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APPEAL AND ERROR — WAIVER — DEFENDANT'S ACCEPTANCE OF NEW TRIAL ON DAMAGE ISSUE CONSTITUTED WAIVER OF RIGHT TO APPEAL LIABILITY ISSUE. — In an action for damages following an automobile accident, the jury returned a verdict for the plaintiff. Defendant moved for judgment notwithstanding the verdict, but the motion was denied. The court, however, considered the award of damages to be excessive, and gave the defendant the option of consenting to judgment for an amount suggested by the court or of relitigating the issue of damages. The defendant elected to have the new trial. Upon final judgment being entered, the defendant appealed the issue of liability. *Held*, defendant by accepting the new trial for damages had accepted the finding of liability and had waived his right to appeal the issue. *Steinfeldt v. Pierce*, 2 Wis. 2d 738, 85 N.W.2d 754 (1957).

When a defendant moves for a new trial because of excessive damages, the court must decide as a matter of law whether the verdict is beyond the limits which it will allow. If it is determined that the damages are excessive, the trial court may simply order a new trial, *Hogg v. Plant*, 145 Va. 175, 133 S.E. 759 (1926), or it may employ remittitur, whereby the court will deny a motion for a new trial provided the successful party remit the sum found excessive by the court. *Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41 (1895); *Noxon v. Remington*, 78 Conn. 296, 61 Atl. 963 (1905). The doctrine of remittitur has been accepted in all jurisdictions and is recognized as an effective means of terminating unnecessary litigation and of sparing litigants the expense and burden of a new trial.

Acceptance of remittitur by the plaintiff is essential. *Bourne v. Moore*, 77 Utah 184, 292 Pac. 1102 (1930). If the court be allowed to change the amount of the verdict without the plaintiff's consent, his constitutional right to jury trial would be invaded. *Kennon v. Gilmer*, 131 U.S. 22 (1889). Once having accepted remittitur, however, the plaintiff has no right to repudiate it. *Lewis v. Wilson*, 151 U.S. 551 (1894). Should the plaintiff decline to accept remittitur, the trial court has but one course of action: it must order a new trial. *Kennon v. Gilmer*, *supra*. The defendant in the meantime, not having been a party to the process of remittitur, has done nothing to affect his right of appeal as to liability or damages.

The Wisconsin employment of remittitur is unique. In order that the courts might be more fully equipped to terminate litigation when faced with a jury verdict awarding excessive damages, Wisconsin has extended remittitur to the defendant. *Rueping v. Chicago & N.W. Ry.*, 123 Wis. 319, 101 N.W. 710 (1904). The trial court is authorized not merely to determine the amount that the plaintiff shall recover, but it may determine the minimum and the maximum amounts that it would allow a properly disposed jury to return. *Beach v. Bird & Wells Lumber Co.*, 135 Wis. 550, 116 N.W. 245 (1908). The court may then approach the plaintiff with the usual remittitur procedure, *Kimball v. Antigo Building Supply Co.*, 261 Wis. 619, 53 N.W.2d 701 (1952), or conversely, may offer the defendant the choice of avoiding a new trial by accepting judgment for the maximum amount. *Landrath v. Allstate Ins. Co.*, 259 Wis. 248, 48 N.W.2d 485 (1951). Moreover, the court may grant the option to both parties. *Flatley v. American Auto. Ins. Co.*, 262 Wis. 665, 56

N.W.2d 523 (1953). In the latter instance, the defendant is generally given twenty days within which to exercise his option; should he remain silent, the plaintiff, in turn, has ten days to make his choice. If either party should exercise his option and accept the modified verdict offered by the court, the other has no ground on which to object. If the defendant exercises his option the plaintiff will be recovering the maximum that the court will allow as a matter of law, or if the plaintiff exercises his option, the defendant will be held liable for the minimum the court would allow. *Campbell v. Sutliff*, 193 Wis. 370, 214 N.W. 374 (1927). Should neither party elect remittitur the court must order a new trial. *Flatley v. American Auto. Ins. Co., supra.* Other jurisdictions might do well to recognize the merits of this procedure as a catalyst in terminating litigation.

However, the Wisconsin procedure, by virtue of its extension of remittitur to the defendant, presents the novel question raised in the instant case, *i.e.*, what are to be the consequences when a defendant, though intending subsequently to appeal liability, exercises his option by electing a new trial on damages? The majority opinion in the instant case construed such action as an immediate waiver of the right to appeal liability. However, this decision leaves a defendant in a rather confusing position when confronted with such an option. Realistically, it appears that the option offers it three courses of action: (1) acceptance of the modified verdict, (2) election of a new trial, or (3) simply remaining silent. The majority opinion takes the position that had the defendant wanted to preserve its right to appeal he "should not have exercised its option to have a new trial on the issue of damages only." This position, however, still leaves open two courses of action, namely, accepting remittitur or remaining silent. But the opinion does not state which of these two courses the defendant should have taken.

Of the two alternatives, acceptance of remittitur is clearly inconsistent with preserving the right of appeal. To allow a party to accept remittitur and yet appeal would defeat the very purpose for which it is employed. The concurring opinion indicates that silence was the proper procedure to preserve the appellate rights. This opinion explains that had the defendant remained silent the court would have entered a judgment on the modified verdict, from which the defendant could have appealed. But, to say that an appealable final judgment can be entered on the court-modified verdict assumes that consent is not an essential element of remittitur and raises grave constitutional questions concerning the right to jury trial. Indeed, this would be directly opposed to the decision announced in *Campbell v. Sutliff, supra.* That case held that the trial court can only offer a modified verdict for the consent of the parties and if they should choose not to accept it, the sole power of the court is to order a new trial. Silence, then, is clearly a rejection of the modified verdict and a new trial must follow *whether or not* he "elects" to relitigate the issue of damages.

