

12-1-1961

Notes and Comments

North Carolina Law Review

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>Part of the [Law Commons](#)

Recommended Citation

North Carolina Law Review, *Notes and Comments*, 40 N.C. L. REV. 111 (1961).Available at: <http://scholarship.law.unc.edu/nclr/vol40/iss1/12>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

NOTES AND COMMENTS

Artificial Insemination Heterologous and the Matrimonial Offense of Adultery in the United Kingdom

Professor Hager's analysis¹ of problems incidental to the practice of artificial insemination discussed the controversial legal question whether artificial insemination heterologous² constitutes the matrimonial offense of adultery. It may be of value to supplement his reference to American and Canadian authorities by some discussion of the attitudes adopted on this issue by lawyers and courts in the United Kingdom.

Justice Vaisey and H. U. Willink, K.C., the legal representatives of a commission appointed in 1948 by the Archbishop of Canterbury to investigate the theological, ethical, sociological and legal aspects of artificial human insemination, expressed no doubt that the perpetration of A.I.D. legally would constitute adultery on the part of both the married donor and the married recipient.³ However, in debate in the House of Lords in March 1949, Lord Merri-man, President of the Probate, Divorce and Admiralty Division of the English High Court, roundly criticized this opinion as "absolute nonsense."⁴ The conclusion of the commissioners was based primarily upon the decision of Justice Orde in *Orford v. Orford*⁵ and a dictum of Lord Dunedin in *Russell v. Russell*.⁶ In the latter case the learned law Lord stated:⁷ "The appellant conceived and had a child without penetration having ever been effected by any man. . . . The jury . . . came to the conclusion that she had been

¹ Hager, *Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. REV. 217, 232-35 (1961).

² Artificial insemination heterologous is the technical term applied to instances where the seminal fluid to be used must be taken from a male other than the husband of the recipient. This technique is more popularly known as artificial insemination donor, see Hager, *supra* note 1, at 222-23, and will be referred to hereinafter as A.I.D.

³ ARCHBISHOP OF CANTERBURY'S COMMISSION ON ARTIFICIAL HUMAN INSEMINATION, REPORT ON ARTIFICIAL HUMAN INSEMINATION 37 (London, 1948).

⁴ 161 H.L. DEB. (5th ser.) 410 (1949). Two eminent Lord Chancellors, Lord Jowitt and Lord Kilmuir, have also regarded A.I.D. as falling outside of adultery. 161 H.L. DEB. (5th ser.) 511 (1950); 207 H.L. DEB. (5th ser.) 982, 1008 (1958).

⁵ [1921] 49 Ont. L.R. 15, [1921] 58 D.L.R. 251.

⁶ [1924] A.C. 687.

⁷ *Id.* at 721.

fecundated *ab extra* by another man unknown, and fecundation *ab extra* is, I doubt not, adultery."

A liberal interpretation of this dictum would suggest that adultery is not confined to a mutual surrender of the sexual organs but extends to a mutual surrender of the reproductive faculties by means of artificial insemination. Such an interpretation, however, divorces the statement from its context for it totally ignores the circumstances in respect of which Lord Dunedin's opinion was expressed. The fecundation *ab extra* referred to in *Russell* resulted not from artificial insemination but from certain acts of intimacy which fell short of a penetration of the female sexual organ.

The direct question whether A.I.D. constituted adultery was considered comparatively recently by the Scottish Court of Session in *MacIennan v. MacIennan*.⁸ The facts of this case may be briefly summarized. The husband petitioned for divorce on the ground of his wife's adultery. The wife alleged that the child to whom she had given birth had been conceived as a result of her artificial insemination with the seed of a donor. The husband contended that this defense was irrelevant since A.I.D. was adultery in the eyes of the law, and further maintained that he did not consent to his wife's impregnation. After stating that specification of the time and place of the alleged artificial insemination was necessary to the admissibility of the wife's defense, the court, in a preliminary judgment by Lord Wheatley, ruled that A.I.D. did not constitute adultery.⁹ It was conceded by the court that a married woman committed a grave and heinous offense against the marriage contract by submitting to artificial insemination without her husband's consent. Nevertheless, this was considered a matter in respect of which the legislature should determine an appropriate remedy and was deemed quite irrelevant to the issue before the court. Following a careful analysis of the authorities, including *Doornbos v. Doornbos*,¹⁰ *Russell v. Russell*¹¹ and *Clark (otherwise Talbot) v.*

⁸ [1958] Sess. Cas. 105, [1958] Scots L.T.R. 12.

⁹ An adjournment was granted to allow entry of the necessary amendments to the wife's defense. Counsel subsequently intimated to the court that the defendant had declined to provide the information needed to cure the defect in the pleadings; accordingly the court sustained the plaintiff's plea that the defense was irrelevant and sent the case to the undefended roll.

¹⁰ 23 U.S.L. WEEK 2308 (1954), discussed in Rossman & Allen, *What's New in the Law*, 41 A.B.A.J. 263 (1955); Tallin, *Artificial Insemination*, 34 CAN. B. REV. 1, 14-15 (1956).

¹¹ [1924] A.C. 687.

Clark,¹² Lord Wheatley observed:¹³

[I]t seems possible to derive [from the cases] the following propositions, according at least to the law of England.

1. For adultery to be committed there must be the two parties physically present and engaging in the sexual act at the same time.

2. To constitute the sexual act there must be an act of union involving some degree of penetration of the female organ by the male organ.

3. It is not a necessary concomitant of adultery that male seed should be deposited in the female's ovum.

4. The placing of the male seed in the female ovum need not necessarily result from the sexual act, and if it does not, but is placed there by some other means, there is no sexual intercourse.

I appreciate that the second of these findings does not square with Lord Dunedin's *obiter dictum* in *Russell*, which seems to conflict with the decision of Pilcher, J., in *Clark* . . . , but even on Lord Dunedin's standard, the physical presence of the male organ and its close proximity and juxtaposition to the female organ seem to me to be essential ingredients of the act.

This opinion no doubt represents a rational judgment to the person who views intent as the essence of adultery.¹⁴ To the matrimonial lawyer, however, it may reflect too rigid acceptance of the concept of adultery, the foundation of English divorce laws, in that it denies opportunity for the courts to afford legal recognition to a socially existing fact, namely, a broken marriage.

The decision of Lord Wheatly was the subject of debate in the House of Lords in February 1958, and in September of that year a departmental committee was appointed "to enquire into the exist-

¹² [1943] 2 All E.R. 540 (P.D.A.). In this case Pilcher, J., held that the marriage in issue had never been consummated despite the wife's fecundation *ab extra* by her husband.

¹³ *MacLennan v. MacLennan*, [1958] Sess. Cas. 105, 113, [1958] Scots L.T.R. 12, 17.

¹⁴ See generally Guttmacher, *The Legitimacy of Artificial Insemination*, 11 HUMAN FERTIL. 16, 17 (1946): "From the physician's point of view it is the intent which is all important. Adultery and artificial insemination are actually the absolute antithesis of each other. One is done clandestinely to deceive and enjoy carnal pleasure; the other decently and frankly to beget offspring without the emotional and physical enjoyment of coitus."

ing practice of human artificial insemination and its legal consequences and to consider whether, taking account of the interests of individuals involved and society as a whole, any change in the law is necessary or desirable." In its report,¹⁵ which was presented to Parliament at Westminster in July 1960, the committee expressed the general conclusion that A.I.D. should neither be prohibited nor even regulated by law. In the context of matrimonial law it accepted the view previously adopted by the Royal Commission on Marriage and Divorce, 1951-1955¹⁶ that a clear distinction be drawn between artificial insemination and adultery. The departmental committee¹⁷ endorsed the recommendation of the Royal Commission that artificial insemination of the wife without the consent of her husband be made a new and separate ground of divorce or judicial separation. It further recommended that such a course of conduct on the part of a wife should entitle the husband to take proceedings in the magistrate's courts for a separation order.

It should be observed that the committee made no recommendation providing a matrimonial remedy for the wife whose husband donated semen for purposes of artificial insemination. This omission is unfortunate insofar as it reintroduces inequality between the sexes before the law. There are, of course, certain practical difficulties which impede the application of similar recommendations to the husband donor for, under present conditions, the anonymity which surrounds the donor's identity will generally preclude discovery of the offense by the wife. Although this particular difficulty might be met by statutory control or regulation of the practice of artificial insemination, other difficult legal problems would remain. For example, would the husband be penalized where his donation was made before marriage but utilized subsequent thereto?

The present inaction of Parliament at Westminster indicates a reluctance to legislate in this controversial province of law. Consequently, the judiciary remains confronted with the unenviable task of resolving legal issues pertaining to artificial insemination without any prior legislative determination of general policy considerations.

JULIAN D. PAYNE*

¹⁵ Human Artificial Insemination Committee, *First Report*, CMD. No. 1105, at 263 (1960).

¹⁶ Royal Commission on Marriage and Divorce, *First Report*, CMD. No. 9678, at 90 (1956).

¹⁷ Human Artificial Insemination Committee, *supra* note 15, at 115-17.

* Assistant Professor of Law, University of Saskatchewan, Saskatoon, Canada.

Constitutional Law—Search and Seizure—Electronic Listening Devices

In *Olmstead v. United States*,¹ the United States Supreme Court stated that the fourth amendment² was not violated "unless there had been an official search and seizure of [a person], or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." In this case the Court held that incriminating telephone conversations obtained by federal officers by tapping the defendant's telephone line were not obtained in violation of the search and seizure clause of the fourth amendment since there had been no *physical* invasion of the defendant's premises.³ The same rationale was applied and a like result reached in *Goldman v. United States*⁴ where the incriminating evidence was obtained by placing a detectaphone against the outer wall of the defendant's office so that police officers could hear conversations inside the office. And in *On Lee v. United States*,⁵ incriminating evidence was obtained through the use of a cleverly concealed miniature microphone on an undercover agent who was admitted into the defendant's shop. The incriminating evidence was transmitted through the microphone to another agent outside the shop. The Court held this evidence admissible, stating that this did not amount to an unlawful invasion of individual privacy.

A similar question was presented in the recent case of *Silverman v. United States*.⁶ District of Columbia police officers suspected that the defendants were using their row house as headquarters for a gambling operation. After securing permission from the owner, the officers went into an adjoining row house and installed an electronic listening device, a "spike mike," in order to obtain in-

¹ 277 U.S. 438, 466 (1928).

² "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." U.S. CONST. amend. IV.

³ This case was decided prior to the passage of the Federal Communications Act which provides that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communications. . . ." 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958). The Court has applied this section of the act to prohibit the admission in federal courts of evidence procured by wire-tapping. *E.g.*, *Nardone v. United States*, 308 U.S. 338 (1939).

⁴ 316 U.S. 129 (1942).

⁵ 343 U.S. 747 (1952).

⁶ 365 U.S. 505 (1961).

criminating evidence. The instrument used was a composite microphone, amplifier, power pack and earphone attached to a one-foot spike. It was inserted into the common wall⁷ of the two houses until it struck the heating duct serving the defendants' house. The District Court for the District of Columbia allowed the police officers, over the objections of the defendants, to describe conversations which they had overheard by means of the listening apparatus. The defendants were convicted and the court of appeals affirmed. The Supreme Court reversed.

The Supreme Court refused to re-examine the fine distinction drawn in *Olmstead*, requiring a physical invasion of one's house as the basis for declaring a search and seizure unlawful under the fourth amendment. Instead, the Court based its decision entirely upon the ground that in the instant case "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the [defendants],"⁸ and was, therefore, violative of their rights under the fourth amendment to be free from an unreasonable search and seizure.

Although consistent with the rationale of *Olmstead* and its application in *Goldman* and *On Lee*, the significance of the decision in *Silverman* can be fully appreciated only by taking cognizance of the fact that the Court did *not* base its decision on a "technical trespass under the local property law relating to party walls";⁹ rather, the "physical penetration" emphasized by the Court was the usurpation of a part of the defendants' house, the heating system, which "became in effect a giant microphone, running through the entire house occupied by the [defendants]."¹⁰ In a concurring opinion, Mr. Justice Douglas stated:

An electronic device on the outside wall of a house is a permissible invasion of privacy . . . while an electronic device that penetrates the wall, as here, is not. Yet the invasion of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises,"

⁷ The common wall (or party wall) was thirteen to fourteen inches thick. The defendants argued that the spike penetrated the wall to such a depth that it entered into their half of the wall by as much as five-sixteenths of an inch, hence, a "trespass" in violation of their rights of privacy under the fourth amendment. *Silverman v. United States*, 275 F.2d 173 (D.C. Cir. 1960).

⁸ *Silverman v. United States*, 365 U.S. 505, 509 (1961).

⁹ *Id.* at 511. And see note 8 *supra*.

¹⁰ *Id.* at 509.

on which the present decision rests seems to me to be beside the point. . . . [O]ur sole concern should be with whether the privacy of the home was invaded.¹¹

In seeking to persuade the Court to reconsider its decisions in *Olmstead*, *Goldman*, and *On Lee*, the defendants brought to its attention various modern electronic devices which could be used to monitor conversations without an actual physical penetration into one's house or office.¹² However, the Court stated that the decision should be based on the the unauthorized physical penetration into the defendant's house and that it need not "contemplate the Fourth Amendment implications of . . . frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."¹³

The Court, by virtue of the peculiar facts of this case, had an opportunity to lay aside a rule of law that has been outmoded by scientific progress and to adhere to the fundamental premise that the principles upon which the fourth amendment is predicated "apply to *all* invasions on the part of the government and its employees of the sanctities of a man's home and the *privacies of life*."¹⁴ Mr. Justice Brandeis long ago made this observation:

The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts, and emotions. *Can it*

¹¹ *Id.* at 512 (concurring opinion).

¹² These include a parabolic microphone, reportedly capable of picking up sound from five hundred to one thousand feet away, an ultrasonic microphone that picks up sound from a distance by way of an electronic beam, and a radio microphone that can be "aimed" with a telescope and is capable of sending its microwave beam up to one thousand feet and picking up sound. For the more ambitious eavesdroppers there are closed circuit television outfits. In addition to these highly technical devices there are automatic, remote controlled and telescopic cameras, tiny recorders and a myriad assortment of concealable microphones. For a thorough technical description of the entire gamut of such devices, see DASH, SCHWARTZ & KNOWLTON, *THE EAVESDROPPERS*, 330-58 (1959).

¹³ *Silverman v. United States*, 365 U.S. 505, 509 (1961).

