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Henry W. Cummings

Louis J. BovAsso

Daniel M. Rosen

Matthew J. Mullaney

Michael F. Curtin

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Case Notes

Conflicts of Law—Res Adjudicata—Full Faith and Credit—Title to Real Property—*Durfee v. Duke*, 32 U.S.L. Week 4014 (U.S. Dec. 2, 1963).

IN 1956 THE PETITIONERS, RESIDENTS OF NEBRASKA, brought an action in a Nebraska state court to quiet title to certain land formed by a change in the course of the Missouri River. The main channel of the Missouri River forms the boundary between Nebraska and Missouri. Whether the land was in Nebraska or Missouri depended upon a question of fact, whether the shift in the river's course had been caused by avulsion or by accretion. There was no dispute as to the controlling effect of this factual issue, the law being well settled that if the middle of a stream is the boundary between states or private land owners, the boundary follows any changes in the stream due to gradual accretion, but if the change in the stream is of a sudden and rapid character, such as when a river forms a new course by cutting through a bend, the boundary does not follow the changes, but remains in the middle of the old channel. *Nebraska v. Iowa*, 143 U.S. 359 (1892).

The trial court and the Supreme Court of Nebraska resolved the factual issue in favor of the petitioners. The respondent made a general appearance in the Nebraska courts and fully litigated all the issues, including the question of whether or not the Nebraska courts had jurisdiction over the subject matter of the controversy, *Durfee v. Keiffer*, 168 Neb. 272, 95 N.W. 2d 618 (1959). The respondent did not petition for certiorari to the U.S. Supreme Court. Instead, respondent brought an action in a Missouri state court to quiet title to the same land.

In the Missouri suit respondent alleged that the land was in Missouri. Petitioner removed the suit to the Federal District Court on the ground of diversity of citizenship. The District Court held that while the land in question was in Missouri the judgment of the Nebraska Supreme Court was binding on the court because of the doctrine of res judicata. The U.S. Court of Appeals for the Eighth Circuit reversed on the theory that the principles of res judicata relied on by the lower court were not applicable to real property and that the Missouri court was free to determine whether

the Nebraska courts had jurisdiction of the subject matter, even though the issue of jurisdiction of the subject matter had been litigated in the Nebraska proceedings.

The U.S. Supreme Court reversed the U.S. Court of Appeals and affirmed the judgment of the District Court.

Mr. Justice Stewart, writing for the majority, held that the full faith and credit clause of the U.S. Constitution requires that judicial proceedings shall have the same effect in every other state as they would in the state where the proceeding took place. Thus a judgment must be given the same *res judicata* effect in all other states as it would have in the state which rendered it. *Durfee v. Duke*, 32 U. S. L. WEEK 4014 (U.S. Dec. 2, 1963).

The Court relied on *Davis v. Davis*, 305 U.S. 32 (1938); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); and *Sherrer v. Sherrer* 334 U.S. 343 (1948), as holding that where the issue of jurisdiction of the subject matter was fully litigated in the original forum, the issue could not be relitigated in a subsequent proceeding in a different forum. There was no issue in the present case regarding personal jurisdiction since respondent made a general appearance in the Nebraska litigation. See *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522 (1931).

The *Davis* and *Sherrer* cases held that jurisdiction of the subject matter based on the domicile of a party to a divorce proceeding must be given full faith and credit in a subsequent proceeding in a sister state where both parties were before the court in the first proceeding and the jurisdictional question was litigated in the first proceeding. In *Treinies* both parties made general appearances in an Idaho state court, the jurisdictional question of a prior Washington state court proceeding was litigated and ownership of personal property was established. It was held that the jurisdictional issue of the Washington proceeding could not be relitigated in a subsequent interpleader suit in the U.S. District Court in Idaho. The *Stoll* case held that full effect must be given to a judgment of the Illinois Federal District Court in the Illinois state courts if jurisdiction was fully litigated in the District Court. Thus the full faith and credit clause was not involved in the *Stoll* case.

In *Durfee* the Court stated that although exceptions to the general rule regarding finality of jurisdictional determinations may be found in cases involving federal preemption or sovereign immunity, *Kalb v. Feuerstein*, 308 U.S. 433 (1940); *United States v. United States Fidelity Co.*, 309 U.S. 506 (1940), it could see no reason why there should also be an exception when real property is involved.

The Court emphasized that the Nebraska decision, while binding the parties to the litigation and their privies, did not bind either Nebraska or Missouri. The states could either form a compact regarding the state in which such land is located under U. S. CONST., Art. I, § 10, or could bring suit in the Supreme Court under the U. S. CONST. Art. III, § 2, 28 U.S.C. § 1251 (a) (1948).

The Court's stated reasons for the *Durfee* decision are that public policy dictates that there should be an end to litigation and that there is no reason to expect that a second decision would be more satisfactory than the first. *Durfee v. Duke, supra* at 4017.

Justice Black filed the only other opinion, a brief one, in which he stated that he concurred in the result with the understanding that it was not being decided whether

or not the parties would continue to be bound by the Nebraska judgment if there was a subsequent compact between the states or an original suit in the Supreme Court.

The lower court, U.S. Court of Appeals for the Eighth Circuit, recognized the strong interest a State has in regard to the land situated within its borders, and balanced this interest against the conflicting policy favoring termination of litigation, *Duke v. Durfee*, 308 F. 2d 209 (1962) :

But a state's sovereignty, the validity of its own land titles and its power to tax, can be affected, although indirectly, by proceedings of the very kind which have taken place here. . . .

After a careful consideration we conclude that, for a land case such as this, a policy of careful recognition of jurisdictional limitations and of permitting inquiry into the basis of subject-matter jurisdiction outweighs any conflicting res judicata principle. *Id.* at 220.

A state has a strong interest in the real property located within its borders. A state's interest in its real property is stronger than its interest in the personal property located within its borders or its interest in the status of individual citizens. The personal property can be moved into and out of the state at will and a person domiciled within the state can change his domicile at will. But the land cannot be so moved at will. In a certain sense the land is the state. The geographical borders of the state are defined in terms of land. It is not seen that there is any legal entity more intimately connected with the state than its land.

Thus a case involving real property can readily be distinguished from the *Treinius*, and *Sherrer* and *Davis* cases relied on by the Supreme Court, which involved, respectively, title to personal property and domicile as a basis of jurisdiction for purposes of divorce.

