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Notes

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NOTES

Constitutional Law—Defamation—Misstatements of Fact about Public Figure Privileged

Defendant corporations published news items received from national wire services reporting involvement of the plantiff, former Major General Edwin A. Walker, in riots at the University of Mississippi. The stories stated that the plaintiff had led a charge of rioters against United States marshals who were present to enforce court orders requiring integration of the university. In *Walker v. Courier Journal*[1] the United States District Court for the Western District of Kentucky dismissed the complaint with prejudice, holding that it could not be sustained constitutionally under the ruling of *New York Times Co. v. Sullivan*.[2]

The *Sullivan* case held that the first amendment guarantee of free speech prohibits a public official from recovering damages for defamatory misstatements of fact relating to his official conduct unless he can prove the statements were made with actual malice.[3] The *Walker* court found that the Supreme Court did not intend that the rule be limited to public officials, but must be extended to "public men" as well. The court held that by injecting himself into an issue of national concern the plaintiff had brought himself into the category to which the rule should apply. Concluding that the defendants had a right to rely on the news-gathering agencies and were not obligated to check the facts contained in the reports, the court ruled that there could be no basis for a finding of actual malice in republishing the reports.[4]

The *Walker* court found justification for the extension in what it found to be the import of the *Sullivan* decision. Two passages from *Sullivan* were especially relied upon. The court pointed to a footnote to the holding in which the Supreme Court suggested that

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[1] 246 F. Supp. 231 (W.D. Ky. 1965).

[2] 376 U.S. 254 (1964).

[3] *Ibid.* In order to show actual malice the plaintiff must prove a knowing falsehood or the reckless disregard of whether the statement was true or false. *Id.* at 279-80.

[4] The widespread publication of the same statements in other newspapers as shown by the suits Walker had pending in other jurisdictions was also treated by the court as evidence of the lack of malice. See New Orleans Times-Picayune, Oct. 30, 1965, § 1. p. 3, col. 1.

it would leave to later decisions the question of how far the rule would be extended,[5] implying to the *Walker* court that it would be stretched beyond public officials. The court also relied on a quotation in *Sullivan* of dictum from *Coleman v. MacLennan,*[6] a declaration that the "privilege extends to a great variety of subjects, and includes matters of public concern, public men, and candidates for office."[7] *Coleman,* which was quoted extensively in *Sullivan,* is the leading case for the rule of a minority of American jurisdictions that before *Sullivan* had adopted a qualified privilege protecting misstatements of fact about public officials[8] and candidates for office.[9] This rule had not received wide acceptance before being approved by *Sullivan,* and only in scattered and seemingly unrelated decisions within the minority had it been extended beyond public officials and candidates.[10] Like *Sullivan,* the *Coleman* rule repre-

[5] "We have no occasion here to determine how far down into the lower ranks of governmental employees the 'public official' designation would extend for purposes of this rule, *or otherwise to specify categories of persons who would or would not be included.*" 376 U.S. at 283 n.23. (Emphasis added.) It could be argued that rather than implying that the rule is to be extended beyond public officials, the Court is simply saying it did not need to determine at that time who would or would not be included in the category of public official.

[6] 78 Kan. 711, 98 Pac. 281 (1908).

[7] *Id.* at 723, 98 Pac. at 285.

[8] *E.g.,* Snively v. Record Pub. Co., 185 Cal. 565, 198 Pac. 1 (1921); Salinger v. Cowles, 195 Iowa 873, 191 N.W. 167 (1922); Ponder v. Cobb, 257 N.C. 281, 126 S.E.2d 67 (1962). See Annot., 110 A.L.R. 412 (1937); Annot., 150 A.L.R. 358 (1944); Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875, 896-97 (1949).

[9] *E.g.,* Friedell v. Blakely Printing Co., 163 Minn. 226, 203 N.W. 974 (1925); *But see* Bailey v. Charleston Mail Ass'n, 126 W. Va. 292, 27 S.E.2d 837 (1943). There the court limited the rule to criticism of the official acts of public officials.

[10] These cases are of little help as background for a "public man" rule because they are usually based not on any policy considerations but on a misreading of prior cases or a confusion of privileges. In Crane v. Waters, 10 Fed. 619 (D. Mass. 1882), the court granted the privilege to statements made about the plaintiff's attempted takeover of a railroad, but it supported its holding by citing cases involving completely distinct privileges of fair comment and the right to make an accurate report of legislative proceedings. In Bearce v. Bass, 88 Me. 521, 34 Atl. 411 (1896), where the criticism was made of the plaintiff's construction of a public building, the court granted the privilege as one falling into the category of the right to communicate information to one who has an interest in the subject matter, but it was limited by Pattangall v. Mooers, 113 Me. 412, 94 Atl. 561 (1915). Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955), cited Crane v. Waters, *supra,* Bearce v. Bass, *supra,* and cases dealing with other privileges in denying recovery to a corporation president.

If there is a leading case for this minority within the minority, it is probably McLean v. Merriman, 42 S.D. 394, 175 N.W. 878 (1920), in

sented a determination by the courts that the right of the official or the candidate to a truthful report of his activities is outweighed by the right of the public to free discussion of those who govern or wish to govern it.[11] By extending the rule, the *Walker* court has declared that this right to free discussion applies also to men who are attempting to influence the opinion of the public about a subject in which it has an interest.

An extension of the rule beyond *Sullivan* to the *Walker* situation must be justified by the first amendment. Ideally, the task that would befall the courts would be to formulate a definition of "public man" that would insure a maximum freedom of speech not only for the critic but for the public man himself. The courts must formulate standards by which it will be possible to ascertain when a plaintiff has brought himself into the class of public men.[12] Two criteria were adopted in *Walker*. The court first found that the subject matter of the news reports was of "grave national concern" and therefore a legitimate issue for widespread public discussion. It then found that the plaintiff had injected himself into this issue and had "interwoven his personal status into that of a public one whereby he . . . [became] the subject of substantial press, radio and television news comment; thus magnifying the chance that his activities would be 'erroneously' reported."[13] In balancing private interests in reputation against first amendment guarantees, a court applying a "public man" rule may be faced with two determinations not present in *Sullivan*: the value of free public discussion of the particular issue, and the extent to which the plaintiff will be deemed

which the statements charged that the leader of a campaign against a woman-suffrage amendment was allied with the liquor interests. The court held that the plaintiff stood much in the position of a candidate for public office and that any information about the forces back of the campaign was a matter of public interest and concern and therefore was privileged.

[11] Coleman v. MacLennan, 78 Kan. 711, 98 Pac. 281 (1908).

[12] The status of "public man" should have no relation to the extent to which the defamation itself has created controversy or placed the plaintiff's name before the public. *But see* Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955). There, plaintiff was a corporation president, and in connection with a municipal election campaign defendant stated falsely that plaintiff's business was closing and 1000 jobs were to be lost. The court found that plaintiff as a corporation president was a public man and that a loss of jobs was an issue of public interest. *Quaere*: Should the defamation be privileged if the threatened loss of jobs was an issue of the defendant's own invention?

[13] 246 F. Supp. at 234.

to have waived protection against damaging misstatements by projecting himself into the issue.

A rule which requires the courts to determine the interest the public has in the discussion of the issue may be as difficult to standardize into a working definition as the concept of obscenity has been for the Supreme Court.[14] As long as the first amendment is not deemed to preempt the law of libel completely,[15] however, some such limitation will have to evolve.

An inseparable part of this requirement of a "public issue" is a determination that the individual criticized has participated in the issue. The courts may be aided by the pre-*Sullivan* cases applying privileges to criticism of persons in the public eye. The qualified privilege protecting misstatement of fact about officials and candidates has often been confused with the fair comment privilege[16] by the courts.[17] The fair comment privilege arose originally as an immunity for criticism of literary works.[18] Later,[19] when the value of free discussion of the government was accepted, it was extended by analogy to criticism of government officials.[20] As such, it has protected comment and opinion only, not misstatement of fact,[21] and the jury has had the burden of distinguishing fact from opinion.[22] The misstatement-of-fact privilege has antecedents different from those of fair comment; its principle justification is by extension from the privilege allowing falsehoods when the person to

[14] See, *e.g.*, Roth v. United States, 354 U.S. 476 (1957).

[15] It is unclear whether even Mr. Justice Black, applying his theory that the first amendment is an "absolute," would conclude that no defamation is ever actionable. See Leflar, *The Free-ness of Free Speech*, 15 VAND. L. REV. 1073, 1079-80 (1962). For an "absolutist" approach that would exclude private libels see Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 259.

[16] Whether fair comment is a privilege or whether statements subject to the fair comment rule are not defamatory at all is a question that is still debated. See 41 N.C.L. REV. 153, 154-55 (1962).

[17] 1 HARPER & JAMES, TORTS 449 (1956). See, *e.g.*, Crane v. Waters, 10 Fed. 619 (D. Mass. 1882); Charles Parker Co. v. Silver City Crystal Co., 142 Conn. 605, 116 A.2d 440 (1955).

[18] Hallen, *Fair Comment*, 8 TEXAS L. REV. 41, 53 (1929); Veeder, *Freedom of Public Discussion*, 23 HARV. L. REV. 413-14 (1910).

[19] In the early nineteenth century criticism of government officials was still severely inhibited by libel laws while criticism of literary works was privileged. See HOLT, LIBEL 96, 213 (Am. ed. 1818).

[20] Hallen, *supra* note 18, at 53; Veeder, *supra* note 18, at 414.

[21] RESTATEMENT, TORTS § 606(1), comment *b* (1938).

[22] *Id.* § 618.

whom the publication is made has a protectible interest in the facts communicated.[23]

Fair comment, like the misstatement-of-fact privilege, is to a great extent a recognition of the public interest in free discussion,[24] but in many cases there are other weighty considerations that move the courts to invoke fair comment. The court may conclude in a particular case that one who submits himself to public scrutiny for profit or for personal gratification should not complain when the reaction is not to his liking since he is in effect asking to be judged.[25] Further, the court naturally hesitates to enter the field of literary, artistic, or political criticism by attempting to set up standards by which to determine the justification of damaging opinion.[26] Neither of these arguments has much force in the typical case of misstatement of fact concerning a public official or candidate for office. The public official or candidate is asking to be judged in an even more literal sense than the artist, and the right to fair comment applies to his critics with equal or greater force. By inviting opinion he is risking his reputation, but it does not follow that he is courting misstatements of fact simply by taking a public stand. Misstatements may be more likely to occur, but this is because of the public interest in reporting his activities. In that sense, the simple fact that he has submitted himself to public scrutiny bears no logical relation to the misstatement privilege. Indeed, the facts of his public activities are more easily accessible because they *are* public.

The second argument buttressing the right to fair comment, that the court's opinion is no more correct than the critic's, is also largely inapplicable to the misstatement privilege. Granting the practical and theoretical difficulties of distinguishing fact from opinion,[27] the court still is more justified in allowing the jury to determine that a fact is true or false than that an opinion is reasonable or unreasonable.

The public figure concept that gives rise to a privilege in the

[23] See Bearce v. Bass, 88 Me. 521, 34 Atl. 411 (1896); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 242-43, 28 N.E. 1, 4 (1891) (recognizing the analogy but denying its application).

[24] See generally PROSSER, TORTS § 110 (3rd ed. 1964); 1 HARPER & JAMES, TORTS § 5.28 (1956); RESTATEMENT, TORTS §§ 606-07 (1938).

[25] Carr v. Hood, 1 Camp. 355, 358, 170 Eng. Rep. 983, 985 (K.B. 1808).

[26] See, *e.g.*, Cleveland Leader Printing Co. v. Nethersole, 84 Ohio St. 118, 137, 95 N.E. 735, 740 (1911).

[27] See Noel, *supra* note 8, at 878-80.

right-to-privacy cases is similar to fair comment in that it includes not only those who abhor publicity but must suffer it because of the public interest involved (*i.e.*, the criminal), but also those who have sought publicity and for whom a claim to a right of privacy would be therefore contradictory.[28]

The definition of "public man" for the purpose of extending the *Sullivan* rule presumably would be narrower than that applied to fair comment and the right to privacy. It would be based on public interest and only insofar as that interest is protected by the first amendment. The extent to which a plaintiff is known should be weighed only in determining the public interest in discussing his activities. The criticism engendered by his public stand must fall within the purview of the first amendment's assurance of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[29] In a new York case, *Dempsey v. Time Inc.*,[30] the court refused to extend the *Sullivan* privilege to a magazine article containing defamatory material about one of the famous prizefighter's bouts. The court was of the opinion that public interest in discussing a sports event of forty years ago was not sufficient to be protected by a first amendment privilege.[31]

Another consideration that must be weighed in a judicial formulation of a "public man" rule is the possibility that a broad privilege will inhibit public discussion rather than encourage it. The classic objection to the *Sullivan* privilege as it existed at the common law was that such a rule would tend to discourage qualified people from

[28] See Prosser, *Privacy*, 48 CALIF. L. REV. 383, 410-15 (1960).

[29] Roth v. United States, 354 U.S. 476, 484 (1957).

[30] 43 Misc. 2d 754, 252 N.Y.S.2d 186 (Sup. Ct. 1964).

[31] *Cf.* Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964). There a famous baseball pitcher was granted an injunction against publication of a fictionalized biography on the grounds that it invaded his right of privacy. The court rejected any application of the *Sullivan* rule. *But cf.* Pauling v. News Syndicate Co., 335 F.2d 659, 671 (2d Cir. 1964) (dictum). There, the statements were made about the pacifist beliefs of a renowned scientist. The court suggested that had it not held for the defendant on other grounds it would have done so by application of *Sullivan*. Gilberg v. Goffi, 21 App. Div. 2d 517, 251 N.Y.S.2d 186 (Sup. Ct. 1964). In this case the defendant suggested that the mayor permitted a conflict of interest in allowing members of his law firm to practice before the city court. Plaintiff, a member of the firm, was denied recovery on the alternate grounds that he was not sufficiently identified as one to whom the damaging statements referred and that his position was so closely related to that of the mayor as to make him a "public official" within the meaning of the rule in *Sullivan*.

seeking office.[32] If this argument seems to underestimate the mettle of American politicians,[33] it becomes more relevant when applied to the public man or the potential public man. If the rule is limited to include only those who wield great power and influence, there would seem to be no danger, but if every writer of letters to the editor or soapbox speaker becomes subject to massive and permissively irresponsible criticism by the press for which he has no legal redress, there may be fewer such people. The first amendment may cut two ways; it should not be interpreted so as to inhibit the public man any more than his critics. In *Barr v. Matteo*[34] the Supreme Court held that the head of a federal executive department had an absolute privilege against a libel action for a publication within his official discretion. Mr. Chief Justice Warren's dissent[35] pointed out that this holding created an imbalance likely to limit public discussion, since there was no generally corresponding privilege accorded to critics of executive officers. In a sense the *Sullivan* case restored the balance and even extended it, since criticism of all public officials is privileged. The question arises whether a privilege protecting misstatements about public men requires some sort of re-balancing of rights that will protect the interests and free speech rights of one who may be a public man. If the rule is extended, will it provide the balance within itself, so that whoever criticizes the public man will automatically become a public man himself and subject to the rule? Granted that it will, the right to counterattack hardly seems a realistic remedy to some classes of persons who could conceivably be deemed public men.[36]

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[32] See Post Publishing Co. v. Hallam, 59 Fed. 530, 541 (6th Cir. 1893).
[33] See Coleman v. MacLennan, 78 Kan. 711, 733-34, 98 Pac. 281, 289 (1908); Noel, *supra* note 8, at 895.
[34] 360 U.S. 564 (1959).
[35] *Id.* at 578.
[36] See Pedrick, *Freedom of the Press and the Law of Libel*, 49 CORNELL L.Q. 581, 602-03 (1964). Two recent cases have declined to follow the holding of the principal case primarily because each court felt that to do so would destroy the balance created by *Barr v. Matteo* and the *Sullivan* case. Fignole v. Curtis Publishing Co., 34 U.S.L. WEEK 2297 (S.D.N.Y. Nov. 23, 1965); Clark v. Pearson, 34 U.S.L. WEEK 2338 (D.D.C. Dec. 20, 1965).

Corporations—Jurisdiction over Foreign Corporations Not Qualified to Transact Business in North Carolina

In 1955 the North Carolina Legislature enacted two statutes that govern in personam[1] jurisdiction over foreign corporations that are not qualified to transact business in North Carolina.[2] These statutes concern corporations that have either transacted business in the state or have committed some act within the state which would

[1] "A proceeding in personam is a proceeding to enforce personal rights and obligations brought against the person and based on jurisdiction of the person . . ." 1 AM. JUR. 2D *Actions* § 39 (1962). "A proceeding in rem is essentially a proceeding to determine the right in specific property, against all the world, equally binding on everyone." 1 AM. JUR. 2D *Actions* § 40 (1962).

[2] N.C. Sess. Laws 1955, ch. 1143, § 1. These statutes were first codified into law as N.C. GEN. STAT. §§ 55-38.05, -38.1 (Supp. 1955) to go into effect upon adoption. Six days later the Legislature adopted the Business Corporation Act, N.C. Sess. Laws 1955, ch. 1371, § 1, which was not to go into effect until July 1, 1957. When the Business Corporation Act went into effect, N.C. GEN. STAT. §§ 55-38.05, -38.1 were recodified as N.C. GEN. STAT. §§ 55-144, -145 (1960). The language was not changed.

> Whenever a foreign corporation shall transact business in this State without first procuring a certificate of authority so to do from the Secretary of State or after its certificate of authority shall have been withdrawn, suspended, or revoked, then the Secretary of State shall be an agent of such corporation upon whom any process, notice, or demand in any suit upon a cause of action arising out of such business may be served.

N.C. GEN. STAT. § 55-144 (1965).

> Every foreign corporation shall be subject to suit in this State, by a resident of this State or by a person having a usual place of business in this State, whether or not such foreign corporation is transacting or has transacted business in this State and whether or not it is engaged exclusively in interstate or foreign commerce, on any cause of action arising as follows:
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> (1) Out of any contract made in this State or to be performed in this State; or
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> (2) Out of any business solicited in this State by mail or otherwise if the corporation has repeatedly so solicited business, whether the orders or offers relating thereto were accepted within or without this State; or
>
> (3) Out of the production, manufacture, or distribution of goods by such corporation with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed, regardless of how or where the goods were produced, manufactured, marketed, or sold or whether or not through the medium of independent contractors or dealers; or
>
> (4) Out of tortious conduct in this State, whether arising out of repeated activity or single acts, and whether arising out of misfeasance or nonfeasance.

N.C. GEN. STAT. § 55-145(a) (1965).

subject them to jurisdiction. The North Carolina Supreme Court recently decided cases that invoke each of the statutes.

In *Byham v. National Cibo House Corp.*,[3] the plaintiff, a North Carolina resident, sought rescission on grounds of fraud of a chain restaurant franchise contract. The defendant, a Tennessee corporation, contended that the North Carolina courts did not have jurisdiction because the contract was made not in North Carolina but in Tennessee when it was accepted in defendant's home office. The court found that the contract was to be performed in North Carolina and held that the North Carolina court had in personam jurisdiction on the basis of the minimum contact statute, section 55-145(a) of the Business Corporation Act.[4]

In *Abney Mills, Inc. v. Tri-State Motor Co.*,[5] the plaintiff, a South Carolina corporation, was seeking damages for an alleged breach of contract by the defendant, a Delaware corporation having its principal place of business in Missouri. The contract, made in South Carolina, stated the defendant would purchase a fifty-seven per cent interest in Kilgo Motor Freight, a North Carolina corporation owned by the plaintiff and others. While awaiting approval from the Interstate Commerce Commission, the parties to the contract made an agreement that the defendant would have temporary management control and would be substituted for Kilgo's board of directors. The defendant's president came to North Carolina and took over active management control of Kilgo for seven months. At the time the transfer was to be completed, the defendant did not have funds available to consummate the sale, and it terminated the management control agreement. The plaintiff instituted proceedings in the North Carolina court. The defendant contended this court did not have jurisdiction because the action did not arise out of any business transacted in North Carolina. The trial court dismissed the action. The Supreme Court remanded the suit for further findings of facts to determine if the defendant's activities in North Carolina were sufficient to subject it to the transacting business

[3] 265 N.C. 50, 143 S.E.2d 225 (1965).

[4] There was evidence that the defendant had solicited for customers in North Carolina by mail and in newspaper advertisements, but the court did not mention this as a basis for jurisdiction under § 55-145(a)(2) (business solicited in this state). Nor did it mention § 55-145(a)(4) (tortious conduct in this state) concerning the defendant's alleged fraudulent representation as a basis.

[5] 265 N.C. 61, 143 S.E.2d 235 (1965).

statute, section 55-144, and also to determine further finding of facts concerning the locus of the breach of contract.