¹⁴ *Boyd v. United States*, 116 U.S. 616, 630 (1886) (dictum). (Emphasis added.)

*be that the Constitution affords no protection against such invasions of individual security?*¹⁵

It is regretted that the Court in *Silverman* failed to give heed to the warning sounded by Mr. Justice Brandeis. An intrusion by stealth upon individual privacy by police officers should be unlawful under the search and seizure clause of the fourth amendment whether the intrusion be in form of an electronic or microwave beam, a light wave, or a sound wave and regardless of the absence or presence of a "physical invasion."

Indeed, one might even question whether in the principal case the spike's touching the heating duct and thereby transforming it into a sounding board was actually a *physical* invasion of the defendants' house. This is especially so in view of the Court's curt dismissal of technical trespass property law as insignificant. Moreover, there would seem to be little difference between the "usurpation" of the heating system of a house by converting it into a "giant microphone" and simply plucking from the air the sounds within a house by means of an electronic device that may not even touch any part of the house.

Should the Court discard the premise upon which *Olmstead*, *Goldman*, *On Lee* and *Silverman* are based, the effect of such a decision would undoubtedly be detrimental to the present practices of police investigations and criminal prosecutions. But, as stated by Mr. Justice Frankfurter in a dissenting opinion in *On Lee*,¹⁶ "criminal prosecution is more than a game. And in any event it should not be deemed to be a dirty game in which 'the dirty business' of criminals is outwitted by the 'the dirty business' of law officers."

THOMAS M. STARNES

Domestic Relations—Evidence—Presumption of Validity of Second Marriage

It is generally held that where a marriage in fact has been proved or admitted, the law raises a presumption that it is valid.¹ This rule

¹⁵ *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion). (Emphasis added.)

¹⁶ 343 U.S. 747, 758 (1952) (dissent).

¹ *E.g.*, *Gee Chee On v. Brownell*, 253 F.2d 814 (5th Cir. 1958); *Brooms v. Brooms*, 151 Cal. App. 2d 343, 311 P.2d 562 (Dist. Ct. App. 1957); *Whelan v. Whelan*, 346 Ill. App. 445, 105 N.E.2d 314 (1952); *Wilson v. Mitchell*, 10 Misc. 2d 559, 169 N.Y.S.2d 249 (Sup. Ct. 1957). See generally *Annot.*, 77 A.L.R. 729 (1932); *Annot.*, 34 A.L.R. 464 (1925).

is applied without difficulty where only one marriage is in question. However, if successive marriages of the same person are involved, the situation becomes more complex in that the courts are confronted with conflicting presumptions.² A great majority of jurisdictions³ in this situation follow the position taken in *Parker v. American Lumber Corp.*⁴ where the court stated:

The decided weight of authority, and we think the correct view, is that where two marriages of the same person are shown, the second marriage is presumed to be valid; that such presumption is stronger than and overcomes the presumption of the continuance of the first marriage, so that a person who attacks a second marriage has the burden of producing evidence of its invalidity. Where both parties to the first marriage are shown to be living at the time of the second marriage it is presumed in favor of the second marriage that the first was dissolved by divorce. These presumptions arise, it is said, because the law presumes morality and legitimacy, not immorality and bastards.⁵

Although the presumption is of great value to the party for whom it operates in that it places the burden of proving the invalidity of the second marriage on the party attacking it,⁶ it has no additional value. Its effect is merely to invoke a rule of law compelling the jury to reach a certain result in the absence of testimony to the contrary.⁷ Thus the presumption is not conclusive, but may be rebutted by proof of a valid prior marriage and by proof that such marriage has not been terminated by death or divorce.⁸

² For example, the presumption of the continuance of a status, or condition, once proved to exist (here the first marriage) and the presumption of the continuing life of the wife of the former marriage.

³ *E.g.*, *Ellenwood v. Ellenwood*, 157 Fla. 640, 26 So. 2d 655 (1946); *Rose v. Rose*, 274 Ky. 208, 118 S.W.2d 529 (1938); *Davis v. Davis*, 2 Wash. 2d 448, 101 P.2d 313 (1940).

⁴ 190 Va. 181, 56 S.E.2d 214 (1949).

⁵ *Id.* at 185, 56 S.E.2d at 216.

⁶ *Gainey v. Gainey*, 119 Cal. App. 2d 564, 259 P.2d 984 (Dist. Ct. App. 1953); *Keller v. Linsenmyer*, 101 N.J. Eq. 664, 139 Atl. 33 (Ct. Ch. 1927); *Williams v. Smith*, 16 Misc. 2d 585, 184 N.Y.S.2d 176 (Sup. Ct. 1959).

⁷ *Vaughan v. Vaughan*, 195 Miss. 463, 16 So. 2d 23 (1943). See generally 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

⁸ *Hamburgh v. Hys*, 22 Cal. App. 2d 508, 71 P.2d 301 (Dist. Ct. App. 1937). Although proving that a divorce has not taken place involves proof of a negative, this task would seem to have been made considerably easier in North Carolina by the enactment of N.C. GEN. STAT. § 130-52.1 (1958),

In *Kearney v. Thomas*⁹ North Carolina adopted the majority view of presuming the second marriage to be valid. It was there stated that the majority view was "so abundantly supported by well considered cases, so consonant with reason, and so consistent with analogous practices, as to justify its adoption."¹⁰

In the recent case of *Williams v. Williams*,¹¹ however, the court refused to hold that upon proof of a subsequent marriage a presumption of its validity was raised. In this case *A*, the admitted first wife of *W*, the decedent, petitioned the court that she be allotted dower in his lands. Thereafter *B* filed an interplea in which she alleged that she was the surviving widow. In support of her claim *B* introduced evidence of a certificate authorizing the marriage and of its return showing that the marriage ceremony had been performed. She also offered evidence to the effect that until *W*'s death they had lived together as man and wife for nearly five and one-half years, and that her name appeared on his death certificate as the surviving spouse. Instead of presuming *B*'s marriage valid upon this proof, the court held that the burden was upon her to show that *W*'s prior marriage to *A*, which was admitted to be valid, had been invalidated or dissolved.

The court justified its decision on the grounds that the intervenor has the burden of proving his case and establishing the rights claimed,¹² and that one who asserts a property right which is dependent upon the invalidity of a marriage must make good his cause by proof.¹³ However, there would seem to be no reason why an intervenor could not be aided by the operation of presumptions.¹⁴ By failing to recognize the presumption, the court has clearly failed to give the intervenor the benefit of the rule announced in the

which provides for the central registration of all divorces granted by the North Carolina courts.

⁹ 225 N.C. 156, 33 S.E.2d 871 (1945). In this case the plaintiffs, children of the first marriage, were heirs at law of Alexander Kearney. The defendant was the second wife. Plaintiffs contended that the property which was the subject of the suit descended to them on the death of their father free of any dower claim of the defendant because the second marriage was bigamous and, therefore, void.

¹⁰ *Id.* at 164, 33 S.E.2d at 877.

¹¹ 254 N.C. 729, 120 S.E.2d 68 (1961).

¹² *Id.* at 730, 120 S.E.2d at 69.

¹³ *Id.* at 731, 120 S.E.2d at 70.

¹⁴ In *Parker v. American Lumber Corp.*, 190 Va. 181, 56 S.E.2d 214 (1949), the court allowed the plaintiff the benefit of the presumption. For the purpose of determining the availability of presumptions there would seem to be no difference between a plaintiff and an intervenor.

Kearney case that "proof of the second marriage adduced by the defendant, if sufficient to establish it before the jury, raises a presumption of its validity, upon which property rights growing out of its validity may be based."¹⁵

The court attempted to distinguish this decision from the *Kearney* case on the ground that in *Kearney*, the death of the first wife being admitted, the question before the court was whether or not the evidence was sufficient to be submitted to the jury upon the validity of a subsequent marriage. The validity of this distinction is questionable. In *Kearney* the court stated that the question before it was whether the burden of the issues submitted to the jury was properly placed on the plaintiffs or on the defendant. This would seem to be the substance of the problem before the court in the *Williams* case. Moreover, in *Kearney* the first wife was alive at the time of the subsequent marriage although it was admitted that she was dead at the time suit was brought. Both cases, therefore, involved a second marriage while the first wife was alive. One factual distinction between the cases is that in the *Kearney* case the defendant was seeking to establish the second marriage rather than the intervenor as in *Williams*. However, the position of the parties to the suit would not seem to be determinative of whether the presumption applies.

Furthermore, there would seem to be better grounds for applying the presumption in *Williams* than in *Kearney*. In *Williams* the first wife was a party to the suit and was present to give evidence rebutting the presumption, but in *Kearney* the first wife was not

¹⁵ 225 N.C. 156, 163-64, 33 S.E.2d 871, 876-77 (1945). As to the amount of proof necessary to raise the presumption, the court in this case stated: "It is to be noted here that the existence, or fact, of the second marriage was supported not only by reputation and cohabitation, but by the direct evidence of the defendant as to the ceremony of marriage, and by the certified copies challenged by the plaintiffs." *Id.* at 164, 33 S.E.2d at 877. In refusing to allow the presumption in *Forbes v. Burgess*, 158 N.C. 131, 73 S.E. 792 (1912), the court said: "Although where a marriage is established by a proof of the fact in any competent way, it raises a presumption that any prior marriage which is relied on to invalidate the second marriage has been dissolved by death or divorce, the presumption of death or divorce will not be indulged in favor of an alleged second marriage, the proof of which rests only on cohabitation and reputation." *Id.* at 133, 73 S.E. at 792-93.

The proof offered in the principal case consisted of more than proof of cohabitation and reputation; in fact it was almost the same as that offered in the *Kearney* case. Therefore, applying the standard prescribed by these two cases, it would seem that the proof was sufficient to raise the presumption.

present. Thus in *Kearney* the court put the burden of proving the validity and continued existence of the first marriage upon parties who did not have personal knowledge of the facts, but in *Williams* it refused to place the burden on the party who did have personal knowledge.

If the court is basing its refusal to allow the intervenor the benefit of the presumption because she is an intervenor rather than a defendant, the court is putting unwarranted stress on who gets to court first and instigates the suit. The fact that the second wife has gone through the requisite marriage ceremony and has lived with a man as his wife for several years without any objection from his former wife should have the same significance regardless of whether she is the plaintiff, defendant or intervenor. If, on the other hand, the court is refusing to allow the intervenor the benefit of the presumption because it has decided to no longer afford the second marriage a presumption of validity, the court, as stated in the dissenting opinion in *Williams*, should expressly overrule the *Kearney* case and specifically state what the law is in this state.

Regardless of why the court in *Williams* failed to give the benefit of the presumption to the intervenor, the better policy would seem to be to uniformly place the burden on the party attacking the validity of the second marriage. Not only does public policy¹⁰ dictate that the second marriage be presumed valid, but also the first wife is in a better position to give evidence about the contract to which she is a party than the second wife. Thus it is hoped that at its next opportunity the court will make clear that the presumption of validity of the second marriage, as adopted in the *Kearney* case, is available to all parties, regardless of their position in the action.

H. MORRISON JOHNSTON, JR.

Federal Jurisdiction—Diversity of Citizenship—Corporation's Principal Place of Business—Multiple Incorporation

In *Kelly v. United States Steel Corp.*¹ the Third Circuit Court of Appeals was called upon for the first time to interpret the term "principal place of business" as used in the diversity jurisdiction

¹⁰ Marriage being an accepted and desirable social institution, the court should favor the parties alleging the marriage by presuming them innocent of bigamy and by presuming the children by the union legitimate.

¹ 284 F.2d 850 (3d Cir. 1960).

statute.² The plaintiff initiated action in the federal district court alleging diversity of citizenship as the grounds for jurisdiction. The complaint alleged that the plaintiff was a citizen of Pennsylvania and the defendant a Delaware corporation with its principal place of business in New York. The defendant sought dismissal for want of jurisdiction claiming that diversity of citizenship was lacking in that Pennsylvania, and not New York, was its principal place of business. The district court dismissed the action for want of jurisdiction. On appeal, the court of appeals affirmed.

The sole question before the court was the location of the defendant's principal place of business. In determining this, the court pointed out that it was a question of fact to be determined by the court, and that what facts were significant and determinative in this matter were left to the court's discretion.³ However, it was considered unsound to attempt to find a single factor or criterion by which the question of the principal place of business could be determined. The court proposed that the proper method was to analyze the question and attempt to select, after an examination of the entire corporate structure, the combination of factors which pointed to some one place as the principal place of business.

The plaintiff introduced evidence⁴ which showed that final approval of over-all corporate policy and financial matters was made by the board of directors from the New York offices. It was contended that this, along with other similar activities carried on in the New York executive offices, was sufficient to establish New York as the defendant's principal place of business.

However, after an examination of all phases of the corporation's activities, the court concluded that the occasional meeting of the policy making directors in New York was not sufficient to establish this site as the defendant's principal place of business. The court held that Pennsylvania, where the corporate policy was actually

² "For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business." 72 Stat. 415, 28 U.S.C. § 1332(c) (1958).

³ "The conclusion that certain facts are or are not helpful in deciding the question is a question of legal standard, or legal concept, and is one for a court to decide as a question of law." 284 F.2d at 852.

⁴ Upon challenge of the jurisdiction, the party invoking federal jurisdiction must prove that the requisite jurisdictional facts are present. *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 181 F. Supp. 130 (S.D.N.Y. 1960).

formulated and where the business activities were centered, was the principal place of business.

While the exercise of co-ordination and direction of corporate policy and affairs from Pennsylvania was the apparent basis of the decision, the court did not disregard the physical operations of the corporation. The location of the majority of the corporate assets and steel production in Pennsylvania, while of lesser importance than the control factors previously mentioned, was considered by the court to lend weight to the finding that Pennsylvania was the principal place of business.

The *Kelly* case is a good example of the difficulty which the courts may encounter in determining the principal place of business, especially when considering a gigantic corporation such as United States Steel Corporation. Therefore, resulting decisions are often, admittedly, somewhat artificial.⁵ While the question of the principal place of business has long been of significance in the bankruptcy law,⁶ it is only since the 1958 amendment of the Judicial Code that this concept has become important in the field of federal jurisdiction.

Prior to the 1958 amendment, the law was well established that a corporation for diversity purposes 'was a citizen of the state in which it was incorporated.'⁷ In 1958, pressured by an ever-increasing case load in the federal courts,⁸ Congress enacted the new

⁵ 284 F.2d at 853.