Therefore, the Court, in deciding the *Durfee* case, has overlooked the strong interest a state has in the land located within its borders and that a realty case is clearly distinguishable from the cases relied on by the Court as a basis for its holding.

The result in the *Durfee* case is not undesirable because there was a real factual issue regarding whether the land was in Nebraska or Missouri. In such border dispute situations it cannot be said that one state has an overriding interest in the realty. Rather, both states have substantially equal interests in the realty which balance one another. In such cases the policy favoring termination of litigation should be controlling.

The *Durfee* case presents an unusual fact situation. In most conflicts cases involving realty, the land will clearly lie in one state or the other. Consider, for example, a case involving title to California realty litigated by both parties, including jurisdiction of the subject matter, first in a Kentucky state court, and then in a California court where the full faith and credit of the Kentucky judgment is in issue. *Redwood Investment Co. v. Exly*, 64 Cal. App. 455, 221 P. 973 (Dist. Ct. App., 1923), appeal denied by Cal. Sup. Ct. (1924). Will the *Durfee* decision be controlling in such a situation?

In a case where the land is clearly located within the second forum state, the second state could constitutionally refuse to follow a sister state's determination of owner-

ship in the land where both parties made general appearances in sister state litigation. The Supreme Court has specifically excepted a strong, adverse public policy in its application of the full faith and credit clause. See: *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493 (1939); *Milwaukee County v. M. E. White Co.*, 296 U.S. 268 (1935); *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Bradford Electric Light Co. v. Clapper*, 286 U.S. 145 (1932); and *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930). See also RESTATEMENT, CONFLICTS OF LAWS § 451 (2), (Supp. 1948); RESTATEMENT, JUDGMENTS § 10 (1942).

In order to avoid conflict with the U.S. CONST. Amend. XIV, § 1, which prohibits deprivation of property without due process of law, the forum state must have a substantial connection with the controversy. See the *Dick* case, *supra*. It is apparent that realty located within the second forum state would provide the requisite contacts with the subject matter according to the *Dick* case test, particularly if either the buyer or the seller were a second forum state resident.

The public policy of the forum can be found in the statute law of the state or from its judicial decisions. 11 AM. JUR. *Conflicts of Laws*, § 6 (1937). Thus a public policy against allowing full faith and credit to extra-territorial determinations of ownership of land where both parties appeared generally in the non-situs state litigation could be found from prior decisions in the land state where such judgments were not given full faith and credit, e.g. *Weesner v. Weesner*, 168 Neb. 346, 95 N.W. 2d 682 (1959); *Clouse v. Clouse*, 185 Tennessee 666, 207 S.W. 2d 576 (1948); *Redwood Investment Co. v. Exlee*, *supra*; *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 23 Utah 627, 66 P. 188 (1901); and also from the Supreme Court cases which hold that a sister state is without jurisdictional power to convey land located in another state. See *Selover, Bates & Co. v. Walsh*, 226 U.S. 112 (1912); *Olmsted v. Olmsted*, 216 U.S. 386 (1910); *Fall v. Eastin*, 215 U.S. 1 (1909); *Clarke v Clarke*, 178 U.S. 186 (1900); *Carpenter v. Strange*, 141 U.S. 87 (1891).

Thus, where the land is clearly within the second forum state, the second forum state may constitutionally balance its interests against those of the non-land state, notwithstanding *Durfee v. Duke*. Full faith and credit should be given when the interests of the non-situs state are stronger, as in a contract for the sale of land where both the buyer and seller are residents of the non-situs forum state. When the interests of the two states are substantially equal, full faith and credit should also be given, because then, the policy that there should be an end to litigation is controlling. Full faith and credit should be denied, however, when the interests of the situs state are clearly stronger, as in contracts for sale of land where either the buyer or seller is a land-state resident.

HENRY W. CUMMINGS

Constitutional Law—Justiciable Controversy—Federal Rules of Civil Procedure—*Application of the President and Director of Georgetown College, Inc.*, —F.2d— (D.C. Cir. 1964) .

ON SEPTEMBER 17, 1963, attorneys for Georgetown Hospital in Washington, D.C. applied for an emergency writ from Judge J. Skelly Wright, U.S. Court of Appeals, D.C., seeking to obtain permission to administer blood transfusions to save the life of an emergency patient, Mrs. Jesse E. Jones, also a D.C. resident. Both the patient and her husband, because of their religious beliefs, refused to consent to the transfusion. The decree being sought by the hospital was one in the nature of an injunction and declaratory judgment, Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1952), as amended, 28 U.S.C. § 2201 (Supp. IV, 1957); FED. R. CIV. P. 57, to determine the legal rights and liabilities between the hospital and its agents on one hand, and Mrs. Jones and her husband on the other. Judge Wright granted the writ, holding, *inter alia*, that a case or controversy was before the court and that the issue was "justiciable", that is, of the type that courts may be called upon to decide. Judge Wright further noted that no attempt was being made to determine the merits of the controversy, that to refuse necessary medical treatment to save one's life might be suicide under the D.C. CODE ANN. [Compare 22 D.C. CODE ANN. § 2401 (1961) with 18 U.S.C. § 1111 (a) (1948)], that Mrs. Jones wanted to live, and that if Mrs. Jones died in the hospital, even though she had signed a waiver relieving the hospital of civil liability, the hospital could be prosecuted criminally for manslaughter. *Jones v. United States*, 308 F. 2d 307 (D.C. Cir. 1962). *Application of the President and Director of Georgetown College, Inc.*—F. 2d— (D.C. Cir. 1964) .

On a petition for rehearing en banc the court held that, since the matter had become moot because Mrs. Jones had recovered and left the hospital, the rehearing should be denied. Judge Danaher, concurring, said that he would have dismissed for lack of a case or controversy. Judge Wilbur K. Miller strongly dissented, saying that the action had not "properly come before this court." Judge Burger concurred in this dissent, agreeing also with Judge Danaher that the petition for rehearing en banc should be dismissed for want of a justiciable controversy since the hospital did not have a legally enforceable right. Judge Burger was of the opinion that no actionable or legally protected right would grow out of a hospital's obligations towards its patients. He discussed Justice Brandeis' "right to be let alone" philosophy and quoted from Cardozo's *The Nature of the Judicial Process* to substantiate his view that no justiciable controversy was present. *Application of the President and Director of Georgetown College, Inc.*, —F. 2d— (D.C. Cir. 1964).