Historically, jurisdiction over foreign corporations has been granted on such theories as implied consent[6] or presence[7] while the corporation was doing business within the state. The modern, more liberal view originated in *International Shoe Co. v. Washington,*[8] a landmark decision expressing approval of a "minimum contacts test"[9] whereby it becomes unnecessary for the corporation to be transacting business in the forum state. This theory has been held valid when there was as little as one contact, an insurance contract renewal, with the forum state.[10] The Court attributed the trend to this liberal view to improved transportation and communication. It recognized that the burden of a party having to defend himself in a state where he had engaged in economic activity had been reduced.[11] But later, in *Hanson v. Denckla,*[12] the Court cautioned that the trend did not remove all restrictions on the personal jurisdictions of state courts.[13]

What, then, are the limits within which North Carolina courts may exercise jurisdiction over corporations not qualified to transact business in North Carolina? This is a question of whether or not the state statute meets the due process requirement of the fourteenth amendment *and* whether or not the defendant has committed the activities designated by the statute. While a particular decision can serve as a guide for future litigants, each holding in this area is necessarily limited to the particular facts before the court.

Section 55-144 replaced the jurisdictional statute[14] in effect prior to 1955; the present statute uses the term "transacting business" instead of "doing business," the term used in the earlier statute.

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[6] See Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855).
[7] See Barrow Steamship Co. v. Kane, 170 U.S. 100 (1898).
[8] 326 U.S. 310 (1945).
[9] [D]ue process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."
Id. at 316.
[10] McGee v. International Life Ins. Co., 355 U.S. 220 (1957).
[11] *Id.* at 222, 223.
[12] 357 U.S. 235 (1958).
[13] *Id.* at 251.
[14] N.C. Sess. Laws 1901, ch. 5. [Last codification was N.C. GEN STAT. § 55-38 (1950).]

Only in *Worley's Beverages, Inc. v. Bubble Up Corp.*[15] has a court noted this substitution prior to the North Carolina Supreme Court in *Abney Mills.* In *Worley's* the United States District Court for the Eastern District of North Carolina said that changing the statute from "doing business" to "transacting business" only had the effect of liberalizing the statute.[16]

Thus, it would seem that any factual situation litigated prior to 1955 that was held to constitute "doing business" would still be good authority for "transacting business" today. However, the authority of a decision that held the activities *did not* constitute "doing business" prior to 1955 would seem to be weakened. If the substitution did liberalize the statute, some of these activities might conceivably be considered as "transacting business" now.

Apparently the courts have not considered the substitution of tremendous import because later decisions still wrestle with the question of the corporation's "doing business," making no reference to "transacting business."[17] But, the court has used "transacting business" and "doing business" interchangeably.[18]

In *Abney Mills* the court has given a qualified definition of "transacting business." It relied upon previous holdings in *Lambert v. Schell*[19] and *Ruark v. Virginia Trust Co.*[20] for definitions of

[15] 167 F. Supp. 498 (E.D.N.C. 1958).

[16] *Id.* at 504.

[17] Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957); Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956); Housing Authority v. Brown, 244 N.C. 592, 94 S.E.2d 582 (1956). In Harrington v. Croft Steel Prods., Inc., *supra,* the trial court had found jurisdiction on the basis of §§ 55-38 *and* 55-38.1(a)(1), (3) [now § 55-145(a)(1), (3)]. The court said: "We conclude the evidence before the trial court was sufficient to support the finding the defendant was doing business in North Carolina. . . . It becomes unnecessary to consider or pass upon the constitutionality of G.S. 55-38.1(1)(3). . . ." *Id.* at 678, 94 S.E.2d at 805-06. [The court, throughout the decision, referred to the statute as G.S. 55-38.1(1)(3) instead of G.S. 55-38.1(*a*)(1), (3).] It is true N.C. GEN. STAT. § 55-38 (1950) was still in effect at this time, but so was N.C. GEN. STAT. § 55-38.05 (Supp. 1955). See text accompanying note 2, *supra.* Section 55-38.05 has been mentioned in only one decision, Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). The court said the plaintiff sought service of process pursuant to § 55-38.05, but in the opinion, the court talked about why the plaintiff could not have service of process according to § 55-38!

[18] United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964); Putnam v. Triangle Publications, Inc., *supra* note 17.

[19] Doing business in this State means doing some of the things or

"doing business" and said these same definitions applied to "transacting business." But, the court cautioned that these definitions were definitely not an all-embracing rule as to the meaning of "transacting business."[21]

Courts have pointed out that of the two statutes, section 55-144, the transacting business statute, is the only one available to a nonresident plaintiff or to a plaintiff that does not have a usual place of business in North Carolina.[22] The North Carolina Supreme Court has also pointed out that to make the transacting business statute applicable, two requirements must be met: (1) the defendant must have transacted business in North Carolina; *and* (2) the cause of action must have *arisen out of such business.*[23]

Section 55-145(a), the minimum contact statute, grants jurisdiction in four specific instances though the corporation is not transacting business in North Carolina: (1) if the corporation makes a contract in this state or one to be performed in this state; (2) if the corporation solicits business in this state; (3) if the corporation can reasonably expect its goods to be used in this state; or (4) if the corporation commits a tort in this state. The statute applies "whether or not such corporation is transacting or has transacted business in this State . . . ."[24] However, if the corporation is transacting business, jurisdiction would attach by virtue of the transacting business statute, so for all practical purposes, the statute need apply only in cases in which the corporation has not transacted

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exercising some of the functions in this State for which the corporation was created. And the business done by it here must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is, by its duly authorized officers and agents, present within the State.

235 N.C. 21, 25, 69 S.E.2d 11, 13-14 (1952).

[20] "The expression 'doing business in this state,' . . . means engaging in, carrying on, or exercising, in this State, some of the things, or some of the functions, for which the corporation was created." 206 N.C. 564, 565, 174 S.E. 441, 442 (1934).

[21] 265 N.C. at 71, 143 S.E.2d at 242.

[22] United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964); Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963). *But see* Belk v. Belk's Dep't Store, Inc., 250 N.C. 99, 108 S.E.2d 131 (1959). The plaintiff was a resident of Florida and the defendant was a South Carolina corporation. The court found jurisdiction on the basis of *International Shoe* and did not mention any statute.

[23] Abney Mills, Inc. v. Tri-State Motor Co., 265 N.C. 61, 143 S.E.2d 235 (1965); Atlantic Coast Line R.R. v. J. B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963).

[24] N.C. GEN. STAT. § 55-145(a) (1965).

business in North Carolina.[25] Nevertheless, if the corporation has not transacted business, the rule of the "minimum contacts test" must be met to assure that due process is satisfied.

The court in *Byham* set forth the factors it will consider in determining if the "minimum contacts test" and "fair play" required in *International Shoe* have been met.[26] These are:

(a) Did the form of substituted service reasonably assure that notice to the defendant would be actual?[27]
(b) Did the defendant do some act invoking the benefits as well as the burdens of the forum state's laws?[28]
(c) Did the forum state have an interest of its residents to protect?[29]
(d) Did the defendant have access to the courts of the forum state to enforce obligations of its residents?[30]
(e) Was the defendant caused great inconvenience in defending a suit away from home?[31]
(f) Were the witnesses and material evidence to be found in the forum state?[32]
(g) Would it be economically practical for plaintiff to pursue his suit in defendant's home state?[33]
(h) If the suit was based on a contract, did it have a substantial connection with the forum state?[34]

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[25] It is possible that a corporation could be transacting one type of business in North Carolina and another type in State *A*. If the plaintiff brings suit in North Carolina because defendant manufactured goods in State *A* that it could reasonably expect to be used in North Carolina, his suit would have to be brought under § 55-145(a)(3) instead of § 55-144. Under § 55-144, the cause of action *must arise* out of the business transacted in North Carolina. In this hypothetical the business transacted in North Carolina has no connection with plaintiff's cause of action, so it is conceivable that a corporation admittedly transacting business within the state would be subject to § 55-145(a). It is obvious that this is a possibility that will rarely occur.

[26] 265 N.C. at 56-57, 143 S.E.2d at 231-32.

[27] See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[28] See Hanson v. Denckla, 357 U.S. 235 (1958); International Shoe Co. v. Washington, *supra* note 27.

[29] See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950).

[30] See Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, *supra* note 29.

[31] See International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[32] See McGee v. International Life Ins. Co., 355 U.S. 220 (1957); Travelers Health Ass'n v. Virginia *ex rel.* State Corp. Comm'n, 339 U.S. 643 (1950).

[33] See McGee v. International Life Ins. Co., *supra* note 32.

[34] *Ibid.*

(i) How much authority has been given the courts by the legislature of the forum state?[35]

The court deems (a), (b) and (i) essential to meet due process requirements, while consideration will be given to (c), (d), (e), (f), (g) and (h).[36] Factor (d) seems to be redundant in that it is included in (b). Factors (e), (f) and (g) are the hardship criteria as they affect the defendant, the claimant, or the witnesses and material evidence. Actually these factors seem to be more related to making a determination of whether or not the doctrine of forum non conveniens applies than they do to determine whether or not jurisdiction has attached. Since a liberal trend in jurisdiction is evolving, these factors should have a lessening weight in the ultimate determination because of decreasing hardships. But they should certainly be considered to prevent gross miscarriages of justice.

Subsection (1) (contract made or to be performed in this state) of section 55-145(a), the minimum contact statute, has been held valid as the *sole* basis for granting jurisdiction to North Carolina courts,[37] as have subsections (3) (reasonable expectation goods will be used in this state)[38] and (4) (tortious conduct in this state).[39] The courts have yet to rule on the validity of subsection (2) (business solicited in this state) alone as a basis for jurisdiction, but they have held it valid in conjunction with one of the other subsections in some cases.[40]

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[35] See Perkins v. Benquet Consol. Mining Co., 342 U.S. 437 (1952); Nixon v. Cohn, 62 Wash. 2d 987, 385 P.2d 305 (1963); Gavenda Bros. v. Elkins Limestone Co., 145 W. Va. 732, 116 S.E.2d 910 (1960).

[36] 265 N.C. at 56, 143 S.E.2d at 231.

[37] Byham v. National Cibo House Corp., 265 N.C. 50, 143 S.E.2d 225 (1965) (contract for franchise for chain restaurant).

[38] Shepard v. Rheem Mfg. Co., 249 N.C. 454, 106 S.E.2d 704 (1959) (home appliance manufacturer could reasonably expect products to be used in state).

[39] Painter v. Home Fin. Co., 245 N.C. 576, 96 S.E.2d 731 (1957). The defendant was guilty of wrongfully taking plaintiff's automobile by duress without any legal process or right, and of invading plaintiff's privacy causing public humiliation.

[40] Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958); Farmer v. Ferris, 260 N.C. 619, 133 S.E.2d 492 (1963). In *Worley's* the court found jurisdiction on basis of §§ 55-144, -145(a)(1)-(3). The defendant's representatives had personally solicited the plaintiff to handle defendant's product in North Carolina. In *Farmer* the court found jurisdiction on the basis of § 55-145(a)(1)-(4). The defendant had solicited its orders by advertisements in *Billboard* magazine and also had sent mimeographed lists of products for sale to customers in North Carolina.

It has been held unconstitutional to apply subsection (3) to the facts of a particular case on two occasions,[41] and in conjunction with subsection (4) on one occasion.[42] Subsection (4) has been

[41] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). In *Putnam* the plaintiff, a North Carolina resident, sued the defendant, a Delaware corporation having its principal place of business in Pennsylvania, for libel and invasion of privacy for an article in defendant's magazine. The defendant had sold the magazines to independent wholesalers in North Carolina, but title had passed outside the state. Defendant's only contact with North Carolina was that three of its representatives entered North Carolina two to five times a year to promote sales to news dealers and television stations. The court held that the defendant did not have sufficient ties with North Carolina to satisfy due process requirements and that N.C. GEN. STAT. § 55-38.1(a)(3) [now § 55-145(a)(3)] would be unconstitutional if applied to the facts in this case. *Id.* at 443, 96 S.E.2d at 454. The court in *Worley's* said that did not mean that the statute would not be constitutional under a different set of facts. 167 F. Supp. at 505-06. For a criticism of the court's decision in *Putnam*, see 7 DUKE L.J. 135 (1958). In *Erlanger Mills* the plaintiff, a North Carolina corporation, placed an order with the defendant, a New York corporation having its principal place of business in New York, for some yarn after plaintiff's representative visited the defendant's mill in New York. The contract was accepted in New York and the goods were shipped f. o. b. New York. Plaintiff found some defective yarn in the shipment and sued to recover damages. The defendant's only contact with North Carolina was that its general manager came to plaintiff's plant in North Carolina to discuss the complaint. Service was made on the general manager while he was here and not through the Secretary of State as prescribed in § 55-146. The court held that to sustain jurisdiction would be offensive to the due process clause. 239 F.2d at 507. Judge Sobeloff posed this hypothetical:

> To illustrate the logical and not too improbable extension of the problem, let us consider the hesitancy a California dealer might feel if asked to sell a set of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires. As in the hypothetical case, the sale in the principal case was "with the reasonable expectation that these goods are to be used or consumed in [the vendee's domicile] and are so used and consumed." It is difficult to conceive of a more serious threat and deterrent to the free flow of commerce between the states.

Ibid.

[42] Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961). The plaintiff, a North Carolina resident, was injured by an object thrown by a lawn mower manufactured by the defendant, an Illinois corporation with its principal place of business in Illinois. The lawn mower was being used by a city employee. The manufacturing defendant had sold the mower to a distributor and independent contractor in Virginia, who had in turn sold it to a retail dealer in Winston-Salem, who in turn had sold it to the city. The manufacturing defendant had no representatives in North Carolina and had never been present in North Carolina. The court said the defendant had no contacts with North Carolina that would make it amenable to process from the courts of North Carolina, based on the *Putnam* decision. *Id.* at 484, 119 S.E.2d at 448.

held unconstitutionally applied to particular facts in only one case.[43]

Occasionally the court is faced with a jurisdictional claim based on both the transacting business statute and the minimum contact statute and has decided on the "transacting business" basis, refusing to consider the constitutionality of the subsections of section 55-145(a).[44]

Only two cases holding application of the statutes to the particular facts of the cases unconstitutional have been decided by the North Carolina Supreme Court.[45] On the other hand, in every case except one[46] that has been decided in a federal court, sufficient "minimum contacts" have been held to be lacking[47] or the defendant corporation has been deemed not to be "transacting business."[48] This indicates that the North Carolina Supreme Court is more ready to grant jurisdiction to protect North Carolina residents, quite naturally, and that it has taken the supposedly liberal interpretation

[43] Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960). The plaintiff, a North Carolina resident, was injured because of the alleged negligence of the defendant, a South Carolina corporation with its principal place of business in South Carolina, in repairing her car. Defendant's contacts with North Carolina were occasional visits to the Chrysler assembly plant in North Carolina to see new automobiles, for which he was a dealer, and telephoning or writing the regional office in North Carolina. The court said to sustain jurisdiction would be offensive to the due process clause, relying on the *Erlanger Mills* case. *Id.* at 3.

[44] Spartan Equip. Co. v. Air Placement Equip. Co., 263 N.C. 549, 140 S.E.2d 3 (1965); Babson v. Clairol, Inc., 256 N.C. 227, 123 S.E.2d 508 (1962); Harrington v. Croft Steel Prods., Inc., 244 N.C. 675, 94 S.E.2d 803 (1956), see note 17 *supra*. In *Spartan Equip. Co.* the trial court found that jurisdiction could be had on the basis of § 55-145(a)(1)-(4), but the appellate court ignored the applicability of § 55-145(a) and found that the defendant was "doing business" in North Carolina. 263 N.C. at 556, 140 S.E.2d at 9. The court made no mention of "transacting business" in the opinion, but did refer to § 55-144. When referring to *International Shoe*, the court referred to "continuous and systematic activities" instead of "minimum contacts." *Ibid.*

[45] Moss v. City of Winston-Salem, 254 N.C. 480, 119 S.E.2d 445 (1961); Putnam v. Triangle Publications, Inc., 245 N.C. 432, 96 S.E.2d 445 (1957). In Atlantic Coast Line R.R. v. J. B. Hunt & Sons, 260 N.C. 717, 133 S.E.2d 644 (1963), the court did not grant jurisdiction because the alleged tort was committed in Virginia instead of North Carolina, so the North Carolina statute was not applicable.

[46] Worley's Beverages, Inc. v. Bubble Up Corp., 167 F. Supp. 498 (E.D.N.C. 1958).

[47] Erlanger Mills, Inc. v. Cohoes Fibre Mills, Inc., 239 F.2d 502 (4th Cir. 1956); Easterling v. Cooper Motors, Inc., 26 F.R.D. 1 (M.D.N.C. 1960).

[48] United States v. Atlantic Contractors, Inc., 231 F. Supp. 356 (E.D.N.C. 1964); Schnur & Cohan, Inc. v. McDonald, 220 F. Supp. 9 (M.D.N.C. 1963); Edwards v. Scott & Fetzer, Inc., 154 F. Supp. 41 (M.D.N.C. 1957).

offered by *International Shoe* more to heart than have the federal courts.

The drafters of the Business Corporation Act intended that the local residents should have as much protection as possible.

> It is thought the wise policy favors subjecting such foreign corporations to suit here for the convenience of residents of this state where it is *constitutionally* possible, since the alternative is to force our residents to bring their actions in foreign jurisdictions.[49]

While the decisions in the *Byham* and *Abney Mills* cases are not earth-shaking deviations from a trend, the guidelines furnished by the North Carolina Supreme Court as to what it considers to be "transacting business" in section 55-144 and what constitutes "minimum contacts" in allowing jurisdiction under section 55-145(a) are useful. Nevertheless, the basic problem of applying these concepts to the particular activities of the defendant corporation will continue to confront the court. It is inconceivable that this problem can be alleviated by substitution of legal rule for *ad hoc* judgment.

HAROLD D. COLSTON

Criminal Law—Credit for Time Served Under a Vacated Judgment Upon Retrial and Second Conviction

In the recent case of *State v. Weaver*[1] the North Carolina Supreme Court reversed its former position and allowed the time served in prison by the defendant prior to his collateral attack upon the previous proceedings and subsequent retrial and conviction, to count toward his prison sentence resulting from his second trial.[2]

Defendant was first tried in May 1963 and pleaded *nolo contendere* to a charge of felonious assault.[3] He was sentenced to imprisonment for a term of not less than five or more than seven

[49] Latty, Powers & Breckenridge, *The Proposed North Carolina Business Corporation Act*, 33 N.C.L. REV. 26, 54 (1954). (Emphasis added.)

[1] 264 N.C. 681, 142 S.E.2d 633 (1965).

[2] *Id.* at 687, 142 S.E.2d at 637.

[3] N.C. GEN. STAT. § 14-32 (1953) provides:

> Any person who assaults another with a deadly weapon with the intent to kill, and inflicts serious injury not resulting in death, shall be guilty of a felony and shall be punished by imprisonment in the state prison or be worked under the supervision of the State Highway and Public Works Commission for a period of not less than four months nor more than ten years.

years. On May 9, 1963, he was committed to state prison and began serving the sentence. On September 25, 1964, after a habeas corpus[4] hearing in the United States District Court for the Middle District of North Carolina, defendant was awarded a new trial.[5] From October 8, 1964, until the new trial in December 1964, he was confined in county jail, apparently because of failure to meet the bond requirement.[6] At the second trial in December 1964 defendant was convicted of assault with a deadly weapon—a general misdemeanor[7] —which is a crime of less degree than the one for which he was charged at the first trial.[8] Defendant was sentenced to two years,[9] which was the maximum legal sentence for this offense.[10]

The North Carolina Supreme Court ruled that from May 9, 1963, until September 25, 1964, defendant's de facto status was that of a prisoner serving a sentence and that this time should be credited against the two-year maximum sentence imposed at the second trial. The court further ruled that the defendant's status from September 25, 1964, until the second trial in December 1964 was that of a person under indictment awaiting trial, and in custody on account of his failure to give the appearance bond fixed by the district court. This time would not be credited to the sentence imposed at the second trial.[11]

There are four situations where the question of credit for time

[4] See 28 U.S.C. § 2241 (1959), which provides for the writ of habeas corpus to extend to a prisoner who is in custody in violation of the Constitution or laws or treaties of the United States.

[5] 264 N.C. at 682, 142 S.E.2d at 634 (reversed on grounds that defendant had not been represented by counsel at the first trial).

[6] *Id.* at 683, 142 S.E.2d at 635.

[7] N.C. GEN. STAT. § 14-33 (1953) provides: "In all cases of assault, with or without the intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the *discretion* of the court." (Emphasis added.)

[8] N.C. GEN. STAT. § 14-32 (1953). See State v. Hefner, 199 N.C. 778, 155 S.E. 879 (1930).