⁶ The test of the "principal place of business" is one of the jurisdictional criterion for the bankruptcy courts. Bankruptcy Act, 66 Stat. 420 (1952), 11 U.S.C. § 11 (1958).

⁷ Originally the term "citizen" as used in the federal constitution was not interpreted to include corporations. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch.) 61 (1809); *Hope Ins. Co. v. Boardman*, 9 U.S. (5 Cranch.) 57 (1809); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806). But in *Louisville, C. & C. R.R. v. Letson*, 43 U.S. (2 How.) 497 (1844), the Court held that a corporation was deemed a citizen of the state in which it was incorporated regardless of the citizenship of the stockholders. Corporate citizenship underwent a final change in *Marshall v. Baltimore & O. R.R.*, 57 U.S. (16 How.) 314 (1853), where it was held that the stockholders of the corporation were conclusively presumed to be citizens of the state in which the corporation was incorporated. This fiction of the corporate citizenship continued until the 1958 amendment.

⁸ "In the years following World War II the judicial business of the United States district courts increased tremendously. Total civil cases filed are up 75 percent and the private civil business has more than doubled in the districts having exclusively Federal jurisdiction. Most of the increase has occurred in the diversity of citizenship cases, which have increased from 7,286 in 1941 to 20,524 in 1956. A large portion of this caseload involves corporations. Of the 20,524 diversity of citizenship cases filed in the district courts during fiscal 1956 corporations were parties in 12,732 cases, or 62

diversity provision, the effect of which was to give some corporations dual citizenship. Under the statute a corporation is a citizen of both the state of its incorporation and the state in which its principal place of business is located.

The new citizenship in the state of the corporation's principal place of business was created to eliminate the evil of a local business bringing its litigations into the federal courts simply because it was incorporated in some other state. It was hoped that by enlarging the corporation's citizenship the number of corporate cases in which jurisdiction was based on diversity could be decreased.⁹

In adopting the criterion of the principal place of business as one of the means of conferring corporate citizenship, Congress was not creating a new concept, but was in fact adopting the term from the bankruptcy statute.¹⁰ It was believed that by using this standard many of the problems of interpretation could be avoided because the courts would find sufficient guidance in the interpretation of the phrase in the bankruptcy cases in which the location of the principal place of business had been in issue.¹¹ But by examining the bankruptcy cases, it will be seen that Congress could hardly have selected a more confusing term.

It is stated in the bankruptcy cases¹² that what constitutes the principal place of business is a question of fact to be determined in each particular case. Thus, being a question of fact, the nature of the corporate business and its activities must be considered.¹³ As to this the bankruptcy cases are in harmony. But in determining the principal place of business, the bankruptcy cases have derived two distinct tests based upon a consideration of two different types of evidence. One line of cases¹⁴ holds that the principal place of

percent." S. REP. No. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3100 (1958).

⁹ *Id.* at 3101-02.

¹⁰ Bankruptcy Act, 66 Stat. 420 (1952), 11 U.S.C. § 11 (1958).

¹¹ S. REP. No. 1830, 85th Cong., 2d Sess., 2 U.S. CODE CONG. & AD. NEWS 3100, 3102 (1958).

¹² *E.g.*, *In re Hudson River Nav. Corp.*, 59 F.2d 971 (2d Cir. 1932); *In re Diamond Star Timber Corp.*, 64 F. Supp. 849 (N.D.N.Y. 1946); *In re DeSoto Crude Oil Purchasing Corp.*, 35 F. Supp. 1 (W.D. La. 1940).

¹³ *E.g.*, *In re Diamond Star Timber Corp.*, *supra* note 12; *In re Devonian Mineral Spring Co.*, 272 Fed. 527 (N.D. Ohio 1920); *In re Worcester Footwear Co.*, 251 Fed. 760 (D. Mass. 1918).

¹⁴ *E.g.*, *Shearin v. Cortez Oil Co.*, 92 F.2d 855 (5th Cir. 1937); *In re Guanacevi Tunnel Co.*, 201 Fed. 316 (2d Cir. 1912); *In re Portex Oil Co.*, 30 F. Supp. 138 (D. Ore. 1939); *In re American & British Mfg. Corp.*, 300

business is where the home office or nerve center of the corporation is located, while other cases¹⁵ have taken the position that it is where the actual operations of the corporation are carried on.

Under the home office or nerve center test the location of the principal place of business is held to be the same as that of the main or central office of the corporation from which radiates the power and control over all corporate activities.¹⁶ In determining this focal point of corporate activities, the location of the managing offices, stockholder's meetings, board meetings, executives, books and records, and banking activities, are all significant factors, although no one factor is conclusive evidence of the principal place of business.

Under the actual operations test the court first determines what the principal business of the corporation actually is¹⁷ and then considers the location of the facilities needed to carry on this primary activity.¹⁸ The site of these facilities is deemed the principal place of business. The location of factories, personnel, production equipment, mines and quarries are the prime objects with which the court is concerned. The location of control over these physical assets is only secondary.

While Congress made it clear that it was permissible for the courts, when applying the jurisdictional test of the principal place of business, to be guided by the standards established in the bankruptcy cases, they failed to indicate which of the two tests should be applied. In examining the cases decided since the 1958 diversity provision went into effect, in which the main issue has been the determination of the principal place of business, it will be seen that the courts have, at various times, adopted both of the bankruptcy tests.

Fed. 839 (D. Conn. 1924); *In re Worcester Footwear Co.*, *supra* note 13; *In re Matthews Consol. Slate Co.*, 144 Fed. 724 (D. Mass. 1905).

¹⁵ *E.g.*, *In re Pusey & Jones Co.*, 286 Fed. 88 (2d Cir. 1922); *Dryden v. Ranger Ref. & Pipe Line Co.*, 280 Fed. 257 (5th Cir. 1922); *Continental Coal Corp. v. Roszelle Bros.*, 242 Fed. 243 (6th Cir. 1917); *Watters v. Hamilton Gas Co.*, 10 F. Supp. 323 (S.D. W. Va. 1935); *In re Tygarts River Coal Co.*, 203 Fed. 178 (N.D. W. Va. 1913).

¹⁶ *In re Matthews Consol. Slate Co.*, 144 Fed. 724 (D. Mass. 1905); See generally 1 COLLIER, BANKRUPTCY § 2.19(2) (14th ed. 1956).

¹⁷ *E.g.*, *In re Tygarts River Coal Co.*, 203 Fed. 178 (N.D. W. Va. 1913); *In re Elmira Steel Co.*, 109 Fed. 456 (N.D.N.Y. 1901).

¹⁸ *In re Tygarts River Coal Co.*, *supra* note 17; See generally 1 COLLIER, *op. cit. supra* note 16.

*Scot Typewriter Co. v. Underwood Corp.*¹⁹ is the best example of an application of the home office test. The defendant was a Delaware corporation engaged in manufacturing, distributing and selling typewriters and business machines. The defendant's manufacturing plants were located in Connecticut, New Jersey and California, and sales offices were located in virtually all other states. However, its executive offices, from which the over-all supervision and co-ordination of sales and production, as well as a determination of corporate policy originated, were in New York. Under these facts the court applied the home office test and held that New York was the defendant's principal place of business. The court stated:²⁰

Where a corporation is engaged in far-flung and varied activities which are carried on in different states, its principal place of business is the nerve center from which it radiates out to its constituent parts and from which its officers direct, control and coordinate all activities without regard to locale, in the furtherance of the corporate objective.

An excellent example of an application of the actual operations test is found in *Mattson v. Cuyuna Ore Co.*²¹ The defendant corporation carried on extensive mining operations in Minnesota. All the mining property, personnel and equipment were located in Minnesota. However, the home office and chief executives of the corporation were in Ohio, and the business transaction out of which the litigation arose originated from these Ohio offices. It was the court's view that the home office was a mere incident to the corporation's existence, and that the principal place of business was that place where the corporation's actual mining operations were carried on.²²

While it is true that under the fact situation presented in *Kelly* the resulting determination of the principal place of business would have been the same regardless of which test was used, there was in

¹⁹ 170 F. Supp. 862 (S.D.N.Y. 1959).

²⁰ *Id.* at 865. For other cases applying the "home office test" see *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*, 193 F. Supp. 456 (D. Conn. 1961); *Wear-Ever Alum., Inc. v. Sipos*, 184 F. Supp. 364 (S.D.N.Y. 1960); *Hughes v. United Eng'rs & Constructors, Inc.*, 178 F. Supp. 895 (S.D.N.Y. 1959); *Riley v. Gulf, M. & O. R.R.*, 173 F. Supp. 416 (S.D. Ill. 1959).

²¹ 180 F. Supp. 743 (D. Minn. 1960).

²² For other cases applying the "actual operations" test see *Gilardi v. Atchison, T. & S. F. Ry.*, 189 F. Supp. 82 (N.D. Ill. 1960); *Potocni v. Asco Mining Co.*, 186 F. Supp. 912 (W.D. Pa. 1960); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960).

Kelly a definite attempt to reject any single criterion as the sole test for the principal place of business. However, in two recent decisions the *Kelly* case has been construed as following both the actual operations and the nerve center tests. In *Potocni v. Asco Mining Co.*²³ the court applied the actual operations test and claimed to rely upon the then unreported decision of *Kelly v. United States Steel Corp.*,²⁴ while in *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*,²⁵ the court viewed *Kelly* as an application of the nerve center test in spite of the court's language repudiating this test.²⁶ Therefore, considering the manner in which the district courts have interpreted the *Kelly* case, it is doubtful that the bankruptcy tests will be discarded, but in all probability these tests will continue to be the basis of future decisions.

The problem of determining the principal place of business is not the only difficulty the courts in the future will encounter. The question of the citizenship of the multi-state corporation and the effect the new statute will have on this citizenship is as yet undecided.

In the early cases²⁷ decided under the new diversity provision it was held that when a corporation had its principal place of business in a state other than the state of incorporation, the corporation would have dual citizenship; and if either of the citizenships coincided with that of the adverse party, there was no diversity within the meaning of the statute. In reaching this result the courts have emphasized the two following points: (1) the intention of the legislature was to limit jurisdiction, not broaden it; and (2) the statute clearly provides that a corporation is a citizen of the state of incorporation *and* the state of its principal place of business.²⁸

²³ 186 F. Supp. 912 (W.D. Pa. 1960).

²⁴ "I am in accord with the view expressed by my associate, Judge Joseph P. Willson, that the state wherein a corporation carries on its chief operations is the principal place of business of that corporation, *Kelly v. United States Steel Corporation*, Cal7251, filed February 17, 1960, officially unreported." *Id.* at 912-13.

²⁵ 193 F. Supp. 456 (D. Conn. 1961).

²⁶ *Id.* at 459.

²⁷ *Canton v. Angelina Cas. Co.*, 279 F.2d 553 (5th Cir. 1960); *Buck v. New York C. R.R.*, 275 F.2d 292 (7th Cir. 1960); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960); *Mattson v. Cuyuna Ore Co.*, 180 F. Supp. 743 (D. Minn. 1960); *Bryfogle v. Acme Mkt., Inc.*, 176 F. Supp. 43 (E.D. Pa. 1959); *Moesser v. Crucible Steel Co.*, 173 F. Supp. 953 (W.D. Pa. 1959); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959); *Jaconski v. McCloskey & Co.*, 167 F. Supp. 537 (E.D. Pa. 1958).

²⁸ "The Act does not give an option to a plaintiff of treating a corpora-

Thus far, however, the courts have not been called upon to determine the effect of the 1958 diversity provision upon the citizenship of the true multi-state corporation—a corporation incorporated under the laws of more than one state.²⁹ Prior to the 1958 amendment, a majority of the cases³⁰ held that a corporation incorporated in the state in which suit was brought would be considered a citizen of that state alone, regardless of the fact that the corporation may have been incorporated elsewhere. This result was based on the theory that when the corporation is sued in a state in which it is incorporated, only the laws of that jurisdiction are brought into play, and the fact that the corporation is incorporated elsewhere has no relevance to that particular controversy.³¹ Thus if an action was brought in federal court in State *A* by a citizen of State *B* against a corporation incorporated under the laws of both States *A* and *B*, diversity was held to exist.³²

When this multi-state situation comes squarely before the court under the new statute, it is believed, in light of the clear language used in the statute,³³ that the multi-state corporation will be considered a citizen of any and every state in which it is incorporated regardless of where the action is brought; and if any one of these citizenships coincides with that of the opposing litigant, diversity will be found to be lacking. The clear intention of the legislature to limit diversity, as well as the cases holding that the litigants cannot choose whether citizenship will be by incorporation or the principal place of business, lend support to this view.

This view has not, however, received complete acceptance. The

tion as a citizen either of the state of incorporation or of the state where its principal place of business is located. The Act treats a corporation as a citizen of the state where it has its principal place of business as well as the state of incorporation. This is clearly indicated by the use of the conjunctive 'and'. The purpose of the law was to narrow jurisdiction, not to broaden it." *Canton v. Angelina Cas. Co.*, *supra* note 27, at 554.

²⁹ *Jacobs v. McCloskey & Co.*, 167 F. Supp. 537 (E.D. Pa. 1958).

³⁰ *E.g.*, *Jacobson v. New York, N. H. & H. R.R.*, 206 F.2d 153 (1st Cir. 1953), *aff'd mem.*, 347 U.S. 909 (1954).

³¹ *Lake Shore & M. S. Ry. v. Eder*, 174 Fed. 944, 945-46 (6th Cir. 1909).

³² *Pennsylvania R.R. v. St. Louis, A. & T. H. R.R.*, 118 U.S. 290 (1886); *Muller v. Dows*, 94 U.S. 444 (1876); *Boston & M. R.R. v. Breslin*, 80 F.2d 749 (1st Cir. 1935); *Boston & M. R.R. v. Hurd*, 108 Fed. 116 (1st Cir. 1901); *Lucas v. New York C. R.R.*, 88 F. Supp. 536 (S.D.N.Y. 1950); *cf.* *Seavey v. Boston & M. R.R.*, 197 F.2d 485 (1st Cir. 1952); *Delaware River Joint Toll Bridge Comm'n v. Miller*, 147 F. Supp. 270 (E.D. Pa. 1956).