A long history of decisions have set out the proposition that a "controversy", under art. III, § 2 of the U.S. CONST., is one that is appropriate for judicial determination. *Osborn v. Bank of the United States*, 9 Wheat. 738, 819 (1824). The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *Massachusetts v. Mellon*, 262 U.S. 447, 487, 488 (1923). One of the questions raised in this case then, is whether the hospital had any legal interests to protect. The

test is whether enough facts have been presented to show that "there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Keener Oil & Gas Co. v. Consolidated Gas Utilities Corp.*, 190 F. 2d 985 (10th Cir. 1951). It is uncontested that, if the hospital had gone ahead and given blood transfusions to Mrs. Jones without her consent, she would have interfered with their actions. A justiciable controversy is presented when a plaintiff, wishing to embark on a course of conduct, seeks to prevent another from interfering with it. *Technical Tape Corp. v. Minnesota Mining & Mfg. Co.*, 200 F. 2d 876 (2d Cir. 1952); *General Electric Co. v. Refrigeration Patents Corp.*, 65 F. Supp. 75 (W.D. N.Y. 1956). Also, *Jones v. United States*, *supra*, would appear to indicate that where one assumes the care of another under a legal duty, the failure to act in accordance with this legal duty may make one criminally liable. Thus, it would seem to be obvious that a "justiciable controversy" was present, and Judge Wright acted according to the well established law of declaratory judgments. See also *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1937).

However, while there may be considerable authority on the other hand supporting its position that there was no "case or controversy" (See, e.g., *United Public Workers v. Mitchell*, 330 U.S. 75 (1947), involving violations of the Hatch Act by government employees), the District Court of Appeals should have considered the fact that it can act as a state court. The District Court of Appeals is a hybrid court, having all the jurisdiction of a state court and all the jurisdiction of a federal court under both article I and article III of the Constitution. *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923), held that, as to the District of Columbia, Congress possesses power to clothe the District Court of Appeals with dual authority, that is, not only jurisdiction and power such as the federal courts have in the several states, but with such authority as a state may confer on her courts.

In their article, *Washingtonians and Roumanians*, 27 NEB. L. REV. 375 (1948), Professors Keeffe and Rathvon discuss fully the interpretation of art. III, § 2 of the Constitution as applied to the District of Columbia. They contend that *O'Donoghue v. United States*, 289 U.S. 516 (1933), made it clear that constitutional courts are capable of accepting jurisdiction beyond that defined by article III of the Constitution. The citizens of D.C. should have the same right to an impartial tribunal as the citizens of the several states enjoy.

Their contentions would appear to have found firm support in the Supreme Court's decision in *National Mutual Insurance Company v. Tidewater*, 337 U.S. 582 (1949). This case involved the question of whether a 1948 amendment of the U.S. Code put the District of Columbia on equal standing with the states. Article I § 8 of the Constitution states that "The Congress shall have Power . . . to exercise exclusive Legislation in all Cases whatsoever, over such District. . .". To Congress, then, goes the exclusive responsibility for the welfare of the District including the power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only *controversies among themselves*, but also claims against citizens of the several states. Thus, even though the District of Columbia courts are article III courts, that is, courts with authority stemming from article III of the Constitution, the same courts can also exercise judicial power conferred by Congress pursuant to article I, § 8. "Where Congress, in the exercise of its powers under article I, finds it necessary to

provide those on whom its power is exerted with access to some kind of court or tribunal for determination of controversies that are within the traditional concepts of the justiciable, it may open the regular federal courts to them . . ." *Id.* at 600. In conclusion, it can be seen that the District Court of Appeals is taking an unprogressive view of the rights of citizens of the District to have their difficulties among themselves settled in court without first qualifying under article III of the Constitution. No progress in the procedural areas concerning the jurisdiction of the District Court of Appeals could be made as long as the court fails to consider the fact that they can also have concurrent jurisdiction under article I of the Constitution. It is regrettable that the majority of the judges of the District Court of Appeals do not feel that citizens of the District should be entitled to a court with the same jurisdiction as is available to the citizens of the several states in their courts. Chief Justice Marshall, in *Hepburn v. Ellzey*, 2 Cranch 445, 453 (1805), implied that Congress could open federal courts to the citizens of the District of Columbia when he said: "It is true that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them." Marshall went on to add that this was a subject for legislative concern, thus implying that Congress could either revise the diversity clause to interpret "state" as applying to the District of Columbia, give a broader interpretation to article III of the Constitution or some other Constitutional provision so as to provide a forum for all "controversies" of the citizens of the District. It would appear that Congress has provided such a forum in the execution of its article I power. Therefore, setting aside for the purpose of this discussion the other constitutional questions involved, Judge Wright's action in accepting jurisdiction in this case can be supported on two theories: first, that there was evidence of a "justiciable controversy" as required under article III, § 2 of the Constitution of the United States; and, second, that the question of a justiciable controversy should be moot since under the constitutional grant of article I, § 8, two citizens of D.C. should be able to have *all* their cases adjudicated in federal court as citizens of the District, without having to qualify under article III of the Constitution. Thus, the District Court of Appeals should have considered this case under its article I, § 8 power without the necessity of the petitioner having first to show that a "justiciable controversy" existed under article III of the Constitution.

LOUIS J. BOVASSO

Taxation—Capital Gains—Transfer of a Patent Right—Termination Clause
—*Wernentin v. United States*, 218 F. Supp. 465 (S.D. Iowa 1963).