[9] 264 N.C. at 682, 142 S.E.2d at 635. The defendant, upon retrial, was charged with felonious assault, but since the jury was probably instructed that assault with a deadly weapon was a lower degree of the same offense, they returned a verdict of guilty for the misdemeanor.

[10] N.C. GEN. STAT. § 14-33. The statute itself does not provide a minimum and maximum sentence for assault with a deadly weapon, and the only restriction is that against cruel and unusual punishment imposed by N.C. CONST. art. 1, § 14. See State v. Crandall 225 N.C. 148, 33 S.E.2d 861 (1945) (two years not cruel and unusual punishment); *but see* State v. Austin, 241 N.C. 548, 550, 85 S.E.2d 924, 926 (1955) (two years the maximum sentence).

[11] 264 N.C. at 687, 142 S.E.2d at 637.

previously served is likely to arise: (1) where, as in *Weaver,* the sentence imposed at the second trial is for the maximum legal sentence; (2) where the sentence imposed at the second trial is not for the maximum legal sentence, and when added to the time served under the vacated judgment the aggregate *does not* exceed the maximum legal sentence; (3) where the sentence imposed at the second trial is not for the maximum legal sentence but when added to the time served under the vacated judgment the aggregate *does* exceed the maximum legal sentence; and (4) where the defendant has been confined in jail because of his inability to raise bond or because of the denial of bond.

In the situation where the maximum legal sentence was imposed at the second trial, the North Carolina court had, prior to *Weaver,* followed the rule that time served in prison under a prior conviction would not as a matter of law be credited to a subsequent sentence resulting from a valid trial. This position was adopted in *State v. Williams.*[12] In that case the defendant was convicted of larceny on February 19, 1963, and sentenced to two years in prison. On July 8, 1963, he was awarded a new trial[13] in a post-conviction hearing.[14] On July 29, 1963, he was again convicted of larceny and sentenced to ten years. The court refused to allow credit for the time served under the vacated judgment, stating merely that "defendant's contention that the judge was compelled to allow him credit for the period spent in prison before a valid trial was had is also without merit."[15] There was no citation of authority, and the fact that the second sentence imposed a maximum prison sentence was not stressed.

In the later case of *State v. White,*[16] decided in the same year,

[12] 261 N.C. 172, 134 S.E.2d 163 (1964).

[13] N.C. GEN. STAT. §§ 15-217 to -222 (Supp. 1965).

[14] Defendant was awarded a new trial because he had not been afforded the benefit of counsel.

[15] 261 N.C. at 174, 134 S.E.2d 163 at 165. However the court did state that "the mere fact that different judges impose different punishment does not invalidate the sentence imposed at the second trial." *Ibid.*

[16] 262 N.C. 52, 136 S.E.2d 205 (1964), *cert. denied,* 379 U.S. 1005 (1965). In *White,* as in *Williams,* the defendants were given a longer prison term upon appeal and retrial. For a more complete discussion of the constitutional aspect of these cases see Alstyne, *In Gideon's Wake,* 74 YALE L.J. 606 (1965); 1965 DUKE L.J. 395. For a discussion of the wide discretion of the trial judge in imposing sentence see Penegar, *Criminal Law Sanctions in Two Civil Rights Cases—A Brief Comparison,* 43 N.C.L. REV. 667 (1965).

the court reconsidered its position and examined the existing authority[17] but did not allow credit for the time served under the vacated judgment. The court stated that a majority of courts have denied credit in such situations and that "the rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial must be deemed to have consented to a wiping out of all the consequences of the first trial. This is not a denial of defendant's constitutional rights. . . ."[18] In *White* the defendant was tried and convicted of armed robbery and sentenced to be imprisoned for ten years. Subsequently, he obtained a new trial and was again convicted of armed robbery and sentenced to be imprisoned from twelve to fifteen years,[19] a term that was not for the maximum legal sentence,[20] nor when added to the time already served under the vacated judgment did it total the maximum legal sentence. In this respect *White* was distinguishable from *Williams* and some of the authority relied upon in *White* would not have been applicable in deciding *Williams*.[21]

After *White,* the North Carolina Supreme Court in *State v. Anderson*[22] did not allow the time served under the vacated judgment to count toward a second sentence. This case was factually in accord with *White* and distinguishable from *Williams, i.e.,* the maximum sentence was not imposed. The court denied credit on the authority of *White* without discussion.[23]

[17] See, *e.g.* Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952); *In re* Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948); *In re* De Meerleer, 323 Mich. 287, 35 N.W.2d 255, *cert denied,* 336 U.S. 946 (1948); People v. Trezza, 128 N.Y. 529, 28 N.E. 533 (1891); People *ex rel.* Lenefsky v. Ashworth, 56 N.Y.S.2d 5, (Sup. Ct. 1945); *Ex parte* Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943); Ogle v. State, 43 Tex. Crim. 219, 63 S.W. 1009 (1901); State *ex rel.* Drankovich v. Murphy, 248 Wis. 433, 22 N.W.2d 540 (1946).

[18] 262 N.C. at 56, 136 S.E.2d at 208.

[19] *Id.* at 53, 136 S.E.2d at 205.

[20] N.C. GEN. STAT. §§ 14-87 (1953).

[21] *E.g., In re* Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948) (no maximum sentence imposed at second trial). *Cf.* Lewis v. Commonwealth, 32 Mass. 445, 108 N.E.2d 922 (1952) (maximum sentence given, but credit allowed). Had this case been followed in deciding *Williams,* a different result would have been obtained.

[22] 262 N.C. 491, 137 S.E.2d 823 (1964). Defendant was indicted upon a charge of rape. He entered a plea of guilty to assault with the intent to commit rape and was sentenced to be imprisoned for not less than twelve or more than fifteen years. After serving almost three years of the sentence he was awarded a new trial. He entered the same plea again, and this time was sentenced to five years.

[23] 262 N.C. at 492, 137 S.E.2d at 824.

Until *Weaver* the court was not called upon to decide a case where the time served under a vacated judgment added to the sentence imposed at the second trial totaled *more* than the maximum legal sentence. The court, in allowing credit for the time served under the first sentence, stated that *Williams,* to the extent that it was in conflict with *Weaver* was overruled.[24] The position of the North Carolina Court in *Weaver* seems to be in accord with the weight of authority.[25]

An examination of the decisions from various jurisdictions reveals that several theories have been advanced to support the position of not allowing the time served under the vacated judgment to be credited to the sentence imposed at the second trial. One such theory is that the first sentence is void, and hence the state has no responsibility for the punishment the individual has undergone;[26] however some courts say that the sentence is merely erroneous and allow credit for time served.[27] The waiver theory has been used to deny credit in this situation with, the courts emphasizing the fact that the defendant himself procured the reversal thereby waiving the benefit of time served. No court has found a constitutional requirement that credit be allowed;[28] however, a growing number of

[24] 264 N.C. at 687, 142 S.E.2d at 637.

[25] This precise question seems to have been answered in In Matter of Leypoldt, 32 Cal. App. 2d 518, 90 P.2d 91 (1939); Kozlowski v. Board of Trustees of New Castle County Workhouse, 2 W. W. Harr. (32 Del.) 29, 118 A. 596 (1921); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952). Substantially the same question seems to have been decided in Youst v. United States, 151 F.2d 666 (5th Cir. 1945); People v. Huber, 389 Ill. 192, 58 N.E.2d 879 (1945); People v. Gilbert, 163 Mich. 511, 128 N.W. 756 (1910); see King v. United States, 98 F.2d 291 (D.D.C. 1938); People v. Brown, 383 Ill. 287, 48 N.E.2d 953 (1943). All of these decisions tend to support the decision in *Weaver.*

[26] See 45 MICH. L. REV. 912 (1947); 12 U. DET. L.J. 135 (1949).

[27] The "waiver" doctrine is a device created to prevent a defendant from claiming double jeopardy after winning a second trial. Comely, *Former Jeopardy,* 35 YALE L.J. 674, 685 (1926), maintains that the "waiver" doctrine was first stated in Hopt v. Utah, 110 U.S. 574 (1884), in which there was no claim for double jeopardy. See Kepner v. United States, 195 U.S. 100, 134 (1904) (no waiver, and double jeopardy not applicable). *But see* People v. Wilson, 391 Ill. 463, 63 N.E.2d 488 (1945), *cert. denied,* 327 U.S. 801 (1946). In Illinois the 1941 Indeterminate Sentence Law had been declared unconstitutional in People v. Montana, 380 Ill. 596, 44 N.E.2d 569 (1942). During its short life many defendants had been sentenced under the enactment. Upon resentencing, even though there had been no appeal and retrial, and hence no waiver, the Illinois court denied credit.

[28] *E.g., Ex parte* Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943) (no constitutional power in the court to allow credit).

jurisdictions do grant credit with[29] or without[30] legislative enactment. One state has even made its statutory provision retroactive, applying it to all persons in prison at the time of its enactment who had not been granted credit.[31]

Prior to *Weaver* the North Carolina court had rejected the theory that a previous sentence was void, holding that it was merely erroneous and hence voidable at the instance of the defendant.[32] In *Weaver* the court took a definite step away from the harsh technicalities heretofore imposed to deny credit for the time served before a defendant has been granted a new trial. It intimated that the trial judge is to have considered the time already served pursuant to the first sentence when passing judgment at the second trial. The court goes on to say "when the maximum sentence is imposed at the second trial, this dispels any suggestion that the trial judge gave defendant credit for the punishment he had already received."[33]

A situation that the North Carolina court has not yet had to face is where the sentence imposed at the second trial does not exceed the maximum legal sentence, but when added to the time served under the vacated judgment the total is more than the maximum legal sentence. In this situation the court will be faced with two alternatives. It may allow credit for the total time served under the vacated judgment or it may allow credit only for the time in excess of the maximum legal sentence. Following the rationale of *Weaver* it would seem mandatory that full credit be given, since it is evident that the trial judge did not consider this time when passing sentence at the second trial.

Another possible solution is to treat this type of sentence as any other sentence in excess of the legal maximum. The rule regarding excessive sentences was stated in *State v. Austin*:[34]

[29] See *e.g.*, CAL. PEN. CODE § 2900.1 (1949); *In re* James, 38 Cal. 2d 302, 240 P.2d 596 (1952). *But cf.*, State *ex rel.* Nelson v. Ellsworth, 141 Mont. 78, 375 P.2d 316 (1962), where the court interpreted a Montana law as forbidding credit in certain situations.

[30] *In re* Wilson, 202 Cal. 341, 260 Pac. 542 (1927); Little v. Wainwright, 161 So. 2d 312 (Fla. 1964); Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1962); *Ex parte* Williams, 63 Okla. Crim. 395, 72 P.2d 904 (1938); Stonebreaker v. Smyth, 187 Va. 250, 46 S.E.2d 406 (1948).

[31] Millard v. Skillman, 341 Mich. 461, 67 N.W.2d 708 (1951).

[32] State v. Goff, 264 N.C. 563, 142 S.E.2d 142 (1965).

[33] 264 N.C. at 686, 142 S.E.2d at 637.

[34] 241 N.C. 548, 85 S.E.2d 924 (1955).

> It is the general rule in this jurisdiction that where a defendant has been properly convicted but given a sentence in excess of that authorized by law and comes to this court pursuant to a petition for a writ of *certiorari* in a *habeas corpus* proceeding, when such defendant has not served as long under the sentence as he might have been legally imprisoned, we *vacate* the improper sentence and *remand* for proper sentence.[35]

As noted previously, the North Carolina court expressly refused to grant credit for the time served in county jail prior to the time the first sentence was vacated and the second judgment pronounced. The court stated that "during this period, while in custody in default of bond, defendant was not serving a sentence as punishment for the conduct charged in the bill of indictment."[36] Research indicates that only a small minority of jurisdictions grant credit in this situation.[37] The view expressed by the North Carolina court has rarely been challenged by appeal or by collateral attack.

In respect to the credit problem in general, it would seem that *Weaver* is at least an affirmative step in the right direction. To deny a prisoner credit in this situation is to penalize him unduly for exercising his post-conviction remedies; furthermore, it would seem to constitute an unnecessary—if not unconstitutional—restraint on the exercise of such rights.[38] It is hoped that the court will extend this decision to instances—not factually in accord with *Weaver*—where the defendant does not receive the maximum sentence upon the second conviction. One means of assuring that such credit is granted would be to have the court remanding the case to specify that the trial court is expressly to give the credit. This would have the desirable effect of removing any idea from the prisoner's mind,[39] and the minds of the public in general, that time served and good

[35] 241 N.C. at 550, 85 S.E.2d at 926. (Emphasis added.)

[36] 264 at 687, 142 S.E.2d at 637.

[37] See Tilghman v. Culver, 99 So. 2d 282 (Fla. 1957). The court gave credit for the time the defendant was confined in jail awaiting a new trial. He had been awarded a new trial because the sentence imposed at the previous trial was excessive. *Cf.* Freeman v. State, 87 Idaho 170, 392 P.2d 542 (1964). *But see* State v. Boles, 148 W.Va. 802, 137 S.E.2d 418 (1964) (court may at its discretion grant credit from the time first confined).

[38] See Alstyne, *In Gideon's Wake,* 74 YALE L.J. 606 (1965); 1965 DUKE L.J. 395.

[39] This would tend to make the prisoner more receptive to prison programs aimed at helping him become a useful citizen. See Tisdel, *Rehabilitation—Colossal Failure,* 7 CAN. B.J. 142 (1964) which points out the failure of the penal systems to rehabilitate and the urgent need for changes to meet this objective.

behavior credits earned would not be tossed into a bottomless pit under the guise of some harsh and highly technical legal theory. This approach has been adopted by the Virginia Supreme Court of Appeals. In *Stonebreaker v. Smyth*[40] the court expressly provided that time served under a vacated judgment should be credited to a second sentence if the defendant were convicted at the second trial.[41]

The North Carolina Supreme Court has followed this procedure in analogous situations. In a case involving an excessive sentence the North Carolina court remanded with the instruction that the trial court so condition its sentence upon the second sentencing to allow credit for the time already served.[42] In another case the defendant had been found guilty on more than one count and had been given consecutive sentences. After having served some time under the first sentence, that conviction was reversed, and the court remanded with directions to allow the time served toward that sentence to count against the second sentence.[43]

In *Weaver,* North Carolina took a giant step in dispensing with the subtle legal technicalities heretofore utilized to deny credit for time served under a vacated judgment. By analogy, it could be argued that the court should grant credit for all confinement following the first conviction, be it in prison or in county jail. In *Weaver,* the defendant was confined in jail for a period of two months because of failure to give bond.[44] The Florida court, granting credit under similar circumstances, stated: "It is not petitioner's fault that the states criminal system failed to judge him guilty and sentence him properly in an uninterrupted operation. . . . It is only fair to give petitioner full credit for all time he has been in official custody since the time of his first commitment. . . ."[45]

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[40] 187 Va. 250, 46 S.E.2d 406 (1948).

[41] In this case the defendant had served fifteen years under a sentence imposed for a conviction of armed robbery. Because he had been denied counsel at the first trial, he was awarded a new trial.

It seems that in other jurisdictions as in North Carolina this problem has arisen primarily where the right to counsel has been denied in a previous trial, but the same principle holds true in other situations.

[42] State v. Hollars, 260 N.C. 195, 132 S.E.2d 325 (1963).

[43] Potter v. State, 263 N.C. 114, 139 S.E.2d 4 (1964).

[44] 264 N.C. at 683, 142 S.E.2d at 635.

[45] Tilghman v. Culver, 99 So. 2d 282, 285 (Fla. 1957).

International Law—Expropriation—The Act of State Doctrine

The recent case of *Banco Nacional de Cuba v. Farr*[1] is the decision on remand of the now famous case *Banco Nacional de Cuba v. Sabbatino*.[2] The litigation arose out of the Cuban expropriation of American properties in 1960. Farr, Whitlock and Company, a New York sugar brokerage firm, had executed a contract to buy sugar from Compania Azucarera Vertientes-Camaguay de Cuba, which was largely owned and controlled by private American capital.[3] Before loading could be completed, Premier Fidel Castro confiscated the properties of twenty-six corporations owned by American interests, including C.A.V.[4] In order to obtain the sugar, Farr, Whitlock had to negotiate another contract with the Cuban Government. Pursuant to this second contract, the sugar was sold in Morocco. Later, Farr, Whitlock refused to deliver either the necessary bills of lading or the proceeds of the sale to the agent of the Cuban government. The Cuban bank then brought suit in a Federal district court against Farr, Whitlock for conversion and against Sabbatino, temporary receiver of C.A.V. for injunctive relief.

The outcome depended upon whether the so-called "act of state doctrine" was to be applied. This doctrine, stated simply, means that the courts of one nation will not sit in judgment on the acts of other nations committed within their own boundaries.[5] Thus if the doctrine were applied, Cuba would succeed because the court could not question the validity of a title obtained by an act of state. If the doctrine were not applied, the court could decide all aspects of the case on its merits, including a determination of the validity of the expropriation in the context of international law.

The district court[6] held that the doctrine was inapplicable be-

[1] 343 F. Supp. 957 (S.D.N.Y. 1965).

[2] 376 U.S. 398 (1964).

[3] Farr, Whitlock & Co. will hereinafter be referred to as Farr, Whitlock. Compania Azucarera Vertientes-Camaguay de Cuba will be referred to as C.A.V.

[4] 376 U.S. at 401-2 n.3-4. The expropriation decree, Cuban Public Law No. 851, provided a highly illusory method of compensation whereby for thirty years the United States would have to buy more sugar from Cuba at higher prices than any previous period in history. For a full English translation, see 55 AM. J. INT'L L. 822 (1961).

[5] Zander, *The Act of State Doctrine*, 53 AM. J. INT'L L. 827 (1959).

[6] Banco Nacional de Cuba v. Sabbatino, 193 F. Supp. 375 (S.D.N.Y. 1961).

cause the taking was confiscatory and thus a violation of international law.[7] Since the taking was unlawful, title had never parted C.A.V. nor vested in the Cuban Government. The court of appeals affirmed.[8] On appeal to the Supreme Court the case was reversed and remanded in a eight-to-one decision with a vigorous dissent by Mr. Justice White.[9] The act of state doctrine was applied in a broad manner. The mandate to the lower court specified that proceedings were to be entered consistent with the Supreme Court's decision, but leave was given to decide other litigable issues if they should arise.[10]

After the Supreme Court's decree and before disposition of the case on remand, Senators Hickenlooper and Sparkman successfully sponsored an amendment to the Foreign Assistance Act of 1964.[11] The Hickenlooper Amendment precludes American courts from applying the act of state doctrine in cases arising out of foreign expropriations of American property from January 1, 1959 to January 1, 1966. The courts are to decide the cases on their merits, according to principles of international law. But if the President advises the court that such determination would hamper the foreign policy interests of the United States or if the taking in question does not violate international law, the doctrine will be applied and there will be no trial on the merits.

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[7] The nationalization was said to be in violation of international law because it was retaliatory, discriminatory, and without adequate compensation. 193 F. Supp. at 384-85.

[8] 307 F.2d 845 (1962).

[9] 376 U.S. 398, 439.

[10] *Ibid.*

[11] The Foreign Assistance Act of 1964 § 301(d)(4), 78 Stat. 1008, 22 U.S.C. § 2370(e)(2). The amendment reads as follows:

> No court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law. *Provided,* that this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court or (3) in any case in which the proceedings are commenced after January 1, 1966.

The district court, in *Banco Nacional de Cuba v. Farr*,[12] held that the general mandate from the Supreme Court was inapplicable because of the intervening act of Congress. It applied the amendment retroactively and held that it was bound by the previous decision of the court of appeals that the expropriation violated international law.[13] However, before dismissing the complaint, the court felt that the "Executive Arm" should have sixty days—or longer if necessary—to make a determination whether the act of state doctrine should be applied in the interest of foreign policy.[14]

In order to understand the importance and implications of *Farr* more fully, it is necessary to consider the act of state doctrine as traditionally applied. Probably the original reason for its existence was the principle of absolute sovereignty of nations.[15] In the *Schooner Exch. v. McFaddon*,[16] Chief Justice Marshall stated that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute,"[17] and any exceptions "to the full and complete power of a nation must be traced up to the consent of the nation itself."[18] It would seem that Chief Justice Fuller, in *Under-*

[12] 243 F. Supp. 957. Even before the decision reached the Supreme Court, Sabbatino was released as temporary receiver of C.A.V. On remand, the case title was amended so as to eliminate him from the proceedings.

[13] 243 F. Supp. at 979-81.

[14] On September 29, 1965, Robert M. Morganthau, United States attorney, in a letter to Fredrick van Pelt Bryan, district judge, stated that "no determination has been made that application of the act of state doctrine is required in this case by the foreign policy interests of the United States." Society of International Law, Letter to Members, Sept.-Oct. 1965, p. 3.