³³ "[A] corporation shall be deemed a citizen of *any* State by which it has been incorporated and of the State where it has its principal place of business." 72 Stat. 415, 28 U.S.C. § 1332(c) (1958). (Emphasis added.)

position has been taken³⁴ that the law regarding the multi-state corporation prior to the 1958 amendment was so well settled that had Congress intended to effect a change in this law, such intention would have been expressed either in the statute or the legislative history of the act. Since this matter was apparently not considered by Congress, it is argued that the established law in this field is still in effect. Furthermore, in *Jaconski v. McCloskey & Co.*³⁵ the court, in a dictum, stated that "the 1958 amendment of the Revised Judicial Code is not understood to have direct bearing upon the bare question of the effect of multiple incorporation in diversity litigation."³⁶ When the problem of multiple incorporation is raised under the new diversity provision, the apparent failure of Congress to consider this situation and the pronouncement in *Jaconski* will undoubtedly lend strong support to the argument favoring a continuance of the old multi-state corporation case law.

While the problem of multiple incorporation is such that it will probably be settled when a case is properly presented to the court, the question of what is the principal place of business will be one which the courts will continue to encounter in the future. The courts have thus far developed no definite rules for determining the principal place of business, and the bankruptcy tests continue to be accepted. However, a new test by which the courts will determine which of the two existing tests shall be applied to a particular situation is apparently developing. In those cases in which the home office test was applied³⁷ a definite similarity can be seen in the type of corporations involved—corporations with activities in many separate states, no one state being completely dominate over any other. Conversely, in those cases in which the actual operations test has been accepted,³⁸ the corporations involved maintained virtually all their tangible assets in one state and exercised control over them

³⁴ Note, 27 GEO. WASH. L. REV. 595 (1959). Cf. FINS, FEDERAL JURISDICTION AND PROCEDURE 12 (1960); 3 VOLTZ, WEST'S FEDERAL PRACTICE MANUAL § 3142 (1960).

³⁵ 167 F. Supp. 537 (E.D. Pa. 1958).

³⁶ *Id.* at 540 (dictum). A similar dictum is found in *Fitzgerald v. Southern Ry.*, 176 F. Supp. 445, 446 (S.D.N.Y. 1959).

³⁷ *E.g.*, *Textron Electronics, Inc. v. Unholtz-Dickie Corp.*, 193 F. Supp. 456 (D. Conn. 1961); *Riley v. Gulf, M. & O. R.R.*, 173 F. Supp. 416 (S.D. Ill. 1959); *Scot Typewriter Co. v. Underwood Corp.*, 170 F. Supp. 862 (S.D.N.Y. 1959).

³⁸ *E.g.*, *Potocni v. Asco Mining Co.*, 186 F. Supp. 912 (W.D. Pa. 1960); *Webster v. Wilke*, 186 F. Supp. 199 (S.D. Ill. 1960); *Mattson v. Cuyuna Ore Co.*, 180 F. Supp. 743 (D. Minn. 1960).

from another state. Furthermore, on numerous occasions when the actual operations test has been applied, the courts have pointed out that their acceptance of the actual operations test is not a rejection of the applicability of the nerve center test under appropriate circumstances—when the activities of the corporation are scattered among many states.³⁹ Thus considering the manner in which the courts have applied the bankruptcy tests so far, it is arguable that when the corporation is concentrated in one state, the actual operations test will be applied, but in cases in which the corporate assets are dispersed among many states, the home office or nerve center test will be invoked.

It is still too soon, however, to ascertain whether this preliminary test will continue to be utilized to determine which of the bankruptcy tests will be applied. It is hoped that through continual development of this preliminary test, some degree of certainty will be introduced into the method of determining a corporation's principal place of business.

GLEN B. HARDYMON

Federal Jurisdiction—Political Question—Non-Justiciability of State Reapportionments

In a recent decision,¹ the United States Supreme Court once again declined to consider a voting right case under the equal protection clause of the fourteenth amendment. In this case, however, the Court invoked its jurisdiction under the fifteenth amendment. The petitioners, all Negroes, alleged that an act of the Alabama legislature² was a device to disenfranchise Negro citizens in the Tuskegee, Alabama municipal elections and that enforcement of this act would deny to them their rights guaranteed under the equal protection clause of the fourteenth amendment and their right to vote under the fifteenth amendment.³ The district court dismissed the action for lack of jurisdiction, stating that the question presented was of a political nature and thus not justiciable. This was affirmed by the court of appeals, but the Supreme Court reversed.

³⁹ *E.g.*, *Gilardi v. Atchison, T. & S. F. Ry.* 189 F. Supp. 82 (N.D. Ill. 1960); *Webster v. Wilke*, *supra* note 38.

¹ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

² Ala. Acts 1957, No. 140.

³ The petitioners alleged that the act changed the originally square shaped municipal boundary into a twenty-eight sided figure that was designed to and in fact did, eliminate all but three or four of the Negro voters from the town.

At first glance, this case would seem to be a direct reversal of a long standing rule, *i.e.*, federal courts have generally refused to consider cases involving gerrymandering.⁴ Such cases have been held non-justiciable because they involve "political questions"—questions for determination by the legislature rather than the judiciary. The instant case is not actually a reversal, however, although it may represent a trend in the direction of enlarging the area considered justiciable. To perceive this clearly it is necessary to examine the language used by the Court in rendering its decision.

The Court supported its decision by saying that since the state's legislative power had been subjugated to the constitutional protection of the obligation of contracts,⁵ it would seem that the federal constitution would also override the state's legislative power when its action conflicted with the provisions of the fifteenth amendment. This case was distinguished from other "political question" cases, however, on the grounds that the act in question was enacted clearly against the Negroes alone, and that it was the removal of an entire voting right.⁶ Its applicability as judicial precedent, therefore, seems to be severely limited.

⁴ *South v. Peters*, 339 U.S. 276 (1950); *Colegrove v. Green*, 328 U.S. 549 (1946); *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956); *Perry v. Folsom*, 144 F. Supp. 874 (N.D. Ala. 1956); *Remmy v. Smith*, 102 F. Supp. 708 (E.D. Pa. 1951). But see *Smiley v. Holm*, 285 U.S. 355 (1932), where redistricting acts were held invalid and mandamus issued ordering that the redistricting acts be disregarded and that the representatives be elected at large. See generally *Notes*, 29 N.C.L. REV. 72 (1950); 62 HARV. L. REV. 659 (1949). See also OHIO CONST. art. 11, §§ 1-11, which provides that reapportionment shall be made every ten years by a board composed of the Governor, Auditor of State and Secretary of State, thus giving the board no discretion. In *State ex rel. Herbert v. Bricker*, 139 Ohio St. 499, 41 N.E.2d 377 (1942), mandamus was issued compelling the board to reapportion as directed. See also *Dyer v. Abe*, 138 F. Supp. 220 (Hawaii 1956), which was distinguished on the grounds that it involved the Hawaii Organic Act.

⁵ *Graham v. Folsom*, 200 U.S. 248 (1906); *Shapleigh v. San Angelo*, 167 U.S. 646 (1894); *Mobile v. Watson*, 116 U.S. 289 (1886); *Mt. Pleasant v. Beckwith*, 100 U.S. 514 (1879); *Broughton v. Pensacola*, 93 U.S. 266 (1876).

⁶ In *Lane v. Wilson*, 307 U.S. 268 (1939), the Court held that if a person was denied the right to vote on the grounds of racial discrimination he had a cause of action for *damages*. This action was based on the fifteenth amendment and the Civil Rights Act, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1958). It must be noted that no mention was made here of an equitable remedy as was granted in the principal case. The general rule is that equitable remedies will be granted when there is no adequate remedy available at law. See *McCLINTOCK, EQUITY* § 60 (1948). It would seem that the diminution of a vote would be far more susceptible to an equitable remedy than a legal redress.

In a concurring opinion Mr. Justice Whitaker, supported by Justices Stewart and Douglas, stated that the decision should have been based on the fourteenth amendment. He contended that the Court had warped the clear meaning of the fifteenth amendment, which was intended simply to protect minorities from being denied the right to vote. In this case, he stated, there had been no denial of the right to vote. What had been denied was equal protection under the law which was protected by the fourteenth amendment.

Despite the limitation which seems to have been placed on this case by the majority, it takes on further meaning when considering its possible applications in future cases of unfair or unequal election districts. To appreciate the full ramifications, it is necessary to consider the historical background of the "political question" cases.

The first mention of the doctrine of a "political question" is found in the very early Supreme Court case of *Luther v. Borden*.⁷ There it was held that for the Court to decide which of two governments was in force in the state of Rhode Island at a particular time, would result in the Court's entering into a matter solely within the domain of the legislative and executive branches of the government. This was held notwithstanding one of the governments in question was republican in form and the other was not, and even though the United States Constitution provided that a republican form of government was guaranteed to the people of the United States.⁸ Another strong pronouncement of this policy is found in *Pacific States Tel. & Tel. Co. v. Oregon*.⁹ In this instance the Court refused to rule on the manner in which a tax statute, which was extremely burdensome to the petitioner, was enacted, implying that the Court had no power to question the sovereign will of the people.¹⁰

The theory intrinsic in the doctrine of the non-justiciable political questions is necessarily intertwined with the doctrine of "separation of powers." If the courts were to assume jurisdiction over matters

⁷ 48 U.S. (7 How.) 1 (1849).

⁸ U.S. CONST. art. IV, § 4: "The United States shall guarantee to every state in this union a republican form of government. . . ."

⁹ 223 U.S. 118 (1912).

¹⁰ *Id.* at 123. The petitioner attacked the statute on the ground that it was passed by a state government that was not republican in form, *i.e.*, that the actions of initiative and referendum violated the constitutional guarantee of a republican government as set out in U.S. CONST. art. IV, § 4. The Court held that where it is alleged that an act of a state legislature deprives a person of property, not because it deprives him of due process of law, but because the government is not republican in form, the question is one of a purely political nature.

solely within the policy-making power of the legislature, they would be removing from the citizens their right to self-government through elected representatives. The courts, however, do possess the power, through judicial review, to examine legislative acts and determine whether they violate any of the fundamental rights guaranteed to the citizens.¹¹

Standing alone, the fact that a state allows an unfair or unequally proportioned electoral system to exist would be beyond the bounds of judicial review.¹² In most of the states, however, there is a constitutional provision directing the periodic reapportionment of electoral districts.¹³ Thus, despite the requirement of periodic reapportionment of election districts, the refusal of the courts to take judicial cognizance of the inaction of a state legislature after an initial apportionment results in a situation in which some people have greater voting power than others and the people possessing the lesser voting power not being given an equal opportunity to participate in self-government. In contrast, the courts have not failed to act in cases where the power of a state legislature has been *actively* used to produce an inequality in voting matters.¹⁴

Colegrove v. Green,¹⁵ *MacDougall v. Green*,¹⁶ and *South v. Peters*¹⁷ are three cases which have been strongly relied upon by the courts in classifying reapportionment as a non-justiciable matter.¹⁸ For this reason a brief summary of the facts and holdings in these cases is merited.

In *Colegrove*, the petitioners were asking that the officers of the state of Illinois be restrained from arranging for an election in which members of Congress were to be chosen pursuant to provisions of an Illinois law of 1901 governing congressional districts. They alleged

¹¹ *Massachusetts v. Mellon*, 262 U.S. 447, 448 (1923); *United States v. Butler*, 297 U.S. 1, 62 (1936).

¹² *Snowden v. Hughes*, 321 U.S. 1 (1943); *Wood v. Broom*, 287 U.S. 1 (1932); *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956); *Perry v. Folsom*, 144 F. Supp. 874 (N.D. Ala. 1951).

¹³ *E.g.*, N.C. CONST. art. 2, §§ 4-5; S.C. CONST. art. 3, §§ 3-4; VA. CONST. art. 4, § 43.

¹⁴ *Carroll v. Becker*, 285 U.S. 380 (1932); *Koenig v. Flynn*, 285 U.S. 375 (1932); *Smiley v. Holm*, 285 U.S. 355 (1932).

¹⁵ 328 U.S. 549 (1946).

¹⁶ 335 U.S. 281 (1948).

¹⁷ 339 U.S. 276 (1950).

¹⁸ See, *e.g.*, *South v. Peters*, 339 U.S. 276 (1950); *Radford v. Gary*, 145 F. Supp. 541, 544 (W.D. Okla. 1956); *Perry v. Folsom*, 144 F. Supp. 874, 876 (N.D. Ala. 1951); *Remmey v. Smith*, 102 F. Supp. 708, 710 (E.D. Pa. 1951).

that this was in conflict with the federal constitution and Illinois state law. In this case only seven Justices were sitting. Three called the matter non-justiciable because it was a political question. Three Justices were in favor of granting the petitioners' request for redistricting. In casting his tie-breaking vote, Mr. Justice Rutledge implied that he sided with the petitioners on the basic issue but thought that equitable discretion demanded leaving the problem to the legislature.¹⁹

In *MacDougall*, the petitioners were protesting a state law requiring a person who wanted to get his name on the ballot for state office to get a minimum number of signatures on his petition for nomination from a majority of the election districts. This was required even though eighty-seven per cent of the population was in less than half of the districts. Without discussing jurisdiction, the Court expressly decided the case on the merits for the defendants.²⁰

In the *South* case the complaint was directed against the Georgia unit system which gives the residents of Fulton County an absurdly small voting power. The Court affirmed the dismissal of the action, stating that the "federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."²¹

The *Colegrove* case should be inapposite as a precedent for classifying reapportionment as a non-justiciable matter since only three members of the Court felt that it presented a political question. Mr. Justice Rutledge's tie-breaking vote was not an endorsement of the opinion that a political question was presented; rather he voted for dismissal on the ground of equitable discretion and implied that a justiciable issue was presented. Moreover, the Court in *MacDougall* apparently ignored the jurisdictional question and rendered a decision on the merits of the case. As to the *South* case, Georgia has no provision calling for legislative action in relation to reapportionment.²² Since the Constitution gives each state the power

¹⁹ 328 U.S. at 564 (1946).

²⁰ 335 U.S. at 285 (1948).

²¹ 339 U.S. at 277 (1950).

