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Notes and Comments

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Admiralty—Limitations on the Sieracki Doctrine

In *Seas Shipping Co., Inc. v. Sieracki*,[1] plaintiff-stevedore was injured while in the process of loading cargo into a ship. As a result, he subsequently sought to recover for his damages from the operator of the ship on the theory of unseaworthiness.[2] Theretofore the ship and her operator had been held liable to a seaman who was injured by reason of the unseaworthiness of the vessel.[3] The Supreme Court held, however, that liability for unseaworthiness was not limited to seamen but was available as well to persons who did a seaman's work irrespective of whether such persons were hired directly by the shipowner, through his consent, or by his arrangement. Doing a seaman's work was said to incur a seaman's risks for which a seaman would be entitled to a seaworthy ship. Since the loading and unloading of a ship's cargo was "historically" the work of the crew, plaintiff was allowed to recover.

Mr. Chief Justice Stone, writing for the dissent, thought the doctrine of unseaworthiness was applicable to seamen only. There is much to be said for the dissent's hypothesis. At least the risks incurred while loading a ship are not those "historically" categorized as "perils of the sea"[4] nor such that might render a ship unseaworthy to the extent that the crew had a right to abandon it.[5]

The *Sieracki* "historical" doctrine was restated and affirmed in *Pope & Talbot, Inc. v. Hawn*.[6] There the shipowner's duty to furnish a seaworthy ship was extended to an employee of a refitting company who was injured while aboard doing carpentry work. It appeared after this decision that any land servant who came aboard a ship to perform any work would be entitled to a seaworthy ship because it would seem that all shipboard labor was "historically" traceable to the crew.

[1] 328 U.S. 85 (1946).

[2] "The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport." The Silvia, 171 U.S. 462, 464 (1898). Spencer Kellogg & Sons v. Great Lakes Transit Corp., 32 F. Supp. 520 (E.D. Mich. 1940). In McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), it was stated that unseaworthiness did not necessarily mean the entire ship must be unfit, but that the ship was considered unseaworthy if any part of it was unseaworthy, as where a ladder step was defective.

[3] The Osceola, 189 U.S. 158 (1903).

[4] "[S]omething so catastrophic as to triumph over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety." The Rosalia, 264 Fed. 285, 288 (2d Cir. 1920).

[5] The Arizona v. Anelich, 298 U.S. 110, 121 n.2 (1936).

[6] 346 U.S. 406 (1953).

Apparently, the *Sieracki* doctrine has been limited by two recent decisions decided the same day by the Supreme Court. In the first, *The Tungus v. Skovgaard,*[7] an action for wrongful death, based jointly upon negligence and unseaworthiness,[8] was brought under the New Jersey wrongful death statute.[9] The district court had dismissed the suit.[10] The court of appeals reversed,[11] and the Supreme Court affirmed this reversal.

Historically, there was no survival of a right of action where the death was caused by unseaworthiness.[12] After passage of the Jones Act[13] and the Death on the High Seas Act,[14] this anomaly was wiped away. Both of these acts established rights in certain classes of survivors. Jones applies to deaths and injuries which occur on any navigable water but is restricted to members of the crew.[15] Therefore, no land servant, regardless of the nature of his work, is covered by its provisions. The Death on the High Seas Act, as the name implies, is applicable only to deaths which occur more than a marine league from the shore although it is unrestricted as to persons covered. Its provisions are available to the survivors of a land servant, then, only if the death occurs more than three miles offshore. Consequently, survivors of a land servant who chanced death within the territorial waters of a state upon an unseaworthy ship can recover only if they have a remedy under the state's wrongful death statute. Such statutes had previously been held to supply a remedy in admiralty for the survivors of a person killed upon the navigable waters[16] of the state under a theory

[7] 358 U.S. 588 (1959).

[8] In Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928), it was held a seaman had to elect to sue either under a theory of negligence or a theory of unseaworthiness. However, in McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958), it was held that a seaman need not elect but if he sued under both theories, he must do so in the same suit because the two were not separate causes of action but alternative causes. Therefore, there could be but one recovery for the one injury. In Pope & Talbot, Inc. v. Hawn, *supra,* a suit under a joint theory was held valid for the non-seagoing type of seaman as well.

[9] N.J. STAT. ANN. § 2A: 31-1.

[10] Skovgaard v. The Tungus, 141 F. Supp. 653 (D.N.J. 1956). The court held that the unseaworthiness action did not lie. The negligence cause was also dismissed on the ground that no duty of exercising ordinary care to provide a safe place to work was owed the deceased by the shipowner.

[11] Skovgaard v. The Tungus, 252 F.2d 14 (3d Cir. 1957). It was held the district court had erred with respect to the unseaworthiness count and with respect to the shipowner's duty to use reasonable care for the deceased's safety.

[12] Lindgren v. United States, 281 U.S. 38 (1930).

[13] 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952).

[14] 41 STAT. 537 (1920), 46 U.S.C. § 761-67 (1952).

[15] Obrecht-Lynch Corp. v. Clark, 30 F.2d 144 (D.C. Md. 1929).

[16] "Admiralty and maritime jurisdiction in the substantive sense can be stated in terms of waters. Events must occur on certain waters in order to be within the general jurisdiction in tort." ROBINSON, ADMIRALTY § 6 at 31 (1939). "Thus to the question, what waters are within the admiralty jurisdiction so that events occurring on them may have cognizance in admiralty courts, the answer is, all

of negligence,[17] but a recovery under a theory of unseaworthiness had not been attempted. It appeared the Court was urged to incorporate (without state-imposed conditions) the state created remedy into the federal maritime law to make effective the federal cause of action and to adhere to the doctrine of uniformity.[18]

The majority, relying on *The Harrisburg*,[19] rejected this argument, in part at least. They took the view that when admiralty adopts a state created statutory remedy, it can only enforce the remedy within the jurisdictional limits attached by the creating state. Therefore it had to be determined whether the New Jersey act had incorporated the federal maritime law and thus embraced a cause of action for unseaworthiness. The court of appeals' resolution of this question in the affirmative was upheld notwithstanding the fact that New Jersey's own courts had never considered it.

Four members of the Court concurred in the result but dissented from the reasoning. Their opinion, by Mr. Justice Brennan, stresses the incongruity of applying state law where death occurs but having to apply the federal admiralty law where an injury is non-fatal. That admiralty substantive law must be applied to admiralty causes wherever they are heard and whether the remedy is maritime in nature only or known also to the law courts is a well known admiralty doctrine.[20] But since the remedy for wrongful death is solely statutory, it would seem that the enacting sovereign could burden or limit the right to the remedy as it saw fit. Therefore despite the admonitions of the minority opinion, it is difficult to discern why the federal courts may not look to the state law in an effort to discover whether the statutory right to recover for wrongful death has been limited or encumbered in any manner.

Originally, *Sieracki* endowed non-seagoing "seamen" with a sub-

waters whether fresh or salt, tidal or non-tidal, which are navigable in fact . . . ." *Id.* at 33.

[17] The Corsair, 145 U.S. 335 (1892).

[18] "One thing . . . is unquestionable; the Constitution must have referred to a system of law . . . operating uniformly in, the whole country." The Lottawanna, 88 U.S. 558, 575 (1874). "Article III, § 2, of the Constitution extends the judicial power of the United States 'To all cases of admiralty and maritime jurisdiction;' and Article I, § 8, confers upon the Congress power 'To make all laws which may be necessary and proper . . . .' Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." Southern Pac. Co. v. Jensen, 244 U.S. 205, 214, 215 (1917). "But the grant presupposed 'a general system of maritime law' . . . and contemplated a body of law with uniform operation." Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43 (1934).

[19] 119 U.S. 199 (1886).

[20] "In the case at bar, plaintiff has sought his remedy at common law to obtain redress arising out of a maritime tort. He entered the common-law court with the same right as he would have entered the admiralty court." Port of New York Stevedoring Corp. v. Castagna, 280 Fed. 618, 624 (C.C.A.N.Y. 1922). But *cf.* Garrett v. Moore-McCormack Co., Inc., 317 U.S. 239 (1942).

stantive right to recover for injuries caused by the unseaworthy condition of a ship. The next logical step would have been the vesting in non-seagoing "seamen's" survivors a maritime susbtantive right to recover for deaths caused by the unseaworthiness of a ship. For the reasons previously mentioned, however, the Court refused to take this step. Whether such a substantive right does exist is a matter of statutory interpretation of state law rather than an inherent mandate of the admiralty law.

In the second recent case, *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki,*[21] the plaintiff also sued under the New Jersey wrongful death statute, also employed a joint theory of negligence and unseaworthiness, and also saw the Court split 5-4, arraying itself identically as it had in *Skovgaard.* Mr. Justice Stewart again wrote for the majority and Mr. Justice Brennan for the minority which this time dissented totally.

Unlike *Skovgaard,* which did not get beyond the pleadings, *Halecki* proceeded to the merits. While *Skovgaard* limited *Sieracki* by making wrongful death recovery by survivors of *Sieracki*-type "seamen" dependent on state law, *Halecki* imposed a direct limitation on *Sieracki* by narrowing the class of land servants entitled to seaworthiness protection.

The decedent had been an employee of a sub-contractor hired by a shipyard to spray a ship's generators with carbon tetrachloride. Death was caused by carbon tetrachloride poisoning. It was stated in the majority opinion that seaworthiness was an absolute, non-delegable right owed by a shipowner to his crew.[22] The *Sieracki* doctrine was said to mean a shipowner could not escape liability for unseaworthiness by contracting to non-seamen work "traditionally" done by the crew. The substitution of "traditionally" for "historically," as used in *Sieracki,* may have significance.[23]

Reversing the decision for plaintiff below, it was held the decedent was not performing work "traditionally" performed by the crew. Four arguments were put forth to support the holding. First, the work could only be performed when the generators were dismantled and the ship was "dead" as opposed to a condition of readiness for sea. Historically,

[21] 358 U.S. 613 (1959).

[22] The Edwin I. Morrison, 153 U.S. 199 (1894), Globe S.S. Co. v. Moss, 245 Fed. 54 (6th Cir. 1917). See Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944), where this duty was held to be unaffected by the fact "that the negligence of the officers of the vessel contributed to its unseaworthiness." Also, Boudoin v. Lykes Bros. S.S. Co., Inc., 348 U.S. 336 (1954), where the vicious disposition of a seaman caused the ship to become unseaworthy bringing liability upon the shipowner for the injuries inflicted upon a fellow-seaman.

[23] In MERRIAM-WEBSTER NEW INTERNATIONAL DICTIONARY (2d ed. 1959), "historical" is defined as being: "Of, pertaining to, or of the nature of, history; as historical truth; narrating, dealing with, or based upon history . . . ." "Traditional" is defined as: "Following or conforming to tradition, or the order, code, practice, etc., accepted from the past; conventional, long established . . . ."

however, whether the ship was "dead" or not, it seems the crew was responsible for the maintenance of the propulsion and power units, at least in the days of sails and whale oil. Further, there seems to be no tradition that work on a dead ship necessarily be farmed out.

Second, the decedent was a specialist using special skills and equipment of which none was connected directly with a ship's seagoing operations. But if a generator is so important, as it obviously is, to the functioning of a ship that the ship is dead and not ready for sea when the generator is disassembled, it is difficult to understand how the skill or tools used to maintain it could be anything but directly connected with seagoing operations.

Third, it was said the work was of such a dangerous nature it was necessary to perform it on a week-end when only a minimum of the crew was aboard. Historically, again, it appears danger was no criterion for determining what was considered the work of the crew nor for deciding what work should be farmed out.

Fourth, quoting from the dissent below, it was said the decedent "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed."[24] Such work is not "traditionally" done by the crew today or ever. This ground appears to be the strongest of the four. In fact it appears to be beyond refutation. There is no "tradition" in the maritime service to spray the generators with carbon tetrachloride irrespective of any historical background for preservation of the propulsion and power units.

Obviously the Court was attempting to ease the swing of the door flung open by the *Sieracki* and *Pope & Talbot* cases. But whatever may be said in criticism of those cases, their doctrine was manifestly positive. Anyone who performed work on a ship or its gear was entitled to a seaworthy ship due to the virtual impossibility of preventing some historical linkage between the work and the crew. However, there can be no "tradition" in mechanical innovations. Consequently, it seems a ship could become so modern that tradition would remain only in its floating in water. If this be the purport of *Halecki,* it would seem that the operation of *Sieracki* has been seriously limited. If the distinction lies in the degree of specialization required for the work, vexing fact questions arise which could lead to either arbitrariness or an importation of a doctrine into this area approximating the very unreliable "twilight zone."[25] If the case be limited to its facts, its doctrine would only be

[24] Halecki v. United N.Y. & N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708, 715 (2d Cir. 1958).

[25] Davis v. Department of Labor and Indus. of Wash., 317 U.S. 249 (1942), where it was stated that an effort under certain conditions to determine whether a stevedore or harbor worker was covered by a state workmen's compensation act or the federal Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C. §§ 901-50 (1927), might be unrewarded because "There is . . .

applicable where extremely dangerous specialized work is being performed on a dead ship.

The dissenters complained the *Sieracki* doctrine had been inverted by the majority so that a shipowner can escape his duties relative to seaworthiness by contracting the dangerous work to non-seamen. Modern ships are outfitted with modern equipment, and contracting out the dangerous maintenance work on such equipment has become the established practice. Further, the *Halecki* doctrine would introduce confusion. Who can tell what is traditional?

Whatever might have been the purpose behind the majority opinion, and the most cogent seems to be the substitution of the old "historical" test for a new "traditional" test, the dissent seems to have the better of the argument—at least to the extent that a rather definite standard has been traded for a somewhat nebulous one. *Halecki* has created a new area of confusion in a once certain field of the law already fraught with indecisiveness in other areas.

GUY C. EVANS

Contracts—Liability of Minor Upon Disaffirmance

The policy of North Carolina has been to cloak an infant with a mantle of protection in his contract dealings with adults by allowing him to disaffirm his contracts for personalty[1] either before[2] or within a reasonable time after[3] attaining his majority. The dominant purpose justifying this principle is to protect the minor from his own improvidence or want of discretion, and from the wiles of designing adults.[4] The disaffirmance when made is irrevocable,[5] voids the contract *ab initio*,[6] and entitles the infant to a return of any consideration passing from him, either in specie or its equivalent;[7] but the infant, unless he has the consideration within his possession or control, is not required to place the other party in *status quo ante*.[8]

clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements." *Id.* at 256.

[1] An infant's deed of realty can be neither disaffirmed nor ratified before he attains his majority. McCormic v. Leggett, 53 N.C. 425 (1862).

[2] Hight v. Harris, 188 N.C. 328, 124 S.E. 623 (1924).

[3] Coker v. Virginia-Carolina Joint-Stock Land Bank, Inc., 208 N.C. 41, 178 S.E. 863 (1935). The infant is liable for personal necessities if the contract price is reasonable. Barger v. M. & J. Fin. Corp., 221 N.C. 64, 18 S.E.2d 826 (1942); Hyman v. Cain, 48 N.C. 111 (1855); Smith v. Young, 19 N.C. 26 (1836). Certain contracts are permitted by statute. See N.C. GEN. STAT. § 39-4 (1950).

[4] McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930).

[5] Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 40 S.E. 822 (1902).

[6] Coker v. Virginia-Carolina Joint-Stock Land Bank, Inc., 208 N.C. 41, 178 S.E. 863 (1935).

[7] Collins v. Norfleet-Baggs, Inc., 197 N.C. 659, 150 S.E. 177 (1929).

[8] Faircloth v. Johnson, 189 N.C. 429, 127 S.E. 346 (1925). *Accord,* Bell v.

The recent case of *Fisher v. Taylor Motor Co.*[9] reiterated the rule that the infant is not required to return the consideration received unless he has it in hand. Plaintiff, a 20 year old sailor, purchased from defendant an automobile for $750, four-fifths of which was his own money and one-fifth of which was furnished by his father. Four months later the vehicle was destroyed in an accident which resulted in plaintiff's being convicted of careless and reckless driving. Subsequently, plaintiff disaffirmed the contract and sued to recover the purchase price. Defendant counterclaimed for damages to the car caused by the unlawful acts of the plaintiff. The court allowed the minor to recover that portion of the purchase price *actually* furnished by him[10] less the value of the automobile in its wrecked condition. Holding that defendant recovers nothing on his counterclaim, the court stated that " 'the infant is not required to account for the use or depreciation of the property while in his possession, or for its loss, if squandered or destroyed . . . .' "[11]

This case is illustrative of the majority view that a disaffirming infant who sues to recover what he has given under the contract is not required to compensate the adult for the use or depreciation of the property while in the minor's possession.[12] The reasoning is that since the infant could avoid a contract to pay for the use or depreciation, the adult should not be able to collect for it by way of recoupment. Other courts[13] grant the adult a set-off, on the principle that the infant should

Burkhalter, 176 Ala. 62, 57 So. 460 (1912); Barr v. Packard Motor Car Co., 172 Mich. 299, 137 N.W. 697 (1912); Craig v. Van Bebber, 100 Mo. 584, 13 S.W. 906 (1890); Blake v. Harding, 54 Utah 158, 180 Pac. 172 (1919).

[9] 249 N.C. 617, 107 S.E.2d 94 (1959).