On November 15, 1965, Judge Bryan, in a memorandum opinion, entered final decree in *Banco Nacional de Cuba v. Farr* based upon the Morganthau letter. It was said that since the Executive Branch had no objections to trying the case on its merits, Cuba's complaint was dismissed and the opinion of the court of appeals in Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (1962), reinstated. 4 INTERNATIONAL LEGAL MATERIALS 1209 (1965).

[15] See Reeves, *The Sabbatino Case: The Supreme Court of the United States Rejects a Proposed New Theory of Sovereign Relations and Restores the Act of State Doctrine*, 32 FORDHAM L. REV. 631, 633 (1964). Reeves praises the *Sabbatino* decision. For a criticism, see Stevenson, *The State Department and Sabbatino-"Ev'n Victors Are by Victories Undone,"* 58 AM. J. INT'L L. 707 (1964).

[16] 11 U.S. (7 Cranch) 116 (1812).

[17] *Id.* at 135.

[18] *Ibid.* As stated by House, *The Law Gone Awry: Bernstein v. Van Heyghen Freres*, 37 CALIF. L. REV. 38, 40 (1949), the act of state doctrine arises out of the doctrine of sovereign immunity. The two are distinguishable in that the act of state doctrine is open as a defense to private litigants who may have obtained expropriated property from the acting government. In contrast, the defense of sovereign immunity is not open to the private

hill v. Hernandez,[19] had these considerations in mind, when in an often-quoted *dictum*, he stated that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[20]

Other reasons for its existence are variants of each other and are not mutually exclusive. They are separation of powers and the self-imposed doctrine of judicial restraint known as "political questions." The Supreme Court in *Oetjen v. Central Leather Co.*[21] stated that "foreign relations of our government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of our government, and—is not subject to judicial inquiry or decision."[22] Because of the importance of foreign relations, the courts have felt that the national interest requires the United States "to speak with one voice"[23] in this area. As a result, foreign affairs has been removed from the scope of judicial review and placed in the realm of "political questions." Consequently, the President has a free and unrestrained hand to carry on foreign relations without fear of adverse decisions by the courts.[24]

The actions of the President in the field of foreign affairs have had an important, though indirect, effect upon the traditional act of state doctrine.[25] For example, in *American Banana Co. v. United*

litigant and can only be used by the sovereign or one of its agents who has acted in his official capacity. See Zander, *supra* note 6, at 826, 827; Comment, 35 N.Y.U.L. REV. 234, 237 n.21 (1960); Comment, 57 YALE L.J. 108, 113 (1947); 75 HARV. L. REV. 1607 (1962).

[19] 168 U.S. 250 (1897).

[20] *Id.* at 252. It is important to note that the case was actually decided on the doctrine of "sovereign immunity," not on the act of state doctrine. The act of state *dictum* by Chief Justice Fuller was not essential to the outcome of the case. This is pointed out in the article by Zander, *supra* note 6, at 837. For other earlier decisions containing the act of state language see Waters v. Collot, 2 U.S. (2 Dall.) 247 (1796); Hatch v. Baez, 7 Hun. 596 (1876); Luther v. Sagor, [1921] 3 K.B. 532.

[21] 246 U.S. 297 (1918).

[22] *Id.* at 302. See Banco de Espana v. Federal Reserve Bank, 114 F.2d 438 (2d Cir. 1940); Holzer v. Deutsche Reichbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938); Dougherty v. Equitable Life Assur. Soc'y, 266 N.Y. 71, 193 N.E. 897 (1934); Wulfson v. Russian Socialist Federated Republic, 234 N.Y. 372, 138 N.E. 24 (1923).

[23] Baker v. Carr, 369 U.S. 186, 281 (1962) (dissenting opinion). See also 13 MERCER L. REV. 370, 393 (1962).

[24] RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 41, comment *a* at 3 (1964) (Report on Revised §§ 41-44).

[25] It appears that the United States government had sometimes intervened but solely on the question of sovereign immunity and not on the application

Fruit Co.[26] and *Ricaud v. American Metal Co.*[27] the Court took judicial notice of the State Department's recognition of the foreign governments that had committed the alleged illegal acts. As a result, the act of state doctrine was applied to deny recovery.[28] Apparently, the courts presumed that a trial on the merits would result in the embarrassment of the President in his conduct of foreign affairs.[29]

Certain inroads have been made into the act of state doctrine as traditionally applied. One such inroad was the "Bernstein exception."[30] After a maze of litigation, plaintiff Bernstein, whose vessels had been confiscated by Nazi Germany, was allowed recovery against the defendant Dutch-American corporation, which had purchased the property from Germany. The court of appeals refused to apply the doctrine, relying on a State Department Release[31] which declared that the President had no objections to the German expropriations cases being fully litigated in American courts. The court held that the case could be tried on its merits and that Bernstein could recover.

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of the act of state doctrine. See National City Bank v. Republic of China, 348 U.S. 356 (1955); Republic of Mexico v. Hoffman, 324 U.S. 30 (1945); P. & E. Shipping Co. v. Banco Para El Comercio Exterior de Cuba, 307 F.2d 415 (1st Cir. 1962). On the governmental intervention in the sovereign immunity cases see HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW (1941); 40 COLUM. L. REV. 453 (1940).

[26] 213 U.S. 347 (1909).

[27] 246 U.S. 304 (1918). It would appear that this decision was the first one actually decided on the act of state doctrine. See Zander, *supra* note 6.

[28] 213 U.S. at 353; 246 U.S. at 309. But in at least one case, Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 186 N.E. 679 (1933), it appears that the act of state doctrine was applied even though the acting nation (Soviet Russia) was not recognized by the United States. *But see* A/S Meriland & Co. v. Chase Nat'l Bank, 189 Misc. 285, 71 N.Y.S.2d 377 (1947). See generally WHITEMAN, 2 DIGEST OF INTERNATIONAL LAW §§ 69-70 (1963).

[29] See 110 CONG. REC. 19546 (1964) (remarks of Senator Hickenlooper).

[30] See Bernstein v. Van Heyghen Freres Societe Anoyme, 163 F.2d 246 (2d Cir.), *cert. denied*, 332 U.S. 772 (1947), where Bernstein was not allowed recovery through a reluctant application of the doctrine by Judge Learned Hand. Subsequently, Bernstein brought a totally different action as Bernstein v. N.V. Nedelandsche- Amerikaansche Stoomvart- Maatshappij, 173 F.2d 71 (2d Cir. 1949). He recovered in the latter action, but the act of state doctrine was not at issue. On remand, the defendant interposed the doctrine in its defense, and the case came to the court of appeals a second time. This time the court amended its prior decision and did not apply the doctrine. 210 F.2d 375 (2d Cir. 1954). The court relied upon the State Department Release, note 31 *infra*.

[31] Letter From Jack B. Tate, Acting Legal Advisor of the Secretary of State, to Bennett, House, & Counts, Counsel for plaintiff, in 20 DEP'T STATE BULL. 592 (1949). "[This] is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

The State Department later apparently adopted the Bernstein release as its permanent policy in the famous Tate letter.[32] The Department announced that it would suggest applications of the doctrine of sovereign immunity where the foreign taking was only governmental in nature. If the taking were confiscatory or commercial in nature, the Department would suggest that the doctrine of sovereign immunity not be applied. Presumably, the *Bernstein*-Tate approach governed prior to *Sabbatino*.[33] However, the full effect of *Bernstein* was never known since it was not appealed to the Supreme Court because of an approved settlement.[34]

The next real test of the doctrine came with *Sabbatino*. The court of appeals had found *Bernstein* controlling because in *Sabbatino,* as in *Bernstein,* the State Department had condemned[35] the expropriations and indicated its willingness to have the cases decided on their merits.[36] The Supreme Court, however, followed the earlier decisions, holding that although the act of state doctrine was not required by the Constitution, it did have "constitutional underpinnings."[37] Thus, it apparently disregarded *Bernstein*[38] and possibly obscured the significance of the Tate letter.[39] The Court also felt that judicial review by American courts of the acts of other states might "embarrass" the Executive Branch in its conduct of foreign affairs and "would hinder rather than further this coun-

[32] Letter From Jack B. Tate, Acting Legal Advisor of the State Department, to Phillip B. Perlman, Acting Attorney General, in 26 DEP'T STATE BULL. 984 (1952). It is to be noted that the *Bernstein* Release dealt only with the act of state doctrine, and the Tate letter spoke only in terms of sovereign immunity. However, they were very related in that they were authored by the same person and because their intention was the same, *i.e.,* to give the wronged party his day in court. See Folsom, *The Sabbatino Case: Rule of Law or Rule of "No Law"?,* 51 A.B.A.J. 725, 728 (1965); 32 U. CINC. L. REV. 112, 114 (1963). For discussion of Tate letter see New York & Cuba Mail S.S. Co. v. Republic of Korea, 132 F. Supp. 684 (S.D.N.Y. 1955).

[33] Kane v. National Institute of Agrarian Reform, 18 Fla. Supp. 116 (Cir. Ct. 1961).

[34] *N.Y. Times,* March 18, 1955, p. 55, col. 2.

[35] 43 DEP'T STATE BULL. 171 (1960). The State Department's condemnation of the expropriation said that it was "in its essence discriminatory, confiscatory and arbitrary."

[36] 307 F.2d 845, 858 (1962).

[37] 376 U.S. at 423.

[38] See Folsom, *supra* note 32, at 727. The Court stated that it took no position in respect to *Bernstein.* 376 U.S. at 420. However the preceding commentary infers that *Bernstein* was overruled.

[39] Folsom, *supra* note 32, at 727.

try's pursuit of goals for itself and for the community of nations as a whole."[40]

Farr presented the first confrontation of the traditional act of state doctrine, as enunciated by *Sabbatino,* and the Hickenlooper Amendment, and as previously stated the district court found the amendment applicable to all pending cases arising out of the Cuban expropriation, including the remanded *Sabbatino* case itself.[41] What is more important, it found the amendment to be constitutional, stating that it comes within the congressional power to legislate in the areas of foreign commerce and foreign affairs.[42]

The commerce argument seems to be the most convincing. The court's reasoning was that Congress had the express power, supplemented by the implied power of the "necessary and proper" clause, to enact the Hickenlooper Amendment.[43] This theory has been voiced by some authorities.[44] But the amendment cannot violate the "constitutional underpinnings" of *Sabbatino,* which are said to be the proper distribution of functions between the political and judiciary branches in regard to foreign affairs.[45] The *Farr* court had no doubts that Congress could legislate in the field of foreign affairs because *Sabbatino*[46] and *Oetjen*[47] had expressly stated that it had the power to do so. However, the question still exists whether Congress can go so far as to realign these "proper functions." The amendment does not convey a new area of jurisdiction upon the courts because they have had jurisdiction from the beginning.[48] They simply have failed to exercise it properly where acts of foreign

[40] 376 U.S. at 416-23.

[41] *Id.* at 423.

[42] 243 F. Supp at 964-71. The outcome of some forty cases will depend upon the final decree in *Farr.* The court's retroactive application of the amendment is open to question. Senator Hickenlooper stated clearly and unequivocally that the amendment did not apply to *Sabbatino.* He said "the amendment will lead U.S. courts to a different result from that reached by the majority . . . in *Banco National de Cuba v. Sabbatino.* It does not change the Court's decision in that case. . . ." 110 CONG. REC. 19559 (1964). The court wrote this off as a casual statement made in floor debate. However, the statement was made in a series of carefully drawn questions and answers by Senator Hickenlooper himself. There was no debate.

[43] 243 F. Supp. at 972-76. See U.S. CONST. art. I, § 8.

[44] FALK, THE AFTERMATH OF SABBATINO 98-101 (1965).

[45] *Id.* at 38.

[46] 376 U.S. at 423.

[47] 246 U.S. at 302.

[48] U.S. CONST. art. III, § 2 specifically states that the judicial power of federal courts "extends to Controversies . . . between a State, or Citizens thereof, and foreign States, Citizens or Subjects."

states were in question. But if the courts do adjudicate, will their decisions be dictated by the President? Also, has the Congress in passing the amendment, impinged upon the function of the Executive? If the President could be embarrassed in his foreign policy by an adverse decision of the court as stated in *Sabbatino,* could the amendment not embarrass him equally so? It would seem that the amendment, in effect, returns us to the *Bernstein* exception, which apparently was rejected in *Sabbatino.* Does this mean that the amendment must fall also? These questions are open ones that only the Supreme Court can answer. The constitutional question is even more important now than when the *Farr* opinion was rendered because Congress has made the Hickenlooper Amendment permanent law.[49]

Assuming the amendment to be constitutional, what are its effects upon international law? First, it does not destroy the act of state doctrine. It modifies the doctrine to achieve a "reversal of presumptions."[50] No longer will the courts have to presume that a decision on the merits regarding a foreign act of state will embarrass the President in the conduct of his foreign policy. Now the presumption is that such decisions will not embarrass him. Of course, the latter presumption can be rebutted by the President's suggestion that a full determination would hinder the foreign policy interests of the United States.[51]

Another effect of the amendment should be a discouragement of foreign confiscations.[52] At the same time, it should encourage foreign investment.[53] The Hickenlooper Amendment does not keep foreign governments from confiscating American property; however, it does prevent confiscating governments from successfully suing otherwise remediless defendants who refuse to pay them what is not rightfully theirs.[54]

Probably the most important result of *Farr* and its supporting

[49] Pub. L. No. 171, 89th Cong., 1st Sess. § 301(d)(4) (Sept. 11, 1965). The House favored a one-year extension of the amendment. See H.R. REP. No. 321, 89th Cong. 1st Sess. 31-32 (1965). The Senate version was to make the amendment permanent, S. REP. No. 170, 89th Cong., 1st Sess. 19 (1965). Finally the Senate version was enacted, deleting the last phrase of the amendment, thus making it permanent.

[50] See 110 CONG. REC. 19557 (1964).

[51] 78 Stat. 1008, 22 U.S.C. § 2370(e)(2); See note 11 *supra.*

[52] Folsom, *supra* note 32, at 727.

[53] See 110 CONG. REC. 19557 (1964).

[54] *Ibid.*

Hickenlooper Amendment should be their effect on the growth of international law. The Supreme Court in *Sabbatino* felt that a review of the Cuban expropriation would retard the growth of international law.[55] However, the reverse would seem to be true.[56] Since international courts have jurisdiction only when the parties are consenting nations, many disputes between foreign states and citizens of the United States would, through application of the act of state doctrine, not be litigable at all. *Farr,* if followed should help to fill this gap in the settlement of transnational disputes. As Mr. Justice White pointed out in his *Sabbatino* dissent, our courts, under the majority ruling, would have to validate automatically, discriminatory and unlawful expropriations.[57] Such acts, if they are also permitted by the law of another nation, would then tend to become a part of accepted international law. Needless to say, if peace and order are to be attained through world law, there can be no place for lawless acts that detract from the stature of international law.

International law has long been declared part of the law of the United States.[58] It would seem, therefore, that our American courts should follow the precedents of the courts of other nations and decide these disputes, even though they may involve acts of foreign states, in the context of international law.[59] *Farr* and the Hickenlooper Amendment should achieve this result.

TOMMY W. JARRETT

Labor Law—Application of Antitrust Law to Union Activities—Extra-Unit Agreements

In an effort to avoid the concentration of economic power, two national policies have been promulgated that, ironically, result in apparent conflict. The antitrust policy, intended to distribute power

[55] 376 U.S. at 433.

[56] Folsom, *supra* note 32, at 727.

[57] 376 U.S. at 439.

[58] The Paquete Habana, 175 U.S. 677 (1900); Hilton v. Guyot, 159 U.S. 113 (1895).

[59] The courts of several countries have not hesitated to declare foreign expropriations unlawful. See *e.g.,* Anglo-Italian Oil Co. v. S.U.P.O.R. Co., [1955] Int'l L. Rep. 23 (Civ. Ct. Rome); Anglo-Iranian Oil Co. v. Jaffrate, [1953] Int'l L. Rep. 316 (Aden Sup. Ct.). It is also especially important to note that the Permanent Arbitration Court in Norway v. United States, 1 U.N. Rep. Int'l Arb. Awards 325 (1933), has declared discriminatory takings to be in violation of international law.

among entrepreneurs, establishes prohibitions on the restraint of competition, while the national labor policy, on the other hand, exempts most union activity from those prohibitions in an attempt to balance the powers of entrepreneurs and workers. The necessity of resolving this conflict of attitudes toward competition is perhaps most pressing when the courts are asked to apply the antitrust laws to labor unions.[1] Recently the United States Supreme Court was faced with that necessity in two cases. In *UMW v. Pennington*[2] Mr. Justice White, writing the opinion of the Court but speaking for only three members, said that while it is clear that unions can bargain with multiemployer groups,[3] the union "forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[4] But in the companion case, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*,[5] the union acted alone and not at the request of an employer group, and Mr. Justice White found that an attempt to gain a marketing-hours restriction is "within the protection of the national labor policy and . . . therefore exempt from the Sherman Act,"[6] since such a restriction, he decided, is intimately related to wages, hours, and working conditions.

In *Pennington* a long controversy concerning a solution to the problem of overproduction in the coal industry had culminated in the National Bituminous Coal Wage Agreement of 1950 in which

[1] For an analysis of this conflict see Winter, *Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities*, 73 YALE L.J. 14 (1963). Professor Winter takes the position that collective bargaining creates anticompetitive incentives and that there are no general principles that will reconcile the conflict. For the position that no conflict exists between the two policies see Frank, *The Myth of the Conflict between Antitrust Law and Labor Law in the Application of Antitrust Law to Union Activity*, 69 DICK. L. REV. 1 (1964).

[2] 381 U.S. 657 (1965).

[3] Approximately four million employees are now governed by collective bargaining agreements signed by unions with thousands of employer associations. At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.
NLRB v. Truck Drivers Union, 353 U.S. 87, 95 (1957).

[4] 381 U.S. at 665 (1965).

[5] 381 U.S. 676 (1965).

[6] *Id.* at 689-90.

the United Mine Workers gave up its opposition to automation and in return for the resulting higher wages agreed to enforce those wages against the smaller companies without regard for their ability to pay.[7] The trustees of the UMW retirement fund brought suit against Phillips Brothers Coal Company, a small operator who had entered the agreement only under union pressure,[8] to recover royalties due under the agreement. Phillips cross-claimed, alleging that the union and trustees had conspired with the large operators to force the smaller companies out of business in violation of sections 1 and 2 of the Sherman Act.[9] The union answered affirmatively that under section 6 of the Clayton Act[10] it is exempt from the Sherman Act provisions.[11] On appeal from a verdict against the union,[12] the Court of Appeals for the Sixth Circuit held that an exemption from the antitrust laws "does not exist . . . where a labor union combines with a nonlabor organization to restrain competition in, or to monopolize the marketing of, goods in interstate commerce."[13]

Also under union pressure, Jewel Tea Company entered an agree-

[7] Adam, *Technology and Productivity in Bituminous Coal, 1949-1959,* 84 MONTHLY LABOR REV. 1081 (1961). The author reviews the general background of the industry and the changes after the agreement.

[8] Pennington v. UMW, 325 F.2d 804, 806 (6th Cir. 1963).

[9] Section 1 provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. . . . Every person who shall make any [such] contract or engage in any [such] combination or conspiracy . . . shall be deemed guilty of a misdemeanor. . . .

Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine . . . or by imprisonment . . . or by both. . . .

26 Stat. 209 (1890), 15 U.S.C. §§ 1, 2 (1964).

[10] The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).

[11] Pennington v. UMW, 325 F.2d 804, 808 (6th Cir. 1963).

[12] The charge against the trustees was dismissed by the trial court.

[13] Pennington v. UMW, 325 F.2d 804, 809 (6th Cir. 1963).

ment whereby it was to sell meat in Chicago only between nine a.m. and six p.m. The same agreement had at first been resisted and then accepted by a multi-employer group of 9,000 other Chicago meat retailers. Jewel alleged a conspiracy between the union and the trade association in violation of the Sherman Act but the trial court, finding no evidence of such a conspiracy, held that the union had acted in its own interests and was thus entitled to the labor exemption. The Court of Appeals for the Seventh Circuit, however, relying on traditional antitrust law, reversed. The court held that the agreement between the union and the trade association was in itself a conspiracy,[14] that the determination of marketing hours is a proprietary function, and that therefore a conspiracy designed to restrict that function "is a violation of the Sherman Act, and not entitled to the exemption therefrom. . . ."[15]

The history of the Court's efforts to reconcile this conflict of policies is marked by confusion and uncertainty resulting first from a lack of legislative guidelines and then from a refusal to recognize the guidelines once they were established. Thus, in the pre-Clayton Act era the Court, relying on the broad language of the antitrust laws and the failure of Congress to include a proposed labor exemption, decided in *Loewe v. Lawlor*[16] that a secondary boycott was susceptible to a suit for treble damages because the Sherman Act "provided that 'every' contract, combination or conspiracy in restraint of trade was illegal."[17] Two years later the Court relied on this construction to uphold an injunction against a "we don't patronize" list published in a union paper.[18]

But in 1914 the congressional response was that human labor is not a commodity[19] and that certain enumerated activities are not to be considered a violation of the federal laws.[20] Such language should

[14] Jewel Tea Co. v. Associated Food Retailers, Inc., 331 F.2d 547, 551 (7th Cir. 1964).
[15] *Id.* at 549.
[16] 208 U.S. 274 (1908).
[17] *Id.* at 301.
[18] Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).
[19] Clayton Act § 6, 38 Stat. 731 (1914), 15 U.S.C. § 17 (1964).
[20] No restraining order or injunction shall be granted by any court of the United States . . . in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury. . . .