WERNENTIN AND JESTER, a partnership, received the Dairy Queen patent and trade-name rights for the state of New Jersey along with the right to subdivide the state among subcontractors. In 1949 the partners conveyed the right to develop all of New Jersey to a subcontractor. The agreement contained obligations and covenants relating to the maintenance of certain quality standards and periodic payment. A further clause provided for termination of the agreement upon failure of the subcontractor to establish three stores within five months. In 1951 a subsequent agreement was entered into by the same parties modifying the termination clause to provide for reversion of the right granted should the buyer default in performance of any of the terms of the agreement, including a violation of the provisions relating to quality standards. The partners paid a tax on the proceeds received from the arrangement at ordinary income rates for a period of years, whereupon they recalculated their tax based on capital gains treatment and filed suit for a refund of the difference. The court held capital gain treatment for the proceeds of the 1949 agreement but ordinary income as to the proceeds of the 1951 agreement. The subjective quality of the retained termination right made the standard for termination in the 1951 agreement too indefinite and inconsistent with the concept of a sale. Specific objection was made to subjective restrictions allowing termination if the grantor should decide the grantee in not "making every effort" to "fully develop" his area, using "high grade equipment" supplied by "reputable" concerns. The court considered the measure of these terms to be based upon a subjective whim of the grantor, as distinguished from a power to terminate upon certain contractually described and enumerated conditions. *Wernentin v. United States*, 218 F. Supp. 465 (S.D. Iowa 1963). The problem thus presented is whether a termination clause based upon a subjective determination of quality standards by the grantor is inconsistent with the tax concept of a sale.

Section 117 (q) of the 1939 Int. Rev. Code (predecessor of Section 1235 of the 1954 Int. Rev. Code) provided that a transfer of property consisting of "all substantial rights" to a patent shall be treated as the sale of a capital asset held for the required long term period. The determination to be made under the statute is whether the grant is sufficient to establish a transfer of "all substantial rights" of the grantor. The patent right has been defined as the right to exclude others from making, using, and selling the patented invention. *Waterman v. MacKenzie*, 138 U.S. 252 (1891). The exclusive grant determines the propriety of capital gain treatment upon income produced by the transfer of the right. *Commissioner v. Hopkinson*, 126 F. 2d 406 (2d Cir. 1942). Any substantial retention of the exclusive right by the grantor renders the transaction a mere license, *Edward C. Myers*, 6 T.C. 258 (1946), whether the agreement is labelled license or sale, *Watson v. United States*, 222 F. 2d 689 (10th Cir. 1955), and the resultant tax treatment that of ordinary income, *Watkins v. United States*, 252 F. 2d 722 (2d Cir. 1958).

Section 1222 of the Internal Revenue Code of 1954 requires a "sale or exchange" for capital gains treatment, but to call a transaction either a sale or not a sale denies

the multiple faceted character of ownership. To what extent the retention of certain facets of ownership will make the transaction a sale or not a sale must practically speaking, be judged on the actual change produced by the transaction in the economic relationship between the parties. Lanning, *Tax Erosion and the Bootstrap Sale of a Business—I*, 108 U. PA. L. REV. 623, 648 (1960). The conditions imposed upon the determination of whether a sale of a patent right has been made are no less realistic. "The entire transaction, regardless of formalities, should be examined in its factual context to determine whether or not substantially all rights of the owner in the patent property have been released to the transferee, rather than recognizing less relevant verbal touchstones." S. REP. NO. 1622, 83rd Cong., 2d Sess 439-40 (1954).

Termination based upon default of a contractual restriction provision operates as a defeasance predicated upon a condition subsequent to the transaction and has no effect on an otherwise valid sale. *Allen v. Werner*, 190 F. 2d 840 (5th Cir. 1951); *Laurence v. United States*, 242 F. 2d 542 (5th Cir. 1957); *First National Bank of Princeton v. United States*, 136 F. Supp. 818 (D.N.J. 1955). But no substantially complete transfer has taken place where the transferor has retained the right to terminate at will, *Young v. Commissioner*, 269 F. 2d 89 (2d Cir. 1959), or upon expiration of a specified time period, *Broderick v. Neale*, 201 F. 2d 621 (10th Cir. 1953), as these conditions are entirely inconsistent with the concept of a sale. The Dairy Queen operation has given rise to a series of cases involving tax aspects of franchise agreements where the franchise privilege included patent and tradename rights as aspects of the total grant. The sale is the substantial transfer of the proprietary interest in the franchise, a capital asset, *Vermont Transit Company v. Commissioner*, 218 F. 2d 468 (2d Cir. 1955), cert. denied, 349 U.S. 945 (1955), and the restrictions placed thereon by the grantor are adjudged as in strict patent situations to determine whether a sufficient transfer has been made. *Dairy Queen of Oklahoma v. Commissioner*, 250 F. 2d 503 (10th Cir. 1957). The Dairy Queen restrictions, as in the principal case, provided generally for maintenance of quality standards and termination of the agreement for violation of a restriction. Such restrictions, where reasonable, were held not to constitute such reservation of ownership by the grantor as to convert capital gain income to ordinary income, *Dairy Queen of Oklahoma v. Commissioner*, supra, and are considered necessary to protect the machine, quality, and name of a product distributed on a state and nationwide basis. *Gowdey's Estate v. Commissioner*, 307 F. 2d 816 (4th Cir. 1962). That the subjective standard of the grantor is properly the measure of a restrictive quality standard and is not inconsistent with the sale of the franchise is implicit in *Moberg v. Commissioner*, 305 F. 2d 800 (5th Cir. 1962). In a second *Moberg* case, however, on an identical set of facts, the 9th Circuit held that the reservation made possible continuing control sufficient to establish that less than all substantial rights had been transferred and treated the franchise payments as ordinary income. *Moberg v. Commissioner*, 310 F. 2d 782 (9th Cir. 1962). The restriction in the present case contained no reservation of continuing power or control, merely the standard commercial development and quality standards which must of necessity be measured by the subjective standard of the grantor, imposed by the grant in order to maintain and secure the grantor's interest. Any future acts by the grantor inconsistent with an agreement otherwise evidencing a sale will have the effect of rendering the agreement a licensing transaction, *Leubsdorf v. United States*, 143 Ct.Cl. 165, 164

F.Supp. 234 (1958), and the tax treatment becomes that of ordinary income.

Ambiguous licensing restrictions will be given "practical interpretation" by a court in determining whether there has been justifiable termination by the grantor. *Potter v. Madison Willow Craft Co.*, 73 F.2d 406 (6th Cir. 1953). Sale treatment has been allowed where a termination clause provided for the grantee to use its "best efforts in marketing the invention." *Kronner v. United States*, 126 Ct.Cl. 156, 110 F.Supp. 730 (1953).

Quality standard provisions such as those questioned by the court in the present case are necessary to a consumer industry, and their inclusion in a grant should not convert a reasonable termination clause into one based on the grantor's whim. Wherever subjectivity is the test of a contractual termination clause, the courts import to it the condition of its exercise only upon reasonable grounds. The grantor, therefore, is not at liberty to exercise his termination right at whim, but only where conditions will justify it. The court, in the present case, has misunderstood the essential nature of quality standard termination provisions in patent and tradename rights agreements.