[10] *Accord,* McCarty-Greene Motor Co. v. McCluney, 219 Ala. 211, 121 So. 713 (1929). *Contra,* Carpenter v. Grow, 247 Mass. 133, 141 N.E. 859 (1923).

[11] 249 N.C. at 620, 107 S.E.2d at 97, quoting from Collins v. Norfleet-Baggs, Inc., 197 N.C. 659, 660, 150 S.E. 177, 178 (1929). This is true even though three-fifths of the infant's payments were earned from the use of the property purchased. Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923). On the other hand the adult is required to compensate the infant for the use and depreciation of the chattel given in part payment by the minor. Greensboro Morris Plan Co. v. Palmer, *supra;* Murdock v. Fisher Fin. Corp., 79 Cal. App. 787, 251 Pac. 319 (Dist. Ct. App. 1926).

[12] See, *e.g.,* Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S.W. 975 (1924); Story & Clark Piano Co. v. Davy, 68 Ind. App. 150, 119 N.E. 177 (1918); Utterstrom v. Myron D. Kidder, Inc., 124 Me. 10, 124 Atl. 725 (1924); Gillis v. Goodwin, 180 Mass. 140, 61 N.E. 813 (1901); Reynolds v. Garber-Buick Co., 183 Mich. 157, 149 N.W. 985 (1914); Freiburghaus v. Herman Body Co., 102 S.W.2d 743 (Mo. Ct. App. 1937); Standard Motor Co. v. Stillians, 1 S.W.2d 332 (Tex. Civ. App. 1928); Blake v. Harding, 54 Utah 158, 180 Pac. 172 (1919); Hines v. Cheshire, 36 Wash. 2d 467, 219 P.2d 100 (1950); Snodderly v. Brotherton, 173 Wash. 86, 21 P.2d 1036 (1933).

[13] See, *e.g.,* Rice Auto Co. v. Spillman, 280 Fed. 452 (D.C. Cir. 1922); Murdock v. Fisher Fin. Corp., 79 Cal. App. 787, 251 Pac. 319 (Dist. Ct. App. 1926); Rice v. Butler, 160 N.Y. 578, 55 N.E. 275 (1899); Gaither v. Wallingford, 101 Ore. 389, 200 Pac. 910 (1921); Pettit v. Liston, 97 Ore. 464, 191 Pac. 660 (1920).

An affirmative recovery has been allowed against the infant by the adult when the amount the infant had paid on the contract was less than the value of the use and depreciation. Toon v. Mack Internat'l Motor Truck Corp., 87 Cal. App.

not be allowed to retain the benefits of the contract while at the same time refusing to make an allowance for its equivalent.

Some courts have intimated that upon disaffirmance the minor would be held to account by way of recoupment for any wanton or wilful damages to the property,[14] apparently reasoning that the adult in dealing with the infant only assumes the risk of his improvidence and lack of discretion, and should not be required to suffer loss from the minor's wilful and wanton acts. Other courts seem not to have recognized such a distinction.[15] Our court in the instant case appears to side with this latter view by rejecting the defendant's contention that an infant who is responsible to society generally for his unlawful acts should be responsible specifically to one who is directly damaged by them, even though a contract may be involved.

Where the infant has obtained possession of the chattel under a bailment or conditional sales contract, most courts agree that upon disaffirmance he is not liable for damage resulting from ignorance or unskillfulness in its use,[16] this being the very improvidence which allows the infant to disaffirm. However, when the infant wilfully departs from the objects of the bailment, or uses the property in an unlawful manner, by a fiction of the law this is construed as an election to disaffirm the contract. The minor then becomes liable as a converter for any loss or damage to the chattel resulting from his wilful[17] or unlawful acts.[18] There appears to be no North Carolina case holding this way. However, our court has held that if an infant uses a car held under a conditional sales contract in an illegal manner causing it to be confiscated and

151, 262 Pac. 51 (Dist. Ct. App. 1927). Connecticut has held the infant liable for use but not for depreciation. Creer v. Active Auto Exch., 99 Conn. 266, 121 Atl. 888 (1923). In Minnesota and New Hampshire an infant is held bound by his contracts found to be reasonable and provident to the extent of the benefit actually derived by him, if after demand he fails to restore the value of the benefits so received. Bergland v. Am. Multigraph Sales Co., 135 Minn. 67, 160 N.W. 191 (1916); Hall v. Butterfield, 59 N.H. 354 (1879).

[14] See, *e.g.*, Whitman v. Allen, 123 Me. 1, 121 Atl. 160 (1923); Wooldridge v. Lavoie, 79 N.H. 21, 104 Atl. 346 (1918); Levine v. Mallon Oldsmobile Co., 127 N.J.L. 197, 21 A.2d 852 (Sup. Ct. 1941); Lowery v. Cate, 108 Tenn. 54, 64 S.W. 1068 (1901); Standard Motor Co. v. Stillians, 1 S.W.2d 332 (Tex. Civ. App. 1928); Mast v. Strahan, 225 S.W. 790 (Tex. Civ. App. 1920).

[15] See, *e.g.*, Quality Motors, Inc. v. Hays, 216 Ark. 264, 225 S.W.2d 326 (1949); Arkansas Reo Motor Car Co. v. Goodlett, 163 Ark. 35, 258 S.W. 975 (1924); Klaus v. A. C. Thompson Auto & Buggy Co., 131 Minn. 10, 154 N.W. 508 (1915).

[16] Jones v. Milner, 53 Ga. App. 304, 185 S.E. 586 (1936); Daugherty v. Reveal, 54 Ind. App. 71, 102 N.E. 381 (1913); Stack v. Cavanaugh, 67 N.H. 149, 30 Atl. 350 (1892); Eaton v. Hill, 50 N.H. 235 (1870); Brunhoelzl v. Brandes, 90 N.J.L. 31, 100 Atl. 163 (Sup. Ct. 1917); Philleo v. Sanford, 17 Tex. 227 (1856); Miller v. Peck, 258 S.W. 887 (Tex. Civ. App. 1924).

[17] Vasse v Smith, 10 US. (6 Cranch) 226 (1810); Smith v. Moschetti, 213 Ark. 968, 214 S.W.2d 73 (1948); Churchill v. White, 58 Neb. 22, 78 N.W. 369 (1899); Freeman v. Boland, 14 R.I. 39 (1882); Ray v. Tubbs, 50 Vt. 688 (1878).

[18] Vermont Acceptance Corp. v. Wiltshire, 103 Vt. 219, 153 Atl. 199 (1931).

sold under a forfeiture sale, the infant *may* be liable for negligence in failing to notify his condtional sales vendor of the proceedings.[19]

A different situation is presented where the infant has been guilty of misrepresenting his age to induce the adult to enter into the contract. Since a minor is generally held liable for his torts not arising out of contract,[20] a majority of the courts allow an action for fraud and deceit predicated upon the infant's misrepresentation,[21] reasoning that but for the fraud there would have been no contract. Since the fraud is antecedent to the making of the contract, it is considered as a separate and distinct tort not arising out of the contract. Moreover, the method of measuring damages in the tort action being different from that used to calculate damages in contract cases, the action does not indirectly enforce the contract.[22] North Carolina has, however, refused to countenance this view[23] and by a divided court reasoned that it would be tantamount to enforcing the contract by changing the form of action from contract to tort, and would in effect ignore the policy of the law which is more concerned with protecting infants from their contractual obligations than imposing liability on them for their torts.[24]

When the infant is sued on the contract, some few courts prevent him from pleading infancy by using his misrepresentation of age as the

[19] Williams v. Aldridge Motors, Inc., 237 N.C. 352, 75 S.E.2d 237 (1953). However, the vendor must show that he has not received notice of the confiscation and forfeiture sale from any other source, and that if he had intervened at the sale he would have been entitled to have the sales proceeds applied in satisfaction of his lien under N.C. GEN. STAT. § 18-6 (Supp. 1957).

[20] Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923) (dictum); Moore v. Horne, 153 N.C. 413, 69 S.E. 409 (1910) (dictum); Smith v. Kron, 96 N.C. 392, 2 S.E. 533 (1887) (dictum). See 27 AM. JUR. *Infants* § 90 (1940); PROSSER, TORTS § 109, at 788 (2d ed. 1955).

[21] See, *e.g.*, Myers v. Hurley Motor Co., 273 U.S. 18 (1927); Dick Murphy Inc. v. Holcer, 57 F.2d 431 (D.C. Cir. 1932); Creer v. Active Auto Exch., 99 Conn. 266, 121 Atl. 888 (1923); Berryman v. Highway Trailer Co., 307 Ill. App. 480, 30 N.E.2d 761 (1940); Rice v. Boyer, 108 Ind. 472, 9 N.E. 420 (1886); Steigerwalt v. Woodhead Co., 186 Minn. 558, 244 N.W. 412 (1932); Byers v. Lemay Bank & Trust Co., 365 Mo. 341, 282 S.W.2d 512 (1955); Fitts. v. Hall, 9 N.H. 441 (1838); Mestetzko v. Elf Motor Co., 119 Ohio St. 575, 165 N.E. 93 (1929).

The misrepresentation must be affirmative, not constructive. Wisconsin Loan & Fin. Corp. v. Goodnough, 201 Wis. 101, 228 N.W. 484 (1930).

The infant is not liable, however, for misrepresentations concerning the subject matter of the contract. Collins v. Gifford, 203 N.Y. 465, 96 N.E. 721 (1911); Lesnick v. Pratt, 116 Vt. 477, 78 A.2d 487 (1951).

[22] See Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 119, 116 S.E. 261, 265 (1923) (dissenting opinion by Stacy, J.).

[23] Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923). *Accord,* Drennen Motor Car Co. v. Smith, 230 Ala. 275, 160 So. 761 (1935); Monumental Bldg. Ass'n No. 2 v. Herman, 33 Md. 128 (1870); Brooks v. Sawyer, 191 Mass. 151, 76 N.E. 953 (1906); Slayton v. Barry, 175 Mass. 513, 56 N.E. 574 (1900); Spangler & Co. v. Haupt, 53 Pa. Super. 545 (1913); Nash v. Jewett, 61 Vt. 501, 18 Atl. 47 (1889); Johnson v. Pie, 1 Lev. 169, 83 Eng. Reprint 353 (1665).

[24] *Accord,* Tyda v. Reiter-Schmidt, Inc., 16 Ill. App.2d 370, 147 N.E.2d 690 (1958); Brown v. Wood, 293 Mich. 148, 291 N.W. 255 (1940).

basis for estoppel.[25] North Carolina,[26] in accord with the majority,[27] has consistently refused to estop the infant, saying that this would deprive him of his traditional defense of infancy and open up the way for reckless youths "to evade the law by lying."[28] Where, however, the infant brings suit seeking disaffirmance and recovery of the consideration he has given under the contract, a majority of the jurisdictions invoke the estoppel doctrine.[29] Several states provide for estoppel by statute.[30]

The net result is that North Carolina in most instances denies the adult any relief in his dealings with the educated and sophisticated youths of today. The infant who misrepresents his age is not estopped from asserting his minority as a defense,[31] nor is he liable for fraud and deceit.[32] He is not held accountable for the use and depreciation of the property while in his possession,[33] and is not liable for negligent and

[25] See, *e.g.*, Clemons v. Olshire, 54 Ga. App. 290, 187 S.E. 711 (1936); Hood v. Duren, 33 Ga. App. 203, 125 S.E. 787 (1924); Damron v. Commonwealth, 110 Ky. 268, 61 S.W. 459 (1901); Klinch v. Reeder, 107 Neb. 342, 185 N.W. 1000 (1921); La Rosa v. Nichols, 92 N.J.L. 375, 105 Atl. 201 (Ct. Err. & App. 1918); Harseim v. Cohen, 25 S.W. 977 (Tex. Civ. App. 1894).

[26] Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923); Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916); Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323, 25 S.E. 975 (1896).

[27] See, *e.g.*, Wilkinson v. Buster, 124 Ala. 574, 26 So. 940 (1899); Arkansas Reo Motor Co. v. Goodlett, 163 Ark. 35, 258 S.W. 975 (1924); Creer v. Active Auto Exch., 99 Conn. 266, 121 Atl. 888 (1923); Price v. Jennings, 62 Ind. 111 (1878); Sawyer Boot & Shoe Co. v. Braverman, 126 Me. 70, 136 Atl. 290 (1927); Raymond v. General Motorcycle Co., 230 Mass. 54, 119 N.E. 359 (1918); Folds v. Allardt, 35 Minn. 488, 29 N.W. 201 (1886); Sternlieb v. Normandie Nat'l Sec. Corp., 263 N.Y. 245, 188 N.E. 726 (1934).

[28] Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323, 329, 25 S.E. 975, 976 (1896).

[29] See, *e.g.*, Mossler Acceptance Co. v. Perlman, 47 So. 2d 296 (Fla. 1950); Carney v. Southland Loan Co., 92 Ga. App. 559, 88 S.E.2d 806 (1955); Watters v. Arrington, 39 Ga. App. 275, 146 S.E. 773 (1929); Lewis v. Van Cleve, 302 Ill. 413, 134 N.E. 804 (1922); Pinnacle Motor Co. v. Daugherty, 231 Ky. 626, 21 S.W.2d 1001 (1929); Adkins v. Adkins, 183 Ky. 662, 210 S.W. 462 (1919); Johnson v. McAdory, 228 Miss. 453, 88 So. 2d 106 (1956); Brinkmann v. Dorsey Motors, Inc., 121 N.J.L. 115, 1 A.2d 473 (Sup. Ct. 1938), *aff'd* 122 N.J.L. 378, 5 A.2d 686 (Ct. Err. & App. 1939); International Land Co v. Marshall, 22 Okla. 693, 98 Pac. 951 (1908); Tuck v. Payne, 159 Tenn. 192, 17 S.W.2d 8 (1929); Stallard v. Sutherland, 131 Va. 316, 108 S.E. 568 (1921); Lubin v. Cowell, 25 Wash. 2d 171, 170 P.2d 301 (1946); Williamson v. Jones, 43 W.Va. 562, 27 S.E. 411 (1897). There appears to be no North Carolina case on this point.

[30] IND. ANN. STAT. § 18-2006 (1950); IOWA CODE § 599.3 (1954); KAN. GEN. STAT. ANN. § 38-103 (1949); MICH. COMP. LAWS § 691.531 (1948); UTAH CODE ANN. § 15-2-3 (1953); WASH. REV. CODE § 26.28.040 (1958). Virginia places an affirmative duty upon the minor to disclose his minority in his business transactions. VA. CODE ANN. § 8-135 (1957). New York denies disaffirmance where the infant is engaged in business and the contract is reasonable, N.Y. DEBT. AND CRED. LAW § 260, as do Iowa, Kansas, Utah, and Washington, *supra*. In Georgia an infant engaging in business as an adult with the consent of his parent or guardian cannot disaffirm contracts arising therefrom. GA. CODE ANN. § 20-203 (1936).

[31] Greensboro Morris Plan Co. v. Palmer, 185 N.C. 109, 116 S.E. 261 (1923); Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916); Carolina Interstate Bldg. & Loan Ass'n v. Black, 119 N.C. 323, 25 S.E. 975 (1896).

[32] Greensboro Morris Plan Co. v. Palmer, *supra* note 31.

[33] McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930); Collins v. Norfleet-Baggs, Inc., 197 N.C. 659, 150 S.E. 177 (1929); Greensboro Morris Plan Co. v. Palmer, *supra* note 31.

unlawful[34] acts causing damage to the property prior to his avoidance of the contract.[35] The only relief available for the adult in the normal case is the right to regain whatever remains in the minor's possession at the time of disaffirmance.[36]

Surely the policy of the law should be to discourage rather than countenance fraud, recklessness, and lawlessness in the adults of tomorrow. Several states have met this problem with statutory provisions[37] requiring as a condition to disaffirmance that the infant, if over eighteen at the inception of the contract, restore the consideration or pay its equivalent to the party from whom it was received. This has the effect of requiring the more mature infant to pay for the depreciation and beneficial use and to account for any damages done to the property, while at the same time preserving his right of avoidance. It is hoped that our Legislature will consider enacting such a statute, in view of the tremendous number of purchases of personalty made by minors today.

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Credit Transactions—Security Agreement Stipulating That on Sale of the Security Property the Security Attaches to the Proceeds

In *Presley E. Brown Lumber Co. v. Textile Banking Co.*,[1] a furniture manufacturer, who was financially impoverished, needed raw materials in the form of core stock, the base to which veneer is applied. The plaintiff-lumber company had such stock to sell but was unwilling to sell to the furniture manufacturer on credit. An agreement was reached whereby the lumber company would consign the core stock to the furniture manufacturer. Title to the raw materials was to remain in the plaintiff until the finished product was sold, at which time the title to the raw materials was to transfer over to the proceeds of sale, including accounts receivable, in proportion to the value of the raw materials in the finished product. The manufacturer was to be the agent to collect the accounts and hold the funds in trust for the plaintiff. This agree-

[34] Taylor v. Fisher Motor Co., 249 N.C. 617, 107 S.E.2d 94 (1959).

[35] Where a statute gives the adult an interest in the chattel, however, the infant is liable for losses sustained through the minor's failure to notify the adult of the chattel's seizure and sale under forfeiture proceedings. Williams v. Aldridge Motors, Inc., 237 N.C. 352, 75 S.E.2d 237 (1953).