And no such restraining order or injunction shall prohibit any

have been a more than adequate guideline, but seven years later in *Duplex Printing Press Co. v. Deering*[21] the Court circumvented the mandate. There the Court construed away the meaning of the statute and enjoined a secondary boycott by restricting section 6 to disputes between employers and their immediate employees and by emphasizing the words "lawfully" and "peacefully" in section 20 to infer that the statute dealt only with lawful conduct. Then in *Coronado Coal Co. v. UMW*[22] the Court found a way to outlaw primary activity, saying

> [W]hen the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering . . . interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act.[23]

Such restrictive constructions of the Clayton Act were frequent[24] until Congress reacted again in 1932 by passing the Norris-LaGuardia Act.[25] The committee reports preceding enactment show a

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person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Clayton Act § 20, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1964).

[21] 254 U.S. 443 (1920).

[22] 268 U.S. 295 (1925).

[23] *Id.* at 310.

[24] See, *e.g.*, Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37 (1927); Industrial Ass'n v. United States, 268 U.S. 64 (1925); United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403 (1923); UMW v. Coronado Coal Co., 259 U.S. 344 (1922); Alco-Zander Co. v. Amalgamated Clothing Workers, 35 F.2d 203 (E.D. Pa. 1929).

[25] 47 Stat. 70-73 (1932), 29 U.S.C. §§ 101-15 (1958). Section 13(c) of the act provides:

> The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or

clear intent to proscribe such judicial toying with the national labor policy.[26] The Court seemed to recognize this and began to give the act full effect. For example, the restrictive definition of a labor dispute in *Duplex* appeared to have been effectively repudiated in *New Negro Alliance v. Sanitary Grocery Co.*[27] A year later, in a case involving a violent sit-down strike, the Court declared that the elimination of wage competition is the object of labor unions but that this is not the kind of restraint on competition that the Sherman Act was intended to curtail.[28]

Finally in 1941, thirty-three years after *Lawlor* and twenty-seven years after the Clayton Act, the Court managed in *United States v. Hutcheson*[29] to give full effect to the labor policy by adopting a "harmonizing text"[30] concept and saying

> If the facts laid in the indictment come within the conduct enumerated in § 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States."[31]

But the decision in *Hutcheson* was not quite as far reaching as it might otherwise have been, for the Court also said

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unself-

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representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

47 Stat. 73 (1932), 29 U.S.C. § 113 (1958).

[26] "That there have been abuses of judicial power in granting injunctions in labor disputes is hardly open to discussion. The use of the injunction in such disputes has been growing by leaps and bounds." S. REP. No. 163, 72d Cong., 1st Sess. 8 (1932). "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, . . . which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H.R. REP. No. 669, 72d Cong., 1st Sess. 3 (1932).

[27] 303 U.S. 552 (1938).

[28] Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-04 (1940).

[29] 312 U.S. 219 (1941).

[30] "Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." *Id.* at 231.

[31] *Id.* at 232.

> ishness of the end of which the particular union activities are the means.[32]

It was this unnecessarily broad dictum that pointed directly to the problem of combinations between labor and management in *Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers.*[33]

Although, when the Court reached *Allen Bradley,* it had refused the exemption to a group of fishermen because they were considered entrepreneurs[34] and had struck down a state court injunction against picketing bakeries to organize independent peddlers,[35] it had not, since the enactment of Norris-LaGuardia, directly faced the problem of unions and employers conspiring against other employers.[36] In *Allen Bradley* the union combined with manufacturers of electrical equipment and the contractors who installed it to close the New York City market to all outside manufacturers. The result of this arrangement was that prices and wages soared to the benefit of all of the conspirators and to the detriment of everyone else. Presented with this hard case, the Court made bad law, perhaps, by saying, in language that was again too broad,

> [W]hen the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.[37]

The Court continued, "Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups."[38]

Since the enactment of Norris-LaGuardia, then, the history of the decisions may be viewed as an effort to give full effect to the labor exemption prescribed by Congress. This effort reached its peak in *Hutcheson* and receded in *Allen Bradley* in which the Court created a sweeping exception that has bothered it ever since.[39]

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[32] *Ibid.*
[33] 325 U.S. 797 (1945).
[34] Columbia River Packers Ass'n v. Hinton, 315 U.S. 143 (1942).
[35] Bakery Drivers Union v. Wohl, 315 U.S. 769 (1942).
[36] Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 807-08 (1945).
[37] *Id.* at 809.
[38] *Id.* at 810.
[39] Since *Allen Bradley* it has been held that union-employer combinations

When the Court was faced in *Pennington* with another flagrant abuse of union power, two precedents were possibly open to it—the *Allen Bradley* approach offered by Mr. Justice Douglas and the *Hutcheson* approach offered by Mr. Justice Goldberg.[40] Significantly, Mr. Justice White rejected both, though he failed to say so expressly, and chose instead to attempt to balance the conflict between the two relevant policies.[41] He reasoned that there is nothing in the national labor policy that permits a union to combine with an employer unit to enforce agreed wage standards against other employers. Quite the contrary, he decided, the labor policy requires the union to keep itself free to bargain on a unit-by-unit basis.[42] On the other hand, the antitrust policy precludes such an agreement since the interests of the union would be inextricably bound to those of a favored employer.[43]

If in *Pennington* Mr. Justice White pointed out what unions may not do, in *Jewel* he showed what unions may do. Here he said that if the subject matter of an agreement is within the realm of mandatory bargaining, the union is exempt if it unilaterally seeks such an agreement from one employer, though the same agreement has been made with other employers.[44] But the rule was offered with this caveat: the mere fact that only one employer is involved does not mean that the antitrust exemption necessarily follows.[45] Again, he pointed out that the problem is one of balancing the relevant policies and that though a mandatory subject of bargaining weighs heavily on the side of exemption, it is not conclusive.[46]

to fix prices, Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n, 155 F.2d 799 (3d Cir. 1946), or to bar competition, United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954), are not within the exemption. Also, it has been held that the union's participation will not provide entrepreneurs with the exemption. United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949). *Accord,* Los Angeles Meat Drivers Union v. United States, 371 U.S. 94 (1962). But it has also been held that, absent other evidence of conspiracy, a wage contract is exempt even though it was made to force an employer out of business. Adams Dairy Co. v. St. Louis Dairy Co., 260 F.2d 46 (8th Cir. 1958).

[40] The *Hutcheson* approach would seem to be feasible if the language quoted above is treated as dictum and the price control factor in *Allen Bradley* is emphasized.

[41] 381 U.S. at 665.

[42] *Id.* at 666.

[43] *Id.* at 668.

[44] 381 U.S. at 689-90.

[45] *Id.* at 689.

[46] *Ibid.*

Thus, he decided that this marketing-hours restriction was so intimately related to wages, hours and other conditions of employment as to fall within the protection of the labor policy.

The two cases when read together, then, seem to stand for the proposition that the union may not make extra-unit[47] bargaining agreements even on mandatory subjects, but even when the subject is not clearly mandatory, the mere existence of a parallel agreement will not deprive the union of its exemption. From this one limitation on *Allen Bradley* is readily apparent: the traditional doctrine of antitrust law, which infers conspiracy without express agreement, will not be applied in the area of collective bargaining.[48] Moreover, it seems clear that the broad language of *Hutcheson* will not be used to exempt agreements on nonmandatory subjects.[49]

However, some problems are not so clearly resolved. For instance, in view of the fact that predatory purpose lurked heavily in the background of *Pennington* and did not appear on the surface in *Jewel,* did the talk of balancing policies actually reflect at least a partial return to the wrongful intent doctrine of the *Coronado* era?[50] Indeed, since the union intent in *Pennington* was in fact anticompetitive, was Mr. Justice White's emphasis on extra-unit agreements only dictum, or will the Court actually hold all such agreements antitrust violations in spite of their purpose?[51] Further, may unions continue to rely on industry leaders to set bargaining patterns for the smaller companies? Is it true, as Mr. Justice Goldberg suggested, that mention of competitive disadvantage will be treated as evidence of conspiracy?[52]

In seeking answers to these problems and others, it must be kept in mind that the Court was split three-three-three in both cases.[53]

[47] Extra-unit bargaining occurs when the union agrees "with one set of employers to impose a certain wage scale [or other terms] on other bargaining units." UMW v. Pennington, 381 U.S. 657, 665 (1965).

[48] *Id.* at 665 n.2. *Contra, id.* at 673 (concurring opinion).

[49] Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689 (1965).

[50] *Id.* at 720 (separate opinion).

[51] Meltzer, *Labor Unions, Collective Bargaining, and the Antitrust Laws,* 32 U. CHI. L. REV. 659, 725 n.228 (1965). Professor Meltzer pointed out that Mr. Justice White failed to take note of some evidence of extra-unit bargaining in *Jewel.* See Jewel Tea Co. v. Local 189, Amalgamated Meat Cutters, 215 F. Supp. 839, 842 (N.D. Ill. 1963).

[52] Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 714-16 (1965) (separate opinion).

[53] In both cases the opinion labeled as that of the Court involved only three members. Justices Douglas, Black and Clark chose to rely on *Allen*

It is this fact that precludes any definite answers without further litigation or new legislation. In the meantime, the most that can be said is that complete reliance on either *Hutcheson* or *Allen Bradley* has been renounced by the majority of the Court.

MARTIN N. ERWIN

Labor Law—Pre-Election v. Post-Election Relief Under the LMRDA

When Raymond Harvey sought to nominate himself for office in the National Marine Engineers Beneficial Association, he discovered that he was unable to do so since he was ineligible to be a candidate. The union bylaws provided that a member could nominate only himself for office, and the union's constitution provided that no one was eligible for nomination to a full-time union office unless he had been a union member for five years and had served at least 180 days in each of two of the three preceding years on ships with union contracts. Harvey had not met the service requirement.[1] He sued the union president, Jesse Calhoon, to enjoin the election, alleging violations of Title I of the Labor Management Reporting and Disclosure Act of 1959. This Title guarantees equal rights to all union members to nominate candidates[2] and allows any member whose rights are violated to bring a pre-election suit in a federal district court for a remedy.[3]

The question presented to the United States Supreme Court in *Calhoon v. Harvey*[4] was whether plaintiff Harvey's rights under

Bradley, concurring in *Pennington* and dissenting in *Jewel*. In a separate opinion, Mr. Justice Goldberg, joined by Justices Harlan and Stewart, concurred in both cases but dissented from the extra-unit bargaining rule. This separate opinion raised many of the important problems inherent in the opinion of the Court. Its basic position is that Mr. Justice White has ignored the fundamental realities of collective bargaining and established barriers to negotiation which will frustrate the congressional intent to promote labor peace and stability.

[1] Harvey v. Calhoon, 324 F.2d 486, 487 (2d Cir. 1963).

[2] (Landrum-Griffin Act) § 101(a)(1), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(1) (1965) [hereinafter cited as LMRDA] provides:

> Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

[3] LMRDA § 102, 73 Stat. 523 (1959), 29 U.S.C. § 412 (1965).

[4] 379 U.S. 134 (1964).

Title I had been violated or whether his rights under Title IV had been violated. Title IV provides that every union member in good standing is eligible "to be a candidate and to hold office (subject to . . . reasonable qualifications uniformly imposed) . . . ,"[5] and allows only a post-election remedy by way of petition to the Secretary of Labor who may direct a new election.[6]

The district court had dismissed the complaint, holding that it did not have jurisdiction since a Title I violation was not alleged.[7] The Second Circuit reversed, holding that the allegations did indicate a Title I violation.[8] The Supreme Court reversed the Second Circuit, accepting the contention of defendant Calhoon that the district court was correct in refusing to hear the case.

The Court refused to consider Title IV violations when determining if Title I had been violated, but discussed the provisions of Title IV in clarifying its decision to deny relief under Title I.[9] In concurring, Mr. Justice Stewart accepted the possibility that a Title IV violation might also violate Title I, rejecting the majority's refusal to consider this.[10] Mr. Justice Douglas dissented,[11] adopting the opinion of the Second Circuit that the restrictions in this case were a violation of Title I.

Section 101(a)(1), part of labor's "bill of rights,"[12] guarantees union members equal rights and privileges to nominate candidates for union office subject to reasonable rules in the union's constitution and bylaws.[13] Section 102 allows any person whose rights secured under Title I have been infringed to bring an action for appropriate civil relief (including injunctions) in a United States district court.[14] This remedy, unlike that provided in Title IV,[15] is

[5] LMRDA § 401(e), 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (1965).
[6] LMRDA § 402(a), 73 Stat. 532 (1959), 29 U.S.C. § 482(a) (1965).
[7] Harvey v. Calhoon, 221 F. Supp. 545 (S.D.N.Y. 1963).
[8] 324 F.2d 486 (2d Cir. 1963).
[9] 379 U.S. at 139-40.
[10] *Id.* at 143.
[11] *Id.* at 141.
[12] This provision was an amendment to the original Kennedy-Ervin bill. 105 CONG. REC. 6475 (1959). Proposed by Senator McClellan, it was amended by Senator Kuchel to provide the right of union members to sue in federal courts. 105 CONG. REC. 6719-20 (1959). (Senator McClellan's amendment had provided for enforcement by the Secretary of Labor.) For a discussion of the legislative history of the act, including Title I, see McADAMS, POWER AND POLITICS IN LABOR LEGISLATION (1964).
[13] 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(1) (1965).
[14] 73 Stat. 523 (1959), 29 U.S.C. § 412 (1965).
[15] LMRDA § 403, 73 Stat. 532 (1959), 29 U.S.C. § 483 (1965).

not exclusive. Section 103 specifically preserves existing rights under state and federal law.[16]

An examination of Title IV clarifies the distinction between a right to nominate and a right to be a candidate. Section 401(e) provides that a union member's right to candidacy is "subject to . . . reasonable qualifications uniformly imposed."[17] Relief for violations of this right is provided by appeal to the Secretary of Labor. Exhaustion of internal union remedies or pursuit of these remedies without a final decision within three months is a prerequisite to this relief. Once this exhaustion requirement is met, the complaining union member may petition the Secretary, who must determine if the restrictions on candidacy are not "reasonable" or not "uniformly imposed."[18] If he so finds, he may sue to have the election invalidated. In section 403 this procedure is declared to be exclusive.[19]

An effective distinction has been drawn between offenses that violate Title I, thus justifying pre-election relief, and offenses that violate Title IV, justifying only post-election relief. The Senate debate on Title I indicated this:

> Mr. KUCHEL. I do not believe that in any fashion the equal rights section touches what the provisions of the [union's] constitution or bylaws might be with respect to the right to run for office.
>
> In that connection, I should like to ask the author of the bill [Mr. Kennedy] . . . if he can shed any light on what may be in the bill with respect to that problem.
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> . . .
>
> Mr. KENNEDY. [T]he bill of rights must be read in conjunction with the remainder of the bill. [In Title IV] we find the following language: (d) In any election . . . every member in good standing shall be eligible to be a candidate and to hold

[16] 73 Stat. 523 (1959), 29 U.S.C. § 413 (1965).
[17] 73 Stat. 532 (1959), 29 U.S.C. § 481(e) (1965).
[18] 73 Stat. 532 (1959), 29 U.S.C. § 482(a) (1965).
[19] One court has recognized this exclusiveness by way of dictum:
> Title IV of the LMRDA creates the right of candidacy and simultaneously vests but limited jurisdiction to grant redress for its violation. The more general provisions of 28 U.S.C.A. § . . . 1337 [granting federal jurisdiction in civil actions under acts of Congress that regulate commerce or protect trade] cannot expand the restricted scope of jurisdiction conferred by the LMRDA.

Colpo v. Highway Truck Drivers Union, 201 F. Supp. 307, 314 (D. Del. 1961), *vacated,* 305 F.2d 362 (3d Cir. 1962).

> office (subject to reasonable qualifications uniformly imposed)....
>
> So other rights are guaranteed, *in addition to* the rights guaranteed in the bill of rights, and the general constitutional rights.[20]

The court accepted this distinction and held that plaintiffs had not established a claim for relief, characterizing their complaint as

> an attempt to sweep into the ambit of their right to sue in federal court if they are denied an equal opportunity to nominate candidates under § 101(a)(1), a right to sue of they are not allowed to nominate anyone they choose regardless of his eligibility and qualifications under union restrictions.[21]

Error was found in the decision of the Second Circuit, which had considered the "*combined* effect of the eligibility requirements and the restriction to self-nomination."[22]

By adopting this interpretation of Title I, the Court supported a general congressional policy against intervention in union affairs and refused to encroach upon the authority given the Secretary of Labor by Title IV. Mr. Justice Black said:

> Congress . . . decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies. . . .[23]

The Secretary has discretion not to sue to invalidate every election in which a complaint is filed. The act, by allowing him to investigate complaints for up to sixty days,[24] has discouraged litigation. The Secretary may discover that no violation was committed, or, as has happened when the violation was clear, the union may act to remedy it.[25] The investigation is conducted by the Office of

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[20] 105 CONG. REC. 6720 (1959). (Emphasis added.)
[21] 379 U.S. at 138.
[22] *Id.* at 139.
[23] *Id.* at 140.
[24] LMRDA § 402(b), 73 Stat. 534 (1959), 29 U.S.C. § 482(b) (1965).
[25] Two recent examples illustrate this. On December 29, 1964, the executive board of the International Electrical Workers declared that incumbent president James B. Carey, Jr., had defeated challenger Paul Jennings by about 2,000 votes. Jennings appealed the election, and the Secretary of Labor ordered an investigation that revealed irregularities in the tabulation of votes. No suit was ever brought since the union immediately declared Jennings the victor. Facts on File, April 1-7, 1965, p. 1275. In the most recent United Steelworkers presidential election, challenger I. W. Abel de-

Labor-Management and Welfare-Pension Reports under authority delegated by the Secretary.[26] Suit is brought only if the investigation shows that the violations may have affected the outcome of the election.[27]

If suit is brought, the role of the court is narrow. Section 402(c) of the act limits a court's determination to whether an election was held within the prescribed time or whether a Title IV violation may have affected the outcome.[28] If a new election is ordered, the Secretary of Labor must supervise it, in conformity with union constitution and bylaws, and certify the results.[29]

Title IV, which leaves most internal matters in the hands of the union and does not subject the union to civil liability, did not disturb organized labor as much as the "bill of rights," which was opposed from its inception.[30] In a House committee hearing, George Meany, president of the AFL-CIO, called Title I

> a device by means of which union officials or unions themselves as entities can be haled before . . . the Federal courts and compelled to account for the manner in which its internal affairs are being conducted.
>
> A basic difficulty, as we see it, is that any effort to write a detailed, legally enforcible code of internal procedures for all unions into a Federal law must inevitably end up either in such

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feated incumbent David J. McDonald by about 10,000 votes. Here the Secretary was never called upon. Union tellers investigated 153 complaints, two thirds of which had been filed by Abel forces. McDonald was unable to cite a single solid case of fraud or illegal voting procedures, and the investigators found none. Thus McDonald had no ground on which to appeal the election. The union had handled its own affairs; litigation was unnecessary. Business Week, May 1, 1965, pp. 49-50.

[26] Riche, *Union Election Challenges Under the LMRDA*, 88 MONTHLY LABOR REVIEW 1 (1965).

[27] If the Secretary finds no indication that the outcome of an election had been affected, he is not required to bring suit. Altman v. Wirtz, 56 L.R.R.M. 2651 (D.D.C. 1964). This is analogous to the power given to the General Counsel by the Taft-Hartley Act. Refusal of the General Counsel to issue a complaint "is final and unappealable." Wellington Mill Div., West Point Mfg. Co. v. NLRB, 330 F.2d 579, 590 (4th Cir. 1964).

[28] 73 Stat. 534 (1959), 29 U.S.C. § 482(c) (1965).

[29] *Ibid.* See United Steel Workers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960), in which Mr. Justice Douglas said (concerning a collective bargaining dispute): "The ablest judge cannot be expected to bring the same experience and competence [as the labor arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed." *Id.* at 582. See also Summers, *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958); Strauss & Willner, *Government Regulation of Local Union Democracy*, 4 LAB. L.J. 519 (1953).

[30] MCADAMS, *op. cit. supra* note 12, at 113-41.

