).
[24] 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).
[25] 4 U.S.C.M.A. 335, 15 C.M.R. 335 (1954). See also United States v. Barnaby, 5 U.S.C.M.A. 63, 17 C.M.R. 63 (1954).

v. Jones[26] the specimen was held inadmissible because the sample was taken by catheterization over the protest of the suspect after he had tried but failed to comply with the order to furnish the urine sample.

After this decision the Services apparently felt that a direct order to furnish a urine sample as evidence was illegal. They began following a suggestion that, instead of an order to furnish a sample, the suspect should be given an explicit order that, when next he urinates, he should do so in a certain container.[27] This method was declared illegal in *United States v. Jordan*.[28] Thus it seems that all orders which require a person to furnish a urine sample that will be used as evidence against him are now illegal.

In *United States v. Bayhand*[29] an order to the unsentenced prisoner to stand in a muddy ditch and carry rocks with sentenced prisoners was held to be illegal. The court, citing article 13 of the Uniform Code of Military Justice,[30] said a distinction must be made between unsentenced and sentenced prisoners with respect to their treatment. The holding, said the court, does not mean that unsentenced prisoners must remain unemployed. They can be required to perform certain useful military duties.[31]

In *United States v. Zachery*[32] a six foot man disobeyed an order to return to a six by six segregation cell after being permitted to leave it temporarily. It was contended that this order was illegal under article 55 of the Uniform Code of Military Justice,[33] which prohibits punishments of a cruel or unusual nature. The court held that the cell was not *so small* as to make confinement therein a violation of the article.

An order may also be unlawful because it does not relate to a military duty. Orders which properly maintain discipline and insure efficient discharge of the military mission are legal even though the prohibited

[26] 5 U.S.C.M.A. 537, 18 C.M.R. 161 (1955). See also, United States v. Speight, 5 U.S.C.M.A. 668, 18 C.M.R. 292 (1955).

[27] This suggestion was made particularly by Robinson O. Everett, former Commissioner, United States Court of Military Appeals. See his book, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 83 (1956).

[28] 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

[29] 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

[30] 10 U.S.C. § 813 (Supp. IV, 1957) (Formerly 64 STAT. 112 (1950), 50 U.S.C. 567 (1952)):

"Subject to section 857 of this title (article 57), no person while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

[31] See also United States v. Hammond, 21 C.M.R. 422 (1956).

[32] 6 C.M.R. 833 (1952).

[33] 10 U.S.C. § 855 (Supp. IV, 1957) (Formerly 64 STAT. 126 (1950), 50 U.S.C. 636 (1952)).

conduct is not criminal per se nor forbidden by law.[34] But an order which has as its sole objective the attainment of some private end,[35] or the sole purpose of increasing the penalty for an offense which it is expected the accused may commit,[36] is not lawful.[37]

The order to be lawful must also be one which the superior officer is authorized under the circumstances to give. This point has come up in connection with orders that one expend his personal funds. In *United States v. Gordon*[38] it was held that a commanding officer had no right to demand that an enlisted man expend his personal funds in moving his personal belongings from his off post living quarters back to the post. However, it was noted that an order to have a dirty uniform cleaned, to get a needed haircut, and orders of a like nature would be legal even though obedience required expenditure of personal funds, provided compliance did not depend on financial status. Orders tending to discourage black market activities have been held to be legal even though they involve limitations on the use of private property of a serviceman.[39]

An order is not authorized when the one to whom it has been given is excused from such duty,[40] or when such order is inconsistent with an order previously given by a superior authority.[41]

It remains to be pointed out that even though the serviceman feels that he is justified in refusing to obey an order, he should remember that he is generally at a very considerable disadvantage. The presumption generally will be in favor of the legality of the order and the reasons upon which legality may hinge will often rest only in the possession

[34] United States v. Hill, 5 C.M.R. 665 (1952); United States v. Wilson, 4 C.M.R. 311 (1952).

[35] 10 U.S.C. § 3639, 8639 (Supp. IV, 1957) (Formerly REV. STAT. § 1232 (1875), 10 U.S.C. § 608 (1953)). It is provided that no officer may use an enlisted man as a servant.

United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63 (1955), held that Special Regulations 210-60-1, 7 December 1948, which permitted the use of enlisted men in the officers' mess on a voluntary basis was not in conflict. The court said that "servant" means one who labors or exerts himself for the personal benefit of an officer. It was held here to be a benefit to the service rather than a benefit to an officer personally. Judge Brossman, dissenting in this case, pointed out that the enlisted man did not volunteer since he was offered the choice between service in the officers' mess or being transferred to another and undisclosed military station.

[36] United States v. Stock, 2 C.M.R. 494 (1952). Here it was held unlawful to give an enlisted man an order to go on "K.P." after the enlisted man had stated to the officer giving the command that he would not go. *But see* United States v. Buttrick, 18 C.M.R. 622 (1954), where an enlisted man had stated that he would not salute an officer, because of his religious beliefs. An order to salute was held lawful on the ground that the officer giving the order reasonably believed that the enlisted man was attempting to bluff his way out of the impending overseas shipment.

[37] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 169b.

[38] 3 C.M.R. 603 (1952).

[39] United States v. Martin, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952); United States v. Barnes, 12 C.M.R. 735 (1953).

[40] United States v. Whitaker, 5 C.M.R. 539 (1952).

[41] United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

of the superior who has given the order. It is usually safer and wiser for the inferior to obey the order even though it is to his own detriment. From the viewpoint of the Armed Services there could be no more dangerous philosophy than that each serviceman should determine for himself whether or not an order is legal, and then disobey it if, in his judgment, the order is illegal.

RICHARD J. TUGGLE

Practice and Procedure—Pre-trial in North Carolina—The First Eight Years

The information presented in this Note was obtained from the following sources: communication by mail with the clerks of the superior court in sixty-nine counties; communication by mail with the judge or recorder of twenty-one inferior courts possessing civil jurisdiction above that of a justice of the peace; interviews with the clerk of the superior court, a deputy or assistant clerk, or with a leading member of the bar in twenty-two counties; communication by mail with all members of the North Carolina Bar who submitted suggestions and criticism on pre-trial to the Bar Association Committee on Improving and Expediting the Administration of Justice; and communication by mail with nineteen superior court judges. All opinions and conclusions contained herein are a summary or digest of the ones gathered from these various sources.

The *General Statutes* require the clerk of the superior court to maintain a pre-trial docket.[1] Yet a survey of the actual practice in the various counties shows that, out of those contacted, fourteen maintain such a docket, nine others have one that is never used, and fifty-four do not even have a pre-trial docket. No information is available for the remaining twenty-three counties. At the same time, it is clear that

[1] N.C. GEN. STAT. §§ 1-169.1.-.6 (1953). For a digest of these provisions, see *A Survey of Statutory Changes in North Carolina in 1949*, 27 N.C.L. REV. 405, 430-32 (1949). For comment on the early days of pre-trial in this state, see Paschal, *Pre-Trial in North Carolina: The First Eight Months*, 28 N.C.L. REV. 375 (1950). For a detailed bibliography of material on pre-trial, see INSTITUTE OF JUDICIAL ADMINISTRATION BULLETIN 2-U22, PRE-TRIAL RULES (Dec. 11, 1953). The most comprehensive general text available is NIMS, PRE-TRIAL (1950). For forms used in federal courts, see JOINER, TRIALS AND APPEALS 92 (1957). For demonstrations of the pre-trial conference, see 11 F.R.D. 3 (1952). For other material on pre-trial, including general discussions, forms, and demonstrations of the conference, see the following: Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 437 (1955) (also prepared and distributed in pamphlet form under the auspices of the Pre-Trial Committee, Section of Judicial Administration, American Bar Association); Murrah, *Pre-Trial Procedure*, 14 F.R.D. 417 (1954); SUPREME COURT OF NEW JERSEY, MANUAL OF PRETRIAL PRACTICE (rev. ed. 1955); JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA MANUAL OF PRE-TRIAL PROCEDURE (1956). A 16 mm. film entitled *A Pre-Trial Conference*, which demonstrates an actual conference, is available for a rental fee of $4.75 plus postage from the National Legal Audio-Visual Center, Indiana University School of Law, Bloomington, Indiana.

the absence of a separate docket is not the factor that limits the use of pre-trial. Many clerks reported that at one time they had such a docket, but that after several years of disuse it was abandoned. Over a third of the clerks reporting indicated a procedure they used (or would use if the opportunity presented itself) to handle pre-trial cases. Most of these would place the case awaiting pre-trial on the civil issue docket.

Sixty superior court clerks reported the number of cases in which the pre-trial hearing, as such, was used during the preceding year.[2] Out of this number, thirty-four (or fifty-six percent) did not have a single case involving a pre-trial hearing within the year. Another eleven counties (an additional eighteen percent) reported that they had from one to five pre-trial cases. No county had over twenty cases.[3]

These figures speak for themselves. There is no widespread use of pre-trial in North Carolina.

There are a few judges who consistently require pre-trial in all contested civil litigation, but this number—small to start with—is steadily decreasing. Several superior court judges stated that at one time they had required pre-trial consistently, but that for one or more of the reasons discussed below they have stopped this practice. Several clerks in one district reported that a particular judge used to require pre-trial frequently but that since he had left the district the practice had fallen into disuse. There remain three or four judges whose names are repeatedly connected with extensive and successful use of pre-trial.

A survey of the inferior courts exercising civil jurisdiction above that of a justice of the peace shows that there are at least five such courts that utilize the pre-trial powers given them under our statute.[4] It is reported that pre-trial has been very successful in some of these courts; but since the problems involved in the inferior courts are not the same as those encountered in the superior court, no details on the procedure in these five courts will be considered here.

Answers touching the success of pre-trial when used vary greatly according to the personal experiences of the person concerned, but the general consensus of opinion is that very good results were usually obtained. It is also interesting to note that the most favorable results

[2] This information was collected during the month of October 1957.

[3] The breakdown on these figures is as follows:

Number of Pre-trial cases	Counties	Percent of counties reporting
0	34	56.7
1 to 5	11	18.4
6 to 10	7	11.6
11 to 15	6	10.0
16 to 20	2	3.3
Over 20	0	0

These figures include all of the larger counties.

[4] N.C. GEN. STAT. § 1-169.6 (1953).

were reported by those who had used pre-trial—or had been connected with its use—consistently over a period of time, rather than from those who used it only occasionally.

The reasons given why pre-trial is not used more often seem to fall into four general categories. Since opinions are so widely spread as to the relative importance of each, there is no attempt here to attach to one reason any more significance than to another.

Unfamiliarity and uncertainty. Most lawyers seem to be unfamiliar with the procedure involved in pre-trial and uncertain as to the goals to be sought. As a result the bar generally makes little or no effort to push the use of pre-trial. Likewise, many judges are not sure how much initiative they should take in requiring a hearing and they seem to be unsure of their powers and duties when the hearing is held. Judges therefore generally do not encourage lawyers to use this procedure. The result of this situation is that the bar waits for the bench to require pre-trial, and the bench generally waits for the bar to request it.

Attitude. Some lawyers and judges simply do not want to change the procedure they have been using for many years. This is not mere unfamiliarity, but a "resentment" of new procedure and a "fear of change." With this attitude present, it is clear that little can be accomplished by pre-trial. In addition, many lawyers do not want to give up any chance of surprising their opponents and impressing the jury. At the pre-trial conference, they will attempt to hold out information and refuse to disclose their hands. They will concede nothing if they can avoid doing so. Under the old idea that a trial is a game of wits between counsel, they want to have as much to work with as possible and therefore do not want to see anything settled prior to trial.

Lack of a satisfactory time for holding pre-trial. Pre-trial has generally worked best when the conference could be held some two to four weeks prior to trial, thus enabling counsel to prepare the case for trial with the pre-trial order before him.[5] This is nearly impossible in most of the superior courts in this state under the present system. In the small counties where only a few civil terms of court are held each year, the conference must now either be held early in the term at which the case is to be tried (whereby pre-trial loses much of its effectiveness because there is insufficient time to take full advantage of its benefits) or held at one term of court with a delay of four or six months before trial can be had at the next civil term. Neither alternative is completely satisfactory. Even in the larger counties where civil terms are held frequently, the calendars are often so crowded that a long delay will result after the case is put on the calendar before trial is had.[6]

[5] See note 1 *supra* for bibliography of materials on pre-trial.

[6] N.C. GEN. STAT. § 1-169.1 (1953) provides that cases awaiting pre-trial shall not be placed on the calendar until pre-trial is completed.

At present, the first day of each civil term is the time designated for pre-trial and other non-jury matters.[7] It has been the experience of many of our judges that Monday is often needed to hear motions, custody matters, and alimony citations made returnable before the judge at that term. Thus there is little or no time for pre-trial on Monday, and judges and lawyers find it understandably difficult to continue with pre-trial conferences on Tuesday when there are other cases waiting for trial.

Rotation of judges. Many proponents of pre-trial believe that the same judge should hold the pre-trial conference and preside at the trial of the case, since the trial judge is then familiar with all the issues and facts of the case. This is virtually impossible with the rotation of judges unless the pre-trial conference and trial of the case take place during the same term of court. There are also some who think that different judges should preside at pre-trial and at the trial of the case. It is contended that lawyers would then be more inclined to admit weaknesses in their cases and would be more willing to make an honest effort to settle. It seems clear that there are advantages in each system.

But aside from the advantages of having the same judge conduct both the pre-trial and the trial, rotation of judges makes pre-trial more difficult in another respect. Under our statute, the trial judge has the final decision as to the effect to be given the pre-trial order, since it is within his discretion to modify that order.[8] Therefore, the judge conducting the pre-trial hearing, not knowing in many cases which judge will preside at the trial, has no assurance that full advantage will be taken of his pre-trial labors. Such a situation is not likely to encourage the use of pre-trial.