²² The Georgia unit system provides that after each census the original apportionment shall be *automatically* changed to give the six counties having the largest population three representatives each; the twenty-six counties having the next largest population two representatives each; and the rest of the counties one representative each. The result of this system is that a county with 5,000 people has one representative and a county with 100,000 people has only three representatives.

to design its electoral system, there is no way to compare the Georgia situation with that which exists in the majority of states. It must be remembered that the courts have no power to make a law for a state in this area, but merely to see that the action of the law in practice does not deny individuals constitutionally guaranteed rights.²³

It is submitted that the dissents of Justices Black in the *Colegrove* case, Douglas in the *South* case and Whitaker in the principal case are the better view. Mr. Justice Black stated that the condition which gave rise to the *Colegrove* case, *i.e.*, the refusal of the legislature to redistrict in the face of a mandate to do so, promoted a wholly indefensible discrimination against the petitioners in that case and all other voters in densely populated areas of that state.²⁴ Mr. Justice Douglas stated that the condition giving rise to the *South* case was a clear reduction of the right of a selective group of citizens to vote equally with the remainder of the electorate.²⁵ It is further submitted that the following line of cases supports the view of the dissenters.

In *Strauder v. West Virginia*²⁶ the question presented was whether Negroes could be systematically excluded from juries in the courts of that state. The Supreme Court held that a state was not required to give any rights to its citizens under the Constitution but that once a right was given, all citizens were to be given that right equally unless it could be removed from individuals for adequate reasons. It would seem that the voting power which is unconditionally guaranteed should be protected in the same manner. In *Nixon v. Herndon*²⁷ the right to vote in a primary was held to come under protection of the equal protection clause of the fourteenth amendment. In *United States v. Saylor*²⁸ active dilution of a citizen's vote was held to be a federal crime. In other words, one cannot stand by a ballot box and put in a vote for X every time somebody votes for Y. In an area where the voting districts are unfairly drawn, the same end is reached by giving a district of 100,000 the same number of electoral votes as a district of 10,000.

²³ See generally Comment, *Reapportionment: Is it Really A Political Question?*, 17 LA. L. REV. 593 (1956).

²⁴ *Colegrove v. Green*, 328 U.S. 549, 569 (1946) (dissent).

²⁵ *South v. Peters*, 339 U.S. 276, 278 (1950) (dissent).

²⁶ 100 U.S. 303 (1879).

²⁷ 273 U.S. 536 (1927).

²⁸ 322 U.S. 385 (1944).

Mr. Justice Frankfurter has condemned "sophisticated as well as simple-minded modes of discrimination."²⁹

In *United States v. Mosely*³⁰ and *United States v. Classic*³¹ it was held that the right to vote included the right to have the ballot counted. It would seem to be a logical extension of this to say that that protection should also cover the right to have one vote counted as much as the next. The Court has said that the fourteenth amendment "merely requires that all persons subjected to [state] legislation . . . be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed"³² and that the fourteenth amendment "was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."³³

Thus it would seem obvious that the passage of new legislation or continued enforcement of an old law effect the same result on a group of people within the meaning of the fourteenth amendment. It seems contradictory to say that the remedy for denial of equality in voting power is the assertion of a diluted voting power in the next election. It may be admitted that mere failure to reapportion election districts is non-justiciable. Nevertheless the enforcement of an outdated, unfair act should be subject to review for it clearly deprives the person affected of equal protection under the law. A thorough, straightforward look at the situation was presented by Judge McLaughlin:

The time has come, and the Supreme Court has marked the way, when serious consideration should be given to a reversal of traditional reluctance of judicial intervention in legislative reapportionment. The whole thrust of today's legal climate is to end unconstitutional discrimination. It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the Constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators.³⁴

²⁹ *Lane v. Wilson*, 307 U.S. 299, 302 (1939).

³⁰ 238 U.S. 383 (1915).

³¹ 313 U.S. 299 (1941).

³² *Hayes v. Missouri*, 120 U.S. 68, 71 (1886).

³³ *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 188 (1888).

³⁴ *Dyer v. Abe*, 138 F. Supp. 220, 236 (Hawaii 1956).

The ills effectuated by the refusal of state legislatures to apportion when justice demands it are very similar to the ills which have been repeatedly redressed by the courts in the individual rights cases. It is possible that the Court has at last started to consider gerrymander cases in the light of the individual right decisions. It is submitted that the *Gomillion* case may well mean that the Court has decided that justice demands the granting of equitable remedies in these instances.³⁵

JOSEPH S. FRIEDBERG

Insurance—Burden of Proof in Insurance Exception Clauses—Pleading

In *Muncie v. Travelers Ins. Co.*,¹ the plaintiff was injured while riding in the automobile of the insured. Eight months after the accident, the insured gave notice to the insurance company. The insurer denied liability under the policy due to the insured's failure to comply with a policy requirement for notification of loss within a reasonable time. The policy designated compliance with this requirement as a condition precedent to recovery. The plaintiff sued the insured and received a default judgment. The insurer knew of this suit but was not a party thereto. In the suit by the plaintiff against the insurer, the trial court instructed the jury that the burden of proof was on the insurer to show that notice had not been given within a reasonable time. This instruction was held error on appeal, the court holding that the notice requirement was a condition precedent to recovery by the insured, thereby placing the burden of proof of compliance with this requirement on the plaintiff.²

In reaching this result, the court distinguished the present case from *MacClure v. Accident & Cas. Ins. Co.*,³ which indicated that noncompliance with a cooperation requirement in an insurance

³⁵ If the result of a judicial order enjoining the further operation of an archaic electoral district would be slight disorganization by the use of an "at large" electoral system in the next election, it must be answered that necessity will soon generate a newer, fairer and more workable system.

¹ 253 N.C. 74, 116 S.E.2d 474 (1960).

² In *Muncie* the plaintiff was the insured's judgment creditor. The court stated that as such he could have no greater right to recover from the insurer than the insured himself would have. *Id.* at 81, 116 S.E.2d at 479.

³ 229 N.C. 305, 49 S.E.2d 742 (1948).

policy was a condition subsequent to recovery and therefore an affirmative defense, stating that this portion of the opinion was merely dictum. Thus, the court avoided any commitment that the condition in *MacClure* was not actually a condition subsequent⁴ and upheld a line of earlier cases, culminating in *Peeler v. United States Cas. Co.*,⁵ which placed the burden of proving notice requirements on the insured as conditions precedent to recovery.

These cases raise the recurring problem of who has the burden of proof as to particular conditions, exclusions and exceptions within insurance contracts. The courts have failed to determine a uniform rule for this allocation. That this should be of more than passing interest to the parties in insurance cases can be seen in those cases where this allocation itself determined the outcome.⁶

Traditionally the burden of proof has been allocated in four ways:⁷ (1) the burden is on the party who seeks an affirmative answer to the issue in question;⁸ (2) the burden is on the party to whose case the fact is essential;⁹ (3) the burden is on the party

⁴ In *MacClure* the insurer denied liability because of an alleged breach by the insured of a cooperation requirement within the policy. The court allowed recovery, stating that noncompliance with the cooperation requirement by the insured was an affirmative defense to liability under the policy. The clause was, the court stated, a condition subsequent. This was true even though the policy designated the clause as a condition precedent, since such matters related to the conduct of the insured after the loss which matured the policy. *Id.* at 310, 49 S.E.2d at 747.

In a concurring opinion to *Muncie*, Mr. Justice Parker refused to accept the dismissal of *MacClure* by merely declaring it to be dictum. He felt that the *MacClure* statement that noncompliance with the policy requirement was an affirmative defense was "erroneous and should be disapproved or overruled by the court," not merely disregarded as dictum. *Muncie v. Travelers Ins. Co.*, 253 N.C. 74, 85-86, 116 S.E.2d 474, 482 (1960). His use of the word "overruled" seems to indicate that the *MacClure* statement might be a holding, not merely dictum.

⁵ 197 N.C. 286, 148 S.E. 261 (1929).

⁶ See, e.g., *Colovos' Adm'r v. Gouvas*, 269 Ky. 752, 108 S.W.2d 820 (1937), where the life insurance policy provided that payment of the proceeds be made to the insured's wife should she survive the insured. If the wife predeceased the insured, the proceeds were to be paid to the insured's estate. The insured and his wife died simultaneously in a common disaster. *Held*: the personal representative of the wife could not recover on the policy since he could not prove the condition precedent, namely, that the insured predeceased his wife.

⁷ STANSBURY, *THE NORTH CAROLINA LAW OF EVIDENCE* § 208 (1946); 9 WIGMORE, *EVIDENCE* § 2486 (3d ed. 1940).

⁸ *Jones v. Waldroup*, 217 N.C. 178, 7 S.E.2d 366 (1940); *Wilson v. Inter-Ocean Cas. Co.*, 210 N.C. 585, 188 S.E. 102 (1936); *Stein v. Levins*, 205 N.C. 302, 171 S.E. 96 (1933).

⁹ *Hauser v. Western Union Tel. Co.*, 150 N.C. 557, 64 S.E. 503 (1909).

having sole knowledge of the fact;¹⁰ and (4) the burden is on the party who has the burden of pleading the fact.¹¹

In contract cases generally allocation of the burden of proof for compliance with or occurrence of conditions stated in the contract has long been a problem.¹² Allocation usually has been made on a basis of whether the condition involved is a condition precedent or subsequent. A condition precedent is involved "where the contract provides for performance of some act or the happening of some event, and the obligations of such contract are made to depend on such performance or happening."¹³ The condition subsequent is that clause which provides "that the policy shall become void . . . upon the happening of some event, or the doing, or omission to do, some act. . . ."¹⁴ Following these definitions, the burden of proving a condition precedent has been placed on the plaintiff and a condition subsequent on the defendant.¹⁵

Due to the complexity of insurance policies, a particular amount of confusion has arisen in allocating the burden of proof in cases involving them. If the traditional contract condition precedent-condition subsequent test is used, the problem arises in categorizing the various "conditions," "exclusions" and "exceptions" of the typical policy. First it must be determined if they are conditions at all.¹⁶ If so, they must be categorized as conditions precedent or subse-

¹⁰ *Skyland Hosiery Co. v. American Ry. Exp. Co.*, 184 N.C. 478, 114 S.E. 823 (1922); *Ange v. Woodmen of the World*, 173 N.C. 33, 91 S.E. 586 (1917).

¹¹ *Hood v. Cobb*, 207 N.C. 128, 176 S.E. 288 (1934); *Cook v. Guirkin & Co.*, 119 N.C. 13, 25 S.E. 715 (1896).

¹² *Harnett & Thornton, The Insurance Condition Subsequent: A Needle in a Semantic Haystack*, 17 *FORDHAM L. REV.* 220 (1948).

¹³ *Jenkins v. Myers*, 209 N.C. 312, 318, 183 S.E. 529, 532 (1936).

¹⁴ 3 *WILLISTON, CONTRACTS* § 667A, at 1919 (rev. ed. 1936). A similar definition is given in the *Restatement of Contracts*: "[A] condition is . . . either a fact . . . which, unless excused . . . (a) must exist or occur before a duty of immediate performance of a promise arises, in which case the condition is a 'condition precedent,' or (b) will extinguish a duty to make compensation for breach of contract after the breach has occurred, in which case the condition is a 'condition subsequent,' or a term in a promise providing that a fact shall have such an effect." *RESTATEMENT, CONTRACTS* § 250 (1932).

¹⁵ *Barron v. Cain*, 216 N.C. 282, 4 S.E.2d 618 (1939); *Hyder v. Metropolitan Life Ins. Co.*, 183 S.C. 98, 190 S.E. 239 (1937).

¹⁶ That a single policy can contain a great number of exceptions can be seen in the policy involved in *Travelers Ins. Co. v. McConkey*, 127 U.S. 661, 662 (1888). See *Seawell, J.*, in *MacClure v. Accident & Cas. Ins. Co.*, 229 N.C. 305, 311, 49 S.E.2d 742, 747 (1948), quoting 3 *WILLISTON, op. cit. supra* note 14, in context which raises this question. See generally *Note, Burden of Proof of Excepted Causes in Insurance Policies*, 46 *COLUM. L. REV.* 802 (1946).

quent. Applying the contract test to insurance policies, it could be said that there is only one true condition subsequent, this being the imposition of a time limit within which the suit must be brought. All other conditions would then be conditions precedent which must be proved by the plaintiff.¹⁷ The problem would be simplified if the court followed such a rule strictly. The confusion has arisen, however, where the courts have attempted to lighten the burden of the plaintiff by designating certain conditions as affirmative defenses. An expanded conception of the condition subsequent is one of the vehicles by which this is accomplished.

Some degree of certainty is needed. When applied to insurance "conditions," "exclusions" and "exceptions," the failure of the substantive contract test to supply any workable standard becomes apparent. The problem involved in the *Muncie* and *MacClure* cases clearly demonstrate this. The court in these two cases was dealing with a similar type of policy provision; yet in one case the court held it to be a condition subsequent while in the other the court saw it as a condition precedent. The impossibility of using this as a continuing basis for the allocation of the burden of proof is indicated by an analysis of how the court in these two cases took two different views of the same determining factor. In *MacClure* the court was relating performance of condition to the time of loss, to which it was subsequent;¹⁸ while in *Muncie* the court was relating performance of condition to the time of bringing the suit, to which it was precedent. For any degree of uniformity, the allocation of the burden of proof must contemplate an agreed single reference point.¹⁹ Obviously, the terms "precedent" and "subsequent" are utterly devoid of meaning unless so related. Adding to the con-

¹⁷ *Northwest Nat'l Life Ins. Co. v. Ward*, 56 Okla. 188, 155 Pac. 524 (1916); Harnett & Thornton, *supra* note 12, at 232.

¹⁸ "It is to be observed that in substance the plea relates to conduct of the insured after the liability on the policy has matured by reason of the accident." *MacClure v. Accident & Cas. Ins. Co.*, 229 N.C. 305, 311, 49 S.E.2d 742, 747 (1948).

¹⁹ The necessity of the single reference point can be shown in another context by considering the requirement for procurement of an architect's certificate for full payment on a building contract. Although this is generally considered to be a condition precedent, this condition can be seen as a condition subsequent merely by changing the reference point. Procurement of this certificate is precedent to duty of payment for full performance, or the right to bring an action for its recovery if payment is refused. Yet, procurement of the certificate is subsequent to certain facts, such as "offer," "acceptance" and "consideration." Harnett & Thornton, *supra* note 12, at 324. See also HOLMES, *THE COMMON LAW* 316 (1881): "In one sense, all conditions are subsequent; in another, all are precedent."

fusion arising from any use of the substantive standard is the fact that many exclusions and exceptions in insurance policies cannot be based on any chronological conception—for example, a flat exclusion such as suicide.²⁰

For the present, such certainty as we have comes from specific decisions which have for one reason or another allocated the burden of proof in respect to specific provisions. For example, on current case authority the insured has the burden of showing that his injury was covered by the policy,²¹ that there was a valid policy in effect at the time of loss,²² that the insurer has waived or is estopped to deny recovery due to a breach by the insured,²³ and general compliance with the requirements set out in the policy, such as "the giving of notice and proof of death (or other event)."²⁴ On the other hand, the court has placed the burden of proof upon the insurer in respect to suicide exclusion clauses,²⁵ property damage exceptions,²⁶ and violent death exceptions.²⁷ Yet, as *Muncie* reveals, even this apparent certainty based upon specific authority may be illusory.