DANIEL M. ROSEN

Constitutional Law—Congressional Reapportionment—Standards—Remedies—Gerrymandering—*Wesberry v. Sanders*, 32 U.S. L. WEEK 4142 (U.S. Feb. 17, 1964).

A 1931 GEORGIA STATUTE CREATED TEN CONGRESSIONAL DISTRICTS WITHIN THE STATE, the citizens within each district to elect one member of the House of Representatives. GA. CODE § 34-2301. Georgia's Fifth District, which includes Atlanta, has over three times the population of the Ninth and more than twice the average population of all the districts. Citizens and qualified voters of the Fifth District, claiming a diminution of their vote in contravention of the Federal Constitution, asked that the Georgia statute be declared invalid and that the defendants, the Governor and the Secretary

of State of Georgia, be enjoined from conducting elections under it. A three-judge U.S. district court found the congressional districts "grossly out of balance," but citing *Colegrove v. Green*, 328 U.S. 549 (1946), the court adjudged the issue "political" and not justiciable. *Wesberry v. Vandiver*, 206 F. Supp. 276 (N.D. Ga. 1962). On appeal, *held*, reversed and remanded for appropriate relief. Petitioners have stated a justiciable claim, and the Georgia legislation is unconstitutional. *Wesberry v. Sanders*, 32 U.S.L. Week 4142 (U.S. Feb. 17, 1964).

To establish the justiciability of congressional apportionment, Mr. Justice Black, writing for the majority, relied solely on *Baker v. Carr*, 369 U.S. 186 (1962), which held justiciable under the Fourteenth Amendment a challenge to the apportionment of the Tennessee legislature. Coupled with the *Baker* case, *Wesberry v. Sanders* removes any vestige of Mr. Justice Frankfurter's opinion in *Colegrove v. Green* that apportionment was a non-justiciable "political" question. For the first time, the Court discussed the merits of an apportionment case. In the mandate of Article I, Section 2 of the Constitution that members of the House be chosen "by the People of the several States," Justice Black found a test of strict numerical equality. Within a state "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Supra*, at 4143. Georgia's deviation from this test was therefore unconstitutional. Mr. Justice Clark, concurring in the decision but dissenting from the Court's interpretation of Article I, Section 2, would have applied the same test he set out in his concurrence in the *Baker* case—as long as a rational classification exists between urban and rural areas, a state may apportion *without regard to population* in an attempt to obtain a political balance. *Supra*, at 251; see A. Sindler, *Baker v. Carr: How to "Sear the Conscience" of the Legislators*, 72 YALE L.J. 23 (1962).

In his dissent, Mr. Justice Harlan reiterated his own dissent and that of Justice Frankfurter in the *Baker* case that apportionment on any level was a non-justiciable political question. Then joined by Justice Stewart, Mr. Justice Harlan further stated that the Constitution gave no mandate that Congressional districts within each state must be equal in population, and that Congress had knowingly abandoned the "one man, one vote" test with the approval of the Court. *Wood v. Broom*, 287 U.S. (1932), 81 U. PA. L. REV. 343 (1933); *but see* C. Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J., 7, 18-21 (1962).

Wesberry v. Sanders and the companion cases handed down by the Court in later weeks represent the first attempts by the Court to shape a constitutional standard for a political question and to construct and time the appropriate relief under the historic *Baker* decision. Before the *Wesberry* case was announced, it was presumed that when the Court finally passed upon the merits of state apportionment, it would apply the test of "invidious discrimination" set out by Justices Clark and Douglas in their separate concurrences in the *Baker* case. Mr. Justice Douglas contended that "universal equality is not the test; there is room for weighting." *Supra*, at 244-45. The majority's strict test in *Wesberry v. Sanders* has altered this presumption. It is now possible that the Court will impress upon state apportionment the Congressional scheme—strict popular representation in one house and representation of the political entities of a state in the other. The cases of *Toombs v. Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), *Lisco v. Love*, 219 F. Supp. 922 (D. Colo. 1963) and *Germano v. Kerner*, 220 F. Supp. 230 (N.D. Ill. 1963) have anticipated the "one person, one vote"

test in state apportionment. In all three cases the apportionment of the Georgia, Colorado and Illinois legislatures respectively was challenged in the light of *Baker v. Carr*; all three cases announced the rule that at least one house of the state legislature must be apportioned solely by population. By way of contrasting the standards, if the numerical equality test is to be applicable to the states' present apportionment, then several recent decisions made after the *Baker* case would have to be struck down: Florida- *Sobel v. Adams*, 214 F. Supp. 811 (S.D. Fla. 1963); Idaho- *Ceasar v. Williams*, 371 P. 2d 241 (Idaho 1962); New Jersey- *Jackman v. Bodine*, 78 N.J. Super 414, 188 A. 2d 642 (1963); Wyoming- *State v. Gage*, 377 P. 2d 299 (Wyo. 1963). These cases applied the more flexible standard suggested in *Baker v. Carr* and upheld the apportionments.

In the *Wesberry* case, Mr. Justice Black failed to set out what factors might render numerical equality not "practicable." Whether by the omission, a mechanical standard was intended, and whether his strict standard will be applied undiluted or will be weighted in application to state apportionment as Justices Clark and Douglas suggest, might be answered in *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368 (S.D.N.Y. 1962), *prob. juris. noted*, 83 Sup. Ct. 1691 (1963). In that case a three-judge district court refused to declare that the constitutional and statutory provisions of New York governing the apportionment of Senate and Assembly districts were unconstitutional. Under the challenged legislation the citizen population of the largest Assembly district—each district electing one Assemblyman—was 14.5 times greater than the smallest district; the maximum differential between Senate districts was 2.2. Yet the apportionment plan applies sufficient counterbalance so that 46% of the state's population has 43.3% of the total Assemblymen and 43.1% of the total number of Senators. Therefore, the political initiative remains substantially with the majority. This seems a valid consideration when constructing an apportionment standard, and the Court should not blindly apply a mechanical rule. The district court in the *W.M.C.A., Inc.* case recognized that the legislature's desire to follow county, ward or political lines that reflect geographical, historical and economic influences could justify a divergence from a strict numerical standard. It has been argued, however, that modern communications and transportation methods have melted any barriers that once made numerically unequal districts reasonable. See generally J. Israel, *On Charting a Course Through the Mathematical Quagmire*, 61 MICH. L. REV. 107 (1962) and R. Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 AM. U.L. REV. 51 (1963).