One superior court judge, when asked if he favored the use of pre-trial, answered: "Qualifiedly yes, under our present system. Definitely yes, if we should ever abolish rotation."

Many different ideas were proposed as means to get better results from pre-trial. Those that were most often suggested or that seemed to be most significant are put forth here.

Familiarization. One superior court judge stated frankly that "I personally feel the need for instruction." Another suggested that it would be most helpful if judges were furnished with a suggested "form" to be used for the pre-trial order. Also, indications are that many members of the bar need some guide to the procedure to be followed, outlining that which is expected of them. It is therefore submitted that a brief guidebook on pre-trial in North Carolina for lawyers and judges, containing a suggested form for a pre-trial order, would be of tremendous assistance.

[7] *Ibid.* [8] *Ibid.*

Provide a time for holding pre-trial. There were many suggestions that a special term of court be held at a stated interval prior to each scheduled civil or mixed term. This special term would handle pre-trial for all civil cases to be tried at the following regular term and would also dispose of motions, custody proceedings, and all other matters not requiring a jury. Then at the regular term—three weeks or a month later—the court could immediately begin trying cases which are known to be ready for trial, thus expediting considerably the disposal of cases during that term. Suggestions concerning which judge should conduct this special term include: the same judge who is to hold the regular term; the resident judge; a special judge who conducts only non-jury terms; or any regular superior court judge to be assigned by the Chief Justice of the North Carolina Supreme Court. Of course, if rotation of judges were ever abolished in this state, it would be much easier to provide for a short non-jury term to precede regularly scheduled terms.

Make mandatory. Perhaps the most controversial question in the field of pre-trial is whether or not it should be required in all contested civil cases. There are some who say pre-trial is not necessary other than in exceptional cases and that it would be a waste of time in all other cases. To this argument the proponents of mandatory pre-trial answer that it will save much time and expense in most cases, and in the other cases little time will be required. A superior court judge stated: "Actually it is not necessary in some cases, but unless required in all, there is a tendency to say that it is not worthwhile in a particular case, and thus pass over many."

It is also argued that most of the cases in our state courts involve only small amounts, so that lawyers do not feel it necessary to have such a conference prior to trial. To this argument another judge answered that pre-trial "would be perfunctory in many cases, but it is impossible to draw the line. Also, 'The littlest possums climb the highest trees.' There is nothing like the $500 case to raise thorny legal problems." Most of the lawyers and judges contacted agree with this statement. Although several qualified their answers to be conditional upon the solving of one or more of the problems raised above, most seemed to think that, under proper circumstances, pre-trial should be made mandatory.

DAVID S. EVANS

Property—Adverse Possession—Color of Title—Tax Foreclosure Deed to Property Held by Tenants in Common

In *Johnson v. McLamb*[1] the court reviewed the North Carolina law with respect to deeds as color of title for purposes of adverse possession.[2] This case points out that in North Carolina any written instrument, with one exception, is color of title which on its face professes to pass a title but which fails to do so, either from want of title in the person making it or from the defective mode of the conveyance employed.[3]

The only exception to the general rule set out above is that a deed made by one tenant in common to the entire tract of land is not sufficient to sever the unity of possession and does not constitute color of title as against the cotenants.[4] The registration of the deed in this case is held

[1] 247 N.C. 534, 101 S.E.2d 311 (1958).

[2] Adverse possession, to ripen into title within seven years, must be under color. N.C. GEN. STAT. § 1-38 (1953). Otherwise, a period of twenty years is required. N.C. GEN. STAT. § 1-40 (1953).

[3] 247 N.C. at 536, 101 S.E.2d at 312; First-Citizens Bank & Trust Co. v. Parker, 235 N.C. 326, 69 S.E.2d 841 (1952); Lofton v. Barber, 226 N.C. 481, 39 S.E.2d 263 (1946); Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941). The topic of this Note is limited primarily to the question of whether or not a tax foreclosure deed is good color of title as to the entire property where the foreclosure proceeding was against only one of the cotenants. However, it should be noted that there are certain requirements which must be met before any deed or other instrument will be color of title against the nonparticipating cotenants, since it is uniformly held that mere purchase of the undivided interest of one of the cotenants does not amount to a disseisin of the other cotenants. In such a case, the grantee is presumed merely to succeed to the title of his grantor. First, it is required that the grantee take actual possession of the land purportedly conveyed to him and that his acts be hostile to the rights of the other cotenants. Price v. Whisnant, 232 N.C. 653, 62 S.E.2d 56 (1950); Lewis v. Covington, 130 N.C. 541, 41 S.E. 677 (1902). Second, notice, either actual or constructive, must be given by the grantee to the cotenants of his adverse and hostile holding. In this respect, North Carolina has said that ordinarily an unregistered deed is not color of title as against parties claiming from the same source, except as between the original parties. Eaton v. Doub, 190 N.C. 14, 128 S.E. 494 (1925). See also Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953); Janney v. Robbins, 141 N.C. 400, 53 S.E. 863 (1906); Austin v. Staten, 126 N.C. 783, 36 S.E. 338 (1900).

[4] 247 N.C. at 536, 101 S.E.2d at 313. The theory of this exception is that the grantee from one tenant in common takes only his share and "steps in his shoes," becoming a tenant in common in his stead; and that therefore it requires twenty years adverse possession of the whole, under claim of ownership, to bar entry by the other tenants in common. See also Cox v. Wright, 218 N.C. 342, 11 S.E.2d 158 (1940). North Carolina is the only state so holding. Other jurisdictions hold that such a deed is color of title. See, *e.g.*, Akley v. Basset, 189 Cal. 625, 209 Pac. 576 (1922); Cook v. Rochford, 60 So. 2d 531 (Fla. 1952); Davis v. Harnesberger, 211 Ga. 625, 87 S.E.2d 841 (1955); Whittington v. Cameron, 385 Ill. 99, 52 N.E.2d 134 (1943); Sams v. Sampson, 255 S.W.2d 626 (Ky. 1953); Davis v. Gulf Ref. Co., 202 Miss. 281, 32 So. 2d 133 (1947), *rehearing granted*, 202 Miss. 808, 34 So. 2d 731 (1948); Stappenbeck v. Mather, 73 Misc. 434, 133 N.Y. Supp. 482 (County Ct. 1911); Medusa Portland Cement Co. v. Lamantina, 353 Pa. 53, 44 A.2d 244 (1945); McIntosh v. Kolb, 112 S.C. 1, 99 S.E. 356 (1919); Hood v. Cravens, 31 Tenn. App. 532, 218 S.W.2d 71 (1948); Easterling v. Williamson, 279 S.W.2d 907 (Tex. Civ. App. 1955); Cochran v. Hiden, 130 Va. 123, 107 S.E. 708 (1921); Laing v. Gauley Coal Land Co., 109 W. Va. 263, 153 S.E. 577 (1930).

not to affect this exception.[5] It has been the policy of the court, as illustrated by the *Johnson* case, to confine the exception to this class of cases.

In the *Johnson* case, there was a foreclosure sale to satisfy a judgment lien obtained against a tenant in common for unpaid taxes assessed against her interest in the property. The city secured the property by bidding in at the foreclosure sale and executed a tax foreclosure deed, which described the entire tract of land, to a stranger. Only the defaulting tenant was made a party to the foreclosure. The court held that such a deed was color of title and that seven years adverse possession of the entire tract, under claim of ownership, was sufficient to bar entry by the other tenants in common who were not made parties to the proceedings.[6]

Another illustration of the policy to confine the exception is found in a partition proceeding to sell land where less than the whole number of tenants in common have been made parties. Here, too, a deed made to a purchaser pursuant to an order of the court is color of title and seven years adverse possession thereunder will bar those tenants in common who were not made parties and who were not under a disability.[7]

Although the policy of the court is clear, it may be useful to consider other types of deeds in respect to color of title where the entire tract of land is conveyed to a stranger[8] but not all of the tenants in common have joined in the conveyance or participated in the proceedings from which the deed issues. North Carolina has not considered most of these other types of deeds. There is a split of authority as to whether or not a quitclaim deed purporting to convey the entire premises is color of title where the grantor owned only an undivided portion, but there was an entry and exclusive possession by the grantee.[9] The great ma-

[5] Bradford v. Bank of Warsaw, 182 N.C. 225, 108 S.E. 750 (1921); Hardee v. Weathington, 130 N.C. 91, 40 S.E. 855 (1902).

[6] *But cf.* Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936), where it was held that the title of tenants in common who are not made parties is not affected by a tax foreclosure suit and commissioner's deed executed in pursuance thereof. See also Howard v. Wactor, 41 So. 2d 259 (Miss. 1950), where one of the cotenants purchased the tax title and then sold to a stranger and it was held that the stranger became a cotenant.

[7] Perry v. Bassenger, 219 N.C. 838, 15 S.E.2d 365 (1941); Roper Lumber Co. v. Richmond Cedar Works, 165 N.C. 83, 80 S.E. 982 (1913); McCulloh v. Daniel, 102 N.C. 529, 9 S.E. 413 (1889).

[8] Somewhat different rules apply where one tenant in common is claiming title to the whole as against his cotenants by adverse possession, or under color of title where he purchased the land at some foreclosure or tax sale or from a stranger to whom he had previously sold his interest. Williams v. Robertson, 235 N.C. 478, 70 S.E.2d 692 (1953); Ange v. Owens, 224 N.C. 514, 31 S.E.2d 521 (1944); Winstead v. Wollard, 223 N.C. 814, 28 S.E.2d 507 (1944); Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936). The basic difference is in the presumption that the cotenant is holding for the benefit of all of the cotenants.

[9] It was held color of title in the following cases: Cook v. Rochford, 60 So. 2d

jority of cases found hold that a foreclosure deed at an execution sale purporting to convey land is color of title to the whole although in fact the title of all the cotenants did not pass.[10] Generally speaking, an executory contract to sell land by one of the cotenants and entry and possession of the same by the expectant grantee has been held to be color of title[11] except where a husband alone executes a contract to convey property held jointly with his wife.[12] Even a will may be color of title. For example, a husband and wife purchased lands as tenants in common and after the husband's death the wife remarried. She devised the property in whole to her stepdaughter, the daughter of her second husband by his first wife. It was held that the daughter acquired title by adverse possession under color of title as against the heirs of the first husband.[13] Generally, a mortgage deed to the whole by a tenant in common who is the only one in possession is not color of title from the time of the mortgage as against his cotenants and in favor of the mortgagee who later enters into possession unless there is an actual ouster of the other cotenants by the mortgaging tenant.[14] However, North Carolina seems to hold that in the latter case the mortgage deed is not color of title as against the cotenants on the ground that the mortgagee when he does get possession has stepped into the shoes of the mortgaging tenant.[15] But a purchase at a mortgage foreclosure sale

531 (Fla. 1952); Tillotson v. Foster, 310 Ill. 52, 141 N.E. 412 (1923); Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325 (1946); Morrison v. Hawksett, 64 N.W.2d 786 (N.D. 1954); Moore v. Slade, 194 Okla. 143, 147 P.2d 1006 (1944); Lloyd v. Mills, 68 W. Va. 241, 69 S.E. 1094 (1911). *Contra,* Liles v. Pitts, 145 La. 650, 82 So. 735 (1919); Edwards v. Bishop, 4 N.Y. 61 (1850).

[10] Call v. Phelps, 20 Ky. L. Rep. 507, 45 S.W. 1051 (1898); Westmoreland v. Curbello, 58 N.M. 622, 274 P.2d 143 (1954); Bradshaw v. Holmes, 246 S.W.2d 296 (Tex. Civ. App. 1951). *Contra,* Curtis v. Barber, 131 Iowa 400, 108 N.W. 755 (1906) (sheriff's deed).

[11] Rose v. Ware, 115 Ky. 420, 74 S.W. 188 (1903); Clapp v. Bromagham, 9 Cow. 530 (N.Y. 1827); Lloyd v. Mills, 68 W. Va. 241, 69 S.E. 1094 (1911).

[12] McNeeley v. South Penn Oil Co., 52 W. Va. 616, 44 S.E. 508 (1903).

[13] Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906); Wallace v. McPherson, 187 Tenn. 333, 214 S.W.2d 50 (1949). *But see* Hicks v. Bullock, 96 N.C. 164, 1 S.E. 629 (1885), where land was left to a trustee to receive the profits and pay them over to one person during his life, and after his death to convey the legal estate to certain remaindermen. It was held that one of the remaindermen could not get a possession adverse to the trustee and his co-remaindermen by taking possession under a deed from the person entitled to receive the rents for life. Such possession does not become adverse until after the death of the person entitled to the rents for life; and even then, an adverse possession for twenty years by one tenant in common is necessary to bar his cotenants.

[14] Livingston v. Livingston, 210 Ala. 420, 98 So. 281 (1923); Harriss v. Howard, 126 Ga. 325, 55 S.E. 59 (1906); King v. Hill, 141 Tex. 294, 172 S.W.2d 298 (1943).

[15] In Bailey v. Howell, 209 N.C. 712, 184 S.E. 476 (1936), it was held that a mortgage executed on the entire tract by one tenant in common in possession was not color of title as against the cotenants. One tenant in common listed the land for taxes in her name and thereafter the land was sold for taxes and deed executed by the sheriff to defendant; but the sheriff's deed was void as being without authority of law. A few days after the execution of the sheriff's deed, defendant

under a deed purporting to convey the whole and entry and possession under such foreclosure deed constitute color of title.[16] No cases have been found which determine the question of whether or not a void deed of gift may be color of title.[17]

BENJAMIN S. MARKS, JR.