The problem is of more than mere academic interest. The difficulty is that both litigants may be forced at different stages of the litigation to make definitional decisions which can control the outcome of the case. Such decisions, however, are impossible to make on a rational basis, as they involve deciding which provisions within a policy are "conditions precedent" and which are "conditions sub-

²⁰ Within this area come the numerous insurance "warranties." They are limitations upon the coverage of the policy, not merely a limitation upon the recovery of the insured per se. As such, they are not easily categorized into any position with relation to the formation of the contract, the loss or the recovery.

²¹ *Jones v. Life & Cas. Co.*, 199 N.C. 772, 155 S.E. 870 (1930).

²² *Chavis v. Home Sec. Life Ins. Co.*, 251 N.C. 849, 112 S.E.2d 574 (1960); *Wells v. Jefferson Standard Life Ins. Co.*, 211 N.C. 427, 190 S.E. 744 (1937); *Collins v. United States Cas. Co.*, 172 N.C. 543, 90 S.E. 585 (1916); *Page v. Life Ins. Co.*, 131 N.C. 115, 42 S.E. 543 (1902).

²³ *Swartzberg v. Reserve Life Ins. Co.*, 252 N.C. 150, 113 S.E.2d 270 (1960); *Smith v. Aetna Ins. Co.*, 197 N.C. 621, 150 S.E. 114 (1929).

²⁴ *Fallins v. Durham Life Ins. Co.*, 247 N.C. 72, 74, 100 S.E.2d 214, 216 (1957).

²⁵ *Hedgecock v. Jefferson Standard Life Ins. Co.*, 212 N.C. 638, 194 S.E. 86 (1937); *Wharton v. New York Life Ins. Co.*, 178 N.C. 135, 100 S.E. 266 (1919).

²⁶ *Polansky v. Millers' Mut. Fire. Ins. Ass'n*, 238 N.C. 427, 78 S.E.2d 213 (1953); *Peoples Bank & Trust Co. v. Fidelity & Cas. Co.*, 231 N.C. 510, 57 S.E.2d 809 (1950).

²⁷ *Warren v. Pilot Life Ins. Co.*, 215 N.C. 402, 2 S.E.2d 17 (1939). See generally 9 WIGMORE, *op. cit. supra* note 7, at § 2510.

sequent." The confusion has arisen due to a combination of several factors: our statutory provisions in regard to the pleading and proof of conditions precedent²⁸ and affirmative defenses;²⁹ our borrowing for definitional purposes the substantive contract distinction between conditions precedent and subsequent; and our equating of conditions subsequent into affirmative defenses. These factors in combination may confront the insured with the necessity of making this perilous definitional decision at the proof stage, while the insurer may encounter it at both the pleading and the proof stages.³⁰

To remove the uncertainty which is apparently now built into our practice by the combination of factors here developed, legislation might be appropriate.³¹ Such legislation has been adopted in other

²⁸ N.C. GEN. STAT. § 1-155 (1953).

²⁹ N.C. GEN. STAT. § 1-135 (1953).

³⁰ In a suit on an insurance policy, the insured carries the burden of pleading conditions precedent by pleading generally that he complied with all conditions precedent. If this allegation is controverted, the insured must then establish, on trial, the facts showing performance. N.C. GEN. STAT. § 1-155 (1953). At this stage the insured has not been called upon to make any determination as to what precisely are conditions precedent, but only to plead general compliance. The insurer at this point in the trial is confronted with this situation: he may make a general denial of the insured's general allegation of compliance with the conditions precedent, which poses no definitional problem to him. But, if he desires to raise in defense what the court determines to be a condition subsequent, and so, an affirmative defense, he must specifically plead it. This poses a definitional problem for him and he must at his peril make it correctly. Assuming that the insurer has made a general denial of the insured's allegations of performance of all conditions precedent, the insured is now in turn forced into a definitional decision of what are the conditions precedent within the policy. To recover he must carry the burden of proof on all conditions precedent which have been controverted by the insurer. This has the effect of forcing the insured to proceed blindly and prove facts showing performance of all conditions which could possibly be denominated as precedent. It seems hardly an equitable result since the insurer would be in a much better position than the insured to know which conditions have or have not been performed.

³¹ Perhaps North Carolina has inadvertently taken a step in this direction with the passage of the Vehicle Financial Responsibility Act, N.C. GEN. STAT. § 20-279.1 (Supp. 1959). Those applicable provisions of this act which deal with the subject at hand, however, are far too limited to the area of automobile accident policies to cover the allocation of the burden with respect to other types of insurance policies. It must also be noted that this act was passed to fulfill another purpose, not to solve the allocation of the burden of proof with respect to insurance contract conditions.

A recent case, *Swain v. Nationwide Mut. Ins. Co.*, 253 N.C. 120, 116 S.E.2d 482 (1960), shows the effect of this statute on the problem before us. In *Swain* a question similar to that in *Muncie* was before the court. The court distinguished it from *Muncie* by the application of this statute, reaching a contrary result. The court said in *Swain* that under this new statute the failure of the insured to comply with a policy requirement for notice did not defeat the right of the judgment creditor to recover. The court stated that

jurisdictions.³² The aim of such legislation should be two-fold. First, it should relieve the parties from having to make such a definitional decision. Second, it should cast the burden of pleading and proof in regard to these insurance conditions in accordance with the most appropriate purposes of pleading and proof. A more equitable rule could be devised using such factors as the availability of evidence to one side or another and the relative positions of the parties as the criteria for determining this allocation of the burdens of pleading and proof. Obviously, the substantive results of insurance litigation will be affected by the way the burden is cast, whatever success such rule would have in removing the impossible definitional problem here discussed.³³

It is submitted that legislation of the following type would be appropriate. Place the burden upon the insurer of *pleading* specifically any grounds for which he denies liability, and upon the insured the burden of *proving* that liability should not be barred by any such facts pleaded by the insurer.³⁴ The insured would allege

in an accident arising after the effective date of the statute and where the judgment against the insured is equal to or less than the maximum coverage under the statute, non-compliance by the insured with a notice provision will not defeat the judgment creditor's right to recover. However, as to accidents arising prior to this effective date of the statute (as the principal case) and as to any amount in excess of the statutory coverage, such violations by the insured are still valid defenses to the insurer.

³² *E.g.*, N.Y. INS. LAW § 167.5 (1945); TEX. REV. STAT. §§ 3-48, -62 (1951).

³³ New York allows allegations by the insured of all conditions precedent in general terms and requires the insurer to specifically counter them. The insured is deemed to have proved all conditions not so traversed by the insurer, but must carry the burden of proof of a condition properly denied. N.Y. INS. LAW § 167.5 (1945). Yet, this rule gives no definite answer as to what constitutes a condition subsequent which presumably the insurer must specifically plead as an affirmative defense. The Texas rule solves this by placing the burden on the insured to plead and prove that the loss is not within an excepted area of the policy. TEX. REV. STAT. §§ 3-48, -62 (1951). This would seem to place the burden of proof on the insured for all excepted clauses within the policy, a burden which seems unduly heavy. For typical litigation on the effect of this rule, see *Imperial Life Ins. Co. v. Thornton*, 138 S.W.2d 295 (Tex. Civ. App. 1939); *Coyle v. Palatine Ins. Co.*, 222 S.W. 973 (Tex. Comm'n App. 1920); see also Note, 6 BAYLER L. REV. 238 (1954).

³⁴ This would have the effect of dividing the burden of pleading and proof as is now done by the statute of limitations. *Muncie* dealt with the burden of proof, as distinguished from the burden of pleading. The party who has the burden of proof has traditionally under our procedure also been given the burden of pleading. The statute of limitations is one of the few exceptions where the burdens are split between the two parties. The defendant has the burden of pleading the statute, but once properly pleaded the plaintiff

the ultimate facts of execution of the policy, loss within its coverage while the policy was in force, and general performance of all conditions. This, if uncontested, would be sufficient to entitle insured to payment under the policy and the right to maintain the action. The insurer, should he wish to contest liability, would then have the burden of pleading specifically any matter by reason of which nonliability is asserted. This would be true whether the matter relates to provisions denominated or interpreted as "conditions," "exclusions" or "exceptions" of whatever kind. Once specifically raised by the insurer, the insured would have the burden of proving facts which show that his recovery should not be barred by the allegations of the insurer, *i.e.*, facts showing specific compliance with the conditions raised by the insurer.³⁵

CARL A. BARRINGTON, JR.

Master and Servant—Unfair Use of Customer Lists and Knowledge

In *Henley Paper Co. v. McAllister*,¹ the plaintiff company sought to enjoin a former salesman from working for a competitor, relying upon an employment contract which contained a covenant not to compete. The plaintiff was engaged in a highly competitive business selling paper products and had hired the defendant as a salesman. While working for the plaintiff, the defendant had compiled at his own expense a record of sales and subsequently terminated his service with the plaintiff to work for a competitor, using the record of sales to solicit business for his new employer. The North Carolina Supreme Court affirmed the trial court's decision that the provisions of the covenant not to compete were unreasonable as to time and geography and that the covenant lacked consideration. The view

has the burden of proof to deny it. *Lee v. Chamblee*, 223 N.C. 146, 25 S.E.2d 433 (1943); see also 1 *McINTOSH*, NORTH CAROLINA PRACTICE AND PROCEDURE § 372 (2d ed. 1956).

³⁵ Under the rule submitted, which is quite similar to the New York rule, there would be no problem with the definitional decision, as there would be no categorizing of conditions as precedent or subsequent. Nor would the insured, when his allegation of performance of all conditions precedent is met by a general denial, be forced (as he presently is) to carry the burden of proof blindly as to which conditions he must prove to satisfy the burden of proof. The insurer is in a better position to know the policy and exactly which facts or occurrences act as a bar to his liability. The more equitable rule, therefore, would be to place the burden of pleading these facts or occurrences upon the insurer, and by so doing we enable the insured to know exactly what he must prove to secure recovery.

¹ 253 N.C. 529, 117 S.E.2d 431 (1960).

taken in this case seems to be consistent with prior North Carolina decisions² on restrictive covenants which were deemed to be unreasonable.

Although the point was not expressly raised in the principal case, the question arises whether a restraining order to prevent the defendant from soliciting the plaintiff's customers while working for a competitor would have been proper in the absence of a covenant not to compete.³ This question does not appear to have been decided in North Carolina, but other jurisdictions have protected the former employer in this situation.⁴

Jurisdictions which have protected the former employer from competitive solicitation by a former employee usually require a three-fold showing by the plaintiff.⁵ First, he must show that knowledge or a list of the names, addresses and requirements of customers constitute a trade secret. Second, that the defendant, while in a

² *Noe v. McDevitt*, 228 N.C. 242, 45 S.E.2d 121 (1947); *Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1943). See generally Note, *Covenants Not To Compete*, 38 N.C.L. Rev. 395 (1960).

³ The scope of this note is confined solely to the fact situation where an employee, while working for an employer, compiles a record of sales and subsequently terminates his service with the employer to work for a competitor or to start his own business, using the record of sales to solicit business and to compete with the former employer. The question is not whether the employer can prevent the employee from competing at all, but rather whether the employer can prevent the employee from engaging in certain competitive practices such as soliciting business from customers whose names or addresses he acquired while employed by the former employer.

⁴ See, e.g., *George v. Burdusis*, 21 Cal. 2d 153, 130 P.2d 399 (1942); *Town & Country House & Home Serv., Inc. v. Newbery*, 3 N.Y. 2d 554, 147 N.E.2d 724 (1958). In these cases, two points of view have to be considered. "The names of customers of a business concern, whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good will of a business which enterprise and foresight have built up, should be . . . entitled to the same protection as the secret of compounding some article of manufacture and commerce. *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 334, 138 Atl. 47, 49 (1927); and equity will, to the greatest extent, protect the property rights of employers in their trade secrets and otherwise. *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955). But the rights and interests of the employee also have to be considered. Sound public policy encourages employees to seek better jobs from other employers and even to go into business for themselves. *Haut v. Rossbach*, 128 N.J. Eq. 77, 15 A.2d 227 (Ct. Ch. 1940), *aff'd*, 128 N.J. Eq. 478, 17 A.2d 165 (Ct. Err. & App. 1941). The employee should not be deprived of the right to pursue a lawful and gainful occupation in a field for which he is equipped. *Levine v. E. A. Johnson & Co.*, 107 Cal. App. 2d 322, 237 P.2d 309 (Dist. Ct. App. 1951).

⁵ *George v. Burdusis*, 21 Cal. 2d 153, 160, 130 P.2d 399, 403 (1942); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 64, 113 P.2d 845, 854 (1941).

position of trust and confidence with his employer, acquired such knowledge or list. And third, that in violation of this trust and confidence, the defendant is using this knowledge or list to the injury and detriment of the former employer.

It is not a simple matter to determine what customer lists constitute trade secrets. Where the very continuance of a business depends upon keeping secret the names of customers,⁶ and such secret knowledge and lists are an important asset to the business,⁷ then such lists are species of property⁸ and are entitled to protection. Knowledge of customers' addresses, buying habits, requirements and preferences has been held to be confidential⁹ and a trade secret.¹⁰ But where the names of customers are readily ascertainable and are of a class known to the public in general, such as wholesale buyers who are few in number¹¹ or persons listed in public directories or trade publications,¹² knowledge or a list of these customers is not a trade secret.¹³ A list of customers of a simple artless business is not a trade secret,¹⁴ especially where the business relationship with

⁶ *George v. Burdusis*, 21 Cal. 2d 153, 130 P.2d 399 (1942).

⁷ *Brenner v. Stavinsky*, 184 Okla. 509, 511, 88 P.2d 613, 615 (1939).

⁸ *Ibid.*

⁹ *Wallich v. Koren*, 80 Cal. App. 2d 223, 181 P.2d 681 (Dist. Ct. App. 1947), holding that where the business is one of repeated purchases in preference to the products of competitors, such knowledge of these customers is "good will."