[36] McCormick v. Crotts, 198 N.C. 664, 153 S.E. 152 (1930); Hight v. Harris, 188 N.C. 328, 124 S.E. 623 (1924); Chandler v. Jones, 172 N.C. 569, 90 S.E. 580 (1916); Pippen v. Mutual Benefit Life Ins. Co., 130 N.C. 23, 40 S.E. 822 (1902). A minor who avoided a compromise of his legacy has been required to account for the property received under the compromise upon asserting a claim for the legacy. Tipton v. Tipton, 48 N.C. 552 (1856).

[37] CAL. CIV. CODE § 35 (1954); IDAHO CODE ANN. § 32-103 (1948); MONT. REV. CODES ANN. § 64-107 (1953); N.D. REV. CODE § 14-1011 (1943); OKLA. STAT. Tit. 15, § 19 (1937); S.D. CODE § 43.0105 (1939).

[1] 248 N.C. 308, 103 S.E.2d 334 (1958).

ment was recorded. The core stock was furnished, the furniture was produced and sold, and accounts receivable came into existence. The furniture manufacturer, again in need of money, sold these accounts receivable to the defendant banking company. In the face of the notice provided by the recordation, the banking company collected the accounts and refused to pay the proceeds to the plaintiff-lumber company.

The lumber company demanded the proceeds, without success, and finally, in this action, sued for the proceeds alleging the agreement explained above. The trial court sustained a demurrer to the plaintiff's cause of action and the Supreme Court on appeal affirmed on the ground that this was a conditional sale of the lumber with permission in the buyer to resell,[2] that when the finished furniture was sold, all the plaintiff-lumber company had was a contractual right to payment from the debtor or assignment by it of the proportion owed to plaintiff from the sales.

The court pointed out that the 1945 Assignment of Accounts Receivable Act[3] as it existed at the time this litigation was commenced was applicable to "a presently subsisting right . . . under an existing contract."[4] Thus, the agreement here could not come under this act because the sales contracts giving rise to the accounts were not yet made at the time of the attempted assignment of a proportion of the accounts to arise from the sale of the furniture after it was manufactured. However, since 1957 the statute allows a creditor to accept an assignment of accounts receivable which are to arise in the future.[5]

May a creditor of a prospective debtor who has unstable credit relations get a lien on the proceeds by stipulating in the security agreement that on sale of the property the security attaches to the proceeds? It seems he can obtain such a lien on proceeds through various routes.

One route is through the Factors' Lien Act.[6] This act is designed for a money lender who *advances money* on the security of raw materials, goods in process, or finished goods. If the provisions of the act are complied with, and the debtor then sells the security property in the ordinary course of business, the lien attaches, without further act or formality, to the proceeds of the sale, including accounts receivable. However, this is limited to a creditor who advances money within the terms of the act and is not extended to one who supplies raw materials as did the plaintiff-lumber company.

[2] The court did not discuss why a valid consignment was not created. For a collection of cases on consignments, see Annot., 63 A.L.R. 355, 368 (1929). Had a valid consignment been created, the plaintiff-lumber company could have controlled the proceeds.

[3] N.C. GEN. STAT. §§ 44-77 to -85 (1950).

[4] N.C. GEN. STAT. § 44-77 (1950).

[5] N.C. GEN. STAT. § 44-77 (Supp. 1957).

[6] N.C. GEN. STAT §§ 44-70 to -76 (1950) as amended by N.C. GEN. STAT. §§ 44-70 to -76 (Supp. 1957).

Another route is through a trust receipt arrangement. Trust receipts are usually used in a three party transaction, as is typical in the automobile wholesale business between the distant manufacturer, the local bank, and the local dealer. Usually, a distant seller will forward goods and their title or bill of lading to a local bank with good credit standing and receive payment immediately. The bank then lets the local buyer take the goods in return for a trust receipt. The holder of the trust receipt has title to the goods until they are sold; when sold, the title attaches to the proceeds. This type of arrangement is provided for in Section 10 of the Uniform Trust Receipts Act.[7]

Another route would be through Section 9-306 of the Uniform Commercial Code[8] which has now been enacted in Pennsylvania,[9]

[7] UNIFORM TRUST RECEIPTS ACT § 10 provides:

Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds or any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:

(a) to the debts described in Section 9 (3); and also

(b) to any proceeds or the value of any proceeds (whether such proceeds are identifiable or not) of goods, documents or instruments, if said proceeds were received by the trustee within ten days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankuptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting; and to a priority to the amount of such proceeds or value; and also

(c) to any other proceeds of the goods, documents or instruments which are identifiable, unless the provision for accounting has been waived by the entruster by words or conduct; and knowledge by the entruster of the existence of proceeds, without demand for accounting made within ten days from such knowledge, shall be deemed to be such a waiver.

[8] *Uniform Commercial Code* § 9-306 provides in part:

(2) "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof by the debtor unless his action was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected but it ceases to be perfected security interest and becomes unperfected ten days after receipt of the proceeds by the debtor unless

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the ten day period."

For a general outline on the effect of the code, see NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, CONNECTICUT ENACTS THE UNIFORM COMMERCIAL CODE (1959); 21 OHIO BAR 1099 (1958). For a comparison of the factors' lien acts with the UNIFORM COMMERCIAL CODE, see Skilton, *Factors Lien on Merchandise*, (1955) WIS. L. REV. 356. On the Uniform Commercial Code in general, see Llewellyn, *Why a Commercial Code?* 22 TENN. L. REV. 779 (1953); Symposium, 16 LAW AND CONTEMP. PROB. 1 (1951); Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1321 (1947-48).

[9] Adopted in 1953. 21 OHIO BAR 1099, 1103 (1958).

Massachusetts,[10] Kentucky,[11] and Connecticut.[12] This act replaces all other acts relating to forms of security and authorizes under limitations a lien on proceeds of any sale of security property. Section 9-306 of the act is based on Section 10 of the Uniform Trust Receipts Act but covers many other types of security arrangements.

Apart from statute, the common law in North Carolina hitherto has apparently permitted one to obtain a lien on proceeds of resale of security property when the debtor assigns the future accounts receivable to the creditor. This is subject to the qualification that if the creditor permits the debtor to have the proceeds of the accounts receivable without accounting for them or replacing the accounts with other accounts of like quality and value, the assignment will be deemed fraudulent in law under the rule of *Benedict v. Ratner*.[13]

Manufacturers Fin. Co. v. Armstrong,[14] held that unless the debtor had been accorded "unfettered dominion over the accounts and the funds collected from them,"[15] the contract involved, which assigned accounts receivable to arise in the future, was otherwise valid. Applying this case, the plaintiff-lumber company would have had a valid lien on the proceeds of resale by the furniture manufacturer since the agreement specifically provided that the proceeds were to be held in trust and turned over to the creditor.

In *In re Steele*,[16] a mortgage of accounts receivable was held invalid because "in effect it was agreed that the mortgagor might use the proceeds of collections on the accounts as he saw fit."[17] The court said in dictum that the chattel mortgage of accounts receivable due and to become due was otherwise valid even as to the accounts to arise in the future. The same Assignment of Accounts Receivable Act was in effect when this case was decided as when the contract between the plaintiff-lumber company and the furniture manufacturer was entered and contested. Applying the dictum of this case, the lumber company could have recovered the accounts receivable from the banking company.

The security in the instant case was not invalid by reason of its after acquired property feature. *Hickson Lumber Co. v. Gay Lumber Co.*[18] is the leading case in North Carolina saying you can mortgage property to be acquired in the future; in other words, that you *can* mortgage the next cast of your net. The court in *Hickson* recognized the common law rule "that nothing can be mortgaged that is not in existence and

[10] Effective October 1, 1958. 21 OHIO BAR 1099, 1103 (1958).
[11] Effective July 1, 1960. 21 OHIO BAR 1099, 1103 (1958).
[12] Effective October 31, 1961. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, CONNECTICUT ENACTS THE UNIFORM COMMERCIAL CODE (1959).
[13] 268 U.S. 353 (1925).
[14] 78 F.2d 289 (4th Cir. 1935).
[15] 78 F.2d at 292.
[16] 122 F. Supp. 948 (E.D.N.C. 1954).
[17] 122 F. Supp. at 952.
[18] 150 N.C. 282, 63 S.E. 1045 (1909).

does not at the time belong to the mortgagor, for a person can not convey that which he does not own; but it is now well settled," the court continued, "that equity will give effect to a contract to convey future-acquired property, whether real or personal. Equity considers that done which the mortgagor has agreed to do, and treats the mortgage as already attaching to the newly acquired property as it comes into the mortgagor's hands. . . ."[19] In North Carolina a mortgage upon after-acquired property, being enforceable *inter partes,* becomes, upon registration, valid, and enforceable against subsequent purchasers, because the registration is an effectual notice as against the world."[20]

In the *Presley E. Brown Lumber Co.* case, since the agreement was recorded and the court held it was a conditional sale, following *Hickson* the plaintiff would have had a lien on the accounts receivable the instant they came into existence by sale of the security property.

CONCLUSION

As has been shown above, except for the old Assignment of Accounts Receivable Act, there seem to be no common law policy reasons in North Carolina against allowing one to assign accounts receivable to arise in the future.[21] Whether the court was correct or incorrect in the *Presley E. Brown Lumber Co.* case, the fact remains that clarification is needed in this field.

In 1955, the General Assembly amended the Factors' Lien Act to provide for a lien on proceeds of resale of security property by those who advance money under the Act.[22] In 1957, the General Assembly amended the Assignment of Accounts Receivable Act to allow assignments of accounts receivable which are not yet in existence.[23] A third step needs to be taken by the General Assembly to enact a statute authorizing security agreements which provide for a transfer of the lien from the security property to the accounts receivable or other proceeds arising from its sale. Or a statute could be enacted following the model of Section 9-306 of the Uniform Commercial Code.[24]

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[19] 150 N.C. at 286, 63 S.E. at 1047. [20] 150 N.C. at 288, 63 S.E. at 1048.

[21] For cases approving this policy in other jurisdictions, see McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69 (1900); Liddle v. Hernandez, 72 Colo. 585, 211 Pac. 821 (1923); Lathrop v. Schlauger, 113 Neb. 14, 201 N.W. 654 (1924); Brookside Granite Co. v. Latty, 83 N.Y. Misc. 384, 144 N.Y. Supp. 1042 (1913); James River Bank v. Hansen, 51 S.D. 13, 211 N.W. 976 (1927); Kramer v. Burlage, 234 Wis. 538, 291 N.W. 766 (1940); Carpenter v. Forbes, 211 Wis. 648, 247 N.W. 857 (1933); Black Hawk State Bank v. Accola, 194 Wis. 29, 215 N.W. 433 (1927); Annot., *Agreement or order to pay obligation out of the proceeds of any sale or mortgage that may be made as creating an equitable mortgage,* 101 A.L.R. 81, 87 (1936).

[22] N.C. GEN. STAT. § 44-73 (Supp. 1957).

[23] N.C. GEN. STAT. § 44-77 (Supp. 1957).

[24] See note 8 *supra.*

Domestic Relations—Conditions and Limitations—Restraints on Marriage and Remarriage

Shackleton v. Food Mach. and Chem. Corp.[1] was a recent federal district court decision concerning the validity, under Illinois law, of a contract provision purporting to be a restraint on plaintiff's remarriage. In this case there was a written agreement between plaintiff's brothers and the predecessor corporation of defendant whereby the corporation agreed to pay plaintiff's mother a royalty on each of certain machines sold by the company during her life. Upon the mother's death, like royalties were to be paid to plaintiff "provided she shall not have theretofore remarried; such royalties to be paid to her until her death or remarriage."[2] Plaintiff, with knowledge of this agreement, remarried before her mother's death and brought this action to recover under the contract, alleging that the provision quoted above was in restraint of marriage and therefore void as against public policy. Defendant contended that (1) it was a condition precedent which was to have been complied with before the royalties should vest, and (2) if not, that restraints on remarriage are not within the rule which declares void unreasonable restraints on marriage. In construing the provision, the court said that the parties intended to impose a total restraint upon plaintiff's marriage by means of a condition subsequent, and therefore that the provision was void. In its discussion of conditions subsequent which restrain remarriage, the court stated that such conditions, if otherwise invalid under Illinois law, would be valid only if imposed by one spouse on the other, or invoked by way of an antenuptial contract.[3]

As a general rule, conditions which totally or unreasonably restrain marriage are held to be void as against public policy.[4] The major difficulty encountered, however, is not in determining whether a restraint is total or unreasonable, but in determining whether it is imposed by way of a condition.[5] Provisions similar to the one in the principal case have been construed by courts as limitations,[6] conditions precedent,[7] and conditions subsequent.[8]

Limitations which purport to restrain marriage are generally held

[1] 166 F. Supp. 636 (E.D. Ill. 1958).
[2] *Id.* at 637.
[3] While this point had never squarely been passed on in Illinois, the federal court interpreted earlier pronouncements of the Illinois court to mean that such restraints on remarriage would be valid only as between spouses, or where an antenuptial contract was involved.
[4] See, *e.g.*, Mann v. Jackson, 84 Me. 400, 24 Atl. 886 (1892). For a general discussion of the history of the rule, see Annot., 122 A.L.R. 8 (1939).
[5] For a complete discussion of the subject and cases see Browden, *Conditions and Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288 (1941).
[6] Irwin v. Irwin, 179 App. Div. 871, 167 N.Y.S. 76 (2d Dept. 1917).
[7] Dreisbiber v. Melville, 178 Mich. 601, 146 N.W. 208 (1914).
[8] Mack v. Mulcahy, 47 Ind. 68 (1874).

valid for the reason, say the courts, that the donor did not intend to restrain marriage, but merely to provide support until the donee marries,[9] or remarries.[10] Conditions precedent are those conditions which must be satisfied before an estate can vest. If there is a condition precedent attached to a gift of personalty, such condition is void if in total or unreasonable restraint of marriage and will not prevent the gift from vesting;[11] but if the gift is of real property, the condition may be valid regardless of the reasonableness of the restraint.[12] A condition subsequent is said to exist when an estate has vested, subject to being divested upon the happening of an event such as marriage of the donee;[13] if a condition subsequent is found to be in general[14] or unreasonable[15] restraint of marriage, it is held to be void.

Although the majority of courts have adopted this distinction between conditions and limitations, an analysis of the cases indicates that there are no fixed guides which can be set forth to determine whether a particular provision is a condition or a limitation. The courts have created a welter of irreconcilable propositions;[16] and qualifications are

[9] Mann v. Jackson, 84 Me. 400, 24 Atl. 886 (1892).
[10] Irwin v. Irwin, 179 App. Div. 871, 167 N.Y.S. 76 (2d Dept. 1917).
[11] *In Re* Liberman, 279 N.Y. 458, 18 N.E.2d 658 (1939).
[12] Dreisbiber v. Melville, 178 Mich. 601, 146 N.W. 208 (1914).
[13] *In Re* Horgan's Estate, 91 Cal. App. 2d 618, 205 P.2d 706 (Dist. Ct. App. 1949).
[14] Meek v. Fox, 118 Va. 774, 88 S.E. 161 (1916).
[15] Watts v. Griffin, 137 N.C. 572, 50 S.E. 218 (1905).
[16] The distinction between conditions and limitations is said to be that "words of limitation mark the period which is to determine the estate; but words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition arises before the determination of the estate or completion of the period described by the limitation." Schaeffer v. Messersmith, 10 Pa. County Ct. 366, 369 (1890).

One group of cases has taken the position that before determining the legality of a provision, the first consideration must be whether it is a condition or a limitation; for a provision which may be void if construed to be a condition, would be valid if found to be a limitation. See, *e.g.*, Maddox v. Yoe, 122 Md. 288, 88 Atl. 225 (1913); Irwin v. Irwin, 179 App. Div. 871, 167 N.Y.S. 76 (2d Dept. 1917). Another group says the distinction is purely technical and irrelevant to policy determinations, because marriage is as much restrained by a limitation as a condition and to hold otherwise would allow one to elude public policy by a mere choice of words. See, *e.g.*, Langfeld's Estate, 4 Pa. County Ct. 82 (1886); Commonwealth v. Stauffer, 10 Pa. 350 (1849).

Also, in construction, words appropriate to describe conditions have been construed to be limitations. See, *e.g.*, Nunn v. Justice, 278 Ky. 811, 129 S.W.2d 564 (1939); Appleby v. Appleby, 100 Minn. 408, 111 N.W. 305 (1907). At least one court has said that the substance and not the form of the language must be decisive. Schaeffer v. Messersmith, *supra*.