Railway Labor Act—Representation of Racial Minority Groups in Bargaining and Contract Administration Without Discrimination

In *Conley v. Gibson*,[1] petitioners, Negro members of the Brotherhood of Railway and Steamship Clerks, were segregated into a separate local union. They brought a class action for themselves and other Negro employees similarly situated against the union, claiming rights arising under the Railway Labor Act.[2] The union had been designated as the exclusive bargaining representative under the act.

The collective bargaining agreement which had been negotiated by the union with the company contained among other provisions a uniform seniority clause; and a summary dismissal of an employee without cause would be a breach of the collective bargaining agreement which normally would be challenged by the union through the grievance procedure.

In substance petitioners alleged that they were discharged by the railroad in violation of the seniority agreement, ostensibly on the ground that their jobs were being abolished. They alleged that in reality their jobs were not abolished, but that the vacancies were immediately filled with white men with the exception of a few Negroes who were rehired for their old jobs with a loss of seniority. The company explained that after abolishing petitioners' jobs it found it necessary to "create" certain new positions. Petitioners alleged that the union failed to protest their discharge, protect their jobs, and process their grievances as they would have those of white employees, all "according to plan."

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reconveyed the land to the tenant in common and took a mortgage back in himself. Thereafter the mortgage was foreclosed and the property bid in by defendant. He transferred the land to a stranger who subsequently reconveyed it to him. The tenant in common listed the land for taxes and remained in possession of the land throughout. The cotenants instituted partition proceedings and defendant claimed sole seisin, basing his claim of title upon seven years adverse possession under color of title.

[16] Dew v. Garner, 207 Ala. 353, 92 So. 647 (1922); Bradshaw v. Holmes, 246 S.W.2d 296 (Tex. Civ. App. 1951); Schlarb v. Castaing, 50 Wash. 331, 97 Pac. 289 (1908). *But cf.* Bailey v. Howell, *supra* note 15.

[17] The court raised the question in Justice v. Mitchell, 238 N.C. 364, 78 S.E.2d 122 (1953), but did not answer it since under the facts if it were color of title it would have been destroyed when claimant was made a cotenant under a will devising the property.

[1] 355 U.S. 41 (1957).

[2] 44 STAT. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1952).

The union interposed several jurisdictional objections. The most important of these was that the National Railroad Adjustment Board had exclusive jurisdiction over the disputes.[3] But the Court pointed out that the portion of the Railway Labor Act defining the jurisdiction of the Board, by its own terms, only gives it jurisdiction over "disputes between an employee or group of employees and a carrier or carriers."[4] Here, the dispute was between employees and their bargaining agent and not between employee and employer.[5]

The Railway Labor Act provides that within an appropriate unit the majority of employees may select the exclusive bargaining agent,[6] whose statutory duty it then becomes to represent *all* of the employees in the class or craft.[7]

On the merits the Court held that if the facts as alleged were true, this was a flagrant violation of the union's statutory duty to bargain collectively in favor of petitioners and to represent them fairly and without hostile discrimination. Collective bargaining does not end with the making of an agreement with the employer; it is a continuing process involving day to day adjustments in the contract and the protection of employee rights already secured by the agreement. The Court therefore reversed the lower courts' dismissal of the complaint and remanded the case for further proceedings in the district court.

The unanimous decision in the *Conley* case was the culmination of a long line of decisions dealing with racial discrimination in collective

[3] Other jurisdictional questions were passed upon. The union contended that the Texas and New Orleans Railroad was an indispensable party defendant. The Court, however, pointed out that the suit was solely by a group of employees against their statutory bargaining representative and only incidentally concerned the carrier. No relief was asked against the railroad and there was little prospect that any would be granted which would bind it.

[4] Railway Labor Act § 3 First (i), 48 STAT. 1191 (1934), 45 U.S.C. § 153 First (i) (1952).

[5] Section 3 of the Railway Labor Act confers jurisdiction on the National Railroad Adjustment Board to hold hearings, make findings, and enter awards in all disputes between carriers and their employees "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, and working conditions . . . ." 48 STAT. 1189 (1934), 45 U.S.C. § 153 (1952). Where a dispute is between a carrier and its employees and *does* involve the interpretation of a collective bargaining agreement the Court denies jurisdiction to federal and state courts until the Board has interpreted the agreement, believing that the Board is peculiarly familiar with the problems of interpreting a collective bargaining agreement. Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946).

[6] Virginian Ry. v. System Federation No. 40, Ry. Employees Dep't, AFL, 300 U.S. 515 (1937).

[7] Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); *cf.* Wallace Corp. v. NLRB, 323 U.S. 248 (1944). The minority of employees in the unit is not allowed by the act to select a collective bargaining representative of its own. Virginian Ry. v. System Federation, No. 40, Ry. Employees Dep't, AFL, *supra* note 6; Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944). *Cf.* J. I. Case Co. v. NLRB, 321 U.S. 332 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944); Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

bargaining, beginning with *Steele v. Louisville & N. R. R.*[8] In that case the exclusive bargaining representative for the railway firemen working on southeastern railroads negotiated several clauses in the collective bargaining agreements with the railroads, against their initial opposition, which would have had the ultimate effect of excluding Negro firemen from the service. One of these clauses was that only "promotable" employees should be employed as firemen or assigned to new runs or permanent vacancies in established runs. Inasmuch as all railroads at that time had a policy of not promoting Negroes to serve as engineers, the provision affected, for the most part, only Negroes. The non-union Negro firemen, thus discriminated against, brought a class action against the union and the railroad alleging a breach of the duty imposed by the Railway Labor Act.[9]

The Court's unanimous decision was that petitioners' complaint stated facts which if proved would entitle them to the relief of a declaratory judgment, damages, and an injunction against further discrimination by the union on the basis of race. The union was held to be under a duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in making contracts with the railroad.[10] Concerning the contract clauses the Court said, "Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations."[11]

To grasp the real significance of the holding in the *Conley* case it is important to notice two differences between it and the *Steele* case. In the latter case, the union bargained as exclusive representative with the railroad for a collective agreement which was discriminatory *on its face* and in operation.[12] In the *Conley* case there was no such dis-

[8] 323 U.S. 192 (1944).

[9] "[T]he right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct." *Id.* at 204.

[10] In deciding a companion case, Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944), the Court merely adopted the reasoning of the *Steele* case, holding that the right asserted by plaintiffs is derived from the duty imposed by the Railway Labor Act on the union as exclusive bargaining representative. Upon remand of the *Tunstall* case, petitioners recovered in the district court. Brotherhood of Locomotive Firemen and Enginemen v. Tunstall, 69 F. Supp. 826 (E.D. Va. 1946), *aff'd*, 163 F.2d 289 (4th Cir. 1947), *cert. denied*, 332 U.S. 841 (1947).

[11] 323 U.S. at 203.

[12] Unions may negotiate collective bargaining agreements which are discriminatory in some respects, but such discriminations must not be based on color. Such contracts may have unfavorable effects on some members of the craft represented provided such differences are relevant to authorized purposes of the act, such as differences in seniority, type of work performed, and the competence and skill with which it is performed. Steele v. Louisville & N. R.R., 323 U.S. 192, 203 (1944). Much litigation has arisen where returning war veterans have been given

criminatory contract; rather, it was administered in a discriminatory manner. Secondly, in the *Steele* case the Negro petitioners were excluded entirely from membership in the union, while in the *Conley* case they were union members, though segregated into a separate local.

In reaching a decision on the sufficiency of the complaint in the *Steele* case the Court had to pass upon several jurisdictional problems which apply equally to the situation in the *Conley* case. The most important of these was that under the Railway Labor Act aggrieved employees could file their own grievances with the National Railroad Adjustment Board.[13] But, the Court pointed out that the Board has consistently declined in over four hundred cases to hear grievance complaints by individual members of a craft represented by a union.[14] "The only way that an individual may prevail is by taking his case to the union and causing the union to carry it through to the Board."[15] Therefore, said the Court, there is no administrative remedy available which would be a condition precedent to equitable relief.[16]

During the next few years after *Steele* was decided, its doctrine was supported in other cases with almost identical facts.[17] The doctrine

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higher seniority ratings than others who had worked for the company for some time. See Huffman v. Ford Motor Co., 345 U.S. 330 (1953); Hartley v. Brotherhood of Clerks, 283 Mich. 201, 277 N.W. 885 (1938).

[13] The Court also disposed of the following contentions: (1) The question was not one of a jurisdictional dispute determinable under the administrative scheme set up by the act. *Cf.* Switchman's Union v. National Mediation Bd., 320 U.S. 297 (1943). (2) The question was not restricted by the act to voluntary settlement by recourse to the traditional implements of mediation, conciliation, and arbitration. *Cf.* General Comm. of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-K.-T. R.R., 320 U.S. 323 (1943). (3) No question of who was entitled to represent the craft or who were members of it was involved, issues which would have been relegated for settlement to the Mediation Board. *Cf.* Switchman's Union v. National Mediation Bd., *supra.* (4) There was no difficulty as to the interpretation of the contract which by the act is committed to the jurisdiction of the Railroad Adjustment Board.

[14] *Administrative Procedure in Government Agencies,* S. Doc. No. 10, 77th Cong., 1st Sess. 7 (1941).

[15] *Ibid.*

[16] It is fairly obvious why the Court would not want to limit petitioners to an action before the Board even if it found that the Board had jurisdiction in such cases. The Board's members are chosen by groups of carriers and the large national unions. 48 STAT. 1189 (1934), 45 U.S.C. §§ 153 First (a), (b), (c), (g) (1952). There are few procedural safeguards. There is no process for compelling the attendance of witnesses or the production of evidence, and no official record is kept except the informal pleadings. Hearings are conducted without witnesses. *Administrative Procedure in Government Agencies,* S. Doc. No. 10, 77th Cong., 1st Sess. 11-14 (1941). Finally, the statute provides no relief for a petitioning party—be he individual, union, or carrier—against an erroneous order of the Board. 48 STAT. 1191 (1934), 45 U.S.C. §§ 153 First (m), (p) (1952).

[17] Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232 (1949). In this case the Court held specifically that the anti-injunction provisions of the Norris-La Guardia Act, 47 STAT. 70 (1932), 20 U.S.C. §§ 101-15 (1952), do not prohibit injunctions of the type which petitioners sought. "In Virginian R. Co. v. System Federation . . . we held that the Norris-La Guardia Act did not deprive federal courts of jurisdiction to compel compliance with positive

was somewhat extended in *Brotherhood of Railway Trainmen v. Howard.*[18] There, the Negroes discriminated against were not within the class of workers which the union had a statutory duty to represent, *i.e.,* they were not within the bargaining unit. The Negroes filed a complaint similar to that in the *Steele* case. The union's contention was that the act imposed no duty upon them to bargain collectively for persons not in their craft or class and that they had no statutory duty to refrain from discriminating against persons whom they had no duty to represent. The Court held that this was not a significant distinction. The case therefore means that unions protected by the act must not use their power to negotiate collective bargaining agreements which discriminate on the grounds of race or color regardless of the classification of the victims.[19]

It will be observed that a common feature of every case considered thus far prior to *Conley* is that the unions had negotiated through collective bargaining a clause in a collective bargaining agreement which was discriminatory on its face. It was after the decision in the *Howard* case that those unions desiring to discriminate against Negro

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mandates of the Railway Labor Act . . . enacted for the benefit and protection, within a particular field, of the same groups whose rights are preserved by the Norris-La Guardia Act. To depart from those views would be to strike from labor's hands the sole judicial weapon it may employ to enforce such minority rights as these petitioners assert and which we have held are now secured to them by federal statute. To hold that this Act deprives labor of means of enforcing bargaining rights specifically accorded by the Railway Labor Act would indeed be to 'turn the blade inward.'" *Id.* at 237. See also, Rolax v. Atlantic Coast Line R.R., 186 F.2d 473 (4th Cir. 1951); Mitchell v. Gulf, M., & O. R.R., 91 F. Supp. 175 (N.D. Ala. 1950). For later decisions see Brotherhood of Locomotive Firemen v. Mitchell, 190 F.2d 308 (5th Cir. 1951); Central of Ga. R.R. v. Jones, 229 F.2d 648 (5th Cir. 1956), *cert. denied,* 352 U.S. 848 (1956).

[18] 343 U.S. 768 (1952).

[19] Despite the fact that the case is so regarded, the Negro "train porters" were only nominally in a different craft or class from the white employees. The bargaining unit was made up of white brakemen. It is true that the company and the union had always considered the Negroes as members of a different class from the white brakemen for collective bargaining purposes and that the Negroes had been represented for bargaining by a separate union of their own choosing but, in addition to performing the same duties as regular white brakemen, they spent only about five percent of their time sweeping aisles and helping patrons on and off trains. Thus, they were in reality brakemen.

The comments of Justice Minton, with whom Chief Justice Vinson and Justice Reed joined in dissenting, are of interest: "The majority reaches out to invalidate the contract, not because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negroes who were discriminated against by the carrier at the behest of the Brotherhood. I do not understand that private parties may not discriminate on the ground of race. Neither a state government nor the Federal Government may do so, but I know of no applicable federal law which says that private parties may not. That is the whole problem underlying the proposed Federal Fair Employment Practices Code. Of course, this court by sheer power can say this case is *Steele,* or even lay down a code of fair employment practices. But sheer power is not a substitute for legality. I do not have to agree with the discrimination here indulged in to question the legality of today's decision." *Id.* at 777.

workers became more subtle in their approach. This subtlety led to a serious conflict among the circuits.