Another question suggested by *Wesberry v. Sanders* and the cases following is the type of relief to be granted and the timing of such relief in relation to the forthcoming elections. In *Wesberry* the question of relief was left to the district court. Since that time, the Georgia legislature has reapportioned so that the maximum deviation from the numerical norm is 40%. *Time*, Feb. 28, 1964. Further, the Supreme Court in *Martin v. Bush*, 224 F. Supp. 499 (S.D. Tex. 1963), *aff'd per curiam*, 32 U.S.L. Week 3304 (U.S. Mar 2, 1964), a successful stereotype attack upon the constitutionality of Texas statutes apportioning congressional districts, has ordered the district court to cast its relief in the light of the "imminence of the forthcoming elections." The offspring of *Baker v. Carr* have discussed possible relief under these circumstances. In *Sims v. Frank*, 208 F. Supp. 431 (M.D. Ala. 1962), *prob. juris. noted*, 83 Sup. Ct.

1692 (1964), the court expressed grave doubts about the constitutionality of Alabama's apportionment laws but accepted them as a stop-gap plan, hoping the rural strangle-hold would be broken by the coming elections. Similarly, in *Wisconsin v. Zimmerman*, 209 F. Supp. 183 (W.D. Wis. 1962) the court dismissed a complaint of malapportionment without prejudice because of impending elections but invited new suits if the newly elected legislature refused to reapportion. With the notable exception of *Moss v. Burkhart*, 220 F. Supp. 149 (W.D. Okla. 1963), where the court itself redistricted the state of Oklahoma, the courts have generally acted with restraint preferring to cajole the state legislatures into action rather than apportion the state themselves. Such conduct will probably continue under the *Wesberry* case. Judicial action taken since the *Baker* decision is summarized by R. Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 369 (1963).

The final question raised by the *Wesberry* case is of the deepest importance. Without an affirmative answer, the state legislatures will be able to neutralize the "one man, one vote" rule. Will the Court go far enough into the "political thicket" to reach gerrymandering, the sophisticated apportionment to benefit a political party? The concern of the present Court for equal voting rights was pointed up by Mr. Justice Black in the *Wesberry* case: "other rights, even the most basic, are illusory if the right to vote is undermined." *Supra*, at 4146. In a case decided the same day, the Court affirmed a district court decision holding there was insufficient evidence that the New York Assembly intentionally grouped the members of a racial minority in a single congressional district. *Wright v. Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1962), *affirmed*, 32 U.S.L. Week 4157 (U.S. Feb. 17, 1964). There the Court demonstrated a willingness to examine the state legislature's *standard* of apportionment as well as the numerical outcome of that apportionment. Three weeks later, however, the Court ducked an opportunity to discuss gerrymandering. It affirmed a district court decision that there was insufficient evidence to prove that a reapportionment scheme designed to discriminate against members of the Democratic Party had been rammed through the New York Assembly by the Republican majority. *Honeywood v. Rockefeller*, 214 F. Supp. 897 (E.D.N.Y. 1963), *aff'd per curiam*, 32 U.S.L. Week 3304 (U.S. Mar. 2, 1964). If proven, the use of a standard of party affiliation for apportionment legislation would seem as violative of the Federal Constitution as racial or urban-rural standards. All are designed to render less effective the votes of some citizens. A bill introduced by Chairman Celler of the House Judiciary Committee requires that congressional districts be "compact" and "contiguous." H.R. 2836, 88th Cong., 1st Sess. (1964). These provisions would effectively bar gerrymandering of congressional districts. The requirements of "compactness" and "contiguity" could also be read into Article I, Section 2 and the Equal Protection Clause. A proposed computer procedure to avoid partisan pressures and criticism upon redistricting is made by Weaver and Hess, *A Procedure for Non-Partisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963).

With the *Wright*, *Martin* and *Honeywood* cases, the Court has entered deeply into the politician's bailiwick. The democratic processes, be they state or federal, are now subject to scrutiny by the federal courts. The Court in the *Martin* case showed a balanced sense of timing in granting available remedies. In the *Wright* and *Honeywood* cases, the Court's appetite was whetted, but it showed a reluctance to enter into

the gerrymandering labyrinth. This series of cases introduces a period of delimiting the extent and speed of entry into the "political thicket" by the federal courts made possible by the *Baker* and *Wesberry* decisions.

MATTHEW J. MULLANEY, JR.

Criminal Law—Traffic Violations—The "Reasonably Prudent Man" Standard—*People v. Lewis*, 13 N.Y. 2d 180, 194 N.E. 2d 831, 245 N.Y.S. 2d 1 (1963).

IN TRYING To get his car started on an icy pavement, the defendant spun his car around three times and was charged with violating a New York statute which prohibits driving "at a speed greater than is reasonable and prudent" even though he did not exceed the posted speed limit. On appealing his conviction to the New York Court of Appeals the defendant contended that the 1960 law was too vague and indefinite to sustain a criminal prosecution. Held: New York Vehicle and Traffic Law Section 1180 (a) (1960), prohibiting operation of motor vehicles upon public highways "at a speed greater than is reasonable and proper under the conditions . . . then existing," is *not* void for vagueness. *People v. Lewis*, 13 N.Y. 2d. 180, 194 N.E. 2d. 831, 245 N.Y.S. 2d 1 (1963).

The 1960 speed law, which the court upheld in the instant case, specifically provides: "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." This provision incorporates the "basic speed rule" which requires the exercise of due care and caution as represented by the conduct of the reasonably prudent man under similar circumstances. Prosecution for violation of this section is subject to the rules of criminal law, *People v. Hildebrandt*, 308 N.Y. 397, 126 N.E. 2d 377, 129 N.Y.S. 2d 48 (1955), though classified as a traffic infraction.