Still another construction has involved gifts over. One group of cases holds that the mere presence of a gift over turns what would have otherwise been a condition into a limitation. See, *e.g.*, Bennett v. Packer, 70 Conn. 357, 39 Atl. 739 (1898); Eastham v. Eastham, 191 Ky. 617, 231 S.W. 221 (1921). Other cases say that the absence of a gift over creates a condition of what otherwise would have been a limitation. Kennedy v. Alexander, 21 App. D.C. 424 (1903); Stilwell v. Knapper, 69 Ind. 558 (1880). See also Annot., 122 A.L.R. 8 (1939); Browden, *Conditions and Limitations in Restraint of Marriage*, 39 MICH. L. REV. 1288 (1941).

imposed to such an extent that the rule declaring conditions in general or unreasonable restraint of marriage to be against public policy is often weakened.[17]

In addition to the condition-limitation distinction, some courts have said that a condition pertaining to a gift of personalty, otherwise reasonable but with no gift over, is merely *in terrorem, i.e.,* unenforceable except in its ability to enforce compliance with the condition by a beneficiary who might not know it was void.[18]

Further, if the provision is found to be a condition that totally or unreasonably restrains marriage, the court may still uphold it if it is in restraint of a second marriage.[19] However, here also are found very divergent views among courts: some say that any restraint on remarriage is valid;[20] others say that the validity is limited to restraints imposed by one spouse upon the other;[21] still others say that no such restraint should be valid, if otherwise void, merely because it is placed upon remarriage and not upon initial marriage.[22]

Regarding the principal case, it is submitted that even if the court reached a proper result, its construction of the provision pertaining to remarriage is questionable. The provision consists of two clauses. Taken separately, the first one may be found to be a condition precedent in that the plaintiff must not have *theretofore* remarried in order to receive the royalties. This, if taken alone, seemingly would not prevent the royalties from vesting since the gift is one of personalty and the condition creates a total restraint on marriage. However, the latter clause clearly appears to be a limitation, with royalties to be paid to plaintiff

[17] See Browden, *Conditions and Limitations in Restraint of Marriage,* 39 MICH. L. REV. 1288 (1941).

[18] United States Nat'l Bank v. Snodgrass, 202 Ore. 530, 275 P.2d 860 (1954). *In terrorem* is a fiction devised by the court of chancery because of differences in the common law and the ecclesiastical courts. By this doctrine, if in a case dealing with personal property the donor had included no gift over in case the condition was breached, the court said that he did not intend for the condition to be enforced but only meant to frighten the beneficiary into performance. If there was a gift over, the court said the rule at common law applied and the donor was said to have meant to have the condition enforced. The common law rule applied in all cases dealing with real property, and the condition was enforced whether there was a gift over or not. Of course, if the condition were not *in terrorem,* it still had to satisfy the general requirements as to reasonableness in order to be upheld. See Annot., 122 A.L.R. 8, 94 (1939).

There are also some cases holding that a gift over is not necessary to render inoperative a condition against remarriage of a widow, but they evidently confuse the rule against restraints with the *in terrorem* rule. POMEROY, EQUITY JURISPRUDENCE § 933(b) (5th ed. 1941).

[19] See, *e.g.,* Chapin v. Cooke, 73 Conn. 72, 46 Atl. 282 (1900). For a discussion of the rationale of this exception, see Annot., 122 A.L.R. 8, 32 (1939).

[20] See, *e.g.,* Anderson v. Crawford, 202 Iowa 207, 207 N.W. 571 (1926); Nunn v. Justice, 278 Ky. 811, 129 S.W.2d 564 (1939).

[21] See, *e.g., In Re* Lambert's Estate, 183 Misc. 115, 46 N.Y.S.2d 905 (Surr. Ct. 1944); Saslow v. Saslow, 104 Ohio App. 157, 147 N.E.2d 262 (1957) (by implication).

[22] See, *e.g.,* Kennedy v. Alexander, 21 App. D.C. 424 (1903); Binnerman v. Weaver, 8 Md. 517 (1855).

until her remarriage (or death)—*and no longer.* Thus, it might well be said that the intent of the parties was to provide support for plaintiff only during that period which the parties contemplated she should need it, and that on her remarriage, payment of royalties would cease automatically by the self-contained limitation on the gift. Nevertheless, the court in construing the two clauses together found that the intent of the parties was to totally restrain marriage by means of a condition subsequent. After determining the nature of the provision, however, it is felt that the court quite properly refused to apply the rule which would except restraints on remarriage simply for the reason that the marriage to be restrained was a second marriage.

The problem faced by the court in the principal case is but an example of the difficulties encountered in attempting to construe such provisions in those jurisdictions which recognize the condition-limitation distinction.

North Carolina has recognized this distinction since the early case of *Foust v. Ireland.*[23] In that case the court construed the testamentary provision "so long as she remain my widow"[24] to be a condition, even though the language is usually considered to create a limitation. The intent of the testator was deemed to be controlling. In *Monroe v. Hall,*[25] words of similar import were construed as a limitation.

The next case before the court touching upon the subject was *Watts v. Griffin.*[26] There, the testatrix gave certain property to her sons, but if either of them married "a common woman"[27] they would not have an interest in the property. The court said they took a fee, subject to a condition, but that the condition was void because of uncertainty.

In the case of *In Re Miller,*[28] the court construed a will by which testator gave real property to his wife and daughter for their natural lives, "but in case either or both marry again, this becomes void."[29] At the death or marriage of both, the estate was to go to his son. In holding the provisions to be a *limitation,* the court stated:

> "[T]here is well-considered authority to the effect that, although the terms used may ordinarily import a condition if, from a perusal of the entire will and the facts and circumstances permissible in aid of a proper interpretation, it appears that the testator intended to make provision for a beneficiary while she remained single, and that the words were not used and intended as a restraint upon marriage, the qualifying words will be given effect according to testator's devise as intended and expressed in the will."[30]

[23] 46 N.C. 184 (1853).
[24] *Id.* at 186.
[25] 97 N.C. 206, 1 S.E. 651 (1887) ("as long as either of them is single").
[26] 137 N.C. 572, 50 S.E. 218 (1905).
[27] *Id.* at 573, 50 S.E. at 218.
[28] 159 N.C. 123, 74 S.E. 888 (1912).
[29] *Id.* at 124, 74 S.E. at 888.
[30] *Id.* at 127, 74 S.E. at 889.

However, in *Gard v. Mason*,[31] a provision in a fee simple deed to the effect that if the grantee married the property would revert back to the grantor or his heirs was held to be an absolute conveyance upon a condition subsequent in general restraint of marriage, and therefore void. The court distinguished the *Miller* case by saying that in that case there was language on the face of the will tending to show that a conditional limitation was intended.

The condition-limitation question was left undecided in *Bryan v. Harper*.[32] Here the will gave the residue, of whatever kind, to testator's wife and three children, but provided that "in the event my wife . . . shall remarry after my death and during the minority of either of my children by her,"[33] then her share of the estate would be equally divided among the children. The court said the "condition or limitation"[34] was valid because conditions against remarriage of the testator's widow are valid.

And, in *Griffin v. Doggett*,[35] after a life estate in the widow, real property was given in fee to testator's daughter provided she did not marry; but in case she should marry, to be sold and the proceeds divided among certain grandchildren. The court stated that it was not the purpose of the testator to prevent his daughter's marriage, but rather to aid her during celibacy. It then held that, though the words used would ordinarily denote a condition subsequent, under the rule of the *Miller* case they were to be construed as a limitation.

From the foregoing cases it is evident that the North Carolina court has looked primarily to the intent of the grantor or testator, and not to the form in which the gift was made. That is, the court first determines intent as drawn from the instrument and then applies the label best fitting that intent, regardless of the words used. It is also seen that in the *Bryan* case the court said that conditions otherwise void would not be so held when imposed by one spouse against the other. However, there was a strong dissent in that case, and the question may not be completely settled as yet.

Thus, as may be seen by a close examination of the principal case and the North Carolina cases, it is practically impossible to predict with any degree of certainty whether such provisions will be construed to be conditions or limitations. Both courts have said that they were trying to ascertain the intent of the donors; then they placed upon the provisions the labels which most nearly approached this apparent intention. It is submitted that this approach obscures the entire area of conditions and limitations pertaining to marriage.

[31] 169 N.C. 507, 86 S.E. 302 (1915).
[32] 177 N.C. 308, 98 S.E. 822 (1919).
[33] *Id.* at 308, 98 S.E. at 822.
[34] *Id.* at 309, 98 S.E. at 823.
[35] 199 N.C. 706, 155 S.E. 605 (1930).

A limitation may restrain marriage as effectively as a condition, despite the intention of the donor; and the public policy which is said to be the basis for holding void general and unreasonable restraints of marriage, is defeated by a mere choice of words. It would seem that if there are sufficient public policy reasons for declaring invalid conditions which are in general or unreasonable restraint of marriage, these same reasons should apply to limitations. It is apparent that at least some courts have been following this reasoning, and apply the label of limitation to those restraints which appear reasonable, while applying that of condition to those which appear unreasonable. However, this approach also creates such confusion that it becomes impossible to distinguish technically between conditions and limitations.[36]

Therefore, it is suggested that the labels be dropped and that the basis which is now being used be recognized for what it is: the *reasonableness* rule. As the rule against restraints of marriage applies not to all restraints, but only to those restraints which are unreasonable under the circumstances of the case, courts can reach the proper conclusion without purporting to rely on technical distinctions which, if properly applied, do not themselves assure a proper result. The validity of the restraint should depend not on whether it is total or partial, or whether it is in the form of a condition or a limitation, but whether in the particular case the provision serves a legitimate purpose.

Included in the factors determining the reasonableness of the restraint should be the relation of the parties. It has been said that when the person upon whom the restraint is designed to operate is the spouse of the testator or donor, the nature of their relationship serves to set this situation apart from others restraining remarriage and overcomes the public policy against remarriage.[37] However, it is submitted that the proper rule is that to uphold a restraint against a second marriage, the restraint imposed must be, under the circumstances, reasonable and intended to serve a proper and meritorious purpose;[38] for while argument might conceivably be made in favor of validating all restraints of marriage, none seems logical in favor of the rule which validates restraints on remarriage and declares invalid those against initial marriage.[39]

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[36] Knost v. Knost, 229 Mo. 170, 176, 129 S.W. 665, 666 (1910).
[37] *In Re* Lambert's Estate, 183 Misc. 115, 46 N.Y.S.2d 905 (Surr. Ct. 1944).
[38] Cowan v. Cowan, 247 Iowa 729, 75 N.W.2d 920 (1956).
[39] *In Re* Dettmer's Estate, 176 Misc. 512, 27 N.Y.S.2d 609 (Surr. Ct. 1941), *aff'd*, 262 App. Div. 1032, 30 N.Y.S.2d 333 (2d Dept. 1941), *aff'd*, 289 N.Y. 597, 43 N.E.2d 830 (1942).

Federal Jurisdiction—A Restriction on the Application of Section 301(a) of the Taft-Hartley Act

When does section 301(a) of the Taft-Hartley Act confer jurisdiction on the federal courts?[1] The act on its face confers jurisdiction over all suits between labor unions and employers, for breaches of collective bargaining contracts, whether the benefits of the suit inure primarily to the employer, the union or the individual employee. However, a study of the cases shows that the interpretation of section 301(a) of Taft-Hartley has not proved this simple.

A restrictive interpretation of section 301(a) was first approved by the Supreme Court in the case of *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*[2] In that case there was a dispute over the payment of 4,000 employees who were absent on a particular day. The employer refused to pay the employees this day's wages. The union contended that by the terms of the collective bargaining agreement, unless the absences were "furlough" or "leave of absence," the company must pay the wages for that day. The union requested a declaration of rights under the agreement. It was held that the union was suing for the wages of the employees which was a "uniquely personal" right of the employees and not one of primary concern to the union. Section 301(a) was held to confer federal jurisdiction only when the rights sought to be vindicated were of primary interest to the union. Mr. Justice Frankfurter, writing for the court, discussed at length the constitutional problems of section 301(a),[3] and

[1] Section 301(a) of the Taft-Hartley Act reads in part, "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." Labor Management Relations Act (Taft-Hartley) § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1952).

[2] 348 U.S. 437 (1955).

[3] The primary constitutional problem raised was whether there was a case "arising under" the Constitution, laws, and treaties of the United States when the Taft-Hartley Act gave the federal courts "bare" jurisdiction, without declaring any substantive law. The case of *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), dispelled the constitutional problem by directing the lower federal courts to "fashion a body of federal law" in this area. 353 U.S. at 451. In view of the fact that the restrictive interpretation of 301(a) originated as a briefly considered escape from constitutional issues, which have now been settled, the future of the *Westinghouse* limitation is questionable.

The constitutional problems of the *Westinghouse* and *Lincoln Mills* cases are discussed in Note, 36 N.C.L. REV. 215 (1958).

Added doubt is cast upon the force of the *Westinghouse* decision by the sharp split of the opinions. Justices Burton and Minton joined Justice Frankfurter in the constitutional entanglement. In the two concurring decisions, the Chief Justice and Justices Clark and Reed were not troubled by the constitutional problems of section 301(a). Rather they would put the decision squarely on the restrictive interpretation of the statute. Justices Douglas and Black dissented on the ground that no such restrictive interpretation could be placed on this section of Taft-Hartley.

clearly indicated that the case was decided upon the restrictive interpretation of this section to avoid a constitutional decision.

It should be noted that the sole reason that Justice Frankfurter gave for the distinction made in the *Westinghouse* case was that "nowhere in the legislative history did Congress discuss or show any recognition of the type of suit involved here . . . ."[4] In substance this is an assertion that there is no legislative intention shown. In the absence of legislative history to the contrary it would seem only reasonable to follow the plain meaning of the act.[5] Section 301(a) provides that an action may be brought in the federal court by "a labor organization representing employees," when there is an industry affecting interstate commerce. There is no indication that such a representative suit may be brought only when the union is primarily interested in the results.

An article by Professor Bunn, an eminent authority on federal jurisdiction, suggests additional reasons why the *Westinghouse* distinction is incorrect.[6] His argument is primarily based on the fact that a *Westinghouse* limitation of section 301(a) is contrary to Rule 17(a) of the Federal Rules of Civil Procedure. This rule provides that the real party in interest must bring the suit. It additionally provides that (1) when a party has made a contract for the benefit of a third party or (2) when a statute so authorizes, a party "may sue in his own name without joining with him the party for whose benefit the action is brought . . . ."[7] (1) The suit by a union for a right that is "primarily for the benefit of the individual employee" fits the third party beneficiary situation. The Supreme Court has held that "an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement . . . ."[8] (2) Section 301(b) of the Taft-Hartley Act gives the union the right to sue for the benefit of the employee.[9]

The *Westinghouse* limitation of section 301(a) to suits wherein the union is primarily interested has been repeatedly applied by the lower federal courts. Several cases have held that suits to enforce agreements to maintain union shops and check-off of union dues are primarily a union concern, and federal jurisdiction is allowed.[10] However, federal

[4] 348 U.S. at 461.

[5] Osaka Shosen Kaisha Line v. United States, 300 U.S. 98 (1937).

[6] Bunn, *Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247 (1957).

[7] FED. R. CIV. P. 17(a).

[8] J. I. Case Co. v. NLRB, 321 U.S. 332, 336 (1944).

[9] This section says, "Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States." Labor Management Relations Act (Taft-Hartley) § 301(b), 61 Stat. 156 (1947), 29 U.S.C. § 185(b) (1952).

[10] United Steelworkers v. Knoxville Iron Co., 162 F. Supp. 366 (E.D. Tenn. 1958); Burlesque Artists Ass'n v. I. Hirst Enterprises, Inc., 134 F. Supp. 203

jurisdiction has been denied because of the "uniquely personal" rights of the employee where the dispute involved extra work hours,[11] discharge of an employee who invoked the fifth amendment,[12] and reduction of an employee's pension allowance by the amount recovered under workmen's compensation.[13]

None of the above cases were ones where there had been an agreement between the union and the employer to arbitrate labor disputes. It is now necessary to discuss how the presence of such an agreement affects the restrictive *Westinghouse* interpretation of section 301(a). Prior to 1957, it had been settled in the lower federal courts that when there was an agreement to arbitrate, the union had standing to sue in the federal courts to force a recalcitrant employer to submit the dispute to arbitration.[14] The union was held to be asserting its right to performance of an agreement that governed the relation between the employer and the union, even if the dispute arose about a benefit "uniquely personal" to the employee.

In 1957, the Supreme Court, in the case of *Textile Workers Union v. Lincoln Mills*[15] and its two companion cases,[16] confirmed the holdings of the lower federal courts that the union had standing to bring an action for specific performance of an agreement to arbitrate. Section 301(a) of the Taft-Hartley Act was held to afford federal jurisdiction when the employer had refused to submit to arbitration, per the collective bargaining agreement, a dispute about workloads and work assignments.

The *Lincoln Mills* case did not overrule the *Westinghouse* distinction between "uniquely personal" and "union" causes of action. The Court merely fitted the arbitration situation into the framework of the distinction.[17]

(E.D. Pa. 1955); Durkin v. John Hancock Mutual Life Ins. Co., 11 F.R.D. 147 (S.D.N.Y. 1950); United Steel Workers v. Shakespeare Co., 84 F. Supp. 267 (W.D. Mich. 1949).

[11] Burlesque Artists Ass'n v. I. Hirst Enterprises, Inc., *supra* note 10.

[12] United Elec., Radio and Mach. Workers, Local 506 v. General Elec. Co., 231 F.2d 259 (D.C. Cir.), *cert. denied* 352 U.S. 872 (1956).

[13] United Steelworkers v. Pullman-Standard Car Mfg. Co., 241 F.2d 547 (3d Cir. 1957).

[14] Local 19, Warehouse Workers Union v. Buckeye Cotton Oil Co., 236 F.2d 776 (6th Cir. 1956) (arbitration of disputes over hours of work, wages and working conditions); Independent Petroleum Workers v. Esso Standard Oil Co., 235 F.2d 401 (3d Cir. 1956) (arbitration of new salary rates when there has been a new job classification); Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953) (arbitration of a dispute over separation pay).

[15] 353 U.S. 448 (1957).