Petitioners' complaint in *Hayes v. Union Pac. R.R.*[20] did not allege, either directly or indirectly, that the collective bargaining agreement by its terms provided for discrimination against petitioners. But petitioners did allege that the union entered into a collective bargaining agreement with an undisclosed intention of administering it in a discriminatory manner. The trial court dismissed the complaint for lack of jurisdiction, stating that it was clear that the federal courts are not charged with the duty of policing the parties in the performance of collective bargaining agreements entered into pursuant to the Railway Labor Act. The Court of Appeals for the Ninth Circuit affirmed, pointing out that the National Railroad Adjustment Board had been established to afford relief for the breach of collective bargaining agreements.[21] "It is only when collective bargaining agreements are unlawfully entered into or when the agreements themselves are unlawful in terms or effect, that the federal courts may act."[22] The Third[23] and Fifth[24] Circuits quickly fell into line.

[20] 184 F.2d 337 (9th Cir. 1950), *cert. denied*, 340 U.S. 942 (1951).

[21] The court cited the Railway Labor Act; Slocum v. Delaware, L. & W. R.R., 339 U.S. 239 (1950); Order of Ry. Conductors v. Pitney, 326 U.S. 561 (1946).

[22] Hayes v. Union Pac. R.R., 184 F.2d 337, 338 (9th Cir. 1950).

[23] Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1952), *cert. denied*, 346 U.S. 840 (1953). In this case we are dealing not with the Railway Labor Act but with the National Labor Relations Act. 49 STAT. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1952). There would seem to be no reason why the doctrine as enunciated in the line of railway cases from *Steele* to *Conley* would not pervade the entire field of labor, embracing those unions and employers covered by the provisions of the National Labor Relations Act. As under the Railway Labor Act, the majority of the employees is entitled to select the exclusive collective bargaining representative whose statutory duty it becomes upon certification to represent not only the majority but *all* of the employees in the bargaining unit. Hughes Tool Co., 104 N.L.R.B. 318 (1953); Larus and Brother Co., 62 N.L.R.B. 1075 (1945). The minority of employees is not entitled to select a collective bargaining representative of its own, and the company is not allowed to treat with such a representative.

There has been almost no litigation involving this question outside of the railway field. However, the Supreme Court apparently agrees with the above conclusion in the one case in point which it has decided. In Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955), the Court reversed in a per curiam decision, which cited only the *Steele, Tunstall,* and *Howard* cases, a court of appeals decision dismissing plaintiffs' complaint for lack of jurisdiction. Syres v. Oil Workers Int'l Union, Local 23, 223 F.2d 739 (5th Cir. 1955). In this case a Negro local and a white local of the Oil Workers were certified as joint bargaining representatives in a single unit. The two locals "amalgamated," forming a single bargaining committee with an agreement that there should be but one line of seniority. The committee, which was all white, made a contract providing for two lines of seniority. The effect was to freeze the Negroes in their jobs. The court of appeals, following Williams v. Yellow Cab Co., *supra,* attempted to distinguish the *Steele* case, pointing out that here the petitioners were actually members of the union whereas there plaintiffs were not union members and were excluded from membership. The Supreme Court obviously did not feel that this was a sufficient distinction. The court of appeals had pointed out in its opinion that no administrative remedy was available from the National Labor Relations Board.

A unique feature of the *Williams* case was that the Negro petitioners were

The lines of conflict were clearly drawn, however, when the Court of Appeals for the Fourth Circuit decided *Dillard v. Chesapeake & O. R.R.*[25] There, petitioners were Negroes who had been working as machinists' helpers and laborers, jobs requiring little skill. Some of these workers were not represented by a labor union. All of the more skilled crafts, however, were represented by unions which had negotiated collective bargaining agreements with the company. These contracts set up uniform rules for the promotion of company employees from one class to another and within a class and were not discriminatory on their face. The plaintiffs charged that the company, pursuant to union pressure and solely on the ground of race, failed to promote them according to the uniform rules. They alleged that they had been qualified, eligible, and entitled for years to be upgraded to higher job classifications, but that instead white employees with less seniority and no more competence were promoted ahead of them.

The court specifically indicated its disapproval of the decision of the Ninth Circuit in the *Hayes* case. Speaking for the court, the late Judge John J. Parker said, "It is immaterial that the unions in exerting their power to discriminate against the Negro employees did not do so by entering into a formal bargaining contract. It is the unlawful use of power vested in the unions by the Railway Labor Act which gives rise to the jurisdiction of the court to afford relief, not the particular form which such abuse of power takes."[26] The court concluded that it is just as unlawful to use the power of the bargaining organization to prevent advancement of Negroes as to use it to destroy their jobs. Since some of the employees were not represented by the union, this case is an extension of both the *Howard* and *Steele* cases.

This was followed by interesting developments in the Fifth Circuit when the principal case of *Conley v. Gibson* arose. The district judge

actually members of the union. Petitioners were also members of the union in the *Hayes* case, but the Ninth Circuit did not discuss that point at length. In the *Williams* case the court held this to be a matter of some weight, pointing out that the taxicab drivers' union derived its authority to bargain for petitioners from their own consent and not from section 9(a) of the National Labor Relations Act, 49 STAT. 449 (1935), 29 U.S.C. § 159(a) (1952), which declares that the collective bargaining representative selected by a majority of the employees in the unit is the exclusive bargaining representative of *all* employees therein. On this basis no federal question was involved. The Supreme Court reviewed none of these cases. The Court has since held, however, that the mere fact that petitioners are members of the union is not a sufficient distinction; that a federal question is still involved. Syres v. Oil Workers Int'l Union, 350 U.S. 892 (1955); Conley v. Gibson, 355 U.S. 41 (1957).

[24] Hettenbaugh v. Airline Pilots Ass'n, 189 F.2d 319 (5th Cir. 1951). Airlines are covered by the provisions of the Railway Labor Act. 49 STAT. 1189 (1936), 45 U.S.C. §§ 181-88 (1952). See also Hampton v. Thompson, 171 F.2d 535 (5th Cir. 1948).

[25] 199 F.2d 948 (4th Cir. 1952).

[26] *Id.* at 951.

dismissed the plaintiffs' complaint,[27] and the circuit court affirmed in a per curiam opinion.[28] The Supreme Court granted certiorari.[29] While *Conley v. Gibson* was pending before the Supreme Court, the Fifth Circuit reversed itself in the case of *Richardson v. Texas & N.O. R.R.*[30] Here, the white and Negro workers had become segregated into two groups, and by custom the Negroes had been discriminated against as far as seniority was concerned. There was a contract clause, nondiscriminatory on its face, which merely stated that the current method of assigning crews was satisfactory and that no change would be made during the life of the contract. In holding that the union must not discriminate in collective bargaining on the grounds of race the court said, "Any other rule would permit a bargaining union and its railroad-employer to practice or perpetuate jointly, through custom and under an agreement innocuous in terms, that very abuse of the bargaining representative's power of representation directly proscribed by the *Steele* and *Tunstall* decisions."[31]

What then is and will be the effect of the Supreme Court's decision in *Conley v. Gibson*? It resolves the conflict which had developed among the circuits by specifically overruling the *Hayes* case from the Ninth Circuit, and by following in effect the holdings of the Fourth Circuit in the *Dillard* case and of the Fifth Circuit in the *Richardson* case. This means that a union breaches its statutory duty imposed by the Railway Labor Act when it uses its power derived from the act to discriminate against a group of minority workers on the grounds of race and color whether or not they be within the class of employees for which the union has a statutory duty to bargain and whether or not the union negotiates a collective bargaining agreement with an employer which is discriminatory on its face. All discriminatory action on the part of labor unions which is based on race or color alone is forbidden.

But the case goes further than this. In the complaint petitioners did not allege that the union procured their discharge. They rather alleged that the union "according to plan" failed to represent them in collective bargaining and to process their grievances as they would have for a white employee discharged in a similar manner. It would seem that the Court is not only forbidding the union from taking discriminatory action against any employees but is requiring the union to represent all employees affirmatively and without discrimination in all respects, including representation against unilateral discriminatory action of the employer.[32]

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[27] 138 F. Supp. 60 (S.D. Tex. 1955).
[28] 229 F.2d 436 (5th Cir. 1956).
[29] 352 U.S. 818 (1957).
[30] 242 F.2d 230 (5th Cir. 1957).
[31] *Id.* at 234.
[32] Some states have gone much further in their holdings on this subject than have the federal courts. Generally, there has been no attempt by the states to

Statutes—Constitutionality of Local Laws

The case of *Orange Speedway v. Clayton*[1] held the session law[2] which banned racing in Orange County invalid. The court ruled that this was a local act regulating trade in violation of the constitution.[3]

A case which, although distinguishable, reaches a different outcome is *State v. Chestnutt*,[4] which involved a broad regulation[5] making Sunday racing under any circumstances a crime.[6] In the *Orange Speedway* case the prohibition against promoting Sunday racing was coupled with insurance and permit requirements for weekday racing. Rather than a

prevent labor unions from restricting their membership on the basis of race if they so desire. However, some states by statute have forbidden all discrimination by labor unions on the basis of race, including restrictive membership clauses. See, *e.g.*, NEW YORK CIVIL RIGHTS LAW § 43; NEW YORK EXECUTIVE LAW § 296(2). It has been held generally in industrial states that unions which restricted their membership to persons of a particular race could not enjoy the benefits of a closed or union shop contract, the closed shop being inconsonant with the closed union. See, *e.g.*, the California cases: Thompson v. Moore Drydock Co., 27 Cal. 2d 595, 165 P.2d 901 (1946); Williams v. International Brotherhood of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343 (1944). *Cf.* Wallace Corp. v. NLRB, 323 U.S. 248 (1944).

In a novel decision the Supreme Court of Kansas held by judicial interpretation that unions may not restrict their membership on grounds of race or color, if the union serves as exclusive bargaining agent under a federal statute. In Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946), is found the familiar railway situation of the *Conley* case where all employees, both Negro and white, were union members, but where they were segregated into separate locals. Petitioners complained that their lodge was under the jurisdiction of and represented by the white local and that plaintiffs could not attend white local meetings, vote on election of officers or selection of bargaining representatives, nor participate in the determination of union policy.

Petitioners did not allege that there was a discriminatory collective bargaining contract or that there had been any attempt on the part of the white local to discriminate in any way, other than their segregation, against Negroes. They simply complained that they were denied privileges of participation equal to those accorded to white employees. The court pointed out that in performing its functions as statutory bargaining agent, a labor union is not to be regarded as a wholly private association of individuals free from all constitutional and statutory restraints to which public agencies are subjected. They were unimpressed with the argument that the Negroes, by voluntarily joining the union, had consented to place themselves within the regulations of the union. They held that petitioners' segregation was arbitrary, fraught with potential danger to their rights, and a violation of their individual rights guaranteed by the fifth amendment in that plaintiffs were deprived of their liberty and property without due process of law. They pointed out that a state court has both the jurisdiction and the duty to enforce the Constitution of the United States.

[1] 247 N.C. 528, 101 S.E.2d 406 (1958).

[2] N.C. Sess. Laws 1957, c. 588.

[3] N.C. CONST. art. II, § 29 (1917). "The General Assembly shall not pass any local, private, or special act or resolution . . . regulating labor, trade, mining, or manufacturing . . . ."

[4] 241 N.C. 401, 85 S.E.2d 297 (1955).

[5] N.C. Sess. Laws 1949, c. 177.

[6] 241 N.C. at 403, 85 S.E.2d at 299. "The General Assembly, exercising the police power of the State, may legislate for the protection of the public health, safety, morals, and general welfare of the people; and Sunday observance statutes and municipal ordinances derive their validity from this sphere of legislative power."

sweeping and absolute prohibition of Sunday racing, it was directed primarily at commercial racing. The court held that such a prohibition amounts to a regulation of trade.

The court defined "trade" under the constitutional limitation as "any employment or business engaged in for gain or profit."[7] This is trade in its broadest sense as applied in many tax cases.[8] Only two instances have been found where a local North Carolina act was held to be a regulation of trade. In both cases there were other reasons for denying the act's validity,[9] and in one case[10] the dissent argued for a more strict interpretation of the words "regulating" and "trade." The fact that "trade" is used in context with "labor," "mining," and "manufacturing" in the constitutional limitation supports this argument. The broad definition of "trade" applied by the court would include all these items. Thus it would seem that "trade" in the amendment was intended to be used in the restricted sense, since otherwise there is unnecessary duplication. A more appropriate definition of "trade" would be "the buying and selling, or exchanging, of commodities either by wholesale or by retail."[11] Under this definition, auto racing and other service industries would not be included within the prohibition.

The court's determination that this is a local act is in line with recent decisions on the subject. However, the judicial history of article II, section 29 of the constitution indicates a change in thought on the part of our court. In early decisions, the court seemed eager to support the constitutionality of questioned legislation, and a finding that an act was unconstitutional came to be the exception rather than the rule.[12] This resulted from the court's lack of a uniform definition of a local act and a rather strict interpretation of the subject matter covered by the prohibition.

The first case[13] decided under the amendment held that an act authorizing the issuance of bonds for road purposes in a township

[7] 247 N.C. at 533, 101 S.E.2d at 410.

[8] Nesbitt v. Gill, 227 N.C. 174, 41 S.E.2d 646 (1947); Bickett v. State Tax Comm'n, 177 N.C. 433, 99 S.E. 415 (1919); Smith v. Wilkins, 164 N.C. 136, 80 S.E. 168 (1913); Lenoir Drug Co. v. Town of Lenoir, 160 N.C. 571, 76 S.E. 480 (1912); State v. Hunt, 129 N.C. 686, 40 S.E. 216 (1901); State v. Worth, 116 N.C. 1007, 21 S.E. 204 (1895).