The majority supported its determination of waiver with the observation that an appeal of liability after the new trial on damages might render the new trial a nullity. This may be indicative of the court's intention to hold as a waiver the mere participation in a new trial on damages. This position would seem to be untenable since there would

then be no way in which the defendant could save its right to appeal liability.

Yet if the majority's position is that the defendant preserves his right of appeal by remaining silent, this also cannot pass without criticism. For to predicate a waiver upon the mere fact that there was an affirmative rather than a negative act, when the result would have been the same in either event, would appear to be unreasonable. The court cites no authority to substantiate such a position and none has been found. The interpretation put forth by the court serves no purpose other than to trap the unwary.

The Wisconsin remittitur procedure embodies features which enable the courts to terminate litigation effectively. However, this admittedly beneficial goal ought not be inserted to defeat unreasonably the rights of litigants. Only where there has been a repudiation of, or an act wholly inconsistent with the appeal should it be declared that there has been a waiver. The act of the defendant in electing a new trial on damages was merely a rejection of the modified verdict and should have in no way affected his right to appeal the substantive question of liability.

Alfred Kaelin

CIVIL PROCEDURE — INTERVENTION — MANUFACTURER HAS RIGHT TO INTERVENE IN ACTION TO ENJOIN RAILROAD FROM USING TRACKS ESSENTIAL TO BUSINESS OF MANUFACTURER. — Petitioner sought to intervene as a defendant under FED. R. CIV. P. 24(a)(2) in a class action brought by resident property owners against a railroad to enjoin the use of certain tracks for storage purposes. Petitioner, a manufacturer, alleged that discontinuance of operation of this trackage would result in great loss and hardship to itself and its employees since it was essential to the operation of its plant in that all of the plant's raw materials were received by rail. It further alleged that the representation of its interests by the railroad was, or might be, inadequate. The motion was denied by the trial court because the petitioner failed to show inadequacy of representation. *Held*, reversed. The possibility of being deprived of essential railroad service if the action against the railroad were successful was sufficient to entitle petitioner to intervene as a matter of right. *Ford Motor Co. v. Bisanz Bros., Inc.*, 249 F.2d 22 (8th Cir. 1957).

Rule 24(a)(2) provides that "upon timely application anyone shall be permitted to intervene in an action . . . when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . ." In order to establish a right of intervention under this subdivision, both inadequate representation and the probability that the applicant will be bound by the judgment must appear; neither is sufficient when standing alone. *Farmland Irrigation Co. v. Dopplmaier*, 220 F.2d 247 (9th Cir. 1955).

The courts have failed to strike a balance of the two criteria presented in Rule 24(a)(2) in the intervention determinations. The strict test of res judicata would appear to be the measure of the "bound by" criterion,

and some decisions reflect this view. *White v. Hanson*, 126 F.2d 559 (10th Cir. 1942). However, the great majority find this test inappropriate, and hold that the practical disadvantage to which the intervenor may be subjected is sufficient to satisfy the requirement despite the fact that he would not be prevented from bringing another action following the judgment. *Textile Workers Union v. Allendale Co.*, 226 F.2d 765 (D.C. Cir. 1955). The instant case would easily come within the purview of the latter interpretation, as an unfavorable decision would leave the petitioner without access to raw materials. Several courts have indicated that the rule should be liberally construed, *Clark v. Sandusky*, 205 F.2d 915 (7th Cir. 1953); *Knapp v. Hankins*, 106 F. Supp. 43 (E.D. Ill. 1952); *Twentieth Century-Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (S.D.N.Y. 1947), but the majority still require an affirmative showing by the applicant that representation of his interests by existing parties would be inadequate. *Fielding v. Allen*, 9 F.R.D. 106 (S.D.N.Y. 1949); *Frieday v. Cowdin*, 83 F. Supp. 516 (S.D.N.Y. 1949).

Inadequacy of representation existed in the following situations: collusion between the applicant's representative and an opposing party, *Klein v. Nu-Way Shoe Co.*, 136 F.2d 986 (2nd Cir. 1943); where the representative had some interest adverse to that of the applicant, *Pyle-National Co. v. Amos*, 172 F.2d 425 (7th Cir. 1949); and where the representative failed because of non-feasance in his duty of representation, *Wolpe v. Poretsky*, 144 F.2d 505 (D.C. Cir. 1944). Various incidental factors may motivate a court's determination of this criterion. In *United States v. C. M. Lane Lifeboat Co.*, 25 F. Supp. 410 (E.D.N.Y. 1938), the fact that the applicant was not on friendly terms with the attorney representing his interests was a salient consideration. Failure to appeal may also be an indication of inadequate representation. *Wolpe v. Poretsky, supra.* However, in *Farmland Irrigation Co. v. Dopplmaier, supra,* petitioner had contractually bound itself to assume all of the liabilities of the defendant. In an action against the defendant for an accounting of royalties due under a license agreement, petitioner's motion to intervene was denied for failure to show inadequate representation since the answer filed by petitioner was the same as that filed by the defendant, and the attorneys for petitioner were also those of the defendant.