[16] Goodall-Sanford, Inc. v. United Textile Workers, Local 1802, 353 U.S. 550 (1957); General Elec. Co. v. Local 205, United Elec., Radio and Mach. Workers, 353 U.S. 547 (1957).

[17] United Steelworkers v. Pullman-Standard Mfg. Co. 241 F.2d 547, 549, 550 (3d Cir. 1957); Textile Workers Union v. Cone Mills Corp. 116 F. Supp. 654, 659 (M.D.N.C. 1958).

But the broad sweep of the opinions may indicate that the Court was not entirely satisfied with the limitation on 301(a).[18] Moreover, the fact that the decision was written by Justice Douglas seems significant. He was one of the dissenters in the *Westinghouse* case.[19]

The lower courts have not found the application of the *Lincoln Mills* holding easy. In *Textile Workers Union v. Bates Mfg. Co.*,[20] the union sued for a wage increase purportedly authorized by the escalator clause in its contract with the employer. Pursuant to the collective bargaining agreement, the employer submitted to arbitration and there was an award in his favor. He refused to pay because he had won the award. The court held that since the arbitration agreement had been completely submitted to and refusal to pay was in compliance with the award, there was nothing more asserted by the union than a suit for wages, which was a "uniquely personal" right of the employees. Accordingly the court refused federal jurisdiction.[21]

In *Textile Workers Union v. Cone Mills Corp.*,[22] a district court sitting in North Carolina heard a case where there had been an arbitration award which decreed that the company must denominate a work stoppage a "shut down," not a holiday or vacation. This decree resulted in an award of unemployment benefits to the individual employees involved. The employer, in violation of the collective bargaining agreement, refused to abide by the decree and award of the arbitrator. The union, in the federal court, sought to force the employer to comply with the award. The court refused jurisdiction. A distinction was drawn between an action to specifically enforce an agreement to submit to arbitration, and enforcement of the terms of the award after the dispute

[18] The broadness of the dictum was recognized by the court in the *Cone Mills* case. 166 F. Supp. 654, 658. One commentator on the case has said, "The reasoning applies as fully to the simple suit for money as to the more complex one for arbitration." Bunn, *Lincoln Mills and the Jurisdiction to Enforce Collective Bargaining Agreements*, 43 VA. L. REV. 1247, 1257 (1957).

[19] The only reference to the *Westinghouse* case is in the form of a noncommittal footnote by way of distinction. 353 U.S. 448, 456, n. 6. In the light of Justice Douglas' former disapproval of the *Westinghouse* limitation on the application of section 301(a), it would seem that the footnote was added with disapproval. All but three of the members of the court joined in this opinion. The two concurring Justices, Burton and Harlan, seem more decidedly in favor of the *Westinghouse* limitation. They said, "The District Court had jurisdiction over the action since it involved an obligation running to a union—a union controversy—and not uniquely personal rights of employees sought to be enforced by a union." 353 U.S. 448, 460.

[20] 158 F. Supp. 410 (S.D. Me. 1958). Another case where there was a refusal to arbitrate a dispute over the discharge of an employee followed *Lincoln Mills* and allowed federal jurisdiction. Item Co. v. New Orleans Newspaper Guild, 256 F.2d 855 (5th Cir.), *cert. denied* 79 Sup. Ct. 98 (1958).

[21] An alternative ground for dismissal of the union's action could have been that the parties were bound to abide by the arbitrator's award. Such an award is binding so long as the arbitrator has not exceeded his jurisdiction. *Motor Haulage Co. v. International Brotherhood of Teamsters, Local 807*, 272 App. Div. 382, 71 N.Y.S. 2d 352 (1st Dept. 1947).

[22] 166 F. Supp. 654 (M.D.N.C. 1958).

has been submitted to arbitration and resolved. The former was held to be a right of primary interest to the union and there is jurisdiction.[23] But in the latter situation, federal jurisdiction was refused because the individual employee in whose favor the award was given was the party primarily interested.[24]

The *Bates* case had said that when there was complete compliance with the agreement to submit to arbitration *and the award of the arbitrator* the union no longer had a right to sue in the federal courts. The *Cone Mills* case went a step further, and refused jurisdiction when the employer had submitted to arbitration, but refused to abide by the award.

The Sixth Circuit Court of Appeals, in *A. L. Kornman Co. v. Amalgamated Clothing Workers*,[25] reached a contrary conclusion in a case practically on "all fours" with *Cone Mills*. The employer had refused to abide by the arbitration award which granted certain employees the disputed vacation pay. Holding that section 301(a) of Taft-Hartley conferred jurisdiction over the union's suit to enforce the award, the court recognized the distinction enunciated in the *Westinghouse* case, but held that the decision of the Supreme Court in *Lincoln Mills* controlled this case. The court stated that it made no difference whether the union sought the aid of the federal courts before or after submission to arbitrate; if there had not been complete compliance with the collective bargaining agreement section 301(a) afforded jurisdiction. The Court said,

> If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards. To hold otherwise would render the entire arbitration machinery merely time-consuming and useless. Authority to compel arbitration carries with it authority to enforce the resulting award.[26]

This case held that jurisdiction would be allowed until there was as complete compliance with the arbitration agreement as there was in the *Bates* case. Mere submission to the award and refusal to abide thereby was not sufficient to prevent federal jurisdiction, as held in the *Cone Mills* case.

CONCLUSION

It is respectfully submitted that the distinction between "uniquely personal" rights of the employee and those of the union is a questionable

[23] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
[24] Textile Workers Union v. Bates Mfg. Co., 158 F. Supp. 410 (S.D. Me. 1958).
[25] 264 F.2d 733 (6th Cir. 1959).
[26] *Id.* at 737.

restriction on the extent to which section 301(a) of the Taft-Hartley Act confers federal jurisdiction. Legislative history does not indicate that such a distinction was intended. Further, this distinction was the result of the Court's wanting to avoid constitutional issues which have now been resolved. Be this as it may, when this distinction is applied to the arbitration situation, the courts should find that there is a "uniquely personal" right of the employee only after there has been submission to arbitration and compliance with the award of the arbitrator. The result of the *Kornman* case seems preferable to that of the *Cone Mills* case.

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Labor Law—FLSA—Extending "In Commerce" Coverage

In *Mitchell v. Lublin, McGaughy & Associates*,[1] the respondent was an architectural and consulting engineering firm engaged in the preparation of plans and specifications for repair and construction of various interstate facilities, including air bases, roads, turnpikes, bus terminals, and radio and television installations. Also, it was engaged in the preparation of plans for the construction of homes, shopping centers, and commercial buildings. These plans and specifications consist of drawings and information needed for the estimation of cost and guidance to contractors in their bidding and in actual construction. The information is gathered by fieldmen at the sites of the projects and transmitted to the offices of the respondent. From this information draftsmen prepare the plans under the supervision of professional engineers. In addition to the draftsmen, clerks and stenographers also participate in the mechanical process of preparing the plans.

The U.S. Court of Appeals for the Fourth Circuit[2] held that the draftsmen, fieldmen, clerks, and stenographers, as a group, were neither "engaged in the production of goods for commerce" nor, because of the local nature of the business, "engaged in commerce" so as to come within the provisions of the Fair Labor Standards Act.[3] Under an almost identical set of facts the Eighth Circuit in *Mitchell v. Brown*[4] had held that the employer's draftsmen, fieldmen, clerks, and stenographers, as a group, were "engaged in commerce" and thus covered by the act. It was

[1] 358 U.S. 207 (1959).
[2] 250 F.2d 253 (4th Cir. 1957).
[3] Fair Labor Standards Act § 6(a), 52 STAT. 1060 (1938), as amended, 29 U.S.C. § 206(a) (1958):
"Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rate. . . ."
[4] 244 F.2d 359 (8th Cir. 1955), *cert. denied*, 350 U.S. 875 (1955). Apparently the only factual difference in the two cases was that in the *Brown* case an agent of the defendant inspected the work of the contractor.

because of this apparent conflict of circuits that the Supreme Court granted certiorari.

The Court confined itself to the issue of whether the employees were "engaged in commerce" and did not go into the question of whether or not they were "engaged in the production of goods for commerce." Whether an employee is covered by the Act is determined by his activity and not by the nature of the business of the employer.[5] The question was whether the activities of the employees in the *Lublin* and *Brown* cases were of a sort that facilitated the operation of instrumentalities of commerce. The Court deemed the employees to be "so closely related to commerce as to be a part of it," in the language of *McLeod v. Threlkeld,*[6] and concluded that they were covered.

The court of appeals in the *Lublin* case had found the employer's business to be of a local nature, thereby giving color to the activities of the subordinates, the draftsmen, fieldmen, clerks and stenographers and had said that the court in the *Brown* case had ignored this element. The *Brown* court had considered the work of these same employee categories to be not "isolated local activity" but "directly and vitally related"[7] to interstate commerce. The fact that an agent of the employer was materially aiding the employer's clients by checking materials and workmanship of the contractor on interstate jobs was afforded considerable weight. These two cases point up the difficulty of determining coverage in the fringe area of the "engaged in commerce" clause.

Early cases[8] held that employees who *operated* facilities of interstate commerce were covered by FLSA. In *Overstreet v. North Shore Corp.,*[9] coverage was extended to include employees who maintained and repaired a toll road and draw bridge that connected with an interstate highway. The maintenance and repair of a facility of interstate commerce was deemed to be so closely related to such commerce as to be a part of it. In *J. F. Fitzgerald Constr. Co. v. Pedersen,*[10] it was held that employees of an independent contractor who helped repair and replace washed out bridge abutments for a railroad were "engaged in commerce" and cited as authority the *Overstreet* case. Thus *Fitzgerald*

[5] McLeod v. Threlkeld, 319 U.S. 491 (1943); A. B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942).

[6] *Supra* note 5. In a five to four decision the Court held that a cook hired by an independent contractor to move with and feed the maintenance gang of a railroad was not covered. The dissent in *McLeod* put up a vigorous protest that commerce covers a whole field of which transportation is only a part and felt that to hold the cook not covered was to construe the "engaged in commerce" clause too narrowly.

[7] 224 F.2d at 363.

[8] Culkin v. Glenn L. Martin Neb. Co., 97 F. Supp. 661 (D.C. Neb. 1951), *aff'd,* 197 F.2d 981 (8th Cir. 1952), *cert. denied,* 344 U.S. 866 (1952), *rehearing denied,* 344 U.S. 888 (1952); Torres v. American R. Co. of Puerto Rico, 66 F. Supp. 745 (D.C. Puerto Rico 1946).

[9] 318 U.S. 125 (1943).

[10] 324 U.S. 720 (1945).

extended coverage to the employees of independent contractors where the work involves replacing or repairing the instrumentality of interstate commerce.[11]

A guidepost case in delineating the fringe area of coverage under the "engaged in commerce" clause is *McLeod.* In that case coverage was denied; however, under the "production of goods for commerce" clause it has been held in a similar fact situation that the employee in question was covered.[12] A further study of the cases points up the broader interpretation given to the "production of goods for commerce" clause.[13] And this is true despite the fact, pointed out by the *McLeod* dissent, that the relevant tests for determining scope of coverage of the two clauses in the act are cast in similar language. Thus under the "production" clause, in *Kirschbaum v. Walling,* it is work which has "such a close and immediate tie with the process of production for commerce as to be an essential part of it." Under the "in commerce" clause, in *Overstreet v. North Shore Corp.* work that "is so intimately related to interstate commerce as to be in practice and in legal contemplation a part of it" brings the employee under coverage as "engaged in commerce."

In *Mitchell v. C. W. Vollmer & Co.,*[14] the court found the employees covered under the "in commerce" clause where they were engaged in the

[11] But see Nieves v. Standard Dredging Corp., 152 F.2d 719 (1st Cir. 1945), where a lapse in the general extension of coverage occurred with the "new construction" theory. There, the employees were performing dredging operations for a graving dock and entrance channel site where previously there had been a swampy, uninhabited wilderness. The employees were held not covered because their project had never been used as an instrumentality of interstate commerce and thus they were deemed to be neither in commerce nor its movement so as to be a part thereof. The original construction was felt to be of a local nature until it is made a part of an instrumentality of interstate commerce.

[12] Consolidated Timber Co. v. Womack, 132 F.2d 101 (9th Cir. 1942) (Cook who stayed with and fed a timber camp gang was covered because he was engaged in a process or occupation necessary to the production of goods for commerce.) *But cf.* Skidmore v. John J. Casale, Inc., 160 F.2d 527 (2nd Cir. 1947), *cert. denied,* 331 U.S. 812 (1947), where it was held that the employee was not engaged in commerce when he cared for washrooms and lockers in a garage which serviced trucks used both in interstate and intrastate commerce.

[13] A. B. Kirschbaum Co. v. Walling, 316 U.S. 517 (1942) (Employees engaged in the operation and maintenance of a loft building in which quantities of goods were manufactured and sold in interstate commerce were held to have such a "close and immediate tie with the process of production for commerce" as to be regarded as "necessary to the production of commerce."); Borden Co. v. Borella, 325 U.S. 679 (1945) (Maintenance employees of an office building where only administrative work was done by a firm, who owned the building but rented out part of it, were covered because the work was necessary to production of goods for commerce.). The Court said it did not make a difference whether the goods are actually produced in the building or production administered, managed, and controlled in the building. *But see* 10 East 40th St. Bldg., Inc. v. Callus, 325 U.S. 578 (1945) (The maintenance employees of the owner of an office building which rented office space to all comers were not covered because the renting of office space was considered of a local nature.)

[14] 349 U.S. 427 (1954).

construction of an alternate waterway to relieve congestion of an existing interstate waterway. By finding that the construction of the alternate waterway was in effect a redesigning of an existing facility of interstate commerce, the court removed the local activity tag of new construction.[15] The practical effect of this case, in the light of the cases previously discussed, was to enlarge the "engaged in commerce" clause.

The holding in the *Lublin* case has expanded the coverage of the FLSA by further enlarging the scope of the "engaged in commerce" section. The test used by the Court is the same one used in *Mitchell v. Vollmer,* namely "whether the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce so as to be, in practical effect, a part of it rather than isolated local activity"[16]—practically the same test used in *McLeod* and *Kirschbaum.*

The Court of Appeals in *Lublin* also cited the *Vollmer* case, but distinguished it on the grounds that the employees in *Vollmer* were employees of the construction contractor, whereas the employees in *Lublin* were employees of an architectural engineering contractor who were more distantly removed from the interstate instrumentality. In effect, the Supreme Court has ruled that it makes no difference who the employer of the employees was in these two situations, and that the nature of the work of the employees would bring them within the "engaged in commerce" section in either case. The Supreme Court said:

> [S]uch work is directly and vitally related to the functioning of these facilities because, without the preparation of plans for guidance, the construction could not be effected and the facilities could not function as planned. In our modern, technologically oriented society, the elements which combine to produce a final product are diffuse and variegated. Deciding whether any one element is so directly related to the end product as to be considered vital is sometimes a difficult problem. But plans, drawings and specifications have taken on greater importance as the complexities of design and bidding have increased. Under the circumstances present here, we have no hesitancy in concluding that the preparation of the plans and specifications was directly related to the end products and that the employees whose activities were intimately related to such preparation were 'engaged in commerce.'[17]

The *Lublin* case would seem to be a new guidepost in the fringe area of coverage under the "engaged in commerce" clause. The activities of the draftsmen, fieldmen, clerks, and stenographers here are not such that they directly facilitate the functioning of an interstate instrumentality by doing the work that improves or maintains these instrumentalities. These

[15] See note 11 *supra.*
[16] 349 U.S. at 429.
[17] 358 U.S. at 212.

employees work on the blueprints and drawings which are used by contractors to improve such facilities of interstate commerce, one step removed. The work of these employees is so directly and vitally related to the functioning of a facility of interstate commerce, however, as to be, in practical effect, a part of it rather than isolated local activity. The clerks and stenographers were as much an aid in preparing the blueprints and drawings as were the fieldmen and draftsmen because all were necessary for the final product.

While enlarging the "in commerce" section, the Court refused to deal with the "production of goods" question presented to them by the Fourth Circuit. From this refusal, a negative implication may be drawn that the Court is restricting the "production of goods" section in conformity with the intentions of the 1949 Amendments.[18]

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Railway Labor Act—Rights of Minority Groups to Membership in Labor Union Acting as Statutory Bargaining Agent

Several Negro firemen employed by various southern railroads brought a class action in federal court, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen, their statutory bargaining representative under the Railway Labor Act. Negro firemen are excluded from membership in the Brotherhood because its constitution limits membership to applicants "white born." *Held,* that the action be dismissed. The Brotherhood is a private association whose membership policies are not subject to judicial control; the plaintiffs have failed to show that an agency of the federal government is responsible for their plight.[1]

The great majority of unions in this country do not practice racial discrimination in membership.[2] At least thirty-nine union constitutions,

[18] These changed the words "necessary" to "closely related and directly essential" as a limitation upon the "fringe area" under the production clause. 29 C.F.R. § 776.17(a) (1958) (The Administrator of the Wage and Hour Division of the U.S. Department of Labor has accepted this legislative history to the effect that the 1949 amendment is intended to narrow the scope of coverage under the "engaged in production of goods for commerce" clause.) See 95 Cong. Rec. 14880 (1949) (remarks of Senator Taft). 95 Cong. Rec. 11001 (1949) (remarks of Congressman Lucas).

[1] Oliphant v. Brotherhood of Locomotive Firemen and Enginemen, 262 F.2d 359 (6th Cir. 1958), *cert. denied,* 359 U.S. 935 (1959).