[9] Taylor v. Carolina Racing Ass'n, Inc., 241 N.C. 80, 84 S.E.2d 390 (1954) (act also delegation of legislative power and grant of privilege and immunity); State v. Dixon, 215 N.C. 161, 1 S.E.2d 521 (1939) (act also in conflict with general licensing power and discrimination within class of real estate brokers).

[10] State v. Dixon, 215 N.C. 161, 174, 1 S.E.2d 521, 528 (1939).

[11] AMERICAN COLLEGE DICTIONARY 1283 (1954).

[12] *E.g.*, Day v. Comm'rs, 191 N.C. 780, 133 S.E. 164 (1926) (act authorizing bonds and tax for bridge invalid because it specified bridge at designated spot); Armstrong v. Board of Comm'rs, 185 N.C. 405, 117 S.E. 388 (1923) (act authorizing erection of tuberculosis hospital in Gaston County held invalid as local act relating to health).

[13] Brown v. Road Comm'rs, 173 N.C. 598, 92 S.E. 502 (1917).

and the levying of a tax to pay them was not unconstitutional because it only provided the means for road construction. Such a tax measure was not an authorization of road work within the meaning of the prohibition. This decision was followed by a series of cases[14] concerning acts authorizing bonds and taxes for roads and bridges in the various counties.[15] In each of them the court said that the questioned act was only a tax measure giving the county the means with which to construct, and was not "authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets or alleys . . . [nor] relating to ferries or bridges"[16] as prohibited by the amendment. In addition, the acts were held not to be local because they applied uniformly throughout the county and the actual construction to be done would be at places determined at the discretion of the county boards. As late as 1940 the court held in *Fletcher v. Collins*[17] that an act allowing Buncombe County to organize any territory in the county into a school district upon petition by ten per cent of the voters was not a prohibited local act because the legislature left the determination of where the districts were to be established to the discretion of the county board.

Within the past decade there has been a new approach by the court in interpreting the amendment. Acts have been held to be "local" on the basis of the area to which they applied without regard to the discretion granted to the county, and the prohibited subject matter has not been interpreted in such a narrow sense. The first indication of this came in 1939 in *State v. Dixon*,[18] which held a real estate tax applicable to only one third of the counties in the state to be a local law regulating trade because it was "one operating only in a limited territory or specified locality."[19] The only reason given for this determination was that under the theory of *In re Harris*[20] the question of whether a law is local depends upon the facts and circumstances of each particular case. No attempt was made to distinguish those earlier cases[21] which had held

[14] Road Comm'rs v. Bank, 181 N.C. 347, 107 S.E. 245 (1921); Board of Comm'rs v. Pruden, 178 N.C. 394, 100 S.E. 695 (1919); Martin County v. Wachovia Bank and Trust Co., 178 N.C. 26, 100 S.E. 134 (1919); Parvin v. Board of Comm'rs, 177 N.C. 508, 99 S.E. 432 (1919); Mills v. Board of Comm'rs, 175 N.C. 215, 95 S.E. 481 (1918).

[15] The opinion of at least one member of the court as to "the importance of the decision of the Court in forwarding the good-roads movement of the State" is illustrated by State v. Kelly, 186 N.C. 365, 376, 119 S.E. 755, 761 (1923).

[16] N.C. CONST. art. II, § 29 (1917).

[17] 218 N.C. 1, 9 S.E.2d 606 (1940).

[18] 215 N.C. 161, 1 S.E.2d 521 (1939).

[19] *Id.* at 165, 1 S.E.2d at 523.

[20] 183 N.C. 633, 112 S.E. 425 (1922) (act applicable to 56 of 100 counties held to be a general law).

[21] Fletcher v. Collins, 218 N.C. 1, 9 S.E.2d 606 (1940); Board of Comm'rs v. Pruden, 178 N.C. 394, 100 S.E. 695 (1919); Parvin v. Board of Comm'rs, 177 N.C. 508, 99 S.E. 432 (1919); Mills v. Board of Comm'rs, 175 N.C. 215, 95 S.E. 481 (1918).

acts which applied to only one county in the state to be general laws rather than local ones.

Dixon was followed in 1940 by a decision[22] holding an act setting up a county physician and quarantine officer in Madison County to be of a local nature pertaining to health and sanitation and therefore unconstitutional. Within the past eight years, the court has held invalid acts allowing Winston-Salem and Forsyth County to consolidate their public health agencies and departments,[23] prohibiting a county board of education from expending more than $2,000 for extending water or sewer sytsems to a new school,[24] allowing construction and operation of toll roads and bridges in a five county area,[25] and setting up a racing commission in Morehead City.[26] All of these were found to be invalid under article 2, section 29 because they were local acts applicable only in a limited territory and were within the subject matter in which such local legislation is prohibited. It is interesting to note that the court relied on these recent decisions to support its position in the present case even though the amendment has been in effect since 1917. None of these cases attempts to distinguish the earlier cases with which they would appear to conflict.

In analyzing the principal case, one arrives at two conclusions. The first is that Orange County could successfully prevent Sunday racing by having the legislature pass an act similar to that passed for Wake County invoking the state police power to enforce such a ban. The second, and more important conclusion is that the court appears to have settled upon a more definite interpretation of this amendment. The cases decided since 1940 have been substantially uniform in holding that an act is local if it is applicable only to a limited area and the restricted subject matter has been broadened to include many areas which were formerly excluded. We can no doubt look forward to more decisions invalidating acts within this area.[27]

LAURENCE A. COBB

Taxation—Income Tax—Determination of Whether Corporate Withdrawals Constitute Loans or Dividends

The 1954 Internal Revenue Code defines the term "dividend" as "any distribution of property made by a corporation to its stockholders

[22] Sams v. Board of Comm'rs, 217 N.C. 284, 7 S.E.2d 540 (1940).
[23] Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951).
[24] Lamb v. Board of Educ., 235 N.C. 377, 70 S.E.2d 201 (1952).
[25] Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (1953).
[26] Taylor v. Carolina Racing Ass'n, Inc., 241 N.C. 80, 84 S.E.2d 390 (1954).
[27] For a detailed discussion of the problem of local, private, and special legislation, see *Report of the Commission on Public-Local and Private Legislation*, Popular Government, Feb.-March, 1949.

—(1) out of its earnings and profits accumulated after February 28, 1913, or (2) out of its earnings and profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made."[1]

It is elementary that a dividend is taxable as income to the recipient, while a loan carries no tax consequences. In determining the factual question[2] of whether a particular withdrawal is a loan or a taxable dividend, the intent of the parties is the most important factor.[3] In determining this question there is no set rule of thumb or standard available. However, in attempting to get at the substance of the transaction the courts usually rely on various well established criteria. An analysis of the criteria used is necessary in order to evaluate a fact situation and deduce with a reasonable degree of certainty the tax treatment that will be accorded it.

1. *Purpose of the Withdrawal.* Whether or not a withdrawal is used for a legitimate business purpose is usually important in the court's determination of whether a withdrawal is a loan or a dividend. A legitimate business purpose has been found in the transferring of an indebtedness from an outside source to the taxpayer's corporation[4] or for acquisition of stock in a closely held corporation.[5] Where the loan was used to purchase a farm for the exclusive use of the stockholder[6] or

[1] INT. REV. CODE OF 1954, § 316(a). The 1939 code contained substantially the same provision. INT. REV. CODE OF 1939, § 115(a), 52 STAT. 496.

[2] Victor Shaken, 21 T.C. 785 (1954); Al Goodman, Inc., 23 T.C. 288 (1954); Carl L. White, 17 T.C. 1562 (1952). In William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180 at 686-57, the court stated: "The question of whether the amount withdrawn by the petitioner from the corporation was a dividend or a loan to him is one of fact, to be determined from the surrounding facts and circumstances, and particularly with reference to petitioner's intent at the time of the transaction."

[3] In Harry E. Wiese, 35 B.T.A. 701 (1937), *aff'd,* 93 F.2d 921 (8th Cir.), *cert. denied,* 304 U.S. 562 (1938), where the taxpayer was the sole stockholder, the court of appeals said: "The significant fact in the present case was the intent of the petitioner when he took the money, whether he took it for permanent use in lieu of dividends or whether he was then only borrowing." 93 F.2d at 923. *Accord,* Anketell Lumber & Coal Co. v. United States, 76 Ct. Cl. 210, 1 F. Supp. 724 (1932); Trinchera Timber Co., 13 B.T.A. 934 (1928). Where there was an intent to repay, the withdrawls were held to be loans. A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020; Walter Freeman, P-H 1957 T.C. Mem. Dec. ¶ 57014; Carl L. White, 17 T.C. 1562 (1952); Irving T. Bush, 45 B.T.A. 609 (1941); George S. Groves, 38 B.T.A. 727 (1938); Moses W. Taitoute, 38 B.T.A. 32 (1938); Gomez v. Johnson, 8 B.T.A. 52 (1927).

[4] William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180. The sole stockholder borrowed money from the corporation to pay off a debt that he incurred in financing the corporation and gave a note for the amount to the corporation. The court held there was a genuine intent to repay a valid loan even though later he was unable to repay and redeemed his stock for the cancellation of the debt.

[5] Isadora Benjamin Estate, 28 T.C. — (1957).

[6] Gene O. Clark, P-H 1957 T.C. Mem. Dec. ¶ 57129. There were two stockholders who made withdrawals from the corporation in the exact proportion to their hold-

merely to provide for his personal living expenses[7] the court found no legitimate business purpose and held the withdrawals to be dividends. However, the fact that a withdrawal is for personal use is not always conclusive.[8]

2. *Formality of a Promissory Note.* The giving of a promissory note by the stockholder who makes the withdrawal is often considered by the courts as evidence that the withdrawal was intended to be a loan.[9] But it has been held that no note was necessary where other factors justified a finding that the parties intended to treat the withdrawal as a loan.[10] In other cases the formality of a note was ignored and the substance of the transaction merited the holding that the withdrawals were dividends.[11]

3. *Other Formalities of the Transaction.* The fact that a dividend is not formally declared has no effect on the question of whether the withdrawal will be treated as a dividend for the obvious reason that the very point at issue is whether the withdrawal is to be deemed a "constructive dividend," *i.e.,* one not actually declared by the corporation.[12] Even if it is illegal under state law for a stockholder or officer to borrow from the corporation it may still be considered a valid loan for tax purposes.[13] It is damaging to the stockholder's position if his withdrawals are not treated as capital assets on the corporation's books.[14] On the other hand if they are treated as assets on the corporation's books, it seems to be influential in determining that the withdrawal is a loan.[15]

4. *Repayment of the Withdrawal.* Where a withdrawal has been partially or wholly repaid, it is in favor of the taxpayer's position that it was a bona fide loan.[16] If there has been no repayment, it is evidence

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ings for the purchase of farms for personal use. Even though a note was given and was carried on the books as a "Note Receivable," the withdrawals were held to be dividends.

[7] Fred C. Niederkrome, P-H 1956 T.C. Mem. Dec. ¶ 56255. See also Minnie F. Lasker, P-H 1952 T.C. Mem. Dec. ¶ 52012; George P. Marshall, 32 B.T.A. 956 (1935).

[8] A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020 (withdrawals used for taxpayer's personal benefit); Walter Freeman, P-H 1957 T.C. Mem. Dec. ¶ 57014 (withdrawals used to pay off gambling debts).

[9] William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180; Victor Shaken, 21 T.C. 785 (1954); Corporate Investment, Co., 40 B.T.A. 1156 (1939); Herman M. Rhodes, 34 B.T.A. 212 (1936).

[10] A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020; H. C. Thorman, P-H 1953 T.C. Mem. Dec. ¶ 53294.

[11] Gene O. Clark, P-H 1957 T.C. Mem. Dec. ¶ 57129; Ben R. Meyer, 45 B.T.A. 228 (1941); Daniel Hunt, Sr., 6 B.T.A. 558 (1923).

[12] Gene O. Clark, P-H 1957 T.C. Mem. Dec. ¶ 57129; Fred C. Niederkrome, P-H 1956 T.C. Mem. Dec. ¶ 56255; Ben R. Meyer, 45 B.T.A. 228 (1941).

[13] Rollin C. Reynolds, 44 B.T.A. 342 (1941).

[14] Minnie F. Lasker, P-H 1952 T.C. Mem. Dec. ¶ 52012.

[15] William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180; John Hamilton Perkins, P-H 1957 T.C. Mem. Dec. ¶ 57128; Frank W. Sharp, P-H 1953 T.C. Mem. Dec. ¶ 53255.

[16] Roy J. Kinner, 36 B.T.A. 153 (1937).

that the purported loan was actually a dividend.[17] However, the court will ignore the fact of repayment where it was made after the taxpayer learned of the government's intention to treat the withdrawal as a dividend.[18] The fact that the taxpayer has a running account and the amount varies from time to time will usually be to his advantage,[19] and even where withdrawals are used to pay personal gambling debts the periodical reduction of the balance may be important in deciding that they are loans.[20]

5. *Payment of Interest.* When the stockholder making the withdrawal is charged interest, and especially where he pays substantial interest, this will be instrumental in the court's finding that there was an intent that the withdrawal be a loan.[21] It has been considered that where there was no interest this was a factor that pointed toward a finding that the withdrawals were dividends.[22] There are some cases, however, where other factors justified calling the withdrawal a loan even though no interest was charged.[23]

6. *Withdrawals in Ratio to Stockholdings.* Where the withdrawals made by the stockholders were in proportion to the amount of stock that each stockholder owned, it was considered evidence of a constructive dividend.[24] Where the withdrawals were not in proportion to holdings, the court relied on this in deciding that they were loans instead of dividends.[25] However, in other cases the courts have said that there is no need that the loans be proportionate to the shares held or even that all the stockholders participate in order for them to be considered a dividend.[26] If the amount of withdrawals varies annually with the earnings

[17] Republic Nat'l Bank, 57-1 U.S.T.C. 9511; A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020.

