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RECENT CASES

CONSTITUTIONAL LAW—DUE PROCESS—REFUSAL TO ANSWER RELEVANT QUESTIONS AS A BASIS FOR DISMISSAL FROM EMPLOYMENT DESPITE INVOCATION OF FIFTH AMENDMENT

In a hearing before the Commissioner of Investigation of the City of New York, appellant refused to state whether he was then a member of the Communist Party and based his refusal to answer on the fifth amendment to the United States Constitution. He was thereafter discharged as an employee of the New York Transit Authority pursuant to provisions of the New York Security Risk Law[1] which allows dismissal of employees of security agencies who are found to be of "doubtful trust and reliability." Without seeking administrative remedies, appellant brought a proceeding in the state court for reinstatement contending that the finding was based solely upon his use of the fifth amendment, thus depriving him of due process. The trial court dismissed the proceeding and the United States Supreme Court, treating the appeal as a petition for certiorari,[2] affirmed. A dismissal from employment based on a refusal to answer questions relevant to employment does not violate due process, and this is so although the refusal is accompanied by the invocation of the fifth amendment. *Lerner v. Casey*, 357 U.S. 468 (1958).

State and lower federal courts have generally held that a refusal to answer questions relating to employment or a refusal to waive immunity in investigations conducted by authorized bodies is a ground for dismissal of a public officer or employee.[3] Usually, these results have been reached by concluding that the refusal to answer constitu-

1. N.Y. UNCONSOL. LAWS §§ 1101-08 (McKinney Supp. 1958). Section 1105 provides that any authorized

> [P]ublic officer, board, body or commission . . . may . . . suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state.

2. The appeal was dismissed and certiorari was granted since the constitutional questions before the court related primarily to conclusions made by appellees rather than to the validity of the provisions of the state law.

3. See, *e.g.*, Steinmetz v. California State Bd. of Educ., 44 Cal. 2d 816, 285 P.2d 617 (1955); Drury v. Hurley, 339 Ill. App. 33, 88 N.E.2d 728 (1949); Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954); Laba v. Newark Bd. of Educ., 23 N.J. 364, 129 A.2d 273 (1957); Souder v. City of Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931); Annot., 44 A.L.R.2d 789, 790 (1955). Cf. Davis v. Univ. of Kansas City, 129 F. Supp. 716 (W.D. Mo. 1955).

tes insubordination,[4] conduct unbecoming the employment,[5] or some other "just cause"[6] under an applicable statute.[7] The Supreme Court of the United States has never expressly ruled that an inference of unsuitability can be drawn from a refusal to answer such questions,[8] but in *Garner v. Board of Public Works*,[9] the Court upheld the right of a state to inquire as to past Communist Party membership and permitted a dismissal of employees who refused requested information. In a later case, however, the Court held that a dismissal could not be based on a refusal to take a loyalty oath which was arbitrary in application and which would have allowed dismissal without regard to innocent membership.[10] This adversity to arbitrary dismissal was reiterated in *Slochower v. Board of Higher Education*[11] where the Court struck down as violating due process a dismissal of a college professor who had been discharged solely for having invoked the fifth amendment in a congressional inquiry. In the *Slochower* case, the Court took the opportunity to again condemn the popular view of recent years that one who invokes the fifth amendment is either a criminal or a perjurer,[12] but indicated that there may be instances in which a resort to the privilege against self-incrimination may be grounds for dismissal if the privilege is invoked in answer to questions relevant to employment.[13]

The instant case is not contrary to the *Slochower* holding but rather demonstrates its narrow scope. The Court points out that an automatic and arbitrary dismissal stemming solely from the use of the fifth amendment was here avoided by basing the conclusion of "doubtful trust and reliability" upon lack of candor concerning matters determining qualifications and fitness for employment. The fifth amendment was actually not available to the appellant in the state proceeding,[14] but the Court indicates that even if it were the results might be the same. In effect, the Court is equating the invocation of the fifth amendment with a refusal to answer; and, consequently, there are no

4. Steinmetz v. California State Bd. of Educ., 44 Cal. 2d 816, 285 P.2d 617 (1955).
5. Souder v. City of Philadelphia, 305 Pa. 1, 156 Atl. 245 (1931).
6. Faxon v. School Comm., 331 Mass. 531, 120 N.E.2d 772 (1954).
7. *E.g.*, CAL. GOV'T CODE § 1028.1 (1958); MASS. ANN. LAWS c. 71 § 42 (Supp. 1957); N.J. STAT. ANN. § 18:13-17 (Supp. 1957); PA. STAT. ANN. tit. 24, § 11-1122 (Supp. 1957).
8. *But see*, Konigsberg v. State Bar, 353 U.S. 252 (1956), where the Court held that unfavorable inferences of moral character were impermissibly drawn from a refusal to answer.
9. 341 U.S. 716 (1951).
10. Wieman v. Updegraff, 344 U.S. 183 (1952).
11. 350 U.S. 551 (1956), 10 VAND. L. REV. 139 (1956).
12. See Ullman v. United States, 350 U.S. 422, 442 (1956). For a discussion on drawing inferences from the use of the fifth amendment in civil suits, see Comment, 4 CATHOLIC U.L. REV. 51 (1954) and Note, 34 NEB. L. REV. 88 (1955).
13. See 10 VAND. L. REV. 139 (1957).
14. *Cf.* Adamson v. California, 332 U.S. 46 (1947); Twining v. New Jersey, 211 U.S. 78 (1908).

inferences drawn from the use, per se, of the privilege against self-incrimination. Here, as in *Beilan v. Board of Public Education*,[15] a similar case decided the same day, the dismissal was not necessarily predicated on disloyalty.[16] On the contrary, the Court indicates in both cases that the conclusions resulting in the dismissals could have been justifiably reached from a refusal to answer any question reasonably related to the employee's ability or integrity.

The decision in this case, and that of the *Beilan* case, emphasizes that due process will not be violated so long as the conclusions resulting in the dismissal are not arbitrarily or mechanically reached from the mere use of a constitutional privilege. The decision in no way defeats the purpose of the fifth amendment which is to protect a person from being compelled to give evidence which may be used against him in a criminal proceeding.[17] In effect, governmental bodies are now given rights more on a level with private employers in discharging employees and are not hindered from making determinations resulting in dismissals by the employees' use of the fifth amendment. The decision appears just since it makes no demands on a government employee to which a private employee is not subject. Further, national security is promoted without necessarily detracting from individual rights and fundemental freedoms.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH—UNCONSTITUTIONAL LIMITATIONS ON FREE SPEECH BY STATE TAX EXEMPTION PROCEDURES

The California constitution provided that no person or organization advocating the violent or otherwise unlawful overthrow of the state or national government would be entitled to a tax exemption.[1] A statute implementing this provision required the signing of a declaration of non-advocacy of such a doctrine as a prerequisite to qualification for property tax exemptions.[2] Appellants claimed such exemptions as members of groups entitled to apply therefor, but the exemptions were denied because of their refusal to sign the non-advocacy oath on the tax form. On appeal from judgments upholding

15. 357 U.S. 399 (1958). The Supreme Court upheld the dismissal of a school teacher on grounds of incompetency for refusal to answer questions concerning Communist Party affiliation asked by the school superintendent. The dismissal was not based upon an inference that the teacher was a Communist Party member but that refusal to answer relevant questions pertaining to his fitness as a teacher was a deliberate and insurbordinate act from which incompetency would be concluded.

16. See concurring opinion of Frankfurter, J., 357 U.S. at 410 (1958).

17. See GRISWOLD, THE FIFTH AMENDMENT TODAY 2 (1955); MCCORMICK, EVIDENCE 252 (1954); 8 WIGMORE, EVIDENCE § 2250 (3d ed. 1940).

1. CAL. CONST. art. XX, § 19.

2. CAL. REV. & TAX. CODE § 32 (1957).

the denial of the exemptions and the constitutionality of the statute, *held,* reversed. A statute which requires claimants of tax exemptions to sign a non-advocacy oath as a prerequisite to such exemptions effects a denial of free speech without due process of law where the procedure for attacking the determination of the tax assessor places the burden of proof on the exemption claimants to show themselves without the non-exempt class. *Speiser v. Randall,* 357 U.S. 513 (1958); *First Unitarian Church v. County of Los Angeles,* 357 U.S. 545 (1958).

That provision of the first amendment of the federal constitution prohibiting the abridgment of free speech by Congress has been held to apply to the states by virtue of the due process clause of the fourteenth amendment.[3] The right thus guaranteed, however, is not an absolute one, and there are situations in which the interest of the state is such that freedom of speech may be restricted without violating substantive due process.[4] In tax exemption cases the burden of proof may ordinarily be placed on the taxpayer to show that he is entitled to the exemption,[5] but the Supreme Court has declared a summary tax collection procedure a violation of procedural due process when the tax imposed was shown to be a penalty for a crime.[6]

In the instant case the Supreme Court reasons that the denial of the exemption had the effect of penalizing the claimants for certain kinds of speech, the deterrent effect being the same as if a fine had been imposed for such speech.[7] According to the majority opinion, a case involving the loss of free speech is the same as a case involving loss of liberty in that the burden of proof must be borne by the party seeking to restrict the speech. The Court assumed without deciding that a state may deny tax exemptions to persons who engage in proscribed speech for which they might be criminally liable. But the California

3. "In a series of decisions beginning with Gitlow v. New York, 268 U.S. 652 (1925), this Court held that the liberty of speech and of the press which the First Amendment guarantees against abridgment by the federal government is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment from invasion by state action. That principle has been followed and reaffirmed to the present day." Burstyn v. Wilson, 343 U.S. 495, 500-01 (1952). See, *e.g.,* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Grosjean v. American Press Co., 297 U.S. 233 (1936); Near v. Minnesota, 283 U.S. 697 (1931).

4. *E.g.,* Kovacs v. Cooper, 336 U.S. 77 (1949) (use of sound truck); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (name-calling in public place); Whitney v. California, 274 U.S. 357 (1927) (criminal syndicalism); Gitlow v. New York, 268 U.S. 652 (1925) (criminal anarchy). *Cf.* Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

5. *E.g.,* Brown v. Helvering, 291 U.S. 193 (1933); Phillips v. Dime Trust Co., 284 U.S. 160 (1931); Green v. Pederson, 99 So. 2d 292 (Fla. 1958); Coyne Elec. School v. Paschen, 12 Ill.2d 387, 146 N.E.2d 73 (1957); State Tax Comm'n v. Blinder, 147 N.E.2d 796 (Mass. 1958); Iota Benefit Ass'n v. County of Douglas, 165 Neb. 330, 85 N.W.2d 726 (1958); *In re* McKinnon's Estate, 319 P.2d 579 (Ore. 1957).

6. Lipke v. Lederer, 259 U.S. 557 (1922).

7. 357 U.S. at 518

exemption statute was interpreted to mean that the failure to sign the affidavit was not conclusive evidence that the claimants should be denied the exemptions. The procedure for attacking the tax assessor's action when a claimed exemption was denied put the burden of proof on the claimants to show that they should not be denied the exemptions. The Court held that this method of enforcing the provisions of the statute was a violation of due process. Therefore, persons claiming the exemptions could not be required to execute the declaration either as a condition precedent to obtaining the tax exemption or to the tax assessor's proceeding further to determine whether claimants were entitled to the exemption.

In sum, the result in this case is reached by holding that the claimant's constitutional rights are violated because the burden of proof has been placed upon them to show that they do not engage in criminal advocacy. This reasoning may be attacked on the ground that the question of burden of proof is not at all relevant here. The California law provides that a claimant must do two things before his claim of exemption will be entertained: first, he must show that he is a member of a specified group, and second, he must sign the non-advocacy affidavit.[8] Until the claimant does these things he has made no proper claim of exemption—no question has been raised as to whether or not he is eligible. The situation is analogous to that in an ordinary suit at law. There is no queston here of burden of proof until a proper claim has been filed and an issue of fact to claimant's eligibility has been raised. Even if burden of proof were the pivotal point in the case, however, the result would still seem questionable. A tax exemption is a privilege granted by the state. To declare that it is violative of constitutional rights to require those who seek a privilege to bear the burden of proving eligibility for that privilege seems an undue stretching of constitutional protections.

CONSTITUTIONAL LAW—FREEDOM OF TRAVEL—INABILITY OF SECRETARY OF STATE TO WITHHOLD PASSPORTS BECAUSE OF BELIEFS AND ASSOCIATIONS OF APPLICANTS

Petitioners sought a declaration that they were entitled to passports after their applications had been denied by the Secretary of State on

8. The California constitution describes certain persons and organizations which may be allowed property tax exemptions. CAL. CONST. art. 13, §§ 1¼, 1½. It also limits the exemptions to those who do not advocate the unlawful overthrow of the government. CAL. CONST. art. 20, § 19. Implementing this provision, the California Code provides that "If any such statement, return, or other document does not contain such declaration, the person or organization . . . shall not receive any exemption . . . ." CAL. REV. & TAX. CODE § 32 (1957).

the grounds that they had communistic backgrounds and had refused to submit affidavits as to their present membership in the Communist Party. The district court granted summary judgment for respondent. On certiorari to the Supreme Court of the United States, *held,* reversed (5-4 decision). Absent explicit congressional provision, the Secretary of State has no authority to withhold passports from citizens because of their beliefs or associations. *Kent v. Dulles,* 357 U.S. 116 (1958).[1]

The traditional purpose of a passport has been to aid the bearer in passing freely and safely through foreign lands.[2] With the exception of certain wartime periods,[3] a passport has not been required of United States citizens for entrance or exit purposes until recent years.[4] During these periods of non-requirement, it was generally understood that the Secretary of State had wide discretion in determining whether he would issue a passport[5] and this view was strengthened by statutory language authorizing the Secretary to issue passports.[6] However, there have been indications that this discretionary power was not absolute.[7] When the President in 1953 invoked by proclamation[8] the

1. See also Dayton v. Dulles, 357 U.S. 144 (1958). There, belief that the citizen was going abroad to engage in activities that would advance the Communist cause was held an insufficient reason for refusing to issue a passport. This case and the instant case were also discussed in Note, 47 GEO. L.J. 142 (1958).

2. Urtetiqui v. D'Arcy, 34 U.S. (9 Pet.) 692, 698 (1835).

3. The necessity for regulating travel across the national borders in time of war gave rise to considerable legislation requiring a passport for entrance and exit. The first statute was passed near the end of the War of 1812, Act of Feb. 4, 1815, ch. 31, § 10, 3 Stat. 195, and expired with the cessation of hostilities. The next statute, Act of May 22, 1918, ch. 81, § 2, 40 Stat. 559, gave the President the power to require a passport for citizens during wartime and was implemented for a time by Presidential Proclamation of Aug. 8, 1918, 40 Stat. 1829. This act was amended by the Act of June 21, 1941, ch. 210, 55 Stat. 252, to include national emergencies and was implemented by Proc. 2523, 55 Stat. 1696 (1941). The basis of restriction on foreign travel is now the Immigration and Nationality Act § 215(b), 66 Stat. 163, 8 U.S.C. § 1185(b) (1952), but the 1941 statute was twice extended, the first extension being by Joint Resolution of July 3, 1952, ch. 570, § 30, 66 Stat. 333, and including the period involved in the instant case. In addition to action taken under statutory authority, there was some purely administrative action, Kent v. Dulles, 357 U.S. 116, 123 (1958), citing U.S. DEPT. OF STATE, THE AMERICAN PASSPORT 50 (1898).

4. A survey made of thirty-seven countries revealed that only ten allowed their nationals to leave the country without a passport. The same survey also revealed that only five of the thirty-seven would allow United States citizens to enter without a passport. Note, *Passport Refusals for Political Reasons,* 61 YALE L.J. 171, n.3 (1952).

5. Miller v. Smjen, 289 Fed. 388, 394 (8th Cir. 1923); 13 OPS. ATT'Y GEN. 89, 92 (1869); HACKWORTH, DIGEST OF INTERNATIONAL LAW § 268 (1942).

6. The initial statute, Act of Aug. 18, 1856, ch. 127, § 23, 11 Stat. 52, stated that the Secretary "shall be authorized to grant and issue passports . . ." and this was amended to "may grant and issue passports . . ." by 44 Stat. 887 (1926), 22 U.S.C. § 211a (1952). See also Exec. Order No. 7856, 3 Fed. Reg. 799 (1938), in which detailed regulations are set out.

7. See, *e.g.,* Perkins v. Elg, 307 U.S. 325 (1939).

8. Proc. 3004, 67 Stat. C31 (1953) following Proc. 2914, 64 Stat. A454, (1950).

statutory[9] power authorizing him to require a passport for entrance and exit during national emergencies, the scope of the Secretary's discretion suddenly became a problem of active interest. The first of a series of cases attacking this discretionary power, *Bauer v. Acheson*,[10] was decided in 1952, prior to the presidential proclamation. *Bauer* and subsequent cases[11] emphasized the necessity for reasonable administrative hearings and the necessity of exhausting administrative remedies before seeking the aid of the courts.[12] Only one case was decided on the basis of the substantive reason for refusing a passport[13] and it was not until the instant case that this issue had come before the Supreme Court for a final determination.

In holding the present reasons for refusal insufficient, the instant decision leaves the Secretary essentially no discretion as to substantive grounds for the refusal of an application. The language of the opinion indicates that the only grounds for refusal that the Court at present considers valid are those relating to citizenship or criminal or unlawful conduct.[14] The Court further indicates that any attempt to limit an individual's right to travel will be subject to close judicial scrutiny, with all doubts of statutory meaning resolved in favor of the individual.[15] Any other reason for refusal would probably have to be authorized by specific statutory language.[16] Further, since the opinion speaks of a constitutional right, there remains some doubt as to the validity of refusals other than on traditional grounds, even though specifically authorized by Congress.[17]

This case represents another clash between individual rights and the interest in national security. On the one hand is the citizen's right to travel, which has found expression in documents from Magna Charta to the United Nation's Universal Declaration of Human Rights.[18] This right is based, at least in part, upon the personal interest in freedom of movement and upon the community interest in allowing

9. Immigration and Nationality Act § 215, 66 Stat. 163, 8 U.S.C. 1185 (1952).
10. 106 F. Supp. 445 (D.D.C. 1952).
11. See, *e.g.*, Boudin v. Dulles, 235 F.2d 532 (D.C. Cir. 1956).
12. Robeson v. Dulles, 235 F.2d 810 (D.C. Cir. 1956).
13. Schachtman v. Dulles, 225 F.2d 938 (D.C. Cir. 1955). Membership in an organization listed by the Attorney General as subversive was held insufficient grounds for refusing