¹⁰ *George v. Burdusis*, 21 Cal. 2d 153, 160, 130 P.2d 399, 403 (1942). A list of customers is a trade secret if the owner has confidential knowledge concerning the value of such customers; *Wallich v. Koren*, *supra* note 9.

¹¹ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

¹² *J. C. Millett Co. v. Park & Tilford Distillers Corp.*, 123 F. Supp. 484, 496 (N.D. Cal. 1954); *Gloria Ice Cream & Milk Co. v. Cowan*, 2 Cal. 2d 460, 464, 41 P.2d 340, 342 (1935).

¹³ *George v. Burdusis*, 21 Cal. 2d 153, 159, 130 P.2d 399, 403 (1942).

¹⁴ *Abalene Exterminating Co. v. Elges*, 137 N.J. Eq. 1, 3, 43 A.2d 165, 166 (Ct. Ch. 1945). Customers on a fuel oil delivery route are not trade secrets. *Vesuvius Fuel Oil Corp. v. Pirraglia*, 128 N.Y.S.2d 2 (Sup. Ct. 1950); *accord*, as to laundry patrons. *Fulton Grand Laundry Co. v. Johnson*, 140 Md. 359, 117 Atl. 753 (1922). However, the fact that patrons are listed in the telephone directory but are otherwise unknown to the public generally as business value does not prevent a customer list from being valuable. *George v. Burdusis*, *supra* note 13. Confidential records of policy holders' names, addresses and insurance data are trade secrets. *Hoslinger, Theis & Co. v. Holsinger*, 329 Ill. App. 460, 471, 69 N.E.2d 360, 365 (1946); *accord*, *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 113 P.2d 845 (1941). Likewise, customer lists of persons without places of business which would have been accessible to competitors only by investigation are trade secrets. *Nathan Outfitters, Inc. v. Pravder*, 191 Misc. 726, 77 N.Y.S.2d 655 (Sup. Ct. 1948). See for a contrary result concerning the names of general fire

these customers is usually short in duration and often not renewed.¹⁵

The second showing that the plaintiff must make in order to obtain relief is that the employee held a position of trust and confidence when he obtained the information to be protected.¹⁶ The plaintiff must also show that the employee has violated this trust and confidence.¹⁷ The former employee may seek the trade and business of his old employer's customers by fair methods including advertising,¹⁸ but he may not canvass old customers whose identities he learned in confidence and thereby destroy the good will of his former employer.¹⁹ A salesman is privileged to advise the trade that he has changed employment to the house of a rival employer²⁰ or that he has established his own business,²¹ as a notice of termination of employment is not considered solicitation.²² The former employee may solicit old customers to buy a new line of products which are not handled by his old employer.²³

The courts are almost unanimous in ruling, however, that a former employee cannot use written lists,²⁴ business records,²⁵ or

insurance policy holders. *Port Inv. Co. v. Oregon Mut. Fire Ins. Co.*, 163 Ore. 1, 94 P.2d 734 (1939).

¹⁵ *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 205, 246 P.2d 11, 16 (1952).

¹⁶ Though few cases have turned on or discussed this point at length, the relationship is always evident. The American Law Institute takes particular cognizance of this point, however: "The agent . . . has a duty to the principal . . . not to use or disclose . . . trade secrets, written lists of names, or other similar confidential matter given to him for the principal's use or acquired by the agent in violation of duty. . . ." *RESTATEMENT (Second)*, AGENCY § 396(b) (1958).

¹⁷ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955). The former employee's duty to the principal continues even after termination of employment. *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 53, 113 P.2d 845, 854 (1941).

¹⁸ *J. L. Cooper & Co. v. Anchor Sec. Co.*, *supra* note 17.

¹⁹ *Ibid.*

²⁰ *Wallich v. Koren*, 80 Cal. App. 2d 223, 181 P.2d 682 (Dist. Ct. App. 1947).

²¹ *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 203, 246 P.2d 11, 14 (1952).

²² *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

²³ *Ibid. Accord*, where there is no evidence that the employee had a plan or scheme to injure the former employer. *Ice Delivery Co. v. Davis*, 137 Wash. 649, 243 Pac. 842 (1926).

²⁴ *Brenner v. Stavinsky* 184 Okla. 509, 510, 88 P.2d 613, 615 (1939). "It is well settled in California that after an employee who worked on a retail delivery route has left the service of his employer, his use of customer lists to solicit for another person is an unwarranted disclosure of trade secrets." *George v. Burdusis*, 21 Cal. 2d 153, 159, 130 P.2d 399, 402 (1942). A list of milk customers is confidential information and its use will be re-

route books²⁶ to competitively solicit old customers where their requirements and identities are trade secrets and the employee came by them in a position of trust. One reason that the courts will readily restrain the use of written lists is based upon the theory that the employer has a property right in written records²⁷ and if an employee retains a list, he is carrying away something more than mere experience gained in the business.²⁸

Once the identity of the customers and their requirements are classified as confidential and the employee has learned of them in confidential service, many courts say that it makes no difference that the employee retains and uses the list of customers on paper or in his head.²⁹ Most courts recognize the property rights in written records, sometimes even where the names on them are not confidential, and their language in prohibiting the use of written lists appears to be more resolute and certain when they can rely on the property theory.³⁰ However, when courts have restrained a former

strained. *Soeder v. Soeder*, 82 Ohio App. 71, 77 N.E.2d 474 (1947). It is not less confidential because a spy could discover the same. *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 337, 138 Atl. 47, 49 (1927). The prohibition against using written records also extends to those lists and records which the employee surreptitiously copies or obtains during his employment and subsequently uses. *Brenner v. Stavinsky*, *supra*.

²⁶ *Jewel Tea Co. v. Grissom*, 66 S.D. 146, 148, 279 N.W. 544, 545 (1938).

²⁹ *Santa Monica Ice & Cold Storage Co. v. Rossier*, 42 Cal. App. 2d 467, 109 P.2d 382 (Dist. Ct. App. 1941).

²⁷ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955).

²⁸ *Di Angeles v. Scauzillo*, 287 Mass. 291, 298, 191 N.E. 426, 429 (1934). Solicitation will be restrained even where the lists are not confidential but the employee carries out a preconceived plan to injure the plaintiff's business by unfair competition. *Gloria Ice Cream & Milk Co. v. Cowan*, 2 Cal. 2d 460, 464, 41 P.2d 340, 342 (1935). Even where a salesman's contract provides for liquidated damages for failure to return secret lists, he is not authorized to turn over these lists to a rival of his employer. *Messenger Pub. Co. v. Mokstad*, 257 Ill. App. 161 (1930). The business competitor who hires the employee will also be restrained from accepting business from customers unfairly solicited by the former employee with the use of written lists. *George Burdusis*, 21 Cal. 2d 153, 163, 130 P.2d 399, 404 (1942), adding that the "employer should also be prohibited from obtaining the benefit of such unfair practices to make the remedy effective and complete."

³⁰ *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45, 67, 113 P.2d 845, 855 (1941). There were no written lists in *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 338, 138 Atl. 47, 49 (1927), but the court stated that it could not see why the employer was entitled to less protection when the names on a list were carried off in the defendant's memory. *Contra*, *American Binder Co. v. Regal & Wade Mfg. Co.*, 278 App. Div. 431, 106 N.Y.S.2d 543 (1951).

³¹ See discussion in notes 24 and 28 *supra*.

employee from calling upon customers whom he remembers, the courts tend to strictly construe the circumstances.³¹

As previously pointed out, North Carolina has never decided whether equity will restrain a former employee from unfairly soliciting old customers in the absence of a covenant not to compete. But it should be noted that in *Kadis v. Britt*,³² the court cited with approval a portion of the *Restatement of Agency* as follows:

The agent may use general information concerning the business of the principal and the names retained in his memory, if not acquired in violation of his duty as agent. . . . Thus while the agent cannot properly use written memoranda concerning customers entrusted to him, or made by him for use in connection with the principal's business, or copies thereof . . . he is privileged to use in competition with the principal the names retained in his memory as a result with the principal and methods of doing business. . . .³³

North Carolina has approved covenants not to compete. Therefore, if the question is properly presented, it is submitted that the North Carolina court should enjoin unfair competitive solicitation by a former employee using written records in the absence of any covenant not to compete.³⁴ What limitation the court would

³¹ As outlined in *Alex Foods, Inc. v. Metcalfe*, 137 Cal. App. 2d 415, 290 P.2d 646 (Dist. Ct. App. 1955), the plaintiff has to show that the employee acquired the secret knowledge of the customers during his employment, that this knowledge was not generally known to competitors, that these customers were solicited with intent to injure the plaintiff's business and that these customers whose trade was particularly profitable would usually patronize only one business or concern and would continue to do so unless unfairly hindered.

³² 224 N.C. 154, 162, 29 S.E.2d 543, 548 (1944).

³³ RESTATEMENT, AGENCY § 396 (1933). The court in *Kadis v. Britt*, *supra* note 32, at 162, 29 S.E.2d at 548, also cited with approval a statement from *Peerless Pattern Co. v. Pictorial Review Co.*, 147 App. Div. 715, 717, 132 N.Y. Supp. 37, 39 (1911), where a question of dealing with customers arose but no lists were involved. The New York court stated: "All that clearly appears is that he [the former employee] undertook to use in his new employment the knowledge he had acquired in the old. This, if it involves no breach of confidence, is not unlawful; for equity has no power to compel a man who changes employers to wipe clean the slate of his memory."

³⁴ N.C. GEN. STAT. § 75-4 (1960), provides that "no contract or agreement hereafter made, limiting the rights of any person to do business anywhere in the State of North Carolina shall be enforceable unless such agreement is in writing. . . ." It is submitted that this statute should have no bearing on cases of this nature. As stated in *Colonial Laundries, Inc. v. Henry*, 48 R.I. 332, 334, 138 Atl. 47, 48 (1927), "equitable jurisdiction . . . does not depend on such an express contract. . . . Specific performance of

put on the definition of customer lists and knowledge as trade secrets is unknown. A prior confidential relationship would probably be required. If a narrow view of the dictum in the *Kadis* case is taken, it may be indicative that North Carolina would be reluctant to restrain competitive solicitation where the former employee relies upon memory alone though the door is left open where the names remembered were acquired and used in breach of trust. It should be remembered that there is substantial case authority in other jurisdictions approving the rule that lists remembered are likewise protectable.

DAVID M. CONNOR

Trusts—Rule Against Perpetuities—Class Gifts

In *Parker v. Parker*¹ a testator devised certain property to his son in trust, the rents and profits therefrom to be used for the education of the son's children in such amounts as the trustee in his discretion deemed necessary. The trustee was directed to convey the property to the grandchildren (or grandchild) or to the issue of any deceased grandchild "when" the youngest grandchild reached twenty-eight. The North Carolina Supreme Court held that the latter provision violated the Rule Against Perpetuities.

In North Carolina the Rule Against Perpetuities has been stated as follows: "No devise or grant of a future interest in property is valid unless title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest."² The effect of the

a contract in its true sense is not sought. Prevention of unfair competition is the reason for seeking equitable interference." This statute should be applicable only to express agreements between the parties, not to what the law implicitly recognizes as unfair competition. The parties can agree to reasonably limit the employee from competing if such agreement is reduced to writing and signed by the employee. But the master-servant or agency relationship found in the cases discussed does not limit the employee's right to compete, but merely the methods that he may use.

¹ 252 N.C. 399, 113 S.E.2d 899 (1960).

² *Id.* at 402, 113 S.E.2d at 902. The North Carolina court often has incorrectly stated that the interest must vest in not *less* than twenty-one years. This has not, however, affected any of the decisions. See *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957); *McPherson v. First Citizens Nat'l Bank*, 240 N.C. 1, 80 S.E.2d 386 (1954); *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). The rule is properly stated in the principal case and also in *Clarke v. Clarke*, 253 N.C. 156, 116 S.E.2d 449 (1960).

rule is to prescribe the time within which an interest must vest,³ thus the rule will affect only contingent interests.⁴ The rule is not concerned with the postponement of possession,⁵ with accumulation,⁶ with suspension of alienation,⁷ or with duration.⁸ However, the rule may not be evaded by the creation of a private trust.⁹ It applies to the time when the legal interest vests in the trustee, as well as to the time when the equitable or beneficial interest vests in the beneficiary.¹⁰

The problems presented in the *Parker* case are of particular importance to the practicing attorney in that there is an increasing number of persons who wish to provide in their wills for the establishment of a trust giving the trustee some discretion in the use of the income in case of unforeseen circumstances and providing for the distribution of the corpus when the beneficiary attains such age as the testator thinks necessary for him to be able to intelligently manage his own affairs. If we assume that such testamentary disposition is a good one and that the testator's intention should be carried out, it would seem that the gift in the principal case could have been saved without doing violence to present North Carolina law.

In order to hold the gift valid in the principal case the court would have to consider three problems: (1) Is the membership in

³ *McQueen v. Branch Banking & Trust Co.*, *supra* note 2.

⁴ *Parker v. Parker*, 252 N.C. 399, 113 S.E.2d 899 (1960).

⁵ *Fuller v. Hedgpeth*, 239 N.C. 370, 80 S.E.2d 18 (1954). See generally GRISWOLD, SPENDTHRIFT TRUSTS § 513 (2d ed. 1947).

⁶ *Goldtree v. Thompson*, 79 Cal. 613, 22 Pac. 50 (1889).

⁷ *Manierre v. Welling*, 32 R.I. 104, 78 Atl. 507 (1911). See generally 6 AMERICAN LAW OF PROPERTY § 26.2 (Casner ed. 1952).

⁸ *Seaver v. Fitzgerald*, 141 Mass. 401, 6 N.E. 73 (1886); *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952). See generally GRAY, THE RULE AGAINST PERPETUITIES § 205 (4th ed. 1942); RESTATEMENT, PROPERTY § 370 (1944); 2 SIMES, FUTURE INTEREST § 500 (1936). But see *American Trust Co. v. Williamson*, 228 N.C. 458, 46 S.E.2d 104 (1948), where the North Carolina Supreme Court stated that the rule limits the duration of private trusts. This statement was repudiated in *McQueen v. Branch Banking & Trust Co.*, *supra*. However, language used by the court in *Finch v. Honeycutt*, 246 N.C. 91, 97 S.E.2d 478 (1957), discussed in 36 N.C.L. Rev. 467 (1958), may reopen the possibility that a private trust might be held invalid because full enjoyment is postponed for an excessive period of time.