[18] Regensberg v. Commissioner, 144 F.2d 41 (2d Cir. 1944). For cases where solvency of the taxpayer was considered in favor of the taxpayer, see A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020; Al Goodman, Inc., 23 B.T.A. 288 (1954); Rollin C. Reynolds, 44 B.T.A. 242 (1941); Moses W. Faitoute, 38 B.T.A. (1938). *But see* Fred C. Niederkrome, P-H 1956 T.C. Mem. Dec. ¶ 56255, where $20,000 was borrowed from 1945 to 1956 and never repaid, and the taxpayer was always in a position to repay. The "loan" was held to be a dividend.

[19] M. Jack Crispin, 32 B.T.A. 151 (1935).

[20] Walter Freeman, P-H 1957 T.C. Mem. Dec. ¶ 57014.

[21] William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180; Al Goodman, Inc., 23 T.C. 288 (1954); Rollin C. Reynolds, 44 B.T.A. 342 (1941); George S. Groves, 38 B.T.A. 727 (1938); Herman M. Rhodes, 34 B.T.A. 212 (1936).

[22] Fred C. Niederkrome, P-H 1956 T.C. Mem. Dec. ¶ 56255.

[23] A. J. Dalton, P-H 1957 T.C. Mem. Dec. ¶ 57020; Walter Freeman, P-H 1957 T.C. Mem. Dec. ¶ 57014.

[24] Chattanooga Sav. Bank v. Bunner, 17 F.2d 79 (6th Cir. 1927); Gene O. Clark, P-H 1957 T.C. Mem. Dec. ¶ 57129; R. E. Nelson, 19 T.C. 575 (1952).

[25] Rollin C. Reynolds, 44 B.T.A. 342 (1941); Herman M. Rhodes, 34 B.T.A. 212 (1936); Kate C. Ryan, 2 B.T.A. 1130 (1925).

[26] Hub Cloak and Suit Co., P-H 1956 T.C. Mem. Dec. ¶ 56196. In Henry F. Mitchell, 16 B.T.A. 1297 (1929), withdrawals were made by all of the shareholders except one who did not participate.

and surplus the court will consider this as evidence tending to show that they should be treated as dividends.[27]

It appears from the more recent cases that there may be a slight trend in favor of the taxpayer in deciding whether a particular withdrawal will be considered a dividend or a loan. An example of the older and more restrictive attitude of the courts is *Ben R. Meyer*.[28] The taxpayer there made withdrawals from a subsidiary of the parent corporation in which he was a stockholder, gave a note bearing four percent interest, and made some repayments. When the subsidiary became insolvent, he set up a trust to repay the withdrawals. In holding that the withdrawals constituted dividends, the court seemed to rely strongly on the fact that the withdrawals were used for personal living expenses and that the stockholders were insolvent. However, in the more current case of *A. J. Dalton*[29] the withdrawals were for personal use, no note was given, no interest was charged, and the taxpayer had insufficient assets to repay at the time; nevertheless the court found there was a bona fide intent to borrow and an obligation to repay and held that the withdrawals were loans. Similarly in the *John Hamilton Perkins*[30] case there were two stockholders each owning fifty percent of the stock. They "borrowed" the money to pay off their personal debts, later executing their notes but paying no interest. Perkins bought out the other shareholder's stock after the shareholder had repaid the corporation the amount he had "borrowed." He then liquidated the corporation and treated the outstanding note as part of his "liquidating dividend." The entire transaction took only about two years, but the court found that the withdrawal was a valid loan.

If there is any reason for the trend of the decisions, it is probably because the courts recognize the real business purpose and financial advantage in borrowing from one's own corporation rather than recognized lending institutions.[31] The conclusion that the taxpayer's position is being upheld should not lull any prospective debtor into a sense

[27] See Albert Bittens, 2 B.T.A. 535 (1925), where the court stated that the withdrawals had no relation to earnings or surplus and held them to be loans rather than dividends. See also C. W. Murchison, 32 B.T.A. 32 (1935), where the taxpayer was sole owner of the corporation and the withdrawals varied in accordance with the net earnings. *Held*, dividends. *But see* Walter Freeman, P-H 1957 T.C. Mem. Dec. ¶ 57014, at 57-63, where the withdrawals were substantially the same as the current income or accumulated earnings and profits. The court nevertheless found that they were not dividends, stating that the taxpayer repaid part of the withdrawals and that "after considering all of the evidence we have concluded that the withdrawals were intended as loans . . . ."

[28] 45 B.T.A. 228 (1941).

[29] P-H 1957 T.C. Mem. Dec. ¶ 57020.

[30] P-H 1957 T.C. Mem. Dec. ¶ 57128. See also William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180; Louis Coutemanche, Jr., 53-1 U.S.T.C. 9303 (1953).

[31] Isadora Benjamin Estate, 28 T.C. — (1957); William D. Bryan, P-H 1957 T.C. Mem. Dec. ¶ 57180.

of security, because the courts are still prone to look through the form of a transaction to its real substance. The taxpayer would be well advised to consider carefully the above mentioned factors which influence the courts in deciding cases. No one factor is usually conclusive in deciding a case, but certainly the more consideration the stockholder gives to each, the greater the possibility that he will not be caught in a tax trap.

GAITHER S. WALSER

Torts—Negligence—Last Clear Chance

A recent North Carolina case[1] involving the doctrine of "last clear chance" seems to have been decided contrary to a long line of unbroken precedents. The case was this:

The defendant was driving down an unpaved public road at eight-thirty p.m. The evidence favorable to the plaintiff showed the road at the place in question was straight and virtually level for a distance of two to three hundred feet, and that there were no obstructions to vision. The plaintiff was lying in the road asleep, between and parallel to two ruts which were in the road. The defendant approached the plaintiff with his lights on low beam and did not see him until approximately twenty-five feet away. He first thought the plaintiff's body was a box or the like, and did not recognize it as a human being until five or six feet away. The defendant's car passed over the plaintiff, straddling him with its wheels, but the oil pan on the car struck the plaintiff in passing, inflicting serious injuries. The defendant stopped twenty-five feet beyond the place where the plaintiff was lying.

The defendant's motion for nonsuit at the trial below was granted, and on appeal it was affirmed, the court holding in a four to three decision that the doctrine of last clear chance was inapplicable on the facts.

It is proposed in this Note to look briefly at the background of the doctrine of last clear chance, after which an attempt will be made to deduce from the North Carolina cases the principles underlying the law of last clear chance in North Carolina. Finally, the principal case will be examined in the light of these principles.

The doctrine of last clear chance is well-established in North Carolina, as in most common law jurisdictions.[2] Although it is stated

[1] Barnes v. Horney, 247 N.C. 495, 101 S.E.2d 315 (1957).

[2] Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954); Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939); Triplett v. Southern Ry., 205 N.C. 113, 170 S.E. 146 (1933); Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 163 S.E. 122 (1932); Norman v. Charlotte Elec. Ry., 167 N.C. 533, 83 S.E. 835 (1914); Sawyer v. Roanoke R.R. & Lumber Co., 145 N.C. 24, 58 S.E. 598 (1907); Lassiter v. Raleigh & G. R.R., 133 N.C. 244, 45 S.E. 570 (1903); Bogan v. Carolina Cent. R.R., 129 N.C. 154, 39 S.E. 808 (1901); Pickett v. Wilmington & W.

differently in different jurisdictions, it may be said generally that it is that principle which allows recovery to a plaintiff who has been contributorily negligent in bringing about his injury, when the defendant, notwithstanding the plaintiff's negligence and his own prior negligence, could still have averted the plaintiff's injury through the exercise of due care.[3]

The doctrine is generally considered to be an application of proximate cause.[4] The argument is that, although both the plaintiff and the defendant have been guilty of negligence, the plaintiff's negligence has culminated, leaving him in a perilous position, and that the defendant then, by the exercise of due care, could still have avoided the injury. Hence, it is argued that the defendant's subsequent negligence was the proximate cause of the injury, and the plaintiff is not barred from recovering by his prior negligence.

The harshness of the doctrine of contributory negligence is generally credited with bringing about the adoption of the doctrine of last clear chance.[5] This doctrine has also been characterized by a leading authority[6] as a "way-station" in the transition from contributory negligence to comparative negligence. Whatever its past and its future, it must be conceded that its present effect, by making it possible for negligent plaintiffs to recover, is to shift the total burden of the loss from an injury from a plaintiff who formerly was barred by contributory negligence, to the defendant who is now held liable under the doctrine of last clear chance.

North Carolina has a long line of cases discussing and applying the doctrine.[7] For the sake of convenience of discussion and a better understanding of the North Carolina law of last clear chance, they will be divided into four categories. They are:[8]

I. The peril of the plaintiff *is* actually discovered by the defendant; the plaintiff is physically *unable* to prevent his injury through the exercise of due care.

II. The peril of the plaintiff *is* actually discovered by the defendant; the plaintiff is physically *able* to prevent his injury through the exercise of due care.

R.R., 117 N.C. 616, 23 S.E. 264 (1895); Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890); PROSSER, TORTS § 52 (2d ed. 1955); Note, 5 N.C.L. REV. 58 (1927).

[3] 38 AM. JUR., *Negligence* § 215 (1941).

[4] Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890); Annot., 92 A.L.R. 47 (1934).

[5] PROSSER, TORTS § 52 (2d ed. 1955).

[6] *Ibid.*

[7] Cases cited note 2 *supra.*

[8] Various divisions of the cases are encountered in this field; the one employed here is adopted from 38 AM. JUR., *Negligence* §§ 221-24 (1941), and Annot., 92 A.L.R. 47 (1934).

III. The peril of the plaintiff *is not* actually discovered by the defendant, but should have been; the plaintiff is physically *unable* to prevent his injury through the exercise of due care.

IV. The peril of the plaintiff *is not* actually discovered by the defendant, but should have been; the plaintiff is physically *able* to prevent his injury through the exercise of due care.[9]

Category I. In this situation, the plaintiff typically has negligently placed himself in a perilous position, such as on a railroad trestle, from which he cannot escape through the exercise of due care and the means at his disposal. The defendant, who is also guilty of some prior negligence, has discovered the apparent peril of the plaintiff, but negligently fails to take any action to avoid injury to him. The defendant runs over the plaintiff, and injures him.

Prior to the defendant's discovery of the plaintiff's perilous situation, both parties had been guilty of negligence; however, after the defendant's discovery of the plaintiff's peril, the plaintiff did nothing further to contribute to his injury, but was simply powerless to avoid it. The defendant, on the other hand, still had a chance—that is, the last clear chance—to avert the accident, but failed to do so, and for his negligence in this respect he is held liable.

The cases in this category seem to be sound in result and in reasoning, and to be in conformity with established views on proximate cause. North Carolina allows recovery in this situation,[10] and in so doing it is in accord with virtually all jurisdictions.[11]

Category II. Cases in this category usually arise under the following type of fact situation: The plaintiff is standing on the railroad track, obviously oblivious to his surroundings. The defendant is the engineer of an approaching train, and is guilty of some prior negligence; he sees the plaintiff, but negligently fails to take any action to avoid an accident. The defendant runs over the plaintiff and injures him.

In this situation, it is clear that both parties have been negligent; it is also clear that, despite their prior negligence, both parties could have

[9] In all of these hypothetical situations, it is assumed that the plaintiff's peril would be apparent to an ordinary, reasonable, prudent man, and that the defendant could, through the exercise of due care, and with the means then at his disposal, avert the accident at the time he discovers (or should discover) the plaintiff's peril. Such is the law in North Carolina. Irby v. Southern Ry., 246 N.C. 384, 98 S.E.2d 349 (1957) (last clear chance inapplicable; no evidence the defendant could have stopped after he should have discovered the peril of the plaintiff); Lemings v. Southern Ry., 211 N.C. 499, 191 S.E. 39 (1937) (last clear chance inapplicable; peril of the plaintiff was not apparent); cases cited note 2 *supra*. The preceding case is noted in 16 N.C.L. REV. 50 (1938) in relation to other cases dealing with persons who were hit by trains while sitting on the end of a cross-tie. The principal difficulty in these cases seems to be the apparency of the peril of such a person.

[10] Newbern v. Leary, 215 N.C. 134, 1 S.E.2d 384 (1939).

[11] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

avoided the accident through the exercise of due care. Strictly speaking, it may well be that as a matter of actual fact in a case such as the example above, the plaintiff would have the "last clear chance"; that is, it might have been possible for the plaintiff to have avoided the accident even after it was no longer possible for the defendant to do so. For this reason, some question is frequently raised as to whether it is consistent with established theories of proximate cause to hold the defendant liable in this situation.[12] It would seem, however, that the plaintiff's actions in putting himself in a position of danger were a remote or incidental cause of the accident, and that the negligence of the defendant in not taking steps to avoid the accident after having perceived the situation was the efficient, substantial cause of the injury.[13]

The courts overwhelmingly hold the defendant liable in these cases,[14] albeit, as observed by Prosser,[15] frequently without stopping to inquire as to the consistency of so doing with established theories of proximate cause. North Carolina allows the plaintiff to recover in this situation in accord with the majority view.[16]

Category III. A fact situation which is typical of this category of cases is one where the plaintiff is unconscious on the railroad track; the

[12] Prosser, for instance, says that holding the defendant liable in this situation on the theory of proximate cause is a mere "fiction." PROSSER, TORTS § 52 (2d ed. 1955). Continuing, he says, "In such a case, the negligence of the plaintiff undoubtedly has been a cause, and a substantial and important one, of his own damage, and it cannot be said that injury through the defendant's negligence was not fully within the risk which the plaintiff has created." *Ibid.* Compare the same author on the subject of contributory negligence: "The accepted view now is that the plaintiff's failure to exercise reasonable care for his own safety does not bar his recovery unless his injury results from the particular risk to which his conduct has exposed him." *Id.* § 51. *Quaere* whether the risk that the driver of an approaching automobile will not take action to avoid injury to the plaintiff after he observes his obliviousness is within the risk created by one who crosses the street without looking.