Prior to the instant case, the requirement of inadequate representation received one of its most liberal applications in *Textile Workers Union v. Allendale Co., supra.* This was a proceeding by a manufacturer to review a determination of the Secretary of Labor fixing a nation-wide minimum wage to be paid laborers producing woolen goods for sale to the federal government. The union and a competing manufacturer, paying higher wages than the scale fixed by the Secretary, sought to intervene as defendants. The appellate court, two judges dissenting, reversed a denial of the motions to intervene, concluding that opposition to their intervention by the Secretary of Labor was sufficient indication that he would not adequately represent their respective positions.

The cases in which innumerable persons may be bound by a judgment, as in the attempts of taxpayers, stockholders, and ratepayers to intervene in actions involving their interests, best illustrate the wisdom of the requirement that potential intervenors also show inadquate repre-

sentation. Here the requirement is a practical and necessary limitation on the right of intervention in view of the confusion and delay such a grant would engender. See *Atlanta Laundries, Inc. v. National Linen Serv. Corp.*, 81 F. Supp. 650 (N.D. Ga. 1948)(stockholder's motion to intervene on ground that plaintiff's counsel was negligent was denied since there was no showing that plaintiff was dissatisfied); *Gross v. Missouri & A. Ry.*, 74 F. Supp. 242 (W.D. Ark. 1947)(cities denied right to intervene in proceedings to appoint receiver for railroad which served them because state was adequately representing interests of the general public).

In view of this consideration, the present court's finding of inadequate representation seems to be based on rather tenuous grounds. The opinion reports that petitioner furnished the defendant railroad with affidavits used by the railroad in its answer and that petitioner adopted the denials and allegations of the railroad's answer in its proposed answer. It is difficult to gather from these facts why petitioner's interests would not be adequately protected by the railroad and no evidence supporting such a conclusion is given in the opinion. That it was equally difficult for the court is evidenced by this extract from the opinion:

> While there is justification for a belief that the Railroad will, at a trial of this case on the merits, adequately present to the trial court all of the evidence and all of the applicable law necessary to enable the court to consider and decide the issues raised by the pleadings including the proposed answer of the Ford Motor Company, it cannot be said with certainty that this will be so. . . . 249 F.2d at 26.

Since the interest of the petitioner in the outcome of the litigation was unquestionably great and no considerable delay would have resulted from granting its motion to intervene, perhaps the trial court made a discretionary error in denying the motion. But to reverse such a ruling under Rule 24(a)(2) may create more difficulties than it has solved. The court does not discuss the possibility of similar suits arising which might affect hundreds of third parties. Since the court here seems to have practically destroyed the requirement that inadequate representation be shown, an original party to an action may unexpectedly find himself opposed by a multitude of intervening litigants at great additional expense to himself. While the trial courts should be liberal in granting such motions, it seems that the appellate courts should exercise extreme caution in reversing their denial by the trial courts.

Donald A. Garrity

CRIMINAL PROCEDURE — APPEAL IN FORMA PAUPERIS — APPOINTED COUNSEL NEED NOT PRESENT FULL ORAL ARGUMENT IN PROVIDING ADEQUATE REPRESENTATION FOR APPELLANT. — Petitioner sought leave in the trial court to appeal in forma pauperis from convictions of housebreaking and larceny. Upon denial of the petition, petitioner applied pro se to the court of appeals for such leave, whereupon the court appointed two counsel to represent petitioner. The court also formulated a procedure to be followed by such counsel whereby they would advise the court whether an appeal should be allowed. After extensive investigation,

counsel reported to the court by memorandum that no substantial question existed in the case although there was one "possible" area of error. The court subsequently *held*: petition denied. Counsel were not required to present arguments to show that the lower court's ruling was actually erroneous since such counsel had advised the court that no substantial question existed, and since the court agreed with counsel's findings. *Ellis v. United States*, 249 F.2d 478 (D.C. Cir. 1957).

The expansion of the concept of post-conviction procedure has accelerated rapidly in the last few years. Specifically, the procedure encompassing an indigent's appeal in forma pauperis has been given special scrutiny. Statutory provision for such appeal is found in 28 U.S.C. § 1915(a) (1952); however, appeal may not be taken if the trial court certifies that it is not taken in good faith. This certification must be given effect by the appellate court unless the appellant is able to overturn it by showing that the certificate was made "without warrant or not in good faith." See *Wells v. United States*, 318 U.S. 257 (1943); *O'Rourke v. United States*, 248 F.2d 812 (1st Cir. 1957). Thus, the finality of the certification may be circumvented, but not without a sufficient showing, which formerly took some expense since it usually necessitated the production of a transcript and possibly the payment of a docket fee. The indigent appellant consequently was indirectly precluded from taking his appeal, since financial aid for these was refused.

However, in *Griffin v. Illinois*, 351 U.S. 12 (1956), an indigent appellant had been refused a transcript despite the fact that Illinois law necessitated such for full appellate review. The Supreme Court held that "destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. Language in the opinion indicates that the case will not be limited to its facts. The Court determined that due process and equal protection require that indigents be given "adequate and effective appellate review." 351 U.S. at 20. Whether "adequate and effective appellate review" in a state court includes the right to counsel on appeal was not determined; however, the New York Court of Appeals, after indicating that it might favor such an extension, *People v. Kalan*, 2 N.Y.2d 278, 140 N.E.2d 357 (1957), has held that the assignment of counsel must be left to the discretion of the court, and such assignment may be refused whenever refusal is "appropriate." *People v. Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85 (1958). The court felt that the broad policy considerations involved in mandatory assignment of counsel, such as expense, an adequate number of attorneys, etc., could only be dealt with effectively by legislative action. *But see* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 10 (1956).

Griffin has had a noticeable effect on post-conviction procedure in federal courts and on the specific problem of providing the indigent with adequate opportunity to challenge the trial court's certification of bad faith. In *United States v. Johnson*, 352 U.S. 565 (1957), decided shortly after *Griffin*, the Court held that a record *and* aid of counsel must be provided the indigent in his challenge. This has been construed to include the payment of docket fees, also. *O'Rourke v. United States*, *supra*. The language in *Johnson* would seemingly extend the defendant's right to trial counsel, *Johnson v. Zerbst*, 304 U.S. 458 (1938), to include

appellate review. However, the construction given the phrase "aid of counsel" in subsequent cases is something less than the normal conception of right to counsel.

Lower federal courts have refused to extend the *Johnson* mandate in two specific areas of post-conviction procedure. First, habeas corpus proceedings and motions to vacate sentences have not been held to be within the scope of *Johnson* since they are not actual steps in the criminal proceedings against the defendant, but are merely means of testing the validity of his detention after conviction. *Hill v. Settle*, 244 F.2d 311 (8th Cir. 1957); *Gershon v. United States*, 243 F.2d 527 (8th Cir. 1957). And second, when the defendant's attack on the certification is patently without merit and frivolous on its face, the courts will summarily dismiss the petition. *United States ex rel. Rodriguez v. Johnson*, 246 F.2d 730 (2d Cir. 1957) (dictum).

In the instant case, appellant was within neither of these two categories. Consequently, he was entitled to and was provided with "aid of counsel" pursuant to the ruling in *United States v. Johnson, supra*. However, in the order appointing the counsel, the court brought to counsel's attention the procedure followed in *United States v. Sevilla*, 174 F.2d 879 (2d Cir. 1949). This case involved an alien's attempt to appeal in forma pauperis; the court held that the statute authorizing such appeals applied only to citizens, but that it had authority to appoint a lawyer to act for the alien. Yet the attorney could only prepare a statement of the evidence and *advise* the court whether there was merit in the appeal. Therefore, the instant court's conception of "aid of counsel" as required by *Johnson*, consists of counsel who acts as a kind of "advisor" to the court.

The procedure thus creates an "in forma pauperis attorney" who differs somewhat from the ordinary paid attorney. His duty is to present disinterested advice to the court, rather than represent the defendant fully as an advocate. He has a role somewhat akin to an *amicus curiae*. The dissenting opinion objected to this, urging rather that:

> Where, as here, there was a fairly arguable question, counsel should have proceeded to present argument—candid, but still designed to present as favorable a showing for petitioner as could honorably be made—to show that the questioned ruling was actually erroneous, leaving the decision of the question to the court. 249 F.2d at 481.

The procedure followed in the instant case seems limited to the District of Columbia Circuit, as other circuits require the normal procedure of full oral argument by appointed counsel. *Gilpin v. United States*, 252 F.2d 685 (6th Cir. 1958); *O'Rourke v. United States, supra*.

In *United States v. Ballentine*, 245 F.2d 223 (2d Cir. 1957), the court allowed appointed counsel to withdraw following his examination of the testimony at the trial and his finding that he could find no merit in the appeal. Application for the assignment of new counsel was denied, but the defendant was allowed to continue the appeal pro se. This procedure seems to be more in keeping with the "equality of justice" theme seen in the *Johnson* case since the attorney's action in this case does not differ from that of a paid attorney. If, as in the instant case, he could see a "possible" area of error, he would certainly carry the case through oral argument. However, the *Ballentine* court's refusal to assign new counsel forced the indigent to proceed alone. The court evidently felt that a new assignment would be of little help to the appellant since it

would probably lead to another withdrawal. Consequently, when this situation presents itself, appellate courts must be extremely cautious in allowing counsel to withdraw, and if permission is given, the court must be ever mindful, in the appellant's pro se attempt to carry the review further, to help him avoid the pitfalls which competent counsel would see and circumvent. See *Gibbs v. Burke*, 337 U.S. 773 (1949).

Ultimately, a solution of the problem revolves around the holding of the Supreme Court in the *Griffin* case, *i.e.*, that the indigent ought not be denied adequate review because he is poor. With respect to appointed counsel on appeal, it is of common knowledge that there is an impossibility of equality of justice. The defendant of economic means is able to hire outstanding counsel; his less fortunate fellow-citizen must usually rely on counsel of far less experience and competency in the specific field. See BROWNELL, LEGAL AID IN THE UNITED STATES 136-41 (1951). A court ought not add to the inequality by tampering with and thereby limiting the minimal assistance he presently receives.*

Terrence Hogan

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* Subsequent to the writing of this comment, the Supreme Court vacated per curiam the decision of the Court of Appeals and remanded the case for further proceedings, directing that the defendant be accorded the procedural safeguards which the author herein indicated would be proper. *Ellis v. United States*, 356 U.S. 674 (1958).

FEES — CLASS ACTION — ATTORNEY FEES RECOVERABLE FROM FUND ALTHOUGH FAVORABLE JUDGMENT IN LOWER COURT WAS RENDERED MOOT BY INTERVENING LEGISLATION. — Petitioners brought an action against a group of Oregon counties and the federal government to recover attorney fees for a prior litigation. This former action involved a class suit by one county on behalf of itself and other counties similarly situated to compel distribution of a fund held for the counties by the federal government pursuant to congressional mandate. 50 STAT. 874 (1937), 43 U.S.C. §§ 1181(a), (b)(1952). The class action resulted in a favorable determination in *Clackamas County v. McKay*, 219 F.2d 479 (D.C. Cir. 1954). However, prior to re-hearing, intervening legislation directed distribution of the fund. 68 STAT. 270 (1954), 43 U.S.C. § 1181(g) (Supp. V, 1958). Upon the Government's petition for writ of certiorari, the suit was remanded to the trial court to dismiss as moot. *McKay v. Clackamas County*, 349 U.S. 909 (1955). Consequently, the counties refused to pay petitioners their fees from the fund on the ground that the suit was neither successful nor beneficial. From a summary judgment for the counties, the petitioners appealed. *Held*, reversed and remanded. The attorneys were entitled to reasonable fees from the fund. since the class action was successful and beneficial though the favorable judgment was vacated due to the intervening legislation. *Lafferty v. Humphrey*, 248 F.2d 82 (D.C. Cir.), *cert. denied*, 355 U.S. 869 (1957).

Generally, attorney fees are not recoverable by litigants in ordinary civil actions, *O'Morrow v. Borad*, 27 Cal. 2d 794, 167 P.2d 483 (1946); however, this rule is not without exceptions. One who benefits others by

successfully prosecuting an action involving a general fund is entitled to reasonable attorney fees from the fund. *Bishop & Collins v. Macon Lumber Co.*, 149 F. Supp. 46 (W.D. Ky. 1957); see *Caine v. Payne*, 191 F.2d 482 (D.C. Cir. 1951). As a rule of convenience, the attorneys themselves are generally allowed to sue directly for their fees. *Mauer v. International Re-Insurance Corp.*, 33 Del. Ch. 456, 95 A.2d 827 (1953).

Today, two theories are advanced to justify the recovery of attorney fees in this situation. One holds that the plaintiff is the representative of the whole class and is authorized to contract for all with respect to the expenses of the litigation. The second theory bases recovery on the doctrine of quasi-contract. *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792, 794 (S.D.N.Y. 1947) (dictum). Underlying both theories is the notion that "the equitable obligation to compensate arises solely . . . from the acceptance of the benefits." *Barnes v. Fifty-Third Union Trust Co.*, 58 Ohio App. 27, 15 N.E.2d 651, 655 (1937) (dictum).

The courts have generally imposed three requirements before allowing recovery in cases of this sort: (1) a fund must be before the court out of which the fees may be awarded, *Gillespie v. Federal Compress & Warehouse Co.*, 37 Tenn. App. 476, 265 S.W.2d 21 (1953); (2) the litigation must be successful, *Thomas v. Peyser*, 118 F.2d 369 (D.C. Cir. 1941); and (3) it must prove actually beneficial to the entire class, *Caine v. Payne, supra.*

Research has indicated that there was no precedent for the precise issue presented to the court in the instant case. The added factor of the intervention of legislation rendered this a case of first impression. Viewed analytically, the court's decision is subject to adverse criticism. Essential to the petitioner's case were their contentions that the litigation was *successful* and that the benefits which the counties received *resulted from* the litigation. These contentions faced two objections.

The first is somewhat technical. The judgment of the court of appeals was vacated by the Supreme Court. "Vacated means to annual, set aside, or render void. . . ." *Steward v. Oneal*, 237 Fed. 897, 906 (1917). In effect, the parties to the action are returned to the same "legal" position they occupied prior to the litigation. Consequently, it is difficult to view as "successful" a judgment which has been rendered legally meaningless.

The second objection reaches more to the heart of the petitioner's case. The fund was distributed pursuant to legislation while certiorari was pending in the Supreme Court. Since the court of appeals' decision was not ultimately decisive, due to the pending writ of certiorari, of what benefit could the decision have been to the counties? The trial court's view of the instant case was that the "services rendered by the petitioners did not produce any benefit to the seventeen counties . . . [as] the fund was the product of legislation." [Brief for Petitioners, p. 37.] To dismiss it, as the court of appeals did, as a mere "play on words" is not, it would seem, a sufficient answer to the problem it poses.

The court's decision in this situation, however, could find its justification in a broader concept of public policy. The Supreme Court in *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 167 (1939) indicated this policy by stating that "the foundation for the historic practice of granting reimbursement for the costs of litigation . . . is a part of the original authority of the chancellor to do equity." It then concluded

that the formalities of the litigation were not decisive where the power of the court to do justice was concerned.

In the instant case, for all practical purposes the fund was distributed as a result of the litigation. The legislation was not passed to prevent the attorneys from receiving their fees. See 100 CONG. REC. 6886-94, 7969 (1954). On the contrary, there is language in the debate tending to show that the legislation was motivated by the litigation. Had the legislation not intervened, there can be little doubt that the attorneys would have been compensated as a matter of course.

The equitable obligation of the counties was not changed by purely legal formalities. Hence, it would seem that the court looked to the plain meaning of the facts and ignored their more technical implications. Justice found its realization not in the letter of the law, but in its underlying spirit.

G. R. Blakey

INJUNCTION — UNION IMMUNITIES — SHERMAN ACT APPLICABLE TO UNION-NON UNION COMBINATION RESTRAINING COMMERCIAL COMPETITION. — The United States sought to enjoin Glaziers Local No. 27 and Hamilton Glass Co., alleging restraint of interstate commerce resulting in higher prices. Plaintiff charged that Local No. 27 conspired with Hamilton Glass and other un-named glazing contractors to restrain trade by two methods. The conspirators agreed either to refrain from using products glazed outside the Chicago area or, if such products were used, union members were to dismantle and re-glaze them at additional cost to consumers. The union, with strikes or threat of strikes, coerced other users of glazed products to comply with this conspiracy. The Government contended the doctrine announced in *Allen Bradley Co. v. Local No. 3, IBEW*, 325 U.S. 797 (1945), holding a union enjoinable, was applicable to this situation. The defendant union contended that they were immune from enforcement of the Sherman Act, 26 STAT. 209 (1890), 16 U.S.C. § 1 (1953), under the exceptions granted to laborers by the Clayton Act, 38 STAT. 738 (1914), 29 U.S.C. § 52 (1953) and the Norris-LaGuardia Act, 47 STAT. 70-73 (1932), 29 U.S.C. §§ 101-15 (1953). The union conceded that activities which fall within the *Allen Bradley* doctrine are not protected by the Clayton and Norris-LaGuardia Acts, but they contended that the factual situation in the present case did not warrant the application of that doctrine. *Held*: Motion to dismiss denied. The activity is enjoinable under the *Allen Bradley* rule. *United States v. Hamilton Glass Co.*, 155 F. Supp. 878 (N.D. Ill. 1957).

The objection raised by the defendant was predicated on the fact that the doctrine has only been applied to conspiracies which *have achieved* market or price control. The union contended that a monopoly had not resulted from this conspiracy. The court by its decision has extended the application of the *Allen Bradley* doctrine to situations where mere restraints in commercial competition exist in the marketing of goods and services which result in curtailment of trade and higher prices. In effect, the court held that a union violates the Sherman Act by conspiring with a business group regardless of the extent of the restraint.

The history of the use of injunctions in labor disputes under the Sherman Act evinces a conflict between a congressional desire to free labor unions from anti-trust suits and the persistent refusal by the courts to comply with this desire. Unions were held in violation of the Sherman Act in the "Danbury Hatters Case." *Loewe v. Lawlor,* 208 U.S. 274 (1908). Six years after this decision, Congress, in response to union demands, passed the Clayton Anti-Trust Act enumerating circumstances in which unions may not be prosecuted under the Sherman Act. The interpretation of the Clayton Act was strictly limited to situations involving workers with their immediate employer. The Act was held to be merely declaratory of the existing law, adding nothing to what the courts had previously held. *Duplex Printing Press Co. v. Deering,* 254 U.S. 443 (1921). Another attempt to free unions from injunctions was made in 1932 by the passage of the Norris-LaGuardia Act. The conflict between Congress and the courts was apparently resolved in *United States v. Hutcheson,* 312 U.S. 219 (1941). The Court ruled that the congressional intent evidenced by the enumerated exceptions granted to unions in the anti-trust statutes must be recognized and adhered to.

The *Allen Bradley* exception to labor's immunity came four years later. The rule announced there states that union activities may be enjoined regardless of the Clayton and Norris-LaGuardia Acts when done in conspiracy with non-union groups creating business monopolies and controlling the marketing of goods and services.

Since the *Allen Bradley* doctrine was enunciated, the courts have applied it to situations where a conspiracy existed between a union and a business group to fix prices, *United States v. Milk Drivers Union,* 153 F. Supp. 803 (D. Minn. 1957), or to restrain the shipment of interstate products. *United States v. Employing Plasterers Ass'n,* 347 U.S. 186 (1954). Restraint of trade on the part of a union has been found in a refusal to work on material, *Lumber Products Ass'n v. United States,* 144 F.2d 546 (9th Cir. 1944), *rev'd on other grounds sub nom. Brotherhood of Carpenters v. United States,* 330 U.S. 395 (1947), or suppressing commercial competition, thereby reducing the use of interstate goods. *United States v. Employing Plasterers Ass'n, supra.* Throughout the cases, restraint of interstate commerce was a requisite for a violation of the Sherman Act. Where a conspiracy to fix prices is found, interstate trade must also be restrained but where price fixing is the major objective of the conspiracy, the courts have emphasized this element in their opinion. Conversely, where the major objective of the conspiracy is to restrain trade, this element is emphasized. *Compare Hawaiian Tuna Packers, Ltd. v. International Longshoremen's Union, CIO,* 72 F. Supp. 562 (D. Hawaii 1947) *with Philadelphia Record Co. v. Manufacturing Photo-Engravers Ass'n,* 155 F.2d 799 (3d Cir. 1946).

Immunity from an injunction has been granted when a union, acting alone, is engaged in a labor dispute. Although the union may refuse to work for an employer, drive him out of business, and even indirectly obstruct the movement of interstate goods, there is no violation of the Sherman Act. *Hunt v. Crumboch,* 325 U.S. 821 (1945).

The conspiracy, the combination intending to achieve the prohibited results, seems to be the essence of the violation. If a conspiracy exists suppressing competition, the Sherman Act is violated. *Las Vegas Mer-*

chant Plumbers Ass'n v. United States, 210 F.2d 732 (9th Cir. 1954). But where a union forced motor carriers who "separately agreed" with the union not to re-transport a common carrier's freight, an injunction was denied on the grounds that a labor dispute existed between the union and the plaintiff carrier. *East Texas Motor Freight Lines v. International Brotherhood of Teamsters, Local 568*, 163 F.2d 10 (5th Cir. 1947). The deciding factor does not seem to be the amount of interstate commerce affected but rather the conspiracy which existed to restrain it. *United States v. Milk Drivers Union, supra.*

An incongruous situation is evident in this area of anti-trust law. While a union violates the Sherman Act by combining with a non-union group to control a market or fix prices, a union acting alone but achieving the same results does not violate the act. This incongruity stems from the desire of Congress to permit laborers to organize and to bring pressures to bear in the collective bargaining process. *Allen Bradley Co. v. Local Union No. 3, supra.*

In the instant case, the complaint alleged a conspiracy to restrain interstate commerce. The differentiation between the present case and cases following the *Allen Bradley* doctrine is that the doctrine has thus far been applied only to situations where a monopoly existed. The instant case involves only a restraint in competition where a monopoly has not yet evolved. An examination of the language of the Court in *Allen Bradley* will aid in determining whether the rule should be extended or not. There the Court was faced with a monopolistic situation but the reasoning used can also be applied to the instant case. The issue presented to the Court was, "Do labor unions violate the Sherman Act when, in order to further their own interests as wage earners, they aid and abet business men to do the precise things which that Act prohibits?" *Allen Bradley Co. v. Local No. 3, supra* at 801. The Court held the union enjoinable, since it could find "no purpose of Congress to immunize labor unions who aid and abet manufacturers and traders in violating the Sherman Act." *Allen Bradley Co. v. Local No. 3, supra* at 810. The crux of the problem revolves around the question of whether the employers acting alone would violate the Sherman Act. If their activities violate the act, then the union also violates it by uniting with them.

A non-union group restraining trade is enjoinable even though market and price control is not achieved. *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457 (1941). And in *International Salt Co. v. United States*, 332 U.S. 392 (1947), a lessor of a patented machine required the lessee to refrain from utilizing a competitor's material in the machine which the lessor himself produced. He was held in violation of the Sherman Act, even though no conspiracy was present, and even though no full monopoly existed. In the instant case, the conspirators had agreed to force others to use pre-glazed products manufactured by Hamilton Glass Co. The rationale of the *Allen Bradley* doctrine is that unions may not frustrate the purpose of the anti-trust laws by aiding and abetting business groups to achieve the very results which Congress sought to prohibit. By analogy, if this rationale is to be enforced, unions are in violation of the Sherman Act when they conspire with a non-union group to restrain the flow of interstate commerce resulting in higher prices.

There is precedent for enjoining a union and a non-union conspiracy which has not achieved market or price control. In *Anderson-Friberg, Inc. v. Clary & Son, Inc.*, 98 F. Supp. 75 (S.D.N.Y. 1951), a complaint alleging a conspiracy between several granite unions and dealers was left for the determination of the trial court. Out of 275 dealers in the area, only 20 were involved in the conspiracy. The court held that the issue to be determined was whether a conspiracy existed in fact. It, like the other courts following the *Allen Bradley* doctrine, failed to discuss the problem of the size of the combination. Although a monopoly was not involved, the court did not require a finding of an industry-wide monopoly before granting an injunction.

It is interesting to note an incidental consequence of the present decision. The contract stipulated that if pre-glazed materials manufactured outside the Chicago area were used, union members were to dismantle and reassemble them, thus earning compensation for this useless work. This is a common featherbedding practice of unions in the construction field. 1956 LAB. L.J. 699.

The anti-featherbedding provision of the Taft-Hartley Act provides that it shall be an unfair labor practice to cause an employer to pay "for services which are not performed or not to be performed." 61 STAT. 142 (1947), 29 U.S.C. § 158(b)(6) (1953). This section has been strictly construed by the courts, prohibiting payment only for work not *actually* performed. *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953). See also *NLRB v. Gamble Enterprises, Inc.*, 345 U.S. 117 (1953). In light of the interpretation of § 8(b)(6) of the Taft-Hartley Act, it would seem that the type of featherbedding engaged in by the Glaziers Union in this case would not be prohibited. Work in dismantling and reassembling the products was actually performed although it was of no actual value.

By holding that the union is enjoinable, the court in the instant case has spliced an additional factor onto the *Allen Bradley* doctrine. It is no longer necessary that a thoroughgoing monopoly exist before an injunction will issue. It is sufficient if conditions be present tending to curtail trade or restrain free competition. Current dissatisfaction with certain highhanded activities of labor unions will make this a welcome decision in some quarters, and may pave the way for even more stringent sanctions against unions in the future.

Gordon C. Ho

LIFE INSURANCE — CONDITIONAL BINDING RECEIPTS — BINDER INEFFECTIVE FOR LACK OF SPECIAL RISK PROVISION. — Plaintiff sought to collect as beneficiary on an alleged contract of life insurance between her husband and the defendant insurance company. The husband, a business executive who was also a private pilot, applied for insurance at the regular rate and plan. Upon payment of his first premium he was issued a conditional binder receipt which stipulated that he was insured from that date provided that in the company's opinion he was insurable at the rate and plan applied for. However, defendant provided a special policy for pilots which was not incorporated into the contract; whether

this oversight was attributable to the agent or the applicant was in dispute. One day after the issuance of the conditional receipt the husband was killed in a plane crash. Upon judgment for plaintiff in the trial court, defendant appealed. *Held,* reversed. The husband was not insurable since he failed to comply with the special rate for private pilots. *New England Mut. Life Ins. Co. v. Hinkle,* 248 F.2d 879 (8th Cir. 1957).

The practice of issuing conditional binder receipts has been adopted by a large number of life insurance companies. While these receipts differ in particulars, they all provide some type of conditional coverage if the applicant pays the whole or part of his first premium at the time of making application. See VANCE, INSURANCE 239 (3d ed. 1951).

Cases involving conditional binder receipts have been a source of great difficulty for the courts. For one thing, the factual situations in the cases vary greatly and in some cases would probably be sufficient to determine the result no matter what the wording of the binder might be. See *Warren v. New York Life Ins. Co.,* 128 F.2d 671 (5th Cir. 1942) (where the applicant, a student pilot, was obviously trying to defraud the company by denying his aviation experience in the questionnaire). The chief source of difficulty is that the wording used in these receipts varies from company to company. This has led some courts to hold that the effect of each receipt must be decided on its own particular wording. *Corn v. United American Life Ins. Co.,* 104 F. Supp. 612 (D.C. Colo. 1952). Most courts, however, appear to treat such conditional receipts in more general terms and have minimized the technical differences in wording. *E.g., Bellak v. United Home Life Ins. Co.,* 211 F.2d 280, 282 (6th Cir. 1954) (dictum); *Gaunt v. John Hancock Mut. Life Ins. Co.,* 160 F.2d 599 (2d Cir. 1947); *Raymond v. National Life Ins. Co.,* 40 Wyo. 1, 273 Pac. 667 (1929).

The majority of courts require the applicant to be insurable at the time of making application in order to effectuate a binding contract. *Mofrad v. New York Life Ins. Co.,* 206 F.2d 491 (10th Cir. 1953); *Wolfskill v. American Union Life Ins. Co.,* 237 Mo. App. 1142, 172 S.W.2d 471 (1943). Some receipts require that this condition exist at the time of the medical examination. *Reynolds v. Northwestern Mut. Life Ins. Co.,* 189 Iowa 76, 176 N.W. 207 (1920). See also *Gettins v. United States Life Ins. Co.,* 221 F.2d 782 (6th Cir. 1955). A few courts, in construing almost identical policy provisions, take a much stricter view, holding that there is no contract until the home office investigates the applicant's insurability and elects to accept the risk. *Bearup v. Equitable Life Assurance Soc'y,* 351 Mo. 326, 172 S.W.2d 942 (1943); *Gerrib v. Northwestern Mut. Life Ins. Co.,* 256 Ill. App. 506 (1930).

A strong minority is represented by the opinion of Judge Learned Hand in *Gaunt v. John Hancock Mut. Life Ins. Co., supra.* In this case, a strictly technical approach to the provisions of the binder would have absolved the insurance company from liability. However, the court ruled that the interpretation which should be given to the terms of the binder was not that of an underwriter, but of "persons utterly unacquainted with the niceties of life insurance, who would read it colloquially." 160 F.2d at 601. The *Gaunt* case represents a growing tendency of courts to hold that such provisions are ambiguous to the average applicant. These courts will then follow the established rule of enforcing an ambiguity

strictly against the insurer. See *Liberty Nat'l Life Ins. Co. v. Hamilton*, 237 F.2d 235 (6th Cir. 1956). Of particular note is *Ransom v. Pennsylvania Mut. Life Ins. Co.*, 265 P.2d 63 (Cal. App. 1953), where the court reviewed both the technical and liberal views on the interpretation of conditional binder receipts, and adopted the majority or technical approach. On appeal, the California Supreme Court held that the provisions of the binder were ambiguous and decided in favor of the insured, thereby adopting the reasoning of the *Gaunt* case. 43 Cal. 2d 424, 274 P.2d 633 (1954).

The dissenting opinion in the instant case raises two problems which are of fundamental importance in insurance law, namely, the difficulty of the insured in interpreting these provisions, and the fact that the average insured in many cases believes that he is covered, when in fact he is not. The courts of New Jersey have developed a method of handling insurance cases which would seem to alleviate these difficulties. In *McAllister v. Century Indemnity Co.*, 24 N.J. Super. 289, 94 A.2d 345 (1953), *aff'd per curiam*, 12 N.J. 368, 97 A.2d 160 (1954), the insured, an excavator, had taken out a policy to provide protection against tort claims. The insurance company denied liability under certain exceptions in the policy. After pointing out that the policy purported to give general coverage against tort liability, the court stated:

> Except as particular provisions of the policy so curtail its scope that an ordinarily intelligent man would understand that the policy does not cover certain risks which come within its general scope—with that exception, the policy should be construed to cover all liability for accidents arising from plaintiff's operations. . . . 94 A.2d at 347.

A more recent case held that a policy holder is imputable only with such knowledge of the terms of a policy as a reasonably intelligent person would acquire from reading the contract. *Heake v. Atlantic Cas. Ins. Co.*, 29 N.J. Super. 242, 102 A.2d 385, *aff'd*, 15 N.J. 475, 105 A.2d 526 (1954). Thus, New Jersey has developed a test for the interpretation of insurance policies which looks first to the type of coverage intended and which the policy purports to give. This coverage will then be enforced unless there are exceptions set forth in the policy in such a manner as to be clearly understood by the average insured. See Rodes, *Insurance*, 10 RUTGERS L. REV. 219, 236-41 (1955).

Assuming the good faith of the insured in the instant case, it is evident that an application of the *Gaunt* and *McAllister* reasoning would have effected a contrary result. The decedent's obvious purpose was to obtain immediate coverage on his life, and the binding receipt purported to give such coverage. The exceptions set out in the receipt were subject to more than one interpretation as is indicated by the dissent. This ambiguity should have been resolved in favor of the insured.

Such a result commends itself as being both realistic and equitable. Life insurance has become a social and economic necessity. A person does not take out insurance unless he needs coverage and only the foolish or the fraudulent would carry a policy which they knew did not provide coverage. If insurance companies feel that certain exceptions must be inserted in a policy, the courts should insist that they be of such clarity that a reasonably intelligent purchaser can understand them.

Paul H. Titus