[2] Summers, *Admission Policies of Labor Unions,* 61 Q.J. ECON. 66-107 (1946). See generally, NORTHRUP, ORGANIZED LABOR AND THE NEGRO (2d ed. 1944). As one of its "Objects and Principles," the AFL-CIO in its constitution undertakes "to encourage all workers without regard to race, creed, or color or national origin to share in the full benefits of union organization." AFL-CIO CONST. art. II, § 4. This provision was criticized on the grounds that it did not recognize the right of all persons to "full membershp" in trade unions. HANDBOOK OF UNION GOVERN-

covering 4,320,551 persons, contain specific provisions which require that all persons qualified for membership are to be admitted without regard to their race, creed, or color.[3] The constitution of the United Steel Workers of America, for example, provides that "all working men and working women, regardless of race, creed, or color, or nationality . . . are eligible to membership."[4] This seems to be the general practice among industrial unions.[5] A substantial minority of unions, however, generally limited to skilled craft and railroad unions, continue to exclude Negroes and certain other racial groups either by explicit provision or by general practice.[6] The big-four railroad brotherhoods, which control most of the workers in the operating department of the major railroads, have explicit constitutional prohibitions which bar Negroes from membership.[7] These four brotherhoods have a combined membership of 414,197.[8] Some unions do not exclude Negroes entirely, but relegate them to inferior locals, under the jurisdiction of adjoining white locals.[9] Others, especially in the South, simply maintain "separate but equal" locals for whites and non-whites.[10]

Though the number of unions with racial discriminatory policies is numerically small, the problem is of considerable importance because of

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MENT STRUCTURE AND PROCEDURES, NATIONAL INDUSTRIAL CONFERENCE BOARD 17 (1955). For the full text of the AFL-CIO constitution as ratified by the AFL-CIO convention, December 5, 1955, see 36 L.R.R.M. 164 (1956). The AFL-CIO has taken some concrete steps toward eliminating racial discrimination in union membership. Hutchinson, *The Constitution and Government of the AFL-CIO*, 46 CALIF. L. REV. 739, 743 & n. 10 (1958).

[3] HANDBOOK, *op. cit. supra* note 2, at 64. The 194 unions covered by the survey have a declared membership of 17,513,798, approximately 16½ million of whom are in the United States. *Id.* at 7.

[4] *Id.* at 64.

[5] The CIO, organized on an industrial basis, has made non-discrimination one of its basic principles, and has countenanced no internationals which exclude workers because of color or race. NORTHRUP, *op. cit. supra* note 2, at 14-16. No CIO union has a constitutional prohibition barring Negroes and other racial minorities. Fourteen unions, with nearly half of the CIO membership, have constitutional provisions containing anti-discrimination clauses. HANDBOOK, *op. cit. supra* note 2, at 63, Tables 30 and 31.

[6] A survey of 185 international unions revealed that 32 unions with a total membership of 2,500,000 excluded Negroes either by constitutional provision or established practice. Summers, *supra* note 2.

[7] HANDBOOK, *op. cit. supra* note 2, at 64. A similar provision in the constitution of the National Postal Transport Association, limiting membership to "Caucasians or North American Indians only," was recently repealed. AFL-CIO News, Oct. 4, 1958, p. 6, col. 4.

[8] Brotherhood of Locomotive Engineers, 77,197; Brotherhood of Locomotive Firemen and Enginemen, 100,000; Brotherhood of Railroad Trainmen, 205,000; and Order of Railway Conductors and Brakemen, 32,000. SOURCEBOOK OF UNION GOVERNMENT STRUCTURE AND PROCEDURES, NATIONAL INDUSTRIAL CONFERENCE BOARD 218-219 (1956).

[9] Summers, *supra* note 2, at 69. For some cases involving such auxiliary locals, see, James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946).

[10] HANDBOOK, *op. cit. supra* note 2, at 17. See, *e.g.*, Davis v. Brotherhood of Ry. Carmen, 272 S.W.2d 147 (Tex. Civ. App. 1954).

the nature of the unions involved. The skilled craft unions and the railroad brotherhoods are among the most powerful unions in the United States and control many of the higher paying and more desirable jobs.[11]

The Importance of Membership in the Union

Under the Railway Labor Act,[12] the majority of employees of a craft or class elect a bargaining representative for the entire craft or class. This representative, usually a labor union, is then certified by the National Mediation Board. Once such a union is certified, it becomes the exclusive bargaining representative of all employees in the unit.[13] The individual employee loses all freedom to make his own contract or to bargain in his own behalf. The compulsory power of the statutory bargaining union extends both to the making of the collective bargaining contract and, in practice, to the settlement of all grievances arising under the contract.[14] In the negotiation and administration of the collective bargaining contract, the conflicting interests of different groups are resolved, and the available gains distributed among the various workers. Since the non-union worker cannot attend meetings of the union or vote for the union officials who negotiate and administer the collective bargaining contract, he cannot be assured that his interests will always be protected.[15] This is especially true where all of the members of a minority race are excluded from the union.[16]

Court decisions have made it clear that a union certified as the statutory bargaining representative must fairly represent both its members and non-members.[17] However, the history of the railway labor movement shows that the all-white brotherhoods have not only failed fairly to represent the interests of the non-member Negroes, but have sought, through overt and covert means, to drive them from their jobs.[18] The

[11] See generally, NORTHRUP, *op. cit. supra* note 2, at 6-34, 49-100, 211-17, 233, 234. For a detailed analysis of the effects of discrimination in economic terms, see BECKER, THE ECONOMICS OF DISCRIMINATION (1957).

[12] 44 Stat. 577 (1926), as amended, 45 U.S.C. §§ 151-63 (1952).

[13] "The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining." Steele v. Louisville & N. R.R., 323 U.S. 192, 200 (1944), *citing* Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944).

[14] For a discussion of the character of collective bargaining, see Summers, *The Public Interest in Union Democracy,* 53 NW. U.L. REV. 610 (1958).

[15] "(T)he union is the workers' sole spokesman in this process of industrial government which so completely regulates his working life. The union makes critical choices which bind him and control his very livelihood, and his only voice of preference or protest is within the union." *Id.* at 617.

[16] Raugh, *Civil Rights and Liberties and Labor Unions,* 8 LAB. L.J. 874 (1957); Hewitt, *The Right to Membership in a Labor Union,* 99 U. PA. L. REV. 919 (1951); Summers, *The Right to Join a Union,* 47 COLUM. L. REV. 43 (1947).

[17] See 36 N.C.L. REV. 529 (1958) for a discussion of these cases.

[18] The late Chief Judge of the Fourth Circuit, Judge John J. Parker, in a case involving one of the collective bargaining contracts negotiated by the Locomotive

remedy envisioned by the Court in *Steele v. Louisville & N. R.R.*[19] and related cases has not put an end to the abuses which the Court recognized as existing.[20]

Remedy: Fair Employment Practices Commissions

Perhaps the most effective remedy in dealing with the problem of racial discrimination in union membership has been the state Fair Employment Practice Laws.[21] Several states have legislation creating specialized commissions which have as one of their purposes the elimination of discrimination in employment.[22] These statutes generally make

Firemen (BLFE), traced a portion of this history as follows:

> (T)he record in the case before us . . . makes [it] clear that the agreement of February 18, 1941, was obtained in the course of a campaign which had been conducted by the Brotherhood for a number of years to eliminate Negro firemen from the service of the railroads. Prior to 1919, when the first collective bargaining agreement was negotiated by the Brotherhood, at least 85% of the locomotive firemen on the defendant railroad were Negroes. Although there had been agitation by the Brotherhood prior to that time for the elimination of Negroes from the service, the agitation seems to have become more effective when the Brotherhood was recognized as bargaining agent, and in 1927 it secured an agreement that one-third of the firemen should be promotable or white firemen. Two years later, in 1929, this proportion was raised by agreement to 50%. Later, following a campaign openly designed to get rid eventually of all the Negro firemen, the agreement here complained of was negotiated; and today only 35% of the firemen in the service of defendant railroad are Negroes. Rolax v. Atlantic Coast Line R.R., 186 F.2d 473, 476 (4th Cir. 1951).

For the history of racial discrimination in trade unions, see NORTHRUP, ORGANIZED LABOR AND THE NEGRO, *supra* note 2.

[19] 323 U.S. 192 (1944).

[20] Consider the Supreme Court's comments on the activities of the BLFE several years after the decision in *Steele, supra* note 19: "It is needless to recite additional details of the present case. What it adds to the governing facts of the earlier cases is a continuing and willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen." Graham v. Brotherhood of Locomotive Firemen and Enginemen, 338 U.S. 232, 234 (1949).

[21] For studies of the various state anti-discrimination commissions, see: 3 RACE REL. L. REP. 1085-1108 (1958); Meiners, *Fair Employment Practices Legislation*, 62 DICK. L. REV. 31-69 (1957); STAFF OF SUBCOMM. ON LABOR AND LABOR MANAGEMENT RELATIONS, SENATE COMM. ON LABOR AND PUBLIC WELFARE, 82D CONG., 2D SESS., STATE AND MUNICIPAL FAIR EMPLOYMENT LEGISLATION (Comm. Print 1952).

[22] ALASKA COMP. LAWS ANN. §§ 43-5-1 to -10 (Cum. Supp. 1958); COLO. REV. STAT. ANN. §§ 80-24-1 to -8 (Supp. 1957); CONN. GEN. STAT. §§ 7400-07 (Supp. 1955); ILL. ANN. STAT. ch. 127, §§ 214.1-.5 (Smith-Hurd 1953); IND. ANN. STAT. §§ 40-2301 to -2306 (1952); KAN. GEN. STAT. ANN. §§ 44-1001 to -1008 (Supp. 1957); MD. ANN. CODE art. 49B §§ 1-10 (1957); MASS. ANN. LAWS ch. 6, §§ 17, 56 (1952); MASS. ANN. LAWS ch. 151B, §§ 1-10 (1957); MASS. ANN. LAWS ch. 151C, §§ 1-5 (1957); MICH. STAT. ANN. §§ 17.458(1)-(11) (Supp. 1957); MINN. STAT. ANN. §§ 363.01-.13 (1957); MO. SESS. LAWS 1957, S.C.S.H.B. 125, at 299; N.J. STAT. ANN. §§ 18-25-1 to -28 (Supp. 1957); N.M. STAT. ANN. §§ 59-4-1 to -14 (1953); N.Y. EXECUTIVE LAW §§ 290-301; N.Y. EDUC. LAW § 313; ORE. REV. STAT. §§ 651.010-.030, 659.010-.990 (1957); PA. STAT. ANN. tit. 43, §§ 951-963 (Supp. 1957); R.I. GEN. LAWS ANN. §§ 28-5-1 to -39 (1956); WASH. REV. CODE §§ 49.60.010-.320 (1957); WIS. STAT. §§ 15.85, 15.855 (1957) (Governors Commission on Human Rights); WIS. STAT. §§ 101.02-06, 111.31-.37 (1957) (Industrial Commission). Two new states have recently enacted FEPC bills—California and Ohio. Both laws ban discriminatory practices by labor organizations and both have enforcement provisions. AFL-CIO News, Apr. 25, 1959, p. 1, col. 2.

unlawful certain practices of labor organizations, notably, denying membership to members of minority groups on the basis of race, religion, color or national origin, expelling such persons from membership, or discriminating against them in any manner.[23] Some of these commissions use the "education" approach alone,[24] while others have the power to use "enforcement" procedures when persuasion fails.[25] Although the enforcement procedures are seldom employed,[26] their importance is not to be underestimated. Experience has shown that better results are obtained by persuasion backed up by the right to go into court and get a cease and desist order.[27]

In the limited area in which they operate, the Fair Employment Practice laws are a satisfactory remedy.[28] However, since they extend only to state boundaries, and only a few states have such laws, the problem still remains a national one. Also, it is extremely unlikely that such laws will ever be enacted in any of the Southeastern states.[29]

[23] See, *e.g.*, this provision of the Alaska Code:
(I)t shall be an unlawful employment practice:
. . . .
2. For a labor organization, because of the race, religion, color or national origin of any individual to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by the employer. ALASKA COMP. LAWS ANN. § 43-5-4 (Cum. Supp. 1958).

[24] Ill., Ind., Kan., Md., and Mo. The "education" approach involves a process of informing the public of the scope of the protection against discrimination afforded by the law and of persuading the public to avoid discriminatory practices. The Kansas statute, for instance, merely empowers its commission "to discourage discrimination in employment because of race, religion, color, national origin or ancestry, either by employers, labor organizations, employment agencies or other persons as hereinafter provided." KAN. GEN. STAT. ANN. § 44-1003 (Supp. 1957).

[25] Alaska, Colo., Conn., Mass., Mich., Minn., N.J., N.M., N.Y., Ore., Pa., R.I., Wash., Wis. By "enforcement" power is meant the authority to issue an order requiring one who has been found to be acting in a discriminatory manner to cease and desist from such unlawful practice In these states, the commission may secure a court decree for enforcement of its orders. 3 RACE REL. L. REP. 1085 (1958).

[26] A study of six thousand cases handled over a period of seven years by ten operating commissions shows that only seven culminated in formal hearings and only two of these actually reached the courts. Leland, *We Believe in Employment on Merit, But . . .*, 37 MINN. L. REV. 246, 262 (1953).

[27] *Ibid.* "It is significant that four states that began with laws designed to secure voluntary compliance have shifted over to laws with enforcement provisions. It is interesting to contrast the results achieved under the New York law, which can be enforced, and the Federal FEP which could not. Under the latter certain railroad unions not only refused to alter their policies of Negro exclusion, but also refused even to attend the hearings to which the commission called them. In New York they have eliminated the discrimination and admit members without regard to color." Meiners, *supra* note 21, at 37.

[28] Note that within two years after the New York Law Against Discrimination became effective, racial restrictive clauses in the constitutions of the railroad brotherhoods were either removed or made inoperative in the state of New York, and later, in all states having laws prohibiting such discrimination. Carter, *Practical Consideration of Anti-Discrimination Legislation—Experience Under the New York Law Against Discrimination,* 40 CORNELL L.Q. 40, 51-52 (1954).

[29] None of these states have what could be called a fair employment practice

The only federal Fair Employment Practice Committee, established by executive order in 1941,[30] had no real enforcement power.[31] Though it closed nearly 5,000 cases during its five year existence,[32] the Committee was ineffective against the discriminatory practices of the great railroad brotherhoods.[33] Other executive commissions established by Presidents Truman and Eisenhower are generally limited to discrimination in government service and government contracts.[34] Congress has never enacted a federal Fair Employment Practice Law, and the probabilities of its doing so in the near future appear very slight.[35]

Administrative Remedy

Controversies between an employee or group of employees and a carrier or carriers arising out of collective bargaining agreements in the railway industry are decided by the National Railroad Adjustment Board.[36] The Adjustment Board is composed of thirty-six members, one-half of whom are selected by the rail carriers and the other half by the labor unions. The awards of the Adjustment Board are final and binding upon the parties to the dispute, except in so far as they contain money awards.[37] Thus, if a party succeeds in getting his case before

act. Consider, rather, a South Carolina statute which provides a penalty of up to $100 for permitting persons of different races to work together within the same room in Textile Mills. S.C. CODE § 40-452 (1952).

[30] Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941).

[31] The Commission was limited to receiving complaints, investigating them, and making recommendations. The Commission could have recommended that parties refusing to cease discriminatory practices should have their war contracts cancelled, but apparently this procedure was not followed. Meiners, *supra* note 21, at 54.

[32] Comment, 56 YALE L.J. 837, 842 (1947).

[33] NORTHRUP, ORGANIZED LABOR AND THE NEGRO 74-75 (2d ed. 1944). The railroad brotherhoods were not alone in defying the Committee. Twenty-six of 35 orders issued by the commission to employers were not complied with; of 10 orders issued to trade unions, only one complied. Comment, 56 YALE L.J. 837, 842 (1947).

[34] A Fair Employment Board within the Civil Service Commission was established by President Truman to prevent discrimination in government service. Exec. Order No. 9980, 13 Fed. Reg. 4311 (1948). President Eisenhower replaced this with the "President's Committee on Government Employment Policy." Exec. Order No. 10590, 20 Fed. Reg. 409 (1955). President Truman also established the "Committee on Government Contract Compliance," Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951), to improve means of obtaining compliance with the requirement that nondiscrimination clauses be put in government contracts. This has been continued and strengthened by President Eisenhower. See Exec. Order No. 10557, 19 Fed. Reg. 5655 (1954). For a study of these nondiscrimination clauses, see Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 VA. L. REV. 837 (1957).

[35] The most advanced step in this direction made by Congress was the enactment of the Civil Rights Act of 1957, 71 STAT. 634 (1957). This is not closely comparable to the state FEP laws and is concerned primarily with the right to vote. See Comment, 56 MICH. L. REV. 619 (1958).

[36] Railway Labor Act, 48 Stat. 1191 (1934), 45 U.S.C. § 153 (1952); ADMINISTRATION OF THE RAILWAY LABOR ACT BY THE NATIONAL MEDIATION BOARD, GOVERNMENT PRINTING OFFICE 26-29 (1958) [hereinafter cited as ADMINISTRATION OF THE RAILWAY LABOR ACT].