> general terms as to be susceptible of almost any interpretation, and hence a breeding ground for litigation, or as a strait-jacket which would inhibit obviously reasonable and proper union practices.[31]

But the "bill of rights" remained, and judicial action has now alleviated many of the fears of organized labor.

The policy of Congress toward labor is implicit in a provision of Title I that deters union members from bringing suit, relying instead upon union procedures. Section 101(a)(4) provides that before a union member may sue for a violation of Title I, he "may be required to exhaust reasonable hearing procedures within the union (but not to exceed a four month [as opposed to three months under Title IV] lapse of time.)"[32] When suits were filed before the member had pursued his union remedies for four months, the courts had to decide if fulfilment of this procedural requirement was (1) necessary to jurisdiction, (2) unnecessary to jurisdiction, or (3) necessary, but waivable in certain circumstances.

An explanation by Senator Kennedy indicated that fulfilment of this requirement was unnecessary to jurisdiction insofar as the courts were concerned. He did, however, deem the requirement to be applicable to union members,[33] so that a union could discipline a member for breach of the restriction though it could not prevent him from bringing suit.[34] In *Detroy v. American Guild of Variety*

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[31] *Hearings Before Joint Subcommittee on Labor-Management Reform Legislation of the House Committee on Education and Labor,* 86th Cong., 1st Sess., pt. 4, at 1515 (1959). Meany also said: "Every Chairman of a local union meeting will be acting under shadow of a court suit each time he makes a ruling on conduct of the meeting." 105 CONG. REC. (Daily Appendix) 6402 (1959).

[32] LMRDA § 101(a)(4), 73 Stat. 522 (1959), 29 U.S.C. § 411(a)(4) (1965). The four-month period is apparently measured from the time the appeal is initiated, rather than from the time of the violation, though no court has clearly stated this. See McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965). For a discussion of the exhaustion requirement see O'Donoghue, *Protection of a Union Member's Right to Sue Under the Landrum-Griffin Act,* 14 CATHOLIC U.L. REV. 215 (1965).

[33] Nor is the intent or purpose of the provision to invalidate the . . . decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention.

. . .

For example, the National Labor Relations Board is not prohibited from entertaining charges by a member against a labor organization even though 4 months has not elapsed.

105 CONG. REC. 17899 (1959).

[34] See McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965).

Artists[35] the Second Circuit concluded that fulfilment of the exhaustion requirement was necessary but waivable since the statute used the word *may* instead of *must*. In this case the Second Circuit waived the requirement because here the union remedy was uncertain and had not been brought to the plaintiff's attention, the violation was clear and undisputed, and the injury was immediate and not compensable by damages.[36] Other courts have followed this result, developing a doctrine of futility by accepting cases if the union appeal procedures would be utterly useless or unduly complicated.[37]

The courts will apparently apply the same rationale when considering the exhaustion requirement of Title IV. Under Title IV a union member may petition the Secretary for relief after invoking internal union remedies for three months. In practice the Secretary has accepted cases in which remedies had not been pursued for the statutory period.[38] One district court has indicated that it would accept a case brought prematurely when appeal within the union would be futile.[39]

The specific requirement for exhaustion of remedies and the

[35] 286 F.2d 75 (2d Cir. 1961).

[36] *Id.* at 81.

[37] McCraw v. United Ass'n of Journeymen, 341 F.2d 705, 711 (6th Cir. 1965) (case heard since time elapsed); Farowitz v. Associated Musicians, 330 F.2d 999, 1002 (2d Cir. 1964) (no appeal was necessary when it "would be a futility"); Harris v. International Longshoremen's Ass'n, 321 F.2d 801, 805 (3d Cir. 1963) (hearing denied until internal appeal attempted); Burris v. International Bhd. of Teamsters, 224 F. Supp. 277 (W.D.N.C. 1963). In the latter case, the court accepted jurisdiction since appeal was impractical because the discharged union member would have to protest his discharge and be reinstated before he could begin his appeal. *Id.* at 280. A federal district court in California has required exhaustion even if futile. Smith v. General Truck Drivers Union, 181 F. Supp. 14 (S.D. Cal. 1960). The court cited a California state court decision requiring exhaustion unless it could be held as a matter of law that such procedure would be to no avail. *Id.* at 18. A more liberal view has now been taken by the Second Circuit. In Libutti v. Di Brizzi, 337 F.2d 216 (2d Cir. 1964), it held: "Where . . . conceded facts show a serious violation of a fundamental right, we hold that plaintiffs need not exhaust their union remedies." *Id.* at 219. (Observe that *Calhoon* reversed this court's interpretation of section 101(a)(1) of the LMRDA.)

[38] Wirtz v. Local 125, Int'l Hod Carriers, 231 F. Supp. 590 (N.D. Ohio 1964).

[39] *Id.* at 595. The court approved the "futility" doctrine as stated in Calagaz v. Calhoon, 309 F.2d 248, 260 (5th Cir. 1962) (appeal unnecessary when persons it was directed against were to hear it, but refused to hear the Secretary's complaint since it appeared that appeal was not futile). (The Secretary contended that the exhaustion requirement did not bind the court; he did not argue that appeal was futile.)

reliance on the Secretary of Labor support the congressional policy of allowing unions the greatest possible latitude in handling their internal affairs. Before the ruling in *Calhoon,* several district courts had heard cases alleging Title I violations and had given effect to this policy, denying pre-election relief and holding that a Title IV, not a Title I, violation was alleged.[40]

Calhoon represents a functional interpretation of the act. It achieves a delicate balance between union freedom and individual justice. The Court understood that Congress did not intend restrictions concerning candidacy, whether "reasonable" or unreasonable, to constitute a Title I violation. Both the legislative history and the policy implicit in the other provisions of the act justify this conclusion. The act seeks to prevent union abuse in its internal procedures, not to establish a means of ignoring those procedures. The Supreme Court, though denying plaintiffs an immediate remedy, has upheld the congressional policy of relying upon union procedures as long as they effectively protect the rights of union members guaranteed in the act.

GEORGE CARSON II

Practice and Procedure—Res Judicata in Parent's Suit for Medical Expenses and Loss of Services

The recent North Carolina decision of *Kleibor v. Rogers*[1] restates the majority rule that, following an injury to his minor child, a father is not barred from bringing an action for medical expenses and loss of services and earnings of the infant when the infant has failed on the merits in a prior suit based on the same occurrence.[2]

[40] Jackson v. National Marine Eng'r Beneficial Ass'n, 221 F. Supp. 347 (S.D.N.Y. 1963); Jackson v. International Longshoremen's Ass'n, 212 F. Supp. 79 (E.D. La. 1962); Colpo v. Highway Truck Drivers, 201 F. Supp. 307 (D. Del. 1961); Johnson v. San Diego Waiters Union, 190 F. Supp. 444 (S.D. Cal. 1961).

[1] 265 N.C. 304, 144 S.E.2d 27 (1965). The case arises out of an injury to plaintiff's nine-year-old son. Judgment for the defendant in a prior action by the mother as next friend was held not to be res judicata in the father's action.

[2] See cases collected in Annot., 133 A.L.R. 181, 201-02 (1941). For other North Carolina cases see, *e.g.,* Ellington v. Bradford, 242 N.C. 159, 86 S.E.2d 925 (1955); Rabil v. Farris, 213 N.C. 414, 196 S.E. 321 (1938); Thigpen v. Kinston Cotton Mills, 151 N.C. 97, 65 S.E. 750 (1909). The rule was criticized and the application of res judicata in these cases was urged in *North Carolina Case Law—Judgments,* 36 N.C.L. REV. 461, 462 (1958).

However, the court indicated a willingness to change this holding and bind the father if the defendant could amend and show that the father controlled the minor's suit within the meaning of section 84 of the Restatement of Judgments.[3] If a showing of control could be made, the court said that res judicata would apply,[4] and the expense and trouble of a new trial to the court,[5] taxpayers, litigants, and witnesses would be partially eliminated.

While in the usual circumstances the father would seem to have, as the Restatement requires, a "proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction,"[6] it is not clear what degree of proof of defendant's control is required. The North Carolina court, when discussing control, has talked of the failure of the defendant to show that one not in privy nevertheless "participated in the trial or that they 'openly and actively' and with respect to some interest of their own, 'assumed and managed' the prosecution."[7] It is clear from decisions[8] and

[3] RESTATEMENT, JUDGMENTS § 84 (1942):

> A person who is not a party but who controls an action, individually or in co-operation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.

[4] 265 N.C. at 308, 144 S.E.2d at 30. For other cases discussing the control idea see White v. Osborne, 251 N.C. 56, 110 S.E.2d 449 (1959); Thompson v. Lassiter, 246 N.C. 34, 97 S.E.2d 492 (1957); Carolina Power & Light Co. v. Merrimack Mut. Fire Ins. Co., 238 N.C. 679, 79 S.E.2d 167 (1953).

[5] One of the chief arguments for passage of the recent bond issue to secure funds for an intermediate appellate court was that the North Carolina court's burden is much greater than that of the majority of the several states. Greensboro Daily News, Oct. 8, 1965, § B, p. 1, col. 5.

[6] RESTATEMENT, JUDGMENTS § 84 (1942).

[7] Carolina Power & Light Co. v. Merrimack Mut. Ins. Co., 238 N.C. 679, 693, 79 S.E.2d 167, 176 (1953). It is suggested that there should be no requirement of an "open and active" participation in order to bind the party who controlled the first action, since to do so would be to defeat the purpose of res judicata and give a litigant two days in court. But when a party *loses* to an unknown adversary, he should not be bound. This is the position taken in Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941), where the defendant who secretly controlled a prior suit in a Nevada federal court was bound by the judgment in a subsequent suit in a New Jersey federal court, both suits based upon the same patents.

[8] Thompson v. Lassiter, 246 N.C. 34, 97 S.E.2d 492 (1957); Rabil v. Farris, 213 N.C. 414, 196 S.E. 321 (1938).

from the Restatement[9] that acting as next friend in the infant's suit is not sufficient control in itself, nor is the mere supplying of funds for the infant's attorney.[10] However, both selecting *and* paying for the attorney has been held an act of control elsewhere.[11]

It is noteworthy that the North Carolina court makes a distinction between a father as next friend for a plaintiff-infant and a father as guardian ad litem for a defendant-infant. In *Thompson v. Lassiter*[12] the plaintiff who had been guardian ad litem for his son was barred in his suit for medical expenses and loss of earnings and services of the minor because the son had been found negligent in the first action. Indicating that as guardian ad litem the father would make more effort than as next friend,[13] the court said that "in legal effect, the distinctions are substantial and not merely formal. . . ."[14]

Even if a liberal test for finding control is adopted, the fact remains that a second suit must be instigated to determine the existence of control, which means additional court time with the attendant expense and inconvenience.[15] Other approaches are available and should be considered.

A minority of jurisdictions have adopted a derivative approach.[16] That is, if the infant is unable to establish liability on the part of the defendant, then any cause of action that the father might have

[9] RESTATEMENT, JUDGMENTS § 84, comment *f* (1942).

[10] *Id.* at comment *e.*

[11] Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941).

[12] 246 N.C. 34, 97 S.E.2d 492 (1957).

[13] It would seem that if the infant is totally dependent upon his father, if they are living under the same roof, and if the infant is totally disabled, the likelihood of the burden of support after majority will rest upon the father. With this in mind, a father as next friend may well have a greater interest in his infant's claim for permanent injuries than he would in defending, as guardian ad litem, an infant who is, for instance, protected by liability insurance.

[14] Thompson v. Lassiter, 246 N.C. 34, 38, 97 S.E.2d 492, 495 (1957).

[15] Whether or not the father exercised control in the first suit could well involve questions of fact requiring a jury and subject to appeal so that, in fact, the blessing could become an added burden. The possibility is also present that a father with reservations about the soundness of his and the infant's claims could *insure* a second trial by systematically and consciously avoiding participation in the infant's suit.

[16] See Jones v. Schmidt, 349 Ill. App. 336, 110 N.E.2d 688 (1953); Cavanaugh v. First Nat'l Stores, 329 Mass. 179, 107 N.E.2d 307 (1952); Zarba v. Lane, 322 Mass. 132, 76 N.E.2d 318 (1947); Reilly v. Rawleigh, 281 N.Y. Supp. 366 (Sup. Ct. 1935); Boyett v. Airline Lumber Co., 277 P.2d 676 (Okla. 1954); Wheng v. Hong, 206 Ore. 125, 290 P.2d 185 (1955); 67 C.J.S. *Parents & Child* § 41 (1950).

had fails to mature. As one court has expressed it: "The mere fact that a parent has sustained damages . . . does not give the parent a cause of action. Such cause of action of the parent is derivative to the extent that if the child cannot recover neither can the parent."[17] This approach is reasonable in that a defendant is not called upon a second time to prove fully adjudicated facts. It should be noted, however, that in the converse situation where the plaintiff-infant wins in the first suit the defendant is not bound by the results.[18] This is because the father must still prove that he has suffered damages[19] or because his burden of proof may be greater.[20]

As seen above, in both the majority and minority approaches to infant-parent suits, a second trial is often necessary. This duplication could be eliminated if the statutory requirement that all causes must affect all parties[21] were changed to permit or require joinder of the two actions.[22] The court has, in fact, already judicially modified the joinder rule by holding that the father waives his rights to a separate suit if the child, with the father's knowledge, claims damages, which would normally be the father's, and the defendant does not enter a timely objection[23] If the statute is modified to permit[24] joinder in *all* infant-parent causes of action, the rights of the parties can be protected in one suit and costly litigation avoided.

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[17] Pokeda v. Nash, 47 N.Y.S.2d 954, 957 (Sup. Ct. 1944).

[18] Holden v. Bloom, 314 Mass. 309, 50 N.E.2d 193 (1943); Annot., 32 A.L.R.2d 1060 (1953).

[19] McCray v. Earls, 267 Ky. 89, 101 S.W.2d 192 (1936).

[20] Hinckley v. Capital Motor Transp. Co., 321 Mass. 174, 72 N.E.2d 419 (1947).

[21] N.C. GEN. STAT. § 1-123 (1953).

[22] This approach has been urged in an extended article where adoption of the substance of the federal joinder rules was seen as a solution to many illogical results, as illustrated by the infant-parent cases. Brandis, *A Plea for Adoption by North Carolina of the Federal Joinder Rules,* 25 N.C.L. REV. 245 (1947). Judge Goodwin of Oregon states:

> As a matter of abstract public policy, and, indeed, of common sense, there is much to be said for the proposition that one trial is enough. Assuming the desirability of combining the two cases in one trial, before one jury, the solution lies in a joinder procedure, rather than in collateral estoppel. Joinder would insure the right of each party to protect his own interest. That matter, however, is one for the legislature.

Wolff v. DuPuis, 233 Ore. 317, 323, 378 P.2d 707, 710 (1963).

[23] Pascal v. Burke Transit Co., 229 N.C. 435, 50 S.E.2d 534 (1948).

[24] To accomplish the most desirable results, the word "permit" should be construed to mean, in these cases, that the father *must* be joined if he can be served. See, *e.g.,* FED. R. CIV. P. 19(a); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 511 (Wright ed. 1961).

It is submitted that the present rule in these cases should be altered. The adoption of a control test will work toward a desirable end, particularly if liberally applied, but as indicated above, two suits will still be required. The minority view, whereby the parent's action is derived from the child's and must fall if the child fails, would be an improvement, but it also sometimes requires two trials. It is urged that the best solution is in a statutory revision to permit joinder, giving all of the parties their day in court, while at the same time eliminating a costly second trial.

PHILIP G. CARSON

Taxation—Deductions of Rental Payments after Gift and Leaseback to Short-Term Trust—Taxation of Income

Taxpayers may use the gift and leaseback device to effect tax saving with greater confidence as a result of a recent decision of the Tax Court of the United States.[1] The gift and leaseback has been popular among some taxpayers in high income brackets, chiefly physicians, as a method of reducing income taxes while boosting total family income.[2] Its popularity began to decline, however, when the Tax Court held in *I. L. Van Zandt*[3] that a noncorporate taxpayer had to show a "business purpose" for making a gift of real estate to a trust before he could validly deduct rental payments made to the trust on leaseback of the property.[4]

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[1] Alden B. Oakes, 44 T.C. No. 48 (July 6, 1965).

[2] The popularity of the gift and leaseback is reflected by the amount of litigation it has generated. Notable successes include Brown v. Commissioner, 180 F.2d 926 (3d Cir.), *cert. denied,* 340 U.S. 814 (1950); Skemp v. Commissioner, 168 F.2d 598 (7th Cir. 1948); Commissioner v. Greenspun, 156 F.2d 917 (5th Cir. 1946), *on remand,* 7 CCH Tax Ct. Mem. 509 (1948); Alden B. Oakes, *supra* note 1.

[3] 40 T.C. 824 (1963), *aff'd,* 341 F.2d 440 (5th Cir.), *cert. denied,* 382 U.S. 814 (1965), 86 Sup. Ct. 32 (1965).

[4] The court said:

> Since deductions are matters of legislative grace and the taxpayer has the burden of proving he is entitled to them, the petitioner here must establish that the rental payments were in fact "ordinary and necessary" expenses in his medical practice. While they may be ordinary, were they necessary under these circumstances? We think not. The petitioner owned and used the building and medical equipment in his "trade or business" before he ever created the trusts, transferred the property to the trusts, and then leased it back. Actually he continued to use the property in exactly the same manner he had before these transactions were arranged and carried out. This indicates a lack of any *business purpose,* which we believe is implicitly required by section 162(a).

40 T.C. at 830-31. (Emphasis added.)

The Tax Court repudiated the *Van Zandt* "business purpose" test in the case of *Alden B. Oakes*,[5] decided in July 1965, and cleared the way to renewed interest in the use of the gift and leaseback. The device has frequently been used in conjunction with a short-term trust[6] and was so used by taxpayers Van Zandt and Oakes. The latter used it successfully while the former did not.

An illustration of a typical situation involving a short-term trust and a gift and leaseback will be helpful in demonstrating how the device works. The taxpayer establishes an irrevocable trust with a term of at least ten years and a day[7] for the benefit of his minor children, conveying real estate used in his business (the gift) to the trust as its corpus. He then leases the same property from the trust (the leaseback), being careful not to pay more than a reasonable rental,[8] and deducts the rent payments as business expenses.[9] Upon the termination of the trust the property reverts to the taxpayer, unless he has sold or otherwise disposed of his reversionary interest.

Assuming the taxpayer's rental deductions are larger than any depreciation deductions he might have claimed if he had kept the property,[10] and assuming any gift tax on the transaction is less than the potential saving of income tax,[11] the taxpayer's reward from using this device is a reduction of his taxes. In addition, he is

[5] 44 T.C. No. 48 (July 6, 1965).

[6] As used in this note, a short-term trust is any trust of limited duration that complies with all of the requirements of §§ 671-78 of the Internal Revenue Code of 1954, so that the income of the trust will not be taxed to the grantor.

[7] The term must be longer than ten years in order to comply with § 673(a) of the Code.

[8] Reasonableness of the rental is one of the factors that determines the deductibility of rent payments. See, *e.g.*, Kirschenmann v. Westover, 225 F.2d 69, 70 (9th Cir. 1955), where the court found a yearly rental of $19,412.25 to be unreasonable when the same property had rented for $1,050 per year before the gift and leaseback, and denied the deductions on this basis.

[9] Deductions are permitted by § 162(a)(3) of the Code for reasonable rental payments that must be made for purposes of a trade or business.

[10] "For a leaseback to be profitable tax-wise, property must either be non-depreciable (real estate) or have a low basis, since rent deduction through a leaseback arrangement is a substitute for depreciation." Cohen, *Transfers and Leasebacks to Trusts: Tax and Planning Considerations*, 43 VA. L. REV. 31 (1957).

[11] Under § 2521 of the Code a donor has a $30,000 lifetime exemption from the gift tax, and under § 2503(b), he has an annual exclusion of $3,000 per donee provided such gift is not a "future interest." Moreover, the aforesaid amounts may be doubled by the donor by "splitting the gift" under § 2513 of the Code.

indirectly rewarded through the benefit that his children receive from the trust. A tax reduction for the family will result only if the income is taxed to the trust or its beneficiaries at a rate lower than that paid by the grantor on his income. The difference in the tax at the lower rate and the tax at the higher rate accrues to the benefit of the taxpayer's family as an economic unit and makes the gift and leaseback device worthwhile for high bracket taxpayers.[12]

While perhaps the most important advantage to be gained by use of a gift and leaseback with a short-term trust is splitting of income between a parent in a high tax bracket and children in lower brackets, this is not the only advantage.[13] The device may be useful for assuring education expenses for children,[14] assuring income for aged relatives,[15] providing life insurance coverage on persons other than the taxpayer,[16] and for accomplishing many other purposes. Its use is limited only by the ingenuity of the planner and provisions of law.