The New York Legislature enacted Section 1180 (a) (1960) to overcome *People v. Firth*, 3 N.Y.2d 472, 146 N.E.2d 682, 168 N.Y.S.2d 949 (1957), a decision of the New York Court of Appeals declaring a predecessor statute unconstitutional on the ground of vagueness. That statute prohibited "driving at such a rate of speed as to endanger the life, limb or property of any person" or "at a rate of speed greater than will permit such person to bring the vehicle to a stop without injury to another or his property."

N.Y. Sess. Laws 1946, ch. 861, Section 56 (I). The court found the provision too vague to delineate criminal conduct, and containing no sufficient standard by which a driver's conduct could be tested. Judge Desmond, in writing the opinion of the court in *People v. Firth, supra*, stated that the statutory verbiage was practically meaningless because there is no such thing as motor vehicle speed incapable of endangering life, limb or property, and it is impossible to determine whether the driver is going too fast when he is unable to bring his car to a stop without injuring someone or something.

In the *Firth* case, the court rejected the interpretation advanced by the Attorney General of New York that the real meaning of the statute was: "A rate of speed is dangerous and constitutes a violation when it is unreasonable or imprudent under the surrounding conditions." *People v. Firth, supra*, 146 N.E. 2d at 684. However, the court reserved the question whether or not such interpretation would constitute an enforceable standard in a criminal prosecution. The instant case is a determination of the question reserved in *People v. Firth, supra*.

The *Lewis* case upholds the constitutionality of the "basic speed rule" embodied in New York Traffic and Vehicle Law Section 1180 (a) (1960). Identical provisions have been adopted in the District of Columbia and 18 other states. The provision has also been approved by the National Committee on Uniform Traffic Laws and Ordinances and incorporated in the UNIFORM VEHICLE CODE Section 11-801 (1962).

Rhode Island is one of the states which has adopted the "basic speed rule." In contrast to the *Lewis* Case and without reference to it, the Supreme Court of Rhode Island, twenty-seven days later, held an indictment charging violation of the "basic speed rule" to be "so lacking in definiteness that a person of ordinary intelligence could not know at what speed he could drive and be within the law." *State v. Campbell*, 196 A.2d 131, 132 (R.I. 1963). The indictment was dismissed, and the defendant discharged. However, if the complaint charging the defendant with exceeding a "reasonable and prudent speed" included a reference to the prima facie speed limits, the constitutional requirement that the accused be informed of the nature and cause of the accusation would be fulfilled. *State v. Brown*, 196 A.2d 133, 135 (R.I. 1963).

The highest courts of New York and Rhode Island reasoned to two different conclusions in determining the criminal liability of a defendant charged with driving at a "speed greater than reasonable and prudent under the conditions . . . then existing." R. I. GEN. LAWS § 31-14-1 (1957). As a standard of civil conduct the words are perfectly clear. The question is how far the courts should extend the standard of the reasonably prudent man into the field of criminal law.

The United States Supreme Court, in determining the constitutionality of certain federal legislation, considered the standard of definiteness necessary to satisfy the "due process of law" requirement of the Fifth Amendment. In *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963), the defendants were charged with violation of the Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13a (1958), making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. The lower court granted defendants' motion for dismissal on the ground that the statute was unconstitutionally vague and indefinite. The Supreme Court reversed, holding that the provision sufficiently defines the prohibited conduct and that it is not vague and indefinite as applied to sales made

below cost with such purpose. In *United States v. Petrillo*, 332 U.S. 1 (1947), the defendant was charged with violation of the Communications Act of 1934, 47 U.S.C. § 506 (1958), making it a crime to compel a licensed radio station to employ additional persons in excess of the number of employees needed by the licensee to perform actual services. The court held that the language of the statute conveyed a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.

Following the lead of the United States Supreme Court, the New York Court of Appeals was correct in its decision in the *Lewis* case in upholding a standard of ordinary negligence as a sufficient and adequate criminal standard with respect to excessive speed. The flexible language of the "basic speed rule" was designed to limit the operation of motor vehicles under various and unusual conditions. The rule was adopted in the interest of highway safety, to cover situations too numerous to be specifically defined by statute. Therefore, the language cannot be considered vague and indefinite when applied to the operation of motor vehicles with respect to speed.

MARY SHEILA BURKE

Labor Law—Union Discrimination—Intent to Encourage or Discourage Union Membership—*N.L.R.B. v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 317 F. 2d 746 (2nd Cir. 1963).

GEORGE MONTY, AN EMPLOYEE of Valletta Motor Trucking Co., was hired in December, 1959 to make "extra" runs from Albany to Boston for Valletta. Monty was used when the number of runs was greater than could be handled by the company's four regular drivers: In addition to Monty the company had two other extra drivers. All seven drivers were members of Local 294 and were covered by the collective bargaining agreement between Valletta and the respondent Union.

For the first nine months of his employment Monty enjoyed "priority" status in

being assigned to the extra runs. In the fall of 1960 his work was steadily decreased. After complaining to the company, he was assured of continuous work and orders to that effect were left with the Albany dispatcher. Monty also complained to his union steward (who doubled as the company's dispatcher at the Albany garage). The union steward presented Monty's complaint to a special committee of members and officers of Local 294 and was told that Monty's job was being kept open for any temporarily unemployed regular driver. Subsequent discussions concerning Monty's position came up between the company and officers of Local 294. The latter, insisting that Monty not be given work, told the company that he (Monty) was a "troublemaker" and "no good".

As a result, the Board found that the respondent union had violated Section 8 (b) (1) (A) and Section 8 (b) (2) of the National Labor Relations Act (29 U.S.C. 158 (b) (1) (A) and (b) (2)).

On a petition by the Board for enforcement, the Court of Appeals for the Second Circuit, overruling the Board, held that the evidence produced failed to establish any violations of Section 8 (b) (1) (A) and 8 (b) (2). *N.L.R.B. v. Local 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 317 F. 2d 746 (2d Cir. 1963).

Section 8 (b) (2) makes it an unfair labor practice for a union:

To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to *discriminate* against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender periodic dues . . . as a condition of acquiring or retaining membership 61 Stat. 141 (1947), 29 U.S.C. § 158 (b) (2) (emphasis added).

In the present case, a unanimous court (Judge Dimock concurring) found that, "merely because it [the union] causes or attempts to cause an employer . . . to discriminate" against an employee, it does not leave itself open to a violation of 8 (b) (2). *N.L.R.B. v. Local 294, supra* at 748. Directing its attention to the discrimination issue, the court declared that, in order to be violative of the Act, the discriminatory action must be based on or related to "union membership or activity". *Id.* at 749.