⁹ *McQueen v. Branch Banking & Trust Co.*, *supra* note 8; *American Trust Co. v. Williamson*, *supra* note 8. For a discussion of the effect of the rule on charitable trusts, see 2 BOGERT, TRUSTS AND TRUSTEES § 352 (1935).

¹⁰ *McQueen v. Branch Banking & Trust Co.*, 234 N.C. 737, 68 S.E.2d 831 (1952).

the class of grandchildren ascertainable within the period of the Rule Against Perpetuities? (2) Do the gifts to the grandchildren vest within the period of the rule? (3) Are the gifts to the issue of any deceased grandchild (or grandchildren) valid and if not, what effect does this have on the gift to the grandchildren?

As to the first of these problems, the court interpreted the will to mean that all the children of the testator's son, including such children as might be born after the testator's death, were to be included in the gift. The court then concluded that the class membership was not ascertainable until the termination of the trust. In so deciding, however, the court failed to consider the grandchildren as a class separate and distinct from the issue. If the court had made this distinction, there is respectable authority for holding the gift valid.

Such a distinction was made in *Hill v. Birmingham*.¹¹ In this case the will establishing the trust provided that the income therefrom was to be used in equal shares for the benefit of the testator's grandchildren as the trustee, in his discretion, might deem proper. The principal was to be paid to them in equal shares "when" the youngest grandchild attained the age of twenty-five. There was a further provision that if any grandchild should die leaving issue, his share would go to his issue. In holding that the gift did not violate the Rule Against Perpetuities the court stated: "No grandchild could be born to the testator later than the time when the survivor of his son or daughter died, with a possible addition of nine months representing the period of gestation, and consequently the class would necessarily close at that time."¹²

Applying the rationale of *Hill* to the principal case, it would be impossible for grandchildren to be born more than a nine months period of gestation after the death of the testator's son whose life can be taken as the measuring life. The class would close at that time, and any interest which vested within the period in which grandchildren could be born would not violate the Rule Against Perpetuities.¹³

The second problem would be whether the gifts to the grandchildren would vest within the period prescribed by the rule. It is

¹¹ 131 Conn. 174, 38 A.2d 604 (1944).

¹² *Id.* at 177, 38 A.2d at 606. While the court appears to have assumed that the postponement of enjoyment was valid, the issue was not raised in the case.

¹³ See *id.* at 177, 38 A.2d 607.

generally held that where a trust gives all or a part of the income to the beneficiary, with directions to the trustee to divide and deliver the estate at a stated time in the future, the interest in the estate vests immediately upon the death of the testator.¹⁴ Conversely, where there is no gift of the income or the estate distinct from the division which is to be made equally between all the children upon the termination of the trust, the "when" of the division marks the time of the vesting.¹⁵ In applying the latter rule to the facts of the *Parker* case the court stated: "[T]here is no bequest of the income to the class as a whole or to any individual in the class, nor is there any gift of the *corpus* apart from the provision for conveyance *per stirpes* when the trust has terminated."¹⁶ In making this statement the court was apparently relying on the rule that a gift of income must be in specified amounts in order to cause the age contingency to apply to the payment of the gift rather than to its vesting.¹⁷ However, the court could have reached an opposite result by applying the rule that a discretionary trust for the maintenance of a class is effective to vest the otherwise contingent gift.¹⁸

While the problem of the vesting of the corpus of a discretionary trust for the maintenance of a class apparently has not arisen in North Carolina, it has been held that a discretionary gift of income is effective to cause the immediate vesting of the corpus in the individual beneficiary. In *Jackson v. Langley*¹⁹ property was willed

¹⁴ *Jackson v. Langley*, 234 N.C. 243, 66 S.E.2d 899 (1951); *Carter v. Kempton*, 233 N.C. 1, 62 S.E.2d 713 (1950); *Sutton v. Quinerly*, 228 N.C. 106, 44 S.E.2d 521 (1947); *Robinson v. Robinson*, 227 N.C. 155, 41 S.E.2d 282 (1947); *Chas. W. Priddy & Co. v. Sanderford*, 221 N.C. 422, 20 S.E.2d 341 (1942); *Coddington v. Stone*, 217 N.C. 714, 9 S.E.2d 420 (1940); *Weill v. Weill*, 212 N.C. 764, 194 S.E.2d 243 (1938).

¹⁵ *Knox v. Knox*, 208 N.C. 141, 179 S.E. 610 (1935); *Bowen v. Hackney*, 136 N.C. 187, 48 S.E. 633 (1904); *Fuller v. Fuller*, 58 N.C. 223 (1859); *Anderson v. Felton*, 36 N.C. 55 (1840).

¹⁶ 252 N.C. at 407, 113 S.E.2d at 905.

¹⁷ *Paterson Sav. Inst. v. De Gray*, 136 N.J. Eq. 371, 42 A.2d 264 (Ct. Ch. 1945); *In re Helme's Estate*, 95 N.J. Eq. 197, 123 Atl. 43 (Prerogative Ct. 1923); *In re Mervin*, [1891] 3 Ch. 197; *In re Parker*, 16 Ch. D. 44 (1879); *Lloyd v. Lloyd*, 3 K. & J. 20, 69 Eng. Rep. 1005 (Ch. 1856).

¹⁸ *Fidelity Union Trust Co. v. Dignan*, 105 N.J. Eq. 750, 146 Atl. 466 (Ct. Ch. 1929); *Hayes v. Robeson*, 29 R.I. 216, 69 Atl. 686 (1908); *In re Williams*, [1907] 1 Ch. 180; *Fox v. Fox*, L.R. 19 Eq. 286 (1875); *Harrison v. Grimwood*, 12 Beav. 192, 50 Eng. Rep. 1033 (Ch. 1849). The court also found that the language of the will indicated an intent on the part of the testator to postpone the vesting of the estate until the youngest child reached twenty-one. It would appear unlikely, however, that the testator would have preferred the whole gift to fail rather than be partially effective.

¹⁹ 234 N.C. 243, 66 S.E.2d 889 (1951).

to a trustee with directions that the net income be applied to the support and education of the testatrix's son. It was further provided that "when" the beneficiary reached the age of twenty-five all the property or the remainder thereof was to vest absolutely in him. In the event certain enumerated emergencies arose the trustee could use the income from or the corpus of the trust estate for his own benefit. The court held that the vesting of the estate in the son was not in any way affected or delayed to any greater extent than if the trustee had been given a life estate with the power to use any part of the corpus for his own benefit. The court stated:

The overwhelming weight of authority, including our own decisions, supports the view that in such cases the estate vests in the ultimate beneficiary upon the death of the testator, subject to be divested of such portion thereof as may be required to meet the authorized needs of the life tenant or other designated person.²⁰

This decision would seem to support the view that in the *Parker* case the corpus would vest in the children in esse at the death of the testator, subject to partial divestment in favor of after born children or subject to total divestment in the event of death.²¹

If it is assumed that there is an immediate vesting of the estate in the children in esse at the testator's death, subject to divestment, the question arises whether the possibility that such divestment might take place at a time beyond the permissible period would invoke the rule. The court in the principal case cited what is supposedly a split of authority on this problem, first citing authority for the proposition that a vested gift, though subject to a condition subsequent, does not come within the rule.²² The court then cited authority for the view that an executory interest is not vested until the time comes for taking possession.²³ As the latter view would

²⁰ *Id.* at 246, 66 S.E.2d at 901. See *In re Sessions Estate*, 217 Ore. 340, 341 P.2d 512 (1958), where property was left in trust for A, who was unborn at the time. The trustee was given discretionary power to apply the income for A's benefit. The corpus was to go to A "when he shall reach 25." The court held that the estate was vested, subject to divestment.

²¹ See *Pearson v. Dolman*, L.R. 3 Eq. 315 (1866), and *Scotney v. Lomer*, 31 Ch. D. 380 (1883), holding that the fact that the gift of income is defeasible does not prevent the gift from causing the immediate vesting of the interests.

²² *Shoemaker v. Newman*, 65 F.2d 208 (D.C. Cir. 1933); *In re Friday's Estate*, 313 Pa. 328, 170 Atl. 123 (1933). Compare *Congregational Church Bldg. Soc. v. Everett*, 85 Md. 79, 36 Atl. 654 (1897).

²³ 6 AMERICAN LAW OF PROPERTY § 24.3 (Casner ed. 1952).

merely invalidate the executory interest of the issue and not effect the interest of the grandchildren, it is questionable whether it is really converse.²⁴ Nevertheless, the court could have preserved the present gift by adopting the former authority.²⁵

The third question confronting the court would be whether the gifts to the issue of any deceased grandchild were valid and if not, what effect, if any, this would have on the gifts to the grandchildren. The court in the principal case stated in a dictum that if the interests did vest at the time of the testator's death, they would be subject to divestment should any of the beneficiaries die before the termination of the trust. The issue of those so dying would take as purchasers under the will.²⁶ The court did not, however, attempt to pass on the validity of the gifts to the issue. The general rule is that gifts to the issue of grandchildren born after the testator's death violate the Rule Against Perpetuities and are, therefore, void.²⁷ However, as the gifts to the issue of grandchildren born before the testator's death will vest at the death of their parents, and as their parents were lives in being at the time of the testator's death, these gifts do not violate the rule.²⁸

Since the gift to the issue of those grandchildren born after the death of the testator is void, the question arises whether this would invalidate the gift to the other classes. The prevailing rule is that even though the gift to one class in a group of classes is void, this does not invalidate the gift to the remaining classes.²⁹

In summary, the court might have saved the gift in the principal case by holding: (1) that the class of grandchildren would close no later than a nine months period of gestation after the death of the testator's son and the membership of the class would be determined at that time; (2) that the discretionary gift of income would cause the immediate vesting of the estate in the grandchildren

²⁴ The interest of the grandchildren would actually be made indefeasible by the invalidation of the divesting contingency.

²⁵ See note 21 *supra*.

²⁶ 252 N.C. at 405, 113 S.E.2d at 903 (1960).

²⁷ *Lamkin v. Hines Lumber Co.*, 158 Ga. 785, 124 S.E. 694 (1924); *Bowman v. Taylor*, 126 Md. 203, 94 Atl. 652 (1915); *Hill v. Simmons*, 125 Mass. 536 (1878).

²⁸ *Shepard v. Union & New Haven Trust Co.*, 106 Conn. 627, 138 Atl. 809 (1927); *Turner v. Safe Deposit & Trust Co.*, 148 Md. 372, 129 Atl. 294 (1925); *Dorr v. Lovering*, 147 Mass. 530, 18 N.E. 412 (1888).

²⁹ *Bowman v. Taylor*, 126 Md. 203, 94 Atl. 652 (1915); *Hill v. Simmons*, 125 Mass. 536 (1878); *Cattlin v. Brown*, 11 Hare. 372, 68 Eng. Rep. 1319 (Eq. 1853).

in esse at the testator's death; (3) that the gift to the issue of the grandchildren born before the testator's death would be valid as their parents were lives in being at the testator's death; and (4) that although the gift to the issue of those grandchildren born after the testator's death would be void, this would not invalidate the gifts to the other classes.

Various attempts have been made to abolish the common law Rule Against Perpetuities either by judicial³⁰ or legislative³¹ action. Although some of these statutes were ill-fated,³² there seems to be a present tendency to adopt laws which eliminate some of the harsh effects of the rule.³³ While these statutes employ varied language, they are basically consistent. In eight states³⁴ the statutes apply to both real and personal property. In six states³⁵ they apply to both equitable and legal interest. In five states³⁶ they provide that the period of the rule should be measured by actual rather than possible events. In four states³⁷ they apply the principle of *cy pres*.

The Vermont statute³⁸ is applicable to both personalty and realty

³⁰ *Story v. First Nat'l Bank & Trust Co.*, 115 Fla. 436, 156 So. 101 (1934), applied the rule on the basis of facts which actually did occur, not those which might have occurred. *Edgerly v. Barker*, 66 N.H. 434, 31 Atl. 900 (1891), avoided the rule by applying the principle of *cy pres* to the will in question.

³¹ *E.g.*, KY. REV. STAT. §§ 381.215 -223 (1960); VT. STAT. ANN. tit. 27, § 501 (1959).

³² Connecticut, Indiana, Ohio and Wyoming repealed their statutes. This, according to Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 HARV. L. REV. 721 (1952), was due to the fact that they were "hopelessly vague."

³³ *E.g.*, Connecticut: CONN. GEN. STAT. REV. § 45-95 (1958); Kentucky: KY. REV. STAT. §§ 381.215 -223 (1960); Maine: ME. REV. STAT. ANN. ch. 160, § 27 (Supp. 1959); Maryland: MD. CODE ANN. art. 16, § 197A (1960); Massachusetts: MASS. GEN. LAWS ANN. ch. 184A, § 1 (1955); New York: N.Y. SESS. LAWS 1960, ch. 448; Pennsylvania: PA. STAT. ANN. tit. 20, § 301.4(b) (1950); Vermont: VT. STAT. ANN. tit. 27, § 501 (1959); Washington: WASH. REV. CODE § 11.98.050 (Supp. 1959).

³⁴ Connecticut, Kentucky, Maine, Maryland, Massachusetts, New York, Pennsylvania and Vermont.

³⁵ Connecticut, Kentucky, Maine, Maryland, Massachusetts and Vermont.

³⁶ Kentucky, Maryland, Pennsylvania, Vermont and Washington. Connecticut, Maine and Massachusetts measure the periods of the rule by actual events only if the interest is to take place after lives in being.

³⁷ Kentucky, New York, Vermont and Washington.

³⁸ The Vermont statute reads in part: "Any interest in real or personal property which would violate the rule against perpetuities shall be reformed, within the limits of the rule, to approximate most closely the intention of the creator of the interest. In determining whether an interest would violate said rule and in reforming an interest the period of perpetuities shall be measured by actual rather than by possible events." VT. STAT. ANN. tit. 27, § 501 (1959).

and incorporates both the doctrine of *cy pres* and the policy of measuring the period of the rule by actual rather than possible events. It is submitted that the North Carolina legislature should adopt such a statute.³⁹

JERRY W. AMOS

³⁹ Until such a statute is adopted by the legislature, the lawyer drawing a will in North Carolina would be well advised to see the saving clause suggested in Leach & Logan, *Perpetuities: A Standard Saving Clause to Avoid Violations of the Rule*, 74 HARV. L. REV. 1141 (1961).