A taxpayer must pay particular attention to two primary issues if he is to use the gift-leaseback device successfully with a short-term trust. These are (1) whether or not the rental payments to the trust are deductible to the grantor, and (2) whether the trust

[12] For an illustration of how worthwhile it can be, see Yohlin, *The Short-Term Trust—A Respectable Tax-Saving Device,* 14 TAX L. REV. 109, 110 (1958)

[13] For a general idea of the many applications of the gift and leaseback device with a short-term trust, see Drew, *Paying Family Expenses and Saving Taxes,* 37 TAXES 689 (1959), and Yohlin, *op. cit. supra* note 12.

[14] In setting up a trust to assure education expenses for children, the grantor must bear in mind that trust income applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain will be taxable to the grantor under authority of § 677(b). However, the measure of the parent's legal obligation is to be found in local rather than federal law, Treas. Reg. § 1.662(a)-4 (1956), and no cases have been found in which a state required a parent to furnish a college or professional education for his child. Therefore, it is doubtful that trust income used to defray a child's college expenses, other than room, board and clothing, will be taxable to the parent.

[15] The principle of § 677(b) of the Code applies to support of parents as well, and if the grantor is under a legal obligation to support them under state law, trust income used for their support will be taxable to him. Still, a trust for the benefit of parents can be a useful device when the income is used only to supplement the parents' own funds.

[16] Trust income used to buy insurance policies on the life of the grantor will be taxed to the grantor. Burnet v. Wells, 289 U.S. 670 (1933). See generally Durant, *Trust Income and the Payment of Premiums,* 27 TAXES 904 (1949); Smith, *Federal Taxation of Insurance Trusts,* 40 MICH. L. REV. 207 (1941). But trust income used to pay premiums on insurance covering someone other than the grantor is not taxable to the grantor.

income is taxable to the trust, to the beneficiary or to the grantor. The gift and leaseback device will yield no tax saving if the rental deductions are disallowed or if the trust income is found to be taxable to the grantor.

In determining the issue of deductibility of rental payments under a gift and leaseback with a short-term trust, the courts have chosen to look at several factors. Chief among these in the past have been the extent of prearrangement of the leaseback,[17] the independence of the trustee,[18] the revocability of the trust,[19] and the reasonableness of the rental payments.[20]

The *Van Zandt* decision was the first application by the Tax Court of a business purpose test to a gift and leaseback made by a noncorporate taxpayer.[21] In order to understand what misled the court in applying the test, it is first necessary to examine the section of the Internal Revenue Code under which the taxpayer claimed a deduction for rental expenses. The deduction was claimed under section 162(a)(3), which says:

> (a) IN GENERAL—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including
>
> . . .
>
> (3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.[22]

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[17] See Helen C. Brown, 12 T.C. 1095, 1101 (1949).

[18] See Brown v. Commissioner, 180 F.2d 926, 929 (3d Cir. 1950), *reversing* 12 T.C. 1095 (1949).

[19] See Skemp v. Commissioner, 168 F.2d 598, 600 (7th Cir. 1948).

[20] See Kirschenmann v. Westover, 225 F.2d 69 (9th Cir. 1955).

[21] In I. L. Van Zandt, 40 T.C. 824, 830 (1963), while the court purportedly acted under the authority of a line of decisions, a study of the decisions it cited shows that a business purpose test was determinative of only one other case involving a gift and leaseback. This case, White v. Fitzpatrick, 193 F.2d 398 (2d Cir. 1951), was criticized by a dissenting judge as a mistaken application of the business purpose test. The test had been applied in earlier cases involving a sale and leaseback, and two of the four cases cited by the *Van Zandt* court were sale and leaseback rather than gift and leaseback cases. W. H. Armston Co. v. Commissioner, 188 F.2d 531 (5th Cir. 1951), *affirming* 12 T.C. 539 (1940); Unger v. Campbell, 7 Am. Fed. Tax R.2d 547 (N.D. Tex. 1960). The court in the fourth case found there was no gift because of lack of showing of a clear and unequivocal intention to part with the property. Johnson v. Commissioner, 86 F.2d 710 (2d Cir. 1936), *affirming* 33 B.T.A. 1003 (1936).

[22] INT. REV. CODE OF 1954, § 162(a)(3).

The *Van Zandt* court held the rental payments in that particular gift and leaseback situation were not "necessary" within the meaning of section 162(a)(3) because the taxpayer had owned the property before the transfer, and there was no compelling business reason for him to give it to the trust; thus the rental was not "required to be made as a condition to the continued use or possession" of the property.[23] The *Oakes* court said the test of business necessity required by section 162(a)(3) should be made by viewing the situation as it exists *after* the gift is made, not before.[24] It is clear that if the court had not repudiated the *Van Zandt* test in *Oakes,* the gift and leaseback would have become valueless as a device for saving income taxes. To require the showing of a business purpose for giving property to the trust is tantamount to an automatic disallowance of the rental deduction. Rarely, if ever, is there a valid business reason for making such a gift to a trust.

In abandoning the "business purpose" test of *Van Zandt,* the *Oakes* court did not say why it was repudiating the earlier position. The court may have had in mind a distinction explained in a recent article by Professor Froehlich in the *California Law Review.*[25] That distinction is that a rational basis exists for applying such a "business purpose" test to a gift and leaseback in the case of a corporation, but does not exist in the case of an individual. The author explained that a corporation is by nature business motivated and ordinarily does not make gifts. Therefore, where a corporation transfers property to a related entity and then leases it back, it

[23] In affirming the case on appeal, the Court of Appeals for the Fifth Circuit said:

> [I]t seems to us inevitably we must look at the original conveyance of the property together with the execution of the leaseback as a single transaction. Thus viewing it, we conclude that the *obligation* to pay rent resulted not as an ordinary and necessary incident in the conduct of the business, but was in fact created solely for the purpose of permitting a division of the taxpayer's income tax.

341 F.2d at 443.

[24] The court said:

> At that point, since Alden Oakes needed a building for practicing medicine, he agreed to rent the property from the trustee for a reasonable amount. Consequently, we believe there is a sound basis for holding that the rent paid by Oakes was, in terms of section 162, both "ordinary and necessary" and "required to be made as a condition to continued use . . . of property."

44 T.C. at ———.

[25] Froehlich, *Clifford Trusts: Use of Partnership Interests as Corpus: Leaseback Arrangements,* 52 CALIF. L. REV. 956, 973-74 (1964).

would appear proper to look to the business reasons for the transfer in determining deductibility of lease payments. Professor Froehlich continued:

> An individual, however, is governed by many non-business influences, and it is recognized that all his transfers need not be business motivated. He may, for instance, make outright gifts of income producing assets. No one has ever challenged the right of an individual to establish a . . . [short-term] trust with stock of a corporation, for instance. Similarly, there should be no problem created by a proprietor's transferring some of his business assets to his child's trust. The fact that the transaction has no business purpose has nothing to do with its bona fides—it is not intended to have a business purpose.[26]

Another factor which has recently come to bear on the issue of deductibility of rental payments made to a short-term trust is the requirement in section 162(a)(3) that the taxpayer have no "equity" in the property he is renting. The section permits deductions only for property "to which the taxpayer has not taken or is not taking title *or in which he has no equity.*"[27]

A few recent cases in the gift and leaseback area have adopted a broad, literal interpretation of this phrase and, as an alternative basis for decision, have denied rental deductions because the lessee had an "equity" in the property.[28] What exactly is the prohibited "equity," and what effect does it have on practical applications of the gift and leaseback device in conjunction with a short-term trust? The Commissioner of Internal Revenue has taken the position that the "equity" is *any* equitable interest held by the taxpayer in the rented property.[29] This interpretation has a direct and adverse

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[26] *Id.* at 973.

[27] See text accompanying note 22 *supra.* (Emphasis added.)

[28] See Hall v. United States, 208 F. Supp. 584, 588 (N.D.N.Y. 1962), where the grantors retained the power to dispose of the corpus of the trust and the court said "it would seem that the grantors had an equity in the premises at least until the power of sale was exercised and for that reason also the Commissioner was right in disallowing the deduction"; Kirschenmann v. Westover, 225 F.2d 69, 71 (9th Cir. 1955), where the concurring opinion suggested that another ground for disallowance of the deduction was that the grantor had an "equity" in the property because he bought the property under a mortgage and gave it to the trust subject to the mortgage, retaining an equity of redemption.

[29] In discussing the Commissioner's contention that taxpayer Oakes had retained the prohibited "equity," the *Oakes* court defined "equity" as a "right of redemption, a reversionary interest, a right to specific performance, or in general any right respecting property which traditionally would have been enforceable by means of an equitable remedy." 44 T.C. at ———.

impact on the use of a short-term trust with a gift and leaseback, as will be presently shown.

One of the primary reasons why the taxpayer chooses a short-term trust as the tax-saving vehicle is the fact that it permits him to regain control of the property after his purpose has been served;[30] *i.e.*, in giving real estate to a trust for ten years, he retains a reversionary interest in the property, and upon the termination of the trust at the end of the ten-year period the property reverts to him. Thus, he is able to effect a tax saving during a temporary period of family need—for instance, when his children need money for college tuition and expenses—and he is restored to full ownership rights in his property when the temporary need has been satisfied.

Is the reversionary interest retained by the settlor of the trust an "equity" within the meaning of the rental deduction section of the Code? If it is, then he may not deduct rental payments upon leaseback. It is true that he can avoid this consequence by either selling or giving away this reversionary interest. However, if he does either of these he will not regain control of the property upon termination of the trust, which amounts to a failure of his primary consideration for choosing a short-term trust.

The *Oakes* decision approved by implication the Commissioner's contention that rental deductions should be disallowed whenever the lessee has *any* equitable interest in the property.[31] However, neither the *Oakes* case nor other decisions in the gift and leaseback area that have dealt with the "equity" problem have met the issue head-on. In *Oakes* the court found that the taxpayer had no equity in the property because he had sold his reversionary interest to his wife.[32] The court failed to consider the probability that Oakes retained effective control over the reversionary interest in his wife's hands. In the future, the court will likely take notice of this prob-

[30] See Yohlin, *op. cit. supra* note 12.

[31] 44 T.C. at ———.

[32] The court said:

> One of the reasons why respondent asserts Alden Oakes did not divest himself of sufficient control and ownership over the property is that upon termination of the trust the property must be returned to the grantors. This argument disregards two pertinent facts, *viz.*, the pre-existing and continuing interest of the wife and the transfer of the doctor's remainder interest to his wife. Surely, after April 28, 1959, Alden Oakes had neither a present nor a remainder interest in the trust property. His wife alone was then left with the power to eventually dispose of the trust corpus.

Id. at ———.

ability and use it as a basis for denying deductions. In the other cases the "equity" issue was not the sole basis for decision.[33]

Insofar as they are authority for the argument that deductions should be refused whenever the taxpayer retains any type of equity in the property, however, it is submitted that the cases are in error. Such a broad interpretation of section 162(a)(3) urged upon the courts by the Commissioner is unwarranted. To follow the argument of the Commissioner to its logical conclusion would mean that no person having a future interest in real estate could rent that real estate from the holder of the present possessory interest and get the benefit of a rental deduction, for if he had a future interest in the property, he would have an equity.

The legislative history of the section offers no clue to the meaning of "equity."[34] The only clue available is in a series of cases dealing with leases containing purchase options.[35] Here, the courts have been concerned by the fact that the lessee has an equity in the property—the option to purchase. Instead, they have looked to the rental payments to see whether the payments are for "rent" or whether they are for the "purchase" of the property. Deductions have been allowed unless it was determined that each rental payment increased the ownership interest of the lessee-optionee.[36] It is submitted that these cases correctly interpret "equity" in the context of this section in its colloquial usage as "ownership" rather than in its legal usage, and that the purpose behind inclusion of the phrase is to prevent persons from deducting as rental expense, money that was really being applied toward purchase of the property.

Turning now to the problem of taxation of the income of the trust, will the income be taxable to the trust, to the beneficiaries, or to the grantor? The main concern of the grantor is that the income not be taxed to him. Many of the problems connected with the

[33] In Kirschenmann v. Westover, 225 F.2d 69 (9th Cir. 1955), the court held the rent payments nondeductible because they were not paid as a condition to continued use of the property in the taxpayer's business, and in Hall v. United States, 208 F. Supp. 584 (N.D.N.Y. 1962), the court disallowed the deductions because the taxpayers retained control over the actions of the trustee.

[34] See H.R. REP. No. 922, 64th Cong., 1st Sess. (1916) and S. REP. No. 793, 64th Cong., 1st Sess. (1916).

[35] See Breece Veneer & Panel Co. v. Commissioner, 232 F.2d 319 (7th Cir. 1956); Judson Mills, 11 T.C. 25 (1948); Edward E. Haverstick, 13 B.T.A. 837 (1928).

[36] *Ibid.*

taxation of the income of a short-term trust have been either solved or simplified by the so-called "Clifford Trust" provisions of the 1954 Code,[87] and if the grantor will carefully comply with their requirements, he will be largely assured that the trust income will not be taxed to him.

Tax consequences of a gift and leaseback are sufficiently predictable to permit use of the device for income-splitting among family members. However, taxpayers should be wary in using the device with a short-term trust so long as the possibility exists that a reversionary interest held by the grantor in the trust corpus will be found to be a prohibited equity under section 162(a)(3).

Until this issue is settled favorably, it would appear wise to make a gift of the entire fee to the trust, to sell the reversionary interest, or to give the remainder interest to another beneficiary who is not so related to the taxpayer as to raise an issue of his possible continued control over the property.

THOMAS J. BOLCH

Taxation—Strike Benefits as Income

The Internal Revenue Code excludes from gross income "the value of property acquired by gift."[1] Although similar language was contained in the first income tax statute[2] following enactment of the sixteenth amendment and in all subsequent revenue acts,[3]

[87] INT. REV. CODE OF 1954, §§ 671-78. The name "Clifford" comes from Helvering v. Clifford, 309 U.S. 331 (1940), the landmark case requiring the settlor to pay tax on the income of a short-term trust where he retained substantial elements of control over the trust corpus and income. This case caused a great amount of uncertainty and resulted in the promulgation by the Treasury of the Clifford Regulations, which set up a series of clear tests defining the situations in which the income of a trust would be taxable to the grantor. These regulations were put into the Code itself in 1954.

[1] INT. REV. CODE OF 1954, § 102(a).

[2] Revenue Act of 1913, ch. 16, § II(B), 38 Stat. 167, provided that gross income shall not include "the value of property acquired by gift, bequest, devise, or descent."

[3] Revenue Act of 1916, ch. 463, § 4, 39 Stat. 758; War Revenue Act of 1917, ch. 63, § 1200, 40 Stat. 329; Revenue Act of 1918, ch. 18, § 213(b)(3), 40 Stat. 1065; Revenue Act of 1921, ch. 136, § 213(b)(3), 42 Stat. 238; Revenue Act of 1924, ch. 234, § 213(b)(3), 43 Stat. 268; Revenue Act of 1926, ch. 27, § 213(b)(3), 44 Stat. 24; Revenue Act of 1928, ch. 852, § 22(b)(3), 45 Stat. 798; Revenue Act of 1934, ch. 277, § 22(b)(3), 48 Stat. 687; Revenue Act of 1936, ch. 690, § 22(b)(3), 49 Stat. 1657; Revenue Act of 1938, ch. 289, § 22(b)(3), 52 Stat. 458; INT. REV. CODE OF 1939, § 22(b)(3), as amended, ch. 619, § 111(a)(3), 56 Stat. 809 (1942) (now INT. REV. CODE OF 1954, § 102(a)).

Congress has never defined "gift"[4] for income tax purposes, nor has the Commissioner attempted its definition in his regulations.[5] Because of this the definition of "gift" has necessarily been left to the courts to shape on an *ad hoc* basis.

The intention of the donor[6] is the most critical factor in determining whether a particular transfer is a gift. This intention, however, is to be distinguished from the personal property law concept of "donative intent"[7] because the income tax statute uses the term "gift" in a more colloquial sense[8] than did the common law. A gift in the statutory sense must derive from a "detached and disinterested generosity,"[9] arising "out of affection, respect, admiration, charity or like impulses."[10] However, the donor's characterization of his action is not conclusive because "there must be an objective inquiry as to whether what is called a gift amounts to it in reality."[11] The mere absence of a moral or legal obligation to make the transfer does not necessarily create a gift.[12] But, if the transfer proceeds primarily from "the constraining force of any moral or legal duty,"[13] or from the incentive of anticipated benefits,[14] or where payment is in return for services rendered, even though the donor receives no economic benefit,[15] it is not a gift.

Because the law had become "unclear and uncertain"[16] and because of the Treasury's insistence that it had found a "new" test that would "almost automatically dispose of the great bulk of the 'gift' cases,"[17] the United States Supreme Court in 1959 granted certiorari in two cases that were to become the leading cases in the field: *Commissioner v. Duberstein*[18] and *Stanton v. United*

[4] For a proposed solution to the gift *vs.* income problem, which was not adopted, see 106 CONG. REC. 12449 (1960).
[5] See Treas. Reg. § 1.102-1 (1965).
[6] Bogardus v. Commissioner, 302 U.S. 34, 43 (1937).
[7] See Gray v. Barton, 55 N.Y. 68 (1873).
[8] Commissioner v. Duberstein, 363 U.S. 278, 285 (1960).
[9] Commissioner v. LoBue, 351 U.S. 243, 246 (1956).
[10] Robertson v. United States, 343 U.S. 711, 714 (1952).
[11] Bogardus v. Commissioner, 302 U.S. 34, 40 (1937).
[12] Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 730 (1929).
[13] Bogardus v. Commissioner, 302 U.S. 34, 41 (1937).
[14] *Ibid.*
[15] Robertson v. United States, 343 U.S. 711, 714 (1952).
[16] Brief for Respondent, p. 5, Stanton v. United States, 363 U.S. 278 (1960).
[17] *Id.* at 29.
[18] 363 U.S. 278 (1960). In *Duberstein* the taxpayer had from time to

States.[19] The Treasury's "new" test that "gifts should be defined as transfers of property made for personal as distinguished from business reasons"[20] was rejected by the Court, as was the Treasury's suggestion that "motive" rather than "intention" govern the taxability of a particular transfer.[21] In rejecting the Treasury's invitation to fix a "standard to be applied by the lower courts and the Tax Court,"[22] the Supreme Court stated that "the governing principles are necessarily general . . . [and] the problem is one which, under the present statutory framework, does not lend itself to any more definitive

time furnished the president of Mohawk Metal Corp. with the names of potential customers for Mohawk's products. In appreciation, and over his protest that he was owed nothing, taxpayer received a Cadillac automobile. Taxpayer did not include the value of the automobile in his gross income for 1951, deeming it a gift. The Commissioner asserted a deficiency for the value of the car that was sustained by the Tax Court, which found the automobile was remuneration for services rendered by taxpayer. Mose Duberstein, 1958 P-H TAX CT. MEM. 13 (1958). The Court of Appeals for the Sixth Circuit reversed. Duberstein v. Commissioner, 265 F.2d 28 (6th Cir. 1959). The Supreme Court reversed the Court of Appeals. 363 U.S. at 293.

[19] 363 U.S. 278 (1960). *Stanton* and *Duberstein* were argued together and consolidated into one opinion. In *Stanton* taxpayer had been employed for ten years by Trinity Church as comptroller of the church corporation and as president of a "holy" owned subsidiary that the church had established to manage its real estate holdings. In 1942 taxpayer resigned both positions to go into business for himself. In appreciation for his services, the board of directors of the subsidiary, which included the vicar and vestry of the church, voted taxpayer a $20,000 "gratuity." Taxpayer failed to include the "gratuity" in his gross income, and the Commissioner asserted a deficiency. In taxpayer's suit for recovery, the district court found that the payment was a "gift." Stanton v. United States, 137 F. Supp. 803 (E.D.N.Y. 1955), *rev'd*, 286 F.2d 727 (2d Cir. 1959), *remanding for additional finding of fact*, 363 U.S. 278 (1960).

[20] *Id.* at 284 n.6.

[21] The Treasury reasoned that the only factual distinction that could be made among the various kinds of voluntary payments was the difference in "motive," or reasons why they were made. Brief for Respondent, p. 23, Stanton v. United States, 363 U.S. 278 (1960). Motive was defined as the inducing cause of the payments or transfer. The Treasury argued that for tax purposes the distinction should be made between those transactions motivated by personal and those motivated by business reasons. Brief for Petitioner, pp. 13-15, Commissioner v. Duberstein, 363 U.S. 278 (1960); Brief for Respondent, pp. 29-33, Stanton v. United States, 363 U.S. 278 (1960). A business reason was to be any reason that established a "proximate . . . causal relationship between the payment and the conduct of the business, the production of income, or the performances of services." Brief for Respondent, p. 29, Stanton v. United States, 363 U.S. 278 (1960). Any reason that was not a business reason would be a personal one. If such a transfer was sufficiently related to the business in such a way as to be an allowable deduction for tax purposes, then it could not qualify as a gift. *Id.* at 30.