[13] "The liability of defendant, under the doctrine of the last clear chance, did not depend upon the 'cessation or culmination of plaintiff's negligence.' What is meant by the quoted expression, which is used in the instruction, we suppose to be that plaintiff's negligence must have spent its force, or have become dormant or inactive. But this was not necessary to constitute the defendant's negligence the proximate cause of the injury. The very fact that the plaintiff, in the presence of danger, continued to be negligent, and in apparent ignorance of the danger with reference to the car, but increased the duty of the defendant's motorman to be on his guard and to adjust his conduct to that situation by lessening the speed of the car, bringing it under control and generally placing himself in a state of readiness to stop, should it be necessary to do so." Norman v. Charlotte Elec. Ry., 167 N.C. 533, 544, 83 S.E. 835, 840 (1914). Continuing, the court quotes from Ins. Co. v. Boon, 95 U.S. 117, 130 (1877): "'The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result.'" *Accord,* especially as to the special duty raised by knowledge of the situation, Terre Haute, I. & E. Traction Co. v. Stevenson, 189 Ind. 100, 123 N.E. 785 (1919).

[14] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

[15] PROSSER, TORTS § 52 (2d ed. 1955).

[16] Norman v. Charlotte Elec. Ry., 167 N.C. 533, 83 S.E. 835 (1914).

defendant engineer should have discovered the plaintiff in time to avoid injury to him, but did not. The plaintiff is run over by the defendant and injured.

In these cases the plaintiff has been negligent in allowing himself to get into such a position of peril, and the defendant has been negligent in failing to maintain a lookout;[17] thus when the defendant arrives on the scene both parties have been guilty of negligence. However, at this time the plaintiff's negligence has culminated, and has left him in a position of peril from which he cannot, through the exercise of due care, extricate himself in time to avert the injury. It is assumed, on the other hand, that there is a period of time during which the defendant could have averted the accident after he should, in the exercise of reasonable care, have discovered the plaintiff; and, therefore, it is reasoned that the defendant had the last clear chance to avoid the accident and should be held liable therefor. This view seems to be in accord with established doctrines of proximate cause, for it appears that the defendant's negligence in not availing himself of his opportunity to avoid injury to the plaintiff is really the efficient cause of the injury.

The North Carolina cases in this category have been uniform in allowing the plaintiff to recover under the doctrine of last clear chance.[18] In other jurisdictions, however, there is a wide diversity in the language of the cases, and some diversity in the holdings.[19] Prosser says the

[17] "The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track, and if by reason of his omission to look out for cows, horses and hogs he fails to see a drunken man or a reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of duty . . . . We are of the opinion that, when by the exercise of ordinary care an engineer can see that a human being is lying apparently helpless from any cause on the track in front of his engine, in time to stop the train by the use of the appliances at his command and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty." Pickett v. Wilmington & W. R.R., 117 N.C. 616, 636-37, 23 S.E. 264, 267 (1895). The duty of the driver of an automobile is laid down in Murray v. Atlantic Coast Line R.R., 218 N.C. 392, 400, 11 S.E.2d 326, 332 (1940): "It is a general rule of law, even in the absence of statutory requirements, that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. In the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision with persons and vehicles upon the highway."

[18] Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954); Sawyer v. Roanoke R.R. & Lumber Co., 145 N.C. 24, 58 S.E. 598 (1907); Bogan v. Carolina Cent. R.R., 129 N.C. 154, 39 S.E. 808 (1901); Pickett v. Wilmington & W. R.R., 117 N.C. 616, 23 S.E. 264 (1895); Deans v. Wilmington & W. R.R., 107 N.C. 686, 12 S.E. 77 (1890).

[19] For an example of a case allowing recovery in this situation, see Porto Rico Ry. Light & Power Co. v. Miranda, 62 F.2d 479 (1st Cir. 1932), *cert. denied,* 289

North Carolina view is the "strong minority,"[20] while another authority[21] concludes that where the fact situation of this category is actually presented, the majority of the courts allows recovery under the doctrine of last clear chance.

Category IV. The following is a situation typical of the cases in this category: The plaintiff is standing on the railroad track, obviously oblivious to his surroundings. The defendant engineer approaches without maintaining a proper lookout, and, though he should in the exercise of reasonable care discover the plaintiff, he does not. The defendant runs over the plaintiff and injures him.

In this situation neither party has discovered the danger (though both are negligent in failing to do so), and either party could prevent the injury simply through the exercise of due care. Furthermore, it cannot be said that the plaintiff's negligence has culminated in this situation; it is still an active, continuing thing. Therefore, it cannot be said that the defendant's negligence is *the* proximate cause of the injury, either on the basis of time sequence,[22] or as *the* substantial causative factor. Accordingly, to hold the defendant liable in a case of this type amounts to a departure from the theory of proximate cause; it is an imposition of liability on the defendant for injuring a plaintiff whose peril he should have discovered in time to avoid the injury, regardless of the contributory negligence of the plaintiff.

North Carolina again allows recovery to the plaintiff in cases falling in this category.[23] This places North Carolina in what is considered the decided minority upon this set of facts.[24]

Thus, it appears that many courts do not allow the application of the doctrine of last clear chance unless the plaintiff is actually discovered, and the great majority of courts does not allow it if, in addition, the plaintiff is not helpless. North Carolina has allowed recovery in all cases where there is: (1) a person in apparent peril; (2) ability to avoid

U.S. 731 (1933). For an example of a case denying recovery in this situation, see Hayman v. Pennsylvania R.R., 77 Ohio App. 135, 62 N.E.2d 724 (1945).

[20] PROSSER, TORTS § 52 (2d ed. 1955).

[21] Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947).

[22] As noted earlier under the second category, where the plaintiff is merely oblivious to the approach of a train, for example, experience tells us that the plaintiff actually has an opportunity to avoid the accident which is subsequent to the last opportunity of the defendant.

[23] Triplett v. Southern Ry., 205 N.C. 113, 170 S.E. 146 (1933); Caudle v. Seaboard Air Line Ry., 202 N.C. 404, 163 S.E. 122 (1932); Ingle v. Asheville Power and Light Co., 172 N.C. 751, 90 S.E. 953 (1916); Lassiter v. Raleigh & G. R.R., 133 N.C. 244, 45 S.E. 570 (1903); Wheeler v. Gibbon, 126 N.C. 811, 36 S.E. 277 (1900).

[24] 38 AM. JUR., *Negligence* § 224 (1941); Annot., 92 A.L.R. 47, 149 (1934), *supplemented by* 119 A.L.R. 1041 (1939), and 171 A.L.R. 365 (1947). For an example of a case following the majority view, see Allnutt v. Missouri Pac. R. Co., 8 F.2d 604 (8th Cir. 1925).

injury to the person after he should, in the exercise of reasonable care, have been discovered; and (3) a negligent breach of the duty to discover resulting in injury to the plaintiff.

The court held in the principal case of *Barnes v. Horney*[25] that judgment of nonsuit was proper because "the evidence in this case is insufficient to show the defendant had the opportunity to avoid the injury after he discovered, or should have discovered, the plaintiff's perilous position."[26] Looking at the facts again, it appears that the defendant did not discover the plaintiff until he was only twenty or twenty-five feet away, and that he did not recognize the true situation until he was only five or six feet away. It further appears that the defendant was traveling thirty miles per hour, and that he was able to stop his car within twenty-five feet after passing the plaintiff. Thus, even assuming that the defendant started braking his car when he first saw the object at a distance of twenty-five feet, he still was able to stop in a maximum of fifty feet.

Obviously, the defendant did not have time to avert the accident after he actually discovered and appreciated the plaintiff's peril. Quite as obviously, had he discovered and appreciated the peril before reaching a point fifty feet from the plaintiff he could have averted the accident. *Should the defendant, in the exercise of reasonable care, have discovered and appreciated the plaintiff's peril before reaching a point fifty feet from him?*

It is generally recognized in North Carolina that there is a duty to maintain a lookout while driving.[27] G.S. § 20-129(a)[28] and G.S. § 20-131(a)[29] provide that the driver of an automobile shall maintain his headlights so that he can see a person at least two hundred feet ahead. There was evidence that the point where the plaintiff was lying could be seen for two hundred feet. Conceding, *arguendo,* that it may not have been possible for the defendant to have seen the plaintiff in his prone position for two hundred feet, it would seem to have been at least a question for the jury whether or not the defendant should, in the exercise of reasonable care, have seen the plaintiff before reaching a point fifty feet from him.[30]

[25] 247 N.C. 495, 101 S.E.2d 315 (1957).
[26] *Id.* at 499, 101 S.E.2d at 317.
[27] See note 17 *supra.*
[28] N.C. GEN. STAT. § 20-129(a) (Supp. 1957).
[29] N.C. GEN. STAT. § 20-131(a) (Supp. 1957).
[30] "Men of fair and reasonable minds might have drawn different conclusions from the evidence in this case, although there is no material conflict between the testimony of the witnesses examined, and, therefore, the jury should have been allowed to determine whether the engineer might have ascertained, by keeping a proper lookout, the real condition of the deceased, . . . and by timely exercise have saved him harmless . . . ." Deans v. Wilmington & W. R.R., 107 N.C. 686, 694, 12 S.E. 77, 80 (1890). See Wade v. Jones Sausage Co., 239 N.C. 524, 80 S.E.2d 150 (1954), a case with facts almost identical with those of the principal case, where the court allowed recovery on the theory of last clear chance.

It appears that the facts of the principal case bring it clearly within Category III discussed above; *viz.*, the peril of the plaintiff was not actually discovered by the defendant, but should have been; the plaintiff was physically unable to prevent his injury through the exercise of due care. That being the case, both the weight of precedents and the sounder reasoning would seem to have required a reversal of the nonsuit which was granted below. The weight to be given to the contrary result, considering the court's orthodox statement of the rule,[31] must await further decisions.

LUKE R. CORBETT

Torts—Physicians and Surgeons—Liability for Signing a Certificate of Insanity Without Proper Examination of the Alleged Lunatic

In *Bailey v. McGill*[1] the North Carolina Supreme Court held that two physicians in signing certificates of insanity under G.S. § 122-43[2] were absolutely immune from civil liability to an alleged mentally disordered plaintiff.[3] The rationale of the court was that the defendant physicians were protected by the absolute privilege given to witnesses for statements made by them in a judicial proceeding.

The plaintiff alleged that the defendant physicians did not make an

[31] "Liability on the new act arises after the defendant has had sufficient opportunity, in the exercise of ordinary care, to discover and to appreciate the plaintiff's perilous position in time to avoid injuring him." 247 N.C. at 498, 101 S.E.2d at 317.

[1] 247 N.C. 286, 100 S.E.2d 860 (1957).

[2] N.C. GEN. STAT. § 122-43 (1952). This statute provides: "When an affidavit and request for examination of an alleged mentally disordered person has been made, . . . the clerk of the superior court . . . shall direct two physicians . . . to examine the alleged mentally disordered person . . . to determine if a state of mental disorder exists and if it warrants commitment to one of the State hospitals or institutions for the mentally disordered. If the said physicians are satisfied that the alleged mentally disordered person should be committed for observation and admission into a hospital for the mentally disordered, they shall sign an affidavit to that effect . . . ."

The institution of the lunacy proceeding is provided for by N.C. GEN. STAT. § 122-42 (1952): "When it appears that a person is suffering from some mental disorder and is in need of observation or admission in a State hospital, some reliable person having knowledge of the facts shall make before the clerk of the superior court of the county in which alleged mentally disordered person is or resides, . . . an affidavit that the alleged mentally disordered person is in need of observation or admission in a hospital for the mentally disordered . . . ."

[3] The court held as to a third defendant physician that the plaintiff had stated a cause of action for abuse of process under N.C. GEN. STAT. § 122-42 (1952), because it was alleged that this physician through ill will and malice toward the plaintiff persuaded the plaintiff's parents to institute the lunacy proceeding and state that plaintiff was suffering from a mental disorder and was in need of observation and admission to a mental institution. However, on retrial of the issue in the Cleveland County Superior Court the case against this physician was dismissed after the close of plaintiff's evidence, evidently on the ground that the evidence was insufficient to go to the jury. It is not known whether an appeal was taken from this decision.

examination of him as required by G.S. § 122-43; or if an examination were made, it was a hasty and superficial one and not a bona fide examination as required by the statute. As a result of these certificates of insanity and this allegedly wrongful and negligent conduct on the part of the defendants, plaintiff was committed to the State Hospital for the Insane by the Clerk of the Superior Court of Cleveland County and forced to remain there for thirty days, at the end of which time it was concluded that he was not insane and never had been. For his humiliation in becoming known as a mental case, plaintiff demanded both compensatory and punitive damages. The supreme court held that the trial judge correctly sustained the defendants' demurrer for failure to state a cause of action.