The Board, relying on the 1954 decision of *Radio Officers Union of Commercial Telegraphers Union, AFL v. National Labor Relations Board*, 347 U.S. 17 (1954), had urged the court to find that *any discrimination* against Monty at the behest of the union was within the purview of 8 (b) (2). Local 294 sought a restrictive reading of the *Radio Officers* case and asked that the court follow *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. National Labor Relations Board*, 365 U.S. 67 (1961).

In the *Radio Officers* case, *supra*, the Supreme Court acknowledged the necessary correlation between the employer's discrimination and the intent to encourage or discourage union membership or activity but dissected the statute to allow the NLRB to draw an inference from the fact of discrimination to the fact of encouragement or discouragement of union activity. Taking it one step further, the Court drew the inference of intent and declared that, from the inferred fact of encouragement or discouragement, the Board could reasonably infer the intent to accomplish this discouragement or encouragement:

[R]ecognition that specific proof of intent is unnecessary where the employer *inherently* encourages or discourages union membership is but an application of the common law rule that a man is held to intend the natural consequences of his conduct. *Radio Officers Union v. N.L.R.B.*, *supra* at 45.

The complexities of this decision's rationale had, it appeared, established conclusive links from *discrimination* to union encouragement and from union encouragement to employer or union intent.

With the Board's policy towards 8 (a) (3) and 8 (b) (2) violations etched in the words of *Radio Officers, supra*, the necessary inference from discrimination to encouragement of union activity or membership played a prominent and, in fact, decisive part in the decisions involving discriminatory aspects of the union "hiring hall" arrangement. Without the authority of the *Radio Officers* opinion, the Board would have had considerable trouble finding in 1957 an "inference of encouragement" from the fact that the hiring hall was run by the union. *Mountain Pacific Chapter of Associated General Contractors of America*, 119 NLRB 883 (1957). However, the establishment of the Board's policy, as interpreted in *Radio Officers, supra*, found mixed support in the Circuits after its decision in *Mountain Pacific, supra*, in 1957. As a matter of fact, the Ninth Circuit, on being petitioned to enforce the Board's decision in this renowned case, reversed the Board's ruling and found untenable its position that a union hall, *per se*, was the sort of discrimination to which 8 (a) (3) and 8 (b) (2) of the Act were addressed. The Ninth Circuit demanded "*evidence*" that the union unlawfully discriminated in supplying the company with personnel. *N.L.R.B. v. Mountain Pacific Chapter of Associated General Contractors*, 270 F.2d 425 (9th Cir. 1959). For a concurring view of the Board policy, see also *N.L.R.B. v. E and B Brewing Company*, 276 F.2d 594 (6th Cir. 1960).

Both the District of Columbia Circuit and the First Circuit found merit to the Board's argument and reaffirmed the latter's interpretation of *Radio Officers*. See *N.L.R.B. v. Local 176, United Brotherhood of Carpenters*, 276 F.2d 583 (1st Cir. 1960); *Local 357, International Brotherhood of Teamsters v. N.L.R.B.*, 275 F.2d 646 (D.C.Cir. 1960).

Local 357, supra, was reversed in the Supreme Court which, while not expressly overruling *Radio Officers, supra*, rejected the Board's argument that:

"[D]iscrimination . . . requires only a showing of disparate treatment of employees in respect to securing or maintaining employment" *Local 357, etc. v. N.L.R.B.*, 365 U.S. 667 (1961) (Board Brief, p. 20).

The majority found that something more than "simply encouragement or discouragement of union members" was required in order to have discrimination in violation of 8 (a) (3) and 8 (b) (2). Accordingly, in the instant case, the court cited a number of situations where discrimination in employment was not enough for a violation of 8 (a) (3) or 8 (b) (2) since it was not "based upon union membership or other union connected activities". The fact that the union sought or the employer, of his own volition, carried out demotion or promotion of a union official would not "constitute an unfair labor practice if the union's action [or the employer's] is based upon the employee's merit or demerit and was unconnected with union membership or activity", *N.L.R.B. v. Local 294, supra* at 749.

In discussing *Local 357, supra*, the court suggests that the setting up of a union hall of necessity involves discrimination:

... since employees are referred in accordance with some type of listed priorities but ... this discrimination is not 'the kind of discrimination to which the Act is addressed' and is not violative of the Act merely because the union's power encourages union membership. *N.L.R.B. v. Local 294, supra* at 750.

The fact that one man is referred out of a hiring hall before another because he has had less work than another is a discriminatory act analogous to the act of refusing to refer a man because he was a "troublemaker" or "no good". Neither, the court rationalized, is based on union membership or activity and, therefore, is not violative of the Act. *N.L.R.B. v. Local 294, supra* at 751.

The decision of the Supreme Court in *Local 357, supra*, supports the view taken by the Second Circuit in the instant case. Justice Douglas, writing for the Court, said: "It is the 'true purpose' or 'real motive' ... that constitutes the test", *Local 357, supra* at 675. Accordingly, no inference of unlawful motivation was sustained as the basis upon which Local 294 could have been charged with an 8 (b) (2) violation. With this in mind, the court advised the Board "not to pass upon the wisdom or desirability of a union's action so long as those actions are not forbidden by the Act", *Local 294, supra* at 751, and, thus, it appears, implicitly removed from the scene of 8 (a) (3) and 8 (b) (2) violations the inferential syllogism of *Radio Officers*. Judge Hayes, in writing for the majority, quite realistically recognized that almost any exercise of union power may be said, in a certain sense, to have the "effect of encouraging union membership". But this was termed "irrelevant" for statutory purposes "in the absence of discrimination based upon union membership or activity" *Local 294, supra* at 750, n. 6.

The Second Circuit in *Local 294, supra*, has come from the "disparate treatment" syllogism of *Radio Officers* to the approach that, even though union induced discrimination, like any other union induced action, may have the incidental effect of encouraging unionism, this does not mean that such discrimination constitutes a violation of the Act unless that discrimination is "based upon" or has as its "true purpose" or "real motive" the encouragement of union participation. This, it seems, is closest to the legislative intent of the Act and is the most reasonable approach to 8 (b) (2) and 8 (a) (3) violations of the Act.

MICHAEL F. CURTIN