[22] Commissioner v. Duberstein, 363 U.S. 278, 284 (1960).

statement . . . ."[23] The Court reasoned that the problem "remains basically one of fact, for determination on a case-by-case basis."[24] It concluded that the decision in each case must be determined by

> the application of the fact-finding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case . . . . [P]rimary weight in this area must be given to the conclusions of the trier of fact.[25]

In a concurring opinion, Mr. Justice Frankfurter reproached the Court for setting "fact-finding bodies to sail on an illimitable ocean of individual beliefs and experiences."[26]

It was upon this background of uncertainty that the Supreme Court for the first time considered in *United States v. Kaiser*[27] the income tax consequences of union strike benefits. The taxpayer in Kaiser was an employee of the Kohler Company of Wisconsin. The bargaining representative at Kohler, a local of the United Automobile Workers, called a strike, and taxpayer went out on strike although he was not a member of the union. His job was his sole source of income, and when he found himself in need of financial assistance, he applied to the union for help. After he had been questioned about his financial resources and dependents, the union agreed to pay his rent and give him a food voucher redeemable in kind at the local grocery store. To receive these strike benefits taxpayer did not have to join the union, nor did he have to perform any picketing duties. Taxpayer failed to include the amount of the strike benefits in his gross income. In the district court[28] the trial judge submitted to the jury the simple interrogatory of whether the strike assistance was a gift. The jury answered that it was, but the court held as a matter of law that the benefit payments were income. The Court of Appeals for the Seventh Circuit reversed.[29] The Supreme Court agreed with the Court of Appeals, stating that "on the basis of our opinion in the Duberstein Case . . . the jury in this case, as finder of the facts, acted within its competence in concluding that the assistance rendered here was a gift."[30] The

[23] *Ibid.*
[24] *Id.* at 290.
[25] *Id.* at 289.
[26] *Id.* at 297 (concurring opinion).
[27] 363 U.S. 299 (1960).
[28] Kaiser v. United States, 158 F. Supp. 865 (E.D. Wis. 1958).
[29] Kaiser v. United States, 262 F.2d 367 (7th Cir. 1958).
[30] 363 U.S. at 303.

court listed several factors from which the jury could have inferred that the assistance did not proceed from a "constraint of moral or legal obligation, of a nature that would preclude it from being a gift."[31] These factors are (1) the form and amount of the assistance and the conditions of personal need, (2) the lack of other sources of income, compensation, or public assistance, (3) the dependency status, and (4) that, while the assistance was furnished only to strikers, it was not conditioned upon performing any strike duties.[32]

Since *Kaiser,* four lower-court cases, two in the federal district court and two in the tax court, have held that union strike benefits were not gifts but were taxable income to the taxpayers. The first of these decisions was *Godwin v. United States.*[33] *Godwin* dealt with payments made by the Air Line Pilots' Association to a striking pilot. In *Godwin* the judge did not let the case go to the jury but held as a matter of law that the strike benefit payments were not gifts. The court listed several factors which it thought distinguished the case from *Kaiser.* First, the union did not consider the personal financial situation of the individual pilots or the availability of help from outside sources, such as unemployment insurance, in determining how much each pilot would be paid, but paid each pilot sixty per cent of his salary. Second, while the amount of the payments in *Kaiser* were very small, were not paid in cash and were not paid directly to the taxpayer, here the payments to the taxpayer amounted to approximately 700 dollars a month and were paid in cash directly to the striking taxpayer. Third, the taxpayer in *Godwin* was a member of the union and participated directly in the strike. Last, the union voted to pay the pilots strike benefits before they actually went out on strike. The court thought that this would give the pilots a "legally enforceable right to receive [the] benefits."[34] In keeping the case from the jury, the court relied on the "motive" of the union in making the payments, reasoning that whether a benefit payment was a gift or income depended

> upon whether it flowed from charitable motives exclusively. In other words, in order to get this case to the jury, the Court would have to determine that there is some evidence from which

[31] *Id.* at 304.
[32] *Ibid.*
[33] 65-1 U.S. TAX. CAS. ¶ 9121 (W.D. Tenn. 1964).
[34] *Id.* at 94, 576.

> a jury could find that the only motive for these payments was charitable . . . .[35]

The second case after *Kaiser* was that of *John N. Hagar*,[36] where the taxpayer was employed as a copy editor for a St. Louis newspaper. When the union of which taxpayer was a member, a local of the American Newspaper Guild, called a strike against the newspaper, taxpayer actively participated in the strike and received strike benefit payments. In reaching its decision the Tax Court was careful to state that it found *"as a matter of fact"*[37] that the payments were income and not gifts. The court thought that the facts that distinguished it from *Kaiser* were (1) the taxpayer was at all times a union member, (2) the benefit payments were not paid to or available for nonunion members, (3) the taxpayer was required to perform strike duties before he was eligible for the benefit payments, and (4) the union's failure to inquire into the financial resources of the taxpayer. The taxpayer's need for the payments was also doubtful.[38]

After *Hagar* came the case of *Halsor v. Lethert*.[39] In *Halsor* the taxpayer, a pilot, was not on strike but was laid off by Northwestern Airlines as a result of a dispute between the International Association of Machinists and the Air Line Pilots Association. While he was locked out, the local of the ALPA passed a resolution whereby "the pilots furloughed due to the dispute arising from implementation of ALPA Policy"[40] would receive benefit payments from the ALPA. The payments were based on a certain percentage of the pilot's salary and were not subject to setoff against other income received by the pilots during the lockout. The court, in finding as a fact that the payments were not gifts, stressed the "intention"[41] of the union, which it found to be the furtherance of

[35] *Ibid.* The use of the donor's motive to determine whether a given transfer is to be treated by the recipient as a gift or income was expressly rejected in the *Duberstein* case. See note 21 *supra* and accompanying text.

[36] 43 T.C. 468 (1965).

[37] *Id.* at 486.

[38] *Ibid.* The taxpayer's wife while he was on strike received a bi-weekly take-home pay of $152.93. Taxpayer had a joint tenancy with his wife and mother in several saving accounts with substantial balances. In addition, taxpayer had some dividend income during the time of the strike. His wife was his only dependent.

[39] 240 F. Supp. 738 (D. Minn. 1965).

[40] *Id.* at 739.

[41] *Id.* at 738.

the objectives of the association and not a " 'detached and disinterested generosity' which is the requisite of a gift under § 102."[42]

The last case dealing with strike benefit payments is that of *Mabel Phillips*.[43] The facts in *Phillips* are almost identical to those in *Hagar*, and the tax court relied heavily on *Hagar* in holding the benefits taxable. In *Phillips*, the taxpayer was a journeyman stereotyper and a member of a local of the Stereotypers' and Electrotypers' International Union that struck the newspaper where he was employed. To receive his benefit payments, taxpayer had to be a member of the union in good standing and had to "sign-in" daily at the strike headquarters. The amount of his payments, which were substantial in comparison with his salary, was not dependent upon his marital status, number of dependents or financial need, but was dependent solely upon his classification as a journeyman. The court concluded that these factors, plus a finding that the union was morally obligated under its constitution to make the payments once the taxpayer went on strike, prevented them from being considered as a gift.

While other areas of the gift *vs.* income dispute may remain "unclear and uncertain," it would seem that the decisions in *Godwin*, *Hagar*, *Halsor*, and *Phillips* have removed some of the confusion as to the income tax consequences of union strike benefit payments. Although the question whether a strike benefit payment in a given case is a gift or taxable income still remains a factual one, it seems certain that the benefits received in any case in which the facts are not very nearly on all fours with *Kaiser* cannot be classified as a gift.

THOMAS E. CAPPS

Torts—North Carolina's "Good Samaritan" Statute

The 1965 North Carolina General Assembly passed a "Good Samaritan" statute which provides that:

> Any person who renders first aid or emergency assistance at the scene of a motor vehicle accident on any street or highway to any person injured as a result of such accident, shall not be

[42] *Id.* at 740.
[43] P-H TAX CT. REP. & MEM. DEC. ¶ 65, 268 (1965).

> liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to wanton conduct or intentional wrongdoing.[1]

Apparently the purpose of the act is to encourage aid to persons injured in automobile accidents. The underlying rationale seems to be that the legislation will encourage aid at the scene of accidents by removing the possibility of liability for negligence.[2]

Although similar statutes have been passed by many other states,[3] there remain questions as to the constitutionality, the necessity, and the effectiveness of such statutes.

The statutes have been attacked as unconstitutional on the ground that they abolish common-law remedies in violation of state constitutional guarantees of civil remedies.[4] The North Carolina Constitution provides that "every person for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law. . . ."[5]

Statutes which have eliminated liability for injuries caused by negligent conduct, but have left unaltered liability for injuries caused by higher degrees of misconduct, have been held constitutional as mere restrictions of remedies, not a complete removal of them.[6] Other states have upheld the abolition of the common-law remedy for breach of promise to marry.[7] However, in Illinois under a constitutional provision similar to North Carolina's,[8] the abrogation of the remedy for alienation of affections was held unconstitutional.[9] In Texas, also under a constitutional provision similar to North Carolina's,[10] statutory abolition of municipal liability for injuries

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[1] N.C. GEN. STAT. § 20-166(d) (Supp. 1965).

[2] For the view that emergency aid is often withheld for fear of liability see Kearney, *Why Doctors Are Bad Samaritans,* READER'S DIGEST, May, 1963, p. 87; Survey, NEW MEDICAL MATERIA, April, 1961, p. 30.

[3] For a comparison of various "Good Samaritan" statutes see 13 DE PAUL L. REV. 297 (1964).

[4] See 43 B.U.L. REV. 140 (1963); 41 NEB. L. REV. 609 (1962).

[5] N.C. CONST. art. I, § 35.

[6] Emberson v. Buffington, 228 Ark. 120, 306 S.W.2d 326 (1957). The dissenting opinion expresses the opposing view that a person injured as the result of a negligence of another has a remedy only for that negligence, and a statute that withdraws liability for negligence completely withdraws the remedy. *Id.* at 130, 306 S.W.2d at 332.

[7] Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936).

[8] ILL. CONST. art. II, § 19.

[9] Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).

[10] TEX. CONST. art. I, § 13.

sustained on the streets and sidewalks was declared unconstitutional.[11]

In *Osborn v. Leach* the North Carolina court stated by way of dictum that statutory impairment of the right to recover for an injury would be unconstitutional.[12] The court has, however, held the Workman's Compensation Act,[13] which in some instances substitutes statutory remedies for common-law remedies, to be a reasonable exercise of the police power.[14] *Quaere,* whether the court will view the Good Samaritan statute as a constitutional restriction of the remedy, rely on *Osborn* and hold it unconstitutional, or uphold it as a reasonable exercise of the police power.

If the statute proves constitutional, its necessity may still be questioned. The act adds no additional inducement to persons already under a duty to aid the injured. In North Carolina these include persons legally responsible for the original injury[15] and the driver, regardless of fault, of any automobile involved in the accident.[16]

Even where there is no such antecedent duty, the act seems unnecessary since it does not appear that under common-law rules liability has been unjustly imposed in the Good Samaritan situation.[17] The general rule is that one who voluntarily undertakes to

[11] Lebohm v. City of Galveston, 154 Tex. 192, 275 S.W.2d 951 (1955). On rehearing the court stated two instances in which the abolition of remedies had been sustained:

> Thus it may be seen that legislative action withdrawing common-law remedies for well established common-law causes of action for injuries to one's "lands, goods, person, or reputation" is sustained only when it is reasonable in substituting other remedies, or when it is a reasonable exercise of the police power in the interest of the general welfare.

Id. at 199, 275 S.W.2d at 955.

[12] 135 N.C. 628, 631, 47 S.E. 811, 812 (1904).

[13] N.C. GEN. STAT. §§ 97-101 to -122 (1965).

[14] Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Heavner v. Town of Lincolnton, 202 N.C. 400, 162 (S.E. 909 (1932).

[15] Parish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942). See generally PROSSER, TORTS 338 (3d ed. 1964); RESTATEMENT (SECOND), TORTS § 322 (1965).

[16] N.C. GEN. STAT. § 20-166(c) (1953), as amended, N.C. GEN. STAT. § 20-166(c) (Supp. 1965).

[17] When liability has been imposed on a volunteer, there has usually been some substantial departure from the accepted standard of conduct. The most common departure seems to be a long delay in obtaining medical assistance for the injured person after he has been taken into the exclusive care and control of the volunteer. See, *e.g.,* Gates v. Chesapeake & O. Ry., 185 Ky. 24, 213 S.W. 564 (1919); *But see* Steckman v. Silver Moon, Inc., 77 S.D. 206, 90 N.W.2d 170 (1958).

aid another is held to the exercise of reasonable care under the circumstances to protect the safety of the person he aids.[18] However, the care that is reasonable in the emergency situation is only that degree of care that would be exercised by a reasonable man *in a like emergency.*[19]

Generally Good Samaritan statutes have been deemed necessary to encourage aid of physicians and other professionally trained persons who fear malpractice claims.[20] In fact, many states have limited the immunity to this class of persons.[21] Among the reasons given for the fear of liability are reported estimates that from six to nine thousand claims for medical negligence or malpractice are filed each year,[22] and that one out of seven physicans has been subjected to such a claim.[23]

The view has been taken that the "plight" of physicians has been exaggerated.[24] From a survey of physicians in Connecticut, it was concluded that the effect of a malpractice suit upon the practice of a physician is much less than is generally believed.[25] Another report indicated that such suits do not have a "serious or extended effect" on the physician's practice.[26] More specifically, an American Medical Association search found no appellate cases involving physicians at roadside emergencies.[27] Furthermore, an investigation of professional liability insurance claims indicated that few mal-

[18] PROSSER, TORTS 339 (3d ed. 1964).

[19] Kataoka v. May Dep't Stores Co., 28 F. Supp. 3 (S.D. Cal. 1939); Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952 (1938); Shloss Poster Advertising Co. v. Hallman, 255 N.C. 686, 122 S.E.2d 513 (1961).

[20] See Kearney, *supra* note 2; STETLER & MORITZ, DOCTOR AND PATIENT AND THE LAW 334 (4th ed. 1962); Survey, NEW MEDICAL MATERIA, *supra* note 2.

[21] See, *e.g.*, CAL. BUS. & PROF. CODE § 2144; NEB. REV. STAT. § 25-1152 (Supp. 1963); WIS. STAT. ANNO. § 147.17(7) (1963).

[22] Silverman, *Medicine's Legal Nightmare,* SATURDAY EVENING POST, April 11, 1959, p. 13.

[23] Committee on Medicolegal Problems, *Professional Liability and the Physician,* 183 A.M.A.J. 695 (1963).

[24] Averbach, *Good Samaritan Laws,* CASE AND COMMENT, March-April, 1964, p. 13; Steincipher, *Survey of Medical Professional Liability in Washington,* 39 WASH. L. REV. 704, 707 (1964).

[25] See Wyckoff, *The Effects of a Malpractice Suit Upon Physicians in Connecticut,* 176 A.M.A.J. 1096 (1961).

[26] *How State Medical Society Executives Size Up Professional Liability,* 164 A.M.A.J. 580, 582 (1957).

[27] Steincipher, *supra* note 24, at 706 n.21 (citing DOCTOR & LAW, Nov. 3, 1963, p. 3).

practice claims have been based on the typical Good Samaritan situation.[28]

Even if a negligence action is brought against a physician, the plaintiff may have difficulty establishing that the physician failed to fulfill his legal duty under the circumstances surrounding the roadside treatment.[29] Since cases involving knowledge peculiar to the science of medicine require expert testimony,[30] the plaintiff must generally produce as expert witnesses other physicians, who are often reluctant to testify against fellow physicians.[31] Assuming such testimony is available, the plaintiff must show that the defendant physician failed to have the skill and learning possessed by other physicians similarly situated,[32] or that he failed to exercise the required care, which is only reasonable care and diligence *under the circumstances*.[33]

It has been suggested that it is not the fear of the ultimate liability, but the "involvement" resulting from the commencement of the action of malpractice or the mere allegation of negligence, that is harmful to the reputation of the physician.[34] If, as it has been indicated, allegations of negligence do not often arise as a result of roadside treatment,[35] it seems that the fear of liability in such situations has resulted from a carry-over from the increasing fear of malpractice claims generally. Perhaps some approach to this problem other than the Good Samaritan statute would have been more appropriate.

The fact that the North Carolina version has eliminated some of the problems of interpretation arising under other "Good Samaritan" statutes[36] does not seem sufficient to insure its effectiveness.

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[28] *Id.* at 706 n.21 (citing A.M.A. NEWS, Oct. 26, 1964, p. 14, col. 2).

[29] Devices have been employed in some jurisdictions to facilitate the plaintiff's recovery in malpractice actions. For a discussion of the application of some of these devices see 64 COLUM. L. REV. 1301, 1304 (1964). Despite such attempts it is suggested that physicians occupy a protected and favored position at law. Steincipher, *supra* note 24, at 732.

[30] Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1954).

[31] See Curran, *Professional Negligence—Some General Comments,* 12 VAND. L. REV. 535, 539 (1959).

[32] Hawkins v. McCain, 239 N.C. 160, 79 S.E.2d 493 (1954).

[33] *Id.* at 168, 79 S.E.2d at 499.

[34] See Curran, *supra* note 31, at 542.

[35] See Steincipher, *supra* note 27, at 706.

[36] Problems of interpretation arise from the use of such uncertain terms as "gross negligence," "emergency situation," "emergency care," and "good faith." For criticism of such language in other statutes see 64 COLUM. L. REV. 1301, 1308 (1964); 13 DE PAUL L. REV. 297, 300 (1964); 75 HARV. L. REV. 641 (1962).

In order to encourage the aid of volunteers, the statute must first be widely publicized, and it must give adequate assurance that the threat of liability for negligence has been eliminated.

The statute will probably be publicized through professional journals as well as through ordinary news media. Nevertheless, persons who have allegedly failed to offer aid for fear of involvement may not be completely assured that the threat has been removed. Though the statute bars an action for negligence, the injured person might still allege wanton conduct.[37] There seems to be no assurance that physicians will be protected against common-law liability for abandonment by the statute.[38] Furthermore, the fact that the statutes vary from state to state as to persons and conduct protected[39] seems sufficient to defeat their effectiveness as to interstate travelers.[40]

In light of this discussion it is concluded that the enactment of the statute will be of little value. In the first place it may be unconstitutional. Secondly it seems to be directed at an evil that may not exist at all. Finally the statute may not be effective in encouraging aid from those to whom it is properly directed.[41]

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[37] Wanton conduct is conduct which is in "conscious and intentional disregard of and indifference to the rights and safety of others." Hinson v. Dawson, 244 N.C. 23, 28, 92 S.E. 2d 393, 397 (1956). However, in an action for injuries resulting from operation of an automobile the evidence showed a failure to keep a proper lookout and a failure to maintain control of the automobile. It was held that there was a question for the jury whether such conduct constituted wanton conduct. Harper v. Harper, 225 N.C. 260, 34 S.E.2d 185 (1945) (construing South Carolina "guest statute").

[38] Once a physician has undertaken to render services, he must continue such services, unless there is a limitation by contract, until the treatment is no longer necessary, or until the relationship is dissolved by the parties, or until reasonable notice has been given so that the patient may have an opportunity to engage the services of another. Groce v. Myers, 224 N.C. 165, 29 S.E.2d 553 (1944). The statute protects acts or omissions *relating to such services rendered.* It is possible, at least, that the act of leaving an injured person after having undertaken to aid him will not be found sufficiently related to the services to be protected, or that it will be found to be wanton conduct that is not protected by the statute.

[39] For a comparative treatment of the various statutes see 13 DE PAUL L. REV. 297, 301 (1964).

[40] It seems highly unlikely that such persons would be aware of the particular provisions of each statute, if they knew a statute existed.

[41] On its face the statute applies to any person who renders aid under the designated circumstances. By literal interpretation it seems that one who has been responsible for an original injury would be relieved of liability for negligence in rendering aid to the injured person. Perhaps the court will avoid this undesirable result by interpreting the statute as relieving the tort-feasor of liability for negligence in his capacity as rescuer but not relieving him of his liability for aggravation as original tort-feasor. Normal-

It seems that a possible result of the statute is that emergency aid will not be encouraged in fact, yet a person injured as a result of conduct that is a substantial departure from the accepted conduct in like situations, but less than wanton conduct, would be denied relief on the questionable belief that such denial has been necessary to achieve a broader public service.

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ly such tort-feasor is liable for the natural and probable consequences of his tort, including aggravation. Bell v. Hankins, 249 N.C. 199, 105 S.E.2d 642 (1958).