Plaintiff conceded that the allegations in his complaint did not set out a cause of action for malicious prosecution,[4] abuse of process,[5] or false imprisonment;[6] however, he maintained that he had stated a cause of action for "a false certificate of insanity made by two of the defendants," and another cause of action for "a certificate of insanity negligently made without proper and ordinary care and prudence, and without due examination and inquiry and proof."[7] But the court, without stating its reason, rejected this contention, and said, "The nature of his allegations and charge against these two physicians would seem to be that of libel."[8] The court then proceeded to hold that the defendants were witnesses in a proceeding of a judicial nature before an officer clothed with judicial powers and were therefore absolutely privileged, because "a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity."[9] The construction of G.S. § 122-46,[10] which gives the clerk

[4] Barnette v. Woody, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955), where the court said "the plaintiff must prove malice, want of probable cause and termination of the prosecution or proceeding in plaintiff's favor." *Accord,* Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Brandt v. Brandt, 286 Ill. App. 151, 3 N.E.2d 96 (1936).

[5] Barnette v. Woody, *supra* note 4; Ledford v. Smith, 212 N.C. 447, 193 S.E. 722 (1937). There was no allegation that the defendants had an ulterior purpose or that they committed an act in the use of the process not proper in the regular prosecution of the proceeding.

[6] Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927); Ussery v. Haynes, 344 Mo. 530, 127 S.W.2d 410 (1939); Dyer v. Dyer, 178 Tenn. 234, 156 S.W.2d 445 (1941). It was not alleged that the commitment was without lawful authority. *But see* Bacon v. Bacon, 76 Miss. 458, 24 So. 968 (1899), where two physicians were held liable for false imprisonment in a lunacy proceeding; however, the proceeding was not held to be judicial in nature and the court did not discuss the elements of false imprisonment.

[7] 247 N.C. at 290, 100 S.E.2d at 860.

[8] *Id.* at 293, 100 S.E.2d at 866.

[9] *Id.* at 293, 100 S.E.2d at 866. *Accord,* Jarman v. Offutt, 239 N.C. 468, 80

of the superior court the judicial authority to hold a hearing, to examine the certificates and affidavits of the physicians and any proper witnesses, and to commit the alleged mentally disordered person to a mental institution, was the foundation upon which the application of the witness privilege rule rested. Examining the certificates of the physicians submitted pursuant to G.S. § 122-43 was necessary to the performance of this judicial authority; therefore, the physicians were deemed to be witnesses before a judicial hearing and were absolutely privileged in their testimony. The court said the defendants "were not engaged in the ordinary practice of their profession. Their role and function in examining the plaintiff and signing the affidavits in respect to his mental condition are those of witnesses."[11]

In holding the defendants' affidavits absolutely privileged, the court placed North Carolina in accord with the weight of authority in this area.[12] Since insanity is often hard to determine with certainty, public policy and the administration of the law require that the certifying physician be protected rather than the injured plaintiff who has been negligently committed to a mental institution as a lunatic.[13] The courts feel that public policy requires that the witness physician be allowed to testify without fear of being sued by one whose interests may be adversely affected by his testimony.[14] It would tend to extend litigation if the matter could be reexamined in a new action, thereby causing multiplicity of suits.[15]

In addition to public policy, some courts say that the plaintiff can

S.E.2d 248 (1954); RESTATEMENT, TORTS § 588 (1938).

The witness privilege rule applies to affidavits submitted to the court as well as to testimony given orally in court. Perry v. Perry, 153 N.C. 266, 69 S.E. 130 (1910).

[10] N.C. GEN. STAT. § 122-46 (Supp. 1957).

[11] 247 N.C. at 292, 100 S.E.2d at 866. *Accord,* Dunbar v. Greenlaw, 128 A.2d 218 (Me. 1956); Niven v. Bolan, 177 Mass. 11, 58 N.E. 282 (1900).

[12] Fisher v. Payne, 93 Fla. 1085, 113 So. 378 (1927) (absolute privilege as to affidavit); Corcoran v. Jerrel, 185 Iowa 532, 170 N.W. 776 (1919) (absolute privilege as to oral testimony); Dunbar v. Greenlaw, *supra* note 11 (absolute privilege); Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953) (absolute privilege as to affidavit); Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954) (absolute privilege, but negligent examination not alleged). *Cf.* Niven v. Bolan, *supra* note 11 (conditional privilege); Perkins v. Mitchell, 31 Barb. (NY) 461 (1860) (conditional privilege).

[13] Brandt v. Brandt, 286 Ill. App. 151, 3 N.E.2d 96 (1936); Dunbar v. Greenlaw, *supra* note 11; Niven v. Bolan, *supra* note 11.

[14] Niven v. Bolan, 177 Mass. 11, 14, 58 N.E. 282, 283 (1900), where the court said: "It is more important that the administration of the law in the manner provided should not be obstructed by the fears of physicians that they may render themselves liable to suit than it is that the person certified by them to be insane, or a diposomaniac, or inebriate should be a right of action in case it turns out that the certificate ought not to have been given." See Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Godette v. Gaskill, 151 N.C. 51, 65 S.E.2d 612 (1909).

[15] Niven v. Bolan, *supra* note 14; Godette v. Gaskill, *supra* note 14.

get redress in a criminal court if the physician commits perjury.[16] Some of the cases mention state statutes which provide for criminal punishment if the plaintiff is wrongfully committed as a result of a conspiracy between the physician and a third person.[17]

Some other opinions join with the majority view and hold the physician not liable because there was no proximate cause between the examination of the plaintiff, the signing of the certificate of insanity, and commitment by the officer with such authority.[18] These cases proceed on the reasoning that the committing authority could commit the alleged lunatic even though it did not rely on the affidavits of the physicians; therefore, it cannot be said that the affidavits of the physician caused the wrongful commitment.[19] The commitment was the sole act of the committing authority.[20] However, this reasoning has been criticized and said to be contrary to the theory of proximate cause as set out in *Palsgraf v. Long Island R.R.*[21] by Judge Cardozo.[22]

There is a very persuasive minority view[23] which imposes liability on the physician on the ground that in examining the plaintiff he has assumed a statutory duty to use ordinary care and will be liable to the plaintiff for any breach of the duty.[24] This view is led by the English decisions; however, the commitment statutes in these cases were less protective of the alleged lunatic and therefore there was more reason to hold the physician responsible.[25] The only American decision follow-

[16] Dunbar v. Greenlaw, 128 A.2d 218 (Me. 1956); Godette v. Gaskill, *supra* note 14 (dictum) at 52, 65 S.E. at 613.

[17] Dunbar v. Greenlaw, *supra* note 16; Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Niven v. Bolan, 177 Mass. 11, 58 N.E.2d 282 (1900).

[18] Mezullo v. Maletz, 331 Mass. 233, 118 N.E.2d 356 (1953); Force v. Probasco, 43 N.J.L. 539 (1881); Everett v. Griffiths, [1920] 3 K.B. 163, 1 A.C. 631 (1921) (distinguished in Harnett v. Fisher, [1927] 1 K.B. 402); Brady v. Collom, 68 R.I. 299, 301, 27 A.2d 311, 312 (1942) (dictum).

[19] *Ibid.*

[20] Mezullo v. Maletz, *supra* note 18.

[21] 248 N.Y. 339, 162 N.E. 99 (1928).

[22] Notes, 53 MICH. L. REV. 493 (1954), 23 U. CIN. L. REV. 525 (1954).

[23] Ayers v. Russell, 50 Hun. 282, 3 N.Y. Supp. 338 (1888); Springer v. Steiner, 91 Ore. 100, 178 Pac. 592 (1919) (action for false imprisonment not allowed because plaintiff did not show lack of good faith on part of the physician.); Williams v. Le Bar, 149 Pa. 149, 21 Atl. 525 (1891) (but no recovery allowed because the physician made a mere error in judgment); Harnett v. Fisher, [1927] 1 K.B. 402; Hall v. Semple, 3 F. & F. 337, 176 Eng. Rep. 151 (Q.B. 1862); Miller v. West, 165 Md. 245, 247, 167 Atl. 696, 697 (1933) (dictum). See also Pennell v. Cummings, 75 Me. 163 (1883).

[24] Ayers v. Russell, *supra* note 23 at —, 3 N.Y. Supp. at 341, where the court said: "Their [the physicians] duty must be measured by the trust which the statute reposes in them, and by the consequences flowing from its improper performance. They assumed the duty by accepting the trust. They are not judicial officers, but medical experts. They . . . are chargeable with that negligence which attaches to a professional expert who does not use the care and skill which his profession, per se, implies that he will bring to his professional work."

[25] Harnett v. Fisher, [1927] 1 K.B. 402; Hall v. Semple, 3 F. & F. 337, 176 Eng. Rep. 151 (Q.B. 1862).

In Hall v. Semple, *supra,* the alleged lunatic could be committed to a mental

ing this view imposed liability on the theory that the privilege should apply only after the physician has exercised ordinary care in examining the plaintiff:[26] "Their privilege is that, so long as they do their duty with the care and skill the statute presumes and requires, they are not responsible to the plaintiff for the consequences, however harsh they may be; for in such a case the law afflicts the plaintiff, but when they do not use such care and skill it is their personal negligence which afflicts him."[27] This type of reasoning separates the testimony or affidavit of the physician from the examination. The testimony is privileged, but the physician is held liable for ordinary negligence in the examination. Under these decisions, the plaintiff is not only given redress at law, but he is less likely to receive a cursory examination, thereby reducing the likelihood of a sane person's being committed to an institution.[28]

In answer to the majority view that public policy requires that the physician be protected, the language of the court in *Bacon v. Bacon*[29] appears to be a pertinent reply:

> A sad, silent, and fragile little lady, now beyond middle life, wrongfully declared a lunatic, and that of the most repulsive style, shut up in a mad house, . . . and with a stigma branded upon her name and character which verdicts of juries and judgments of courts may never wholly efface, and with endurance of such shame, humiliation, and crucifixion of soul as happily does not often fall to woman's lot, has appealed to the courts for redress of her wrongs, and we do not feel authorized to take from her the poor fruits of her victory.[30]

The suit was one for false imprisonment and the court does not consider the witness privilege rule, but the language of the court seems to offer a persuasive argument for balancing public policy in favor of the alleged lunatic.

In the principal case, there does not seem to be any doubt that the lunacy proceeding conducted by the clerk of the superior court was a judicial proceeding.[31] It reasonably follows that the role and function

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institution on the basis of the physician's certificate alone. His case was not reviewed by legal authorities until after the commitment. In Harnett v. Fisher, *supra,* however, a relative of the plaintiff made the petition, a physician signed the certificate, and the justice appointed for that purpose to perform the duty made the reception order. This procedure is more similar to the North Carolina statutes.

[26] Ayers v. Russell, 50 Hun. 282, 3 N.Y. Supp. 338 (1888).

[27] *Id.* at —, 3 N.Y. Supp. at 341.

[28] Note, 53 MICH. L. REV. 493 (1954).

[29] 76 Miss. 458, 24 So. 968 (1899).

[30] *Id.* at 472, 24 So. at 971.

[31] Corcoran v. Jerrell, 185 Iowa 532, 170 N.W. 776 (1919); Perkins v. Mitchell, 31 Barb. (N.Y.) 461 (1860); Jarman v. Offutt, 239 N.C. 468, 80 S.E.2d 248 (1954); Dyer v. Dyer, 178 Tenn. 234, 156 S.W.2d 445 (1941); 33 AM. JUR., *Libel and Slander* § 148 (1941); 53 C.J.S., *Libel and Slander* § 104(b) (1948).

of the physicians in examining the plaintiff and signing the certificates of insanity expressing their opinion as to the mental condition of the plaintiff were those of witnesses. But although the law protects the physician for what he says in the course of a judicial proceeding, the common law also imposes a duty upon him to use due care in the practice of his profession.[32] Surely, the legislature did not intend to clothe the physician with authority to examine the plaintiff as to his mental condition and recommend that he be committed to a mental institution and at the same time abolish this common law duty he owed to the plaintiff to use due care in examining him. It would appear to be more logical to say that the legislature intended to supplement the common law duty with a statutory duty to exercise due care in examining the plaintiff. The defendants should be privileged in whatever they testified to in the lunacy proceeding, but the duty to examine properly the plaintiff under G.S. § 122-43 should be an entirely separable role and function to be performed by them, not as witnesses, but as men of professional skill who are required to use due care in examining the plaintiff as a patient. It is therefore submitted that, although the plaintiff did not state a cause of action for signing a libelous certificate of insanity, he did state a cause of action for *negligence* in preparing the certificate of insanity without first properly examining the plaintiff as to his mental condition.

By allowing a cause of action for negligence the court could have balanced the interests between the plaintiff and the defendants. The physicians would be allowed to testify freely at the hearing before the clerk of the superior court without fear of a vexatious law suit from a dissatisfied party, but the court would impose upon them a statutory and professional duty of exercising ordinary care and skill in examining the plaintiff, thereby rendering it more likely that the plaintiff would not be confined in a mental institution without first being properly examined as to his mental condition. The end result is compliance with the legal maxim that "for every wrong there is a remedy."

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[32] Walden v. Jones, 289 Ky. 395, 158 S.W.2d 609 (1942); Parkell v. Fitzporter, 301 Mo. 217, 256 S.W. 239 (1923); Tvedt v. Haugen, 70 N.D. 338, 294 N.W. 183 (1940); PROSSER, TORTS § 31 (2d ed. 1955); 41 AM. JUR., *Physicians and Surgeons* §§ 73, 79 (1942); 70 C.J.S., *Physicians and Surgeons* § 36 (1951).