[37] ADMINISTRATION OF THE RAILWAY LABOR ACT, *supra* note 36, at 29.

the board and loses, he has no right of appeal. This Board, composed of partisans, one-half of whom are appointed by organizations which do not afford Negroes equal status, is an ineffective remedy for Negro employees seeking redress against the discriminatory practices of the railroad brotherhoods.[38]

The National Mediation Board has the authority to resolve disputes among employees as to the designation of the bargaining representative for a particular craft or class.[39] Unlike the Adjustment Board, the National Mediation Board is an independent agency unaffected by partisan interests.[40] However, it has not provided an effective remedy against racial discrimination in the railroad industry.[41]

The National Labor Relations Board has refused to establish bargaining units based on race[42] and has ruled that the segregation of white and Negro employees into separate locals is not per se a form of racial discrimination.[43] In several cases, the Board has given warning that it will consider revoking certification of a union which denies "adequate representation" to all employees in the bargaining unit for which it has exclusive representation.[44] However, it appears that the Board has not found the facts of any case sufficient to justify revoking any union certification.[45] Apparently, the Board's present position is that discriminatory admission policies of a union will not be considered in determining the appropriate bargaining unit.[46]

[38] For a particularly critical review of some of the Adjustment Board's decisions, see NORTHRUP, ORGANIZED LABOR AND THE NEGRO, *supra* note 2, at 66-71, 101, 248-249.

[39] ADMINISTRATION OF THE RAILWAY LABOR ACT, *supra* note 36, at 11, 14-25.

[40] The Board is composed of three members appointed by the President of the United States with the advice and consent of the Senate. The Board has a staff of mediators in the field, all of whom are selected through civil service. *Id.* at 11.

[41] NORTHRUP, *supra* note 2, at 100. See Brotherhood of Ry. & SS. Clerks v. United Transp. Serv. Employees, 137 F.2d 817 (D.C. Cir. 1943), *rev'd on other grounds*, 320 U.S. 715 (1943).

[42] United States Bedding Co., 52 N.L.R.B. 382, 388 (1943) (union admitted both whites and Negroes without discrimination, but skilled whites were outnumbered in an industrial unit by skilled Negroes).

[43] Atlantic Oak Flooring Co., 62 N.L.R.B. 973 (1945).

[44] *Id.* at 975-76; General Motors Corp., 62 N.L.R.B. 427, 431 (1945); Southeastern Portland Cement Co., 61 N.L.R.B. 1217, 1219 (1945) ("equal representation"); Carter Mfg. Co., 59 N.L.R.B. 804, 806 (1944) ("equal representation").

[45] See Aaron and Komaroff, *Statutory Regulation of Internal Union Affairs*, 44 ILL. L. REV. 425, 439 (1949).

[46] See Balaban and Katz (Princess Theatre), 87 N.L.R.B. 107 (1949); Norfolk So. Bus Corp., 83 N.L.R.B. 115 (1949) (employer cited for refusal to bargain with a local of the Machinists; employer defended on the grounds that it could not be required to bargain with the local because a majority of the employees in the bargaining unit were Negroes and therefore not eligible for membership in the union. This defense was not sustained.); Aaron and Komaroff, *supra* note 45, at 438-46. This view finds some support in § 158 of the Labor Management Relations Act, which makes it an unfair labor practice for a labor organization to restrain employees in the exercise of certain rights, but provides that "this paragaph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 61 Stat. 140 (1947), 29 U.S.C. § 158(b)1(A)

Remedy: Judicial

The United States Supreme Court has not ruled on the question whether a member of a racially excluded group may demand admittance to a union acting as the exclusive bargaining representative for the class of which he is a member.[47] The Supreme Court of California, in a line of cases beginning with *James v. Marinship Corporation*,[48] has held that where the union has a closed shop agreement with the employer, it cannot maintain an arbitrarily closed or partially closed union, but must admit to full membership those of a minority race if they are otherwise qualified.[49] The Supreme Court of Kansas has held that the denial of full membership privileges in the statutory bargaining representative certified under the Railway Labor Act is a violation of rights guaranteed by the fifth amendment to the United States Constitution.[50] In contrast, the Court of Civil Appeals of Texas refused to order plaintiffs admitted to a white local of the Brotherhood of Railway Carmen of America where the Brotherhood maintained a "separate but equal" local for Negro employees.[51] And, in a recent Wisconsin case,[52] the court refused to order a bricklayers' union to admit persons excluded from membership solely because of race. This case is of particular importance because it involves the Wisconsin Fair Employment Statute. The Commission had conducted hearings and recommended that the union admit the plaintiffs to membership. The court held that the recommendations of the Com-

(1952). Compare this express statutory provision with Justice Stone's dictum in the *Steele* case, referring to the Railway Labor Act: *"While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership,* it does require the union, in collective baragining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." (Emphasis added.) Steele v. Louisville & N. R.R., 323 U.S. 192, 204 (1944).

[47] In the representation cases, although it was recognized that Negroes were not members of the union involved, whether or not they could demand admittance to the union was not directly passed on. The representation cases dealt with the duty of the union toward employees once it became the statutory bargaining representative. See note 17 *supra.*

[48] 25 Cal. 2d 721, 155 P.2d 329 (1944).

[49] See, *e.g.*, Thorman v. International Alliance of Theatrical Stage Employees, 49 Cal. 2d 638, 320 P.2d 494 (1958), *modifying and affirming* 149 Cal. Adv. App. 116, 307 P.2d 1026 (App. Dep't 1957); Riviello v. Journeymen Barbers Union, 88 Cal. App. 2d 499, 199 P.2d 400 (Dist. Ct. App. 1948); Williams v. International Bhd. of Boilermakers, 27 Cal. 2d 586, 165 P.2d 903 (1946); Bautista v. Jones, 25 Cal. 2d 746, 155 P.2d 343 (1944).

[50] Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946). Here the plaintiffs were Negro workmen employed in the railway shops of an interstate carrier. The plaintiff's allegations that they were denied equal privileges of participation and representation in matters within the purview of the National Railway Act and assigned to separate lodges under the jurisdiction of the while local were held to state a cause of acton. The court said that the actions complained of constituted a violation of individual rights guaranteed by the fifth amendment and that injunction was a proper remedy if the facts were proved.

[51] Davis v. Brotherhood of Ry. Carmen of America, 272 S.W.2d 147 (Tex. Civ. App. 1954).

[52] Ross v. Ebert, 275 Wis. 523, 82 N.W.2d 315 (1957).

mission were not judicially enforceable,[53] and that the action of the union was not *state action* so as to subject it to the requirements of the fourteenth amendment.[54]

In the principal case, the court neither discussed nor cited any of the above cases. Though all of them are perhaps distinguishable from *Oliphant*,[55] *Betts v. Easley*[56] is strikingly similar to the principal case on its facts. Both cases involved railway labor unions charged with a statutory duty of representing the employees bringing the suits. In both cases the essential wrong is the denial of the right to participate in union affairs incident to employment. In both cases the denial was based solely on race. Only the method chosen was different. If the partial exclusion of the *Betts* case was unlawful, certainly the present case is stronger on the facts for the plaintiffs, since their status is one of *total* exclusion.

It is submitted that the Kansas Court in *Betts* took a more realistic attitude toward the denial of full membership privileges than did the Sixth Circuit in the principal case. It would seem that the same reasons which prohibit a union acting as statutory bargaining agent from negotiating a racially discriminatory contract should also prohibit it from arbitrarily denying membership privileges to a group of the employees it represents; also, that a union which derives its exclusive power to represent a class by virtue of a federal statute cannot excuse its discriminatory admission policies on the grounds that it is a private voluntary organization. In denying relief to the plaintiffs in the principal case, the court has failed to forge the missing link in the chain of judicial remedies necessitated by the problems of racial discrimination in union membership.[57]

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[53] Following this case, the Wisconsin statute was rewritten so as to provide for enforcement powers. Wis. Laws 1957, ch. 266. For a discussion of the new law, see, Comment, 1958 WIS. L. REV. 294.

[54] See note 52 *supra*.

[55] The *Marinship* case, *supra* note 48, involved a closed shop in conjunction with a closed or partially closed union. The court expressly did not pass on the question as to "whether or not the union, in absence of a closed shop agreement, would be required to open its doors to all qualified employees." 25 Cal. 2d 721, 745, 155 P.2d 329, 342 (1944). The Texas case is distinguishable because it involved the maintenance of two separate but self-governing locals. Davis v. Brotherhood of Ry. Carmen of America, *supra* note 51. In the *Wisconsin* case, the bricklayers union was not the statutory bargaining agent for the persons seeking admittance. Ross v. Ebert, *supra* note 52. This distinguishes it from the *Betts* and *Oliphant* cases, where the plaintiffs were members of the class which the union had a statutory duty to represent.

[56] 161 Kan. 459, 169 P.2d 831 (1946). See note 50 *supra*.

[57] The courts are quite correct in holding that the statutory bargaining agent has a duty to represent fairly those within the unit for whom it bargains, even though they are not members of the union. However, the weakness of the rationale of these cases is in the tacit assumption that the duty of fair representation does not, of itself, require equal participation in union membershp. The most obvious

Trial Practice—Jury—Taking of Notes

In a South Carolina case of first impression,[1] defendant, after a conviction of murder, moved for a new trial on the ground, *inter alia,* that two of the jurors took notes of the testimony and charge and took these notes to the jury room with them. Affirming the trial court's denial of the motion, the South Carolina Supreme Court held that whatever objection defendant may have had to the note taking was waived when he failed to make his objection known during the progress of the trial. The court went on to say, however, that the propriety of allowing jurors to take notes on their own volition was a question which rests within the sound discretion of the trial court.

The decision seems to put South Carolina in line with the majority of the courts which have decided the issue. The general rule is that whether jurors should be forbidden to take notes during the trial rests within the sound discretion of the trial court, and it is not improper to allow jurors to do so.[2] There is, however, a substantial body of authority which holds that the jury may not take notes of the trial proceedings.[3] Courts adopting this minority view reason that by taking notes a juror: (1) emphasizes to himself, and perhaps later to other jurors, one feature of the case over other equally important features;[4] (2) has his attention diverted from the natural progression of the evidence;[5] (3) leads the jury to rely on what might be imperfectly written;[6] and (4) obtains an unfair advantage, in case of disagreement, in persuading the other jurors to accept his version of the testimony.[7]

On the other hand, the majority points out: (1) that there is no legal reason for not allowing jurors to take notes;[8] (2) that the supposed

method of assuring that the interests of a minority group will be considered along with those of other workers, is to require the union to admit them to full membership in the union where their voice and vote will be felt in the determination of union policy and bargaining objectves. See notes 12-20 *supra* and accompanying text.

[1] State v. Trent, 106 S.E.2d 527 (S.C. 1959).

[2] Goodloe v. United States, 188 F.2d 621 (D.C. Cir. 1950); United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950); Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956); United States v. Carlisi, 32 F. Supp. 479 (D.C. 1940); Denson v. Stanley, 17 Ala. App. 198, 84 So. 770 (1919); Tift v. Towns, 63 Ga. 237 (1879); Martin v. Atherton, 151 Me. 108, 116 A.2d 629 (1955); W. H. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).

[3] United States v. Davis, 103 Fed. 457 (C.C.W.D. Tenn. 1900); Long v. State, 95 Ind. 481 (1884); Cheek v. State, 35 Ind. 492 (1871); Gipson v. Commonwealth, 133 Ky. 398, 118 S.W. 334 (1909); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955); Commonwealth v. Fontaine, 183 Pa. Super. 45, 128 A.2d 131 (1956); Commonwealth v. Wilson, 19 Dist. Rep. 48 (Pa. 1910).

[4] Thornton v. Weaber, *supra* note 3.

[5] Cheek v. State, 35 Ind. 492 (1871).

[6] Cheek v. State, *supra* note 5.

[7] United States v. Davis, 103 Fed. 457 (C.C.W.D. Tenn. 1900); Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

[8] United States v. Carlisi, 32 F. Supp. 479 (D.C. 1940).

dangers appear "far-fetched, if not imaginary";[9] (3) that there is less danger of erroneous notes than of erroneous memory;[10] and (4) that with modern court reporting there is no difficulty in ascertaining what a witness did nor did not testify.[11]

The North Carolina Supreme Court has considered the question of note taking by jurors only briefly in *Cowles v. Hayes*,[12] decided in 1874. In that case, over the defendant's objection, the trial court allowed the jury to copy a memorandum, made out by plaintiff's counsel, of articles sold and the prices thereof. On appeal, the court said this amounted only to a "note of the evidence taken down by a juror, which was not only proper, but often commendable."[13] Upon such authority as this case represents, it would seem that North Carolina agrees with the majority of the states that it is not error to permit a juror to take notes of the evidence.

It is hoped that if and when the issue is again raised, the North Carolina court will more adequately and firmly state its position in favor of allowing the jury to take notes. The cases which forbid the taking of notes do not seem well considered in the light of modern jurisprudence. In days gone by, when illiteracy was common, there may have been more substance to the argument that those jurors who were able to take notes would wield an undue influence in the consideration of the case. Today, fortunately, illiteracy is the exception rather than the rule. Moreover, whatever validity there is to the argument that the best note taker will be the most influential juror seems to lose weight when it is considered that in case of dispute as to what a witness said, the jury need not rely on the notes of a fellow juror, but may request that the testimony be read to them from the notes of the court reporter. In a long and detailed trial it cannot be denied that the use of notes to refresh the memory of the jury will be more likely to result in a just and proper verdict. The fact that some of the jurors may not have the ability or the desire to take notes is no reason to deprive the other jurors of an opportunity to do so.

The purpose of notes is not to replace the memory but rather to refresh it. If a witness in a case may use notes and memoranda of pertinent facts to refresh his memory, certainly this advantage should be available to the jury. At any trial the judge, counsel, and court reporter take notes of important facts and testimony. How can it be said that it is any less necessary for the jury to take notes than these persons who are trained and experienced in the trial of lawsuits? Of course

[9] United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950).
[10] W. H. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).
[11] United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956).
[12] 71 N.C. 230 (1874).
[13] *Id.* at 231.

there is the possibility of error in the taking of notes, but certainly it is no greater than the possibility of erroneous memory.

Some of the majority decisions recognize a distinction between the juror taking notes on his own volition and the jury taking notes at the request of counsel. These cases hold that while it is permissible for the juror to take notes on his own volition, it is improper for counsel to request that notes be taken.[14] The reason for the distinction seems to be that by such a request counsel is attempting to obtain an unfair advantage and curry favor with the jury.

It is submitted that there is no impropriety in a request by counsel that the jury be allowed to take notes. Most jurisdictions which allow the jury to take notes voluntarily also permit the practice at the request of counsel,[15] and some even permit counsel to furnish the jury pencil and paper with which to take notes.[16] Counsel may for a very good reason desire that the jury remember certain facts such as dates, amounts, and items of damages. It is difficult to see what advantage or favor counsel could gain in the eyes of the jury by such a request. Perhaps the trial court should, however, draw the line where the attorney attempts to furnish the jury with writing materials. This would seem to be a more proper duty of an impartial officer of the court.

There are at least two cases in which the trial court upon its own motion instructed the jurors that they might take notes. In both it was held that such an instruction was erroneous. One of the cases apparently followed the general rule in Pennsylvania that "writing of memoranda by jurors is not encouraged and is generally forbidden."[17] In the other case the trial judge, in a personal injury action, stated that he was going to permit the jury to take notes at their option and furnished them with writing materials for that purpose.[18] The Ohio Supreme Court held that this situation was far different from the case of a juror taking notes on his own volition.[19] The instruction made it appear to the jurors that

[14] Indianapolis & St. L. Ry. v. Miller, 71 Ill. 463 (1874); Kelley v. Call, 324 Ill. App. 143, 57 N.E.2d 501 (1944); Ettlesohn v. Kirkwood, 33 Ill. App. 103 (1889); Cahill v. Baltimore, 129 Md. 17, 98 Atl. 235 (1916).

[15] Chicago & N.W. Ry. v. Kelly, 84 F.2d 569 (8th Cir. 1936); (Here the court said that the request that the jury takes notes should first be addressed to the court and communicated by it to the jurors with suitable instructions if the court decides to allow the request.) Tift v. Towns, 63 Ga. 237 (1879); Vaughn v. State, 17 Ga. App. 268, 86 S.E. 461 (1915); Omaha Fire Ins. Co. v. Crighton, 50 Neb. 314, 69 N.W. 766 (1897).

[16] Tift v. Towns, *supra* note 15; Commercial Music Co. v. Klag, 288 S.W.2d 168 Tex. Civ. App. 1956). (The court said, however, that it would have been better practice for the attorney to have requested the court to have some officers of the court furnish the jury with writing materials so the attorney would not seem to be in the position of attempting to curry favor with the jury.)

[17] Thornton v. Weaber, 380 Pa. 590, 112 A.2d 344 (1955).

[18] Corbin v. Cleveland, 144 Ohio St. 32, 56 N.E.2d 214 (1943). See also Annot., 154 A.L.R. 878 (1945).

[19] It had previously been held in Ohio that it was not improper for jurors to

it was their duty to take notes, regardless of their ability or disposition to do so. Also, the attorneys had not opportunity to inquire as to the jurors' note taking abilities on voir dire examination. The court pointed out that normal people are endowed by nature with the ability to listen and remember, but that writing is an acquired ability and note taking is a further refinement of the ability to write. If the procedure adopted by the trial court were allowed, education or the ability to take notes would be a prerequisite to selection as a juror.

This latter decision does not seem to be based on sound reasoning. If the court may, in its discretion, allow jurors to take notes on their own volition, what objection can validly be made to the court's stating on its own motion that it will allow the jurors to take notes? Why should the court not suggest that the jury take notes where it appears that such a practice will better facilitate the ends of justice? Of course the court should properly instruct the jury as to the proper use of the notes and should make it clear that the taking of notes is optional and not mandatory. It seems highly doubtful that such a practice would lead to a prerequisite of note taking ability in order to be selected as a juror anymore than the practice of allowing jurors to take notes on their own volition or upon motion of counsel has led to such a requirement.

In the principal case, the South Carolina court expressly limited its discussion to the practice of note taking by jurors on their own volition.[20] The court did not discuss note taking at the request of counsel or the trial judge.

Where the jury is observed taking notes it is universally held that, even if it is objectionable, it may be waived by failure to make a timely objection.[21] This seems proper since counsel should not be allowed to sit idly by while the jury takes notes and then raise the objection after the jury has rendered a verdict against him. There is a duty upon counsel to use due diligence to ascertain that the jurors are taking notes, and the objection is deemed waived where the action of the jury is obvious.[22] In other words, if the attorney should have seen the jury taking notes, it is no excuse that he denies having seen their conduct, and the objection is deemed waived unless he can show that by the use of due

take notes on their own volition. Davis Die Co. v. Beltzhoover Elec. Co., 40 Ohio App. 308, 178 N.E. 418 (1931).

[20] State v. Trent, 106 S.E.2d 527, 531 (S.C. 1959).

[21] Conger v. White, 69 Cal. App. 2d 28, 158 P.2d 415 (Dist. Ct. App. 1945); Gipson v. Commonwealth, 133 Ky. 398, 118 S.W. 344 (1909); Martin v. Atherton, 151 Me. 108, 116 A.2d 629 (1955); Randolph v. O'Riordon, 155 Mass. 331, 29 N.E. 583 (1892); State v. Robinson, 117 Mo. 649, 23 S.W. 1066 (1893); Swift & Co. v. Bleise, 63 Neb. 739, 89 N.W. 310 (1902); Corbin v. Cleveland, 40 Ohio App. 308, 178 N.E. 418 (1943).

[22] Commonwealth v. Tucker, 189 Mass. 457, 76 N.E. 127 (1905); Swift & Co. v. Bleise, *supra* note 21; State v. Trent, 106 S.E.2d 527 (S.C. 1959).

diligence he could not have ascertained that notes were being taken. There seems to be no exception to this rule, even in a capital case where the defendant is on trial for his life, as the application of the rule in the principal case illustrates.

No case was found in which it was held that there is an absolute right to have the jury take notes, absent a statute to that effect. It is at most a matter in the sound discretion of the trial court and it is not error to prohibit note taking.[23] "It has never been suggested that the judge must permit the practice; the question has always been whether he must forbid it."[24] At least nine states have enacted statutes which expressly authorize the jury to take notes in criminal trials.[25]

While permitting the jury to take notes may not be entirely advantageous, the argument is well in favor of allowing the practice within the sound discretion of the trial court. It should not be permitted to delay or unduly prolong the trial, nor should it be allowed where it might in some way be prejudicial, but otherwise it would seem to be a useful and favorable practice.

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Trust Investments—Prudent Man Rule

The recent Virginia case of *Goodridge v. National Bank of Commerce*[1] raised the issue of whether or not a prudent man investment statute,[2] enacted in 1956, was applicable to trusts created prior to the enactment of the statute. The trusts in question gave authority to the trustees to make such investments as were authorized "under the statute laws of the State of Virginia."[3] The trustees contended that they were bound to invest according to the "legal lists" statutes that were in existence when the trusts were created, because to apply the new prudent man statute to previously created trusts would be an unconstitutional impairment of the contract obligation owed the settler by the trustees, and would interfere with the vested rights of the beneficiaries without due process of law. The Virginia court rejected the above contentions, holding that the settlor is presumed to have contemplated that the legislature might change the type of investments allowed fiduci-

[23] United States v. Campbell, 138 F. Supp. 344 (N.D. Iowa 1956).
[24] United States v. Chiarella, 184 F.2d 903 (2d Cir. 1950).
[25] CAL. PEN. CODE § 1137; IDAHO CODE ANN. § 19-2203 (1947); IOWA CODE § 784.1 (1954); MINN. STAT. ANN. § 631.10 (1947); MONT. REV. CODES ANN. § 94.7303 (1947); NEV. REV. STAT. § 175.390 (1957); N.Y. CODE CRIM. PROC. § 426; N.D. REV. CODE § 29-2204 (1943); UTAH CODE ANN. § 77-32-2 (1953). While these statutes apparently apply only to criminal cases, it is certainly arguable that they are declarative of the state's policy and apply by analogy to civil cases.

[1] 106 S.E.2d 598 (Va. 1959).
[2] VA. CODE ANN. § 26—45.1 (Supp. 1958).
[3] One of the trust indentures omitted the word "statute" and authorized the trustees to invest according to "the laws of the State of Virginia."

aries as economic conditions changed, and that consequently, in the absence of an express provision to the contrary, the settlor is presumed to have intended that the trustees make such investments as were lawful and proper under the statutes in effect at the time the investments were made.[4]

While this case as a matter of law merely upholds the constitutionality of Virginia's new prudent man statute as applied to trusts created prior to its enactment, the case has additional significance as another illustration of the recent tendency of state legislatures to adopt the prudent man rule for trust investments.

The first introduction of the prudent man rule in this country was in 1830 by way of the famous Massachusetts case, *Harvard College v. Amory*,[5] where the basic philosophy of the rule was stated in the following words:

> All that can be required of a trustee to invest, is, that he conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion, and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.[6]

The classic divergence from the Massachusetts rule is found in a New York case, *King v. Talbot*,[7] decided in 1869. While agreeing with the basic philosophy of the Massachusetts rule, the New York court prohibited the investment of trust funds in stocks. Clearly the Massachusetts rule had not contemplated such a prohibition against the investment of stocks, as the court in *Harvard College* specifically held that the trustees were authorized to make investments in the stocks of a manufacturing company. Yet the New York rule was to set a precedent which found expression in case law,[8] statutes,[9] and even the constitutions[10] of states all over the country.

The majority of the states enacted statutes which set out so-called "legal lists" for fiduciary investments. These "legal lists" statutes, in the main, followed the New York rule and made no provision for in-

[4] *Accord*, Aydelott v. Breeding, 111 Ky. 847, 64 S.W. 916 (1901); Mechanicks Nat'l Bank v. Brady, 100 N.H. 469, 129 A.2d 857 (1957); Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93 A.2d 321 (1952); *In re* Lincoln Rochester Trust Co., 201 Misc. 1008, 111 N.Y.S.2d 45 (Surr. Ct. 1952); *In re* Flynn's Estate, 205 Okla. 311, 237 P.2d 903 (1951); *In re* Yate's Will, 259 Wis. 263, 48 N.W.2d 601 (1951).

[5] 26 Mass. (9 Pick.) 446 (1830).

[6] *Id.* at 461.

[7] 40 N.Y. 76 (1869).

[8] See, *e.g.*, Sellers v. Milford, 101 Ind. App. 590, 198 N.E. 456 (1935).

[9] See, *e.g.*, GA. CODE ANN. §§ 108-417 to -421 (1933), as amended, GA. CODE ANN. §§ 108-417, 108-420 (Supp. 1958).

[10] See, *e.g.*, ALA. CONST. art. 4, § 74.

vestment in private corporate stocks. Usually the "legal lists" included only the traditionally conservative trust investments such as government bonds, municipal bonds, and first mortgages on land and were either permissive in that the trustee could go outside the list, if he sustained the burden of proving reasonable care and skill, or mandatory in that any investment outside the list would be a breach of trust.[11]

This ultra-conservative attitude of the legislature and courts of our country prevailed during the whole of the nineteenth century; and as late as 1937, 107 years after the *Harvard College* case, only six states[12] used the Massachusetts or prudent man rule. Since 1937, however, one finds an astonishing shift. Today at least 36 states[13] follow the prudent man rule either in complete or limited form. Thus in the comparatively short space of 21 years, 30 states have completely or partially adopted the rule by judicial decision[14] or legislative enactment.[15]

There are several reasons for this sudden change in attitude. Perhaps first and foremost is that of inflation. It is common knowledge that we have been and are now experiencing an inflationary trend in our economy with a corresponding decrease in the purchasing power of the dollar. In many instances life beneficiaries of trusts set up prior to World War II are no doubt receiving much less purchasing power than their benefactors intended. Furthermore the dollar value of the trust *res* itself, if restricted to debt securities, has not increased in accordance with the general rise in prices. The only remedy for this inflationary devaluation seems to be equity investment.[16]

It should be further pointed out that today financial information about private corporations is more readily available than it was in the nineteenth century and the marketing of stocks is subject to stringent regulation. It follows then that the courts and legislatures are now more inclined to allow investment of fiduciary funds in stocks of corporations which have acquired a reputation for financial soundness.

North Carolina's position in regard to the prudent man rule is somewhat unusual. It has adopted the prudent man rule by judicial de-

[11] BOGERT, TRUSTS § 103 (3d ed. 1952).

[12] Kentucky, Maryland, Massachusetts, North Carolina, Rhode Island, Vermont.

[13] Arkansas, California, Colorado, Connecticut, Delaware, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia.

[14] See, *e.g.*, Rand v. McKittrick, 346 Mo. 466, 142 S.W.2d 29 (1940).

[15] See, *e.g.*, N.Y. PERS. PROP. LAW § 21 (Supp. 1958) (35% of the trust estate may be invested under the prudent man rule); CAL. CIV. CODE § 2261 (100% of the trust estate may be invested under the prudent man rule).

[16] For a complete discussion of the reasons for the use of stocks in trust investments, see generally, Torrance, *Legal Background, Trends, and Recent Developments in the Investment of Trust Funds,* 17 LAW & CONTEMP. PROB. 128, 143 (1952).

cision[17] and in addition maintains a statutory permissive list.[18] This situation has been confusing to legal writers[19] so that it is not illogical to assume that it has also been confusing to members of the Bar as well as corporate trustees.

Without expressly adopting it, the North Carolina court as far back as 1858 seems to have used what might be considered substantially the prudent man rule. In *Washington v. Emery*,[20] a testamentary trustee held an unsecured note of a known speculator. The trustee converted the note into sixty shares of a well-established railroad stock. The stock had been paying dividends for many years, and the trustee had consulted competent advisors before investing in the railroad stock. No loss to the estate had resulted from acquisition of the stock. The court held that the trustee had acted in good faith and with a reasonable belief that the fund would be benefited, and that he should be credited with the value of the stock in his final accounting.

Later where a trustee invested over 9,000 dollars more than the court originally authorized in a building, the court approved his investment saying:

> While the utmost degree of good faith is exacted of a trustee, he is not always held to an assured judgment in the management of a trust fund or in making an investment; the exercise of the sound discretion that a prudent man would show in the management of his own affairs is usually the approved standard in such cases.[21]

Although corporate stocks were not involved in this case, under the circumstances it would seem that the language is broad enough to include stock investments as well.

Eventually in *Sheets v. J. G. Flynt Tobacco Co.*,[22] the North Carolina court expressly approved the Massachusetts prudent man rule. Here a guardian invested 9,000 dollars in the preferred stock of a tobacco company. The stock subsequently depreciated, and a newly appointed guardian sued to rescind. A holding for the plaintiffs was re-

[17] Sheets v. J. G. Flynt Tobacco Co., 195 N.C. 149, 145 S.E. 355 (1928).

[18] N.C. GEN. STAT. §§ 36-1 to -6 (1950), as amended, N.C. GEN. STAT. § 36-3 (Supp. 1957).

[19] See BOGERT, TRUSTS § 104 nn. 72-4 (3d ed. 1952), where North Carolina was not included in a list of prudent man states; Torrance, *Legal Background, Trends, and Recent Developments in the Investment of Trust Funds*, 17 LAW & CONTEMP. PROB. 128, 161 (1952), where North Carolina was classified as a permissive list state; Stevenson, *Why the Prudent Man Rule?*, 7 VAND. L. REV. 74, 91 (1953), where North Carolina was classified as a prudent man state.

[20] 57 N.C. 32 (1858).

[21] Fisher v. Fisher, 170 N.C. 378, 382, 87 S.E. 113, 115 (1915). See also State *ex rel* Cummings v. Mebane, 63 N.C. 315 at 317 (1869), where very similar language was used by the court in holding that there was no imprudence in a guardian accepting Confederate money as payment of a loan of estate funds.

[22] 195 N.C. 149, 141 S.E. 355 (1928).

versed on appeal and a new trial ordered, because of the trial court's refusal to submit the defendant's issues as to the good faith and diligence of the guardian in making the investment. The court said that if there was any liability it was primarily the guardian's and the prudent man rule as stated in the *Harvard College* case was quoted as the standard to be applied to trust investments.

Even though the court did not decide the question, it would seem unlikely that the investment in the above case would be a proper one under the prudent man rule. While there is no information as to how great a proportion of the trust estate was placed in this particular investment, the stock was that of a small relatively unknown corporation. The prudent man rule is not to be interpreted as allowing investment in such a corporation, nor is an unduly large share of the estate to be placed in one particular investment. As the Massachusetts court said in the *Appeal of Dickenson*:[23]

> [T]rustees in this Commonwealth are permitted to invest *portions* of trust funds in dividend paying stocks and interest-bearing bonds of private business corporations *when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments.* (Emphasis added.)

This language emphasizes the high standards a corporation must meet in order to justify the investment of fiduciary funds in its stock.

The *Sheets* case seems to be the only North Carolina case expressly upholding the prudent man rule[24] and even then the court did not have the opportunity to apply it to the facts of the case. Perhaps one of the reasons for this dearth of case law is the existence of our permissive list statute[25] which, like the old New York rule authorizes investment in traditional government bonds and similar securities, but makes no pro-

[23] 152 Mass. 184, 187-88, 25 N.E. 99, 100 (1890).

[24] *But see* Young v. Hood, 209 N.C. 801, 184 S.E. 823 (1936), where testator created a trust estate, part of which was bank stock. The number of shares of stock was increased by a stock dividend and by the trustee's exercise of stock subscription rights. The bank subsequently merged with other banks and the trustee exchanged the old stock for stock in the new bank which resulted in the trustee holding its own stock. The new bank failed and in an action to restrain an assessment against the estate on the ground that the trustee acted in bad faith in exercising the stock subscription right, and in exchanging the old stock for the new, the court found no bad faith and upheld the trustee's action. However this case is complicated by the fact that the testator suggested in his will that the bank stock was not to be sold without certain consents unless holding it would, in the opinion of the trustee, be detrimental. See also Cutter v. American Trust Co., 213 N.C. 686, 197 S.E. 542 (1938), where an original restriction to invest only in government bonds was removed, and the trustee authorized by the court to invest in stocks and bonds.

[25] N.C. GEN. STAT. §§ 36-1 to -6 (1950), as amended, N.C. GEN. STAT. § 36-3 (Supp. 1957).

vision for investing in private corporate stocks. In a permissive list state, the general rule is that the trustees may invest according to the statutory list, or they may invest outside the list providing they use reasonable skill and prudence.[26] It is also a general rule that a trustee cannot blindly follow the statutory list. He is usually expected to display reasonable skill and prudence even in making investments which are provided for by statute.[27] Unfortunately North Carolina is not wholly in accord with this latter rule, and by statute[28] insures the trustee against personal liability if he follows the statutory list.

Consequently, this statute would seem to limit the use of the prudent man rule in North Carolina. Assuming trustees know the prudent man rule has been adopted by judicial decision, they may still be hesitant to follow it when they can enjoy statutory protection. Such a situation, in these days of inflation could conceivably prove very unfavorable to trust beneficiaries. Therefore it is submitted that the North Carolina legislature would be well-advised in considering statutory enactment of the prudent man rule.[29] The enactment of the prudent man rule would clarify the present situation on trust investments; and at the same time, create an atmosphere less inhibiting on trustees who presently hesitate to go outside our permissive list.

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[26] See 3 BOGERT, TRUSTS AND TRUSTEES § 614 (1946); 3 SCOTT, TRUSTS § 227.13 (2d ed. 1956). North Carolina is in accord with this rule. See Sheets v. J. G. Flynt Tobacco Co., 195 N.C. 149, 154, 141 S.E. 355, 358 (1928).

[27] 3 BOGERT, *op. cit. supra* note 26; 3 SCOTT, *op. cit. supra* note 26.

[28] N.C. GEN. STAT. §§ 36-1, -2, -4 (1950).

[29] An illustrative statute embodying the prudent man rule is as follows:

"In investing, reinvesting, purchasing, acquiring, exchanging, selling and managing property for the benefit of another, a trustee shall exercise the judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard, and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind, and stocks, preferred or common, which men of prudence, discretion and intelligence acquire for their own account.

"In the absence of express provisions to the contrary in the trust instrument, a trustee may continue to hold property received into a trust at its inception or subsequently added to it or acquired pursuant to proper authority if and as long as the trustee, in the exercise of good faith and of reasonable prudence, discretion and intelligence, may consider that retention is in the best interests of the trust." CAL. CIV. CODE § 2261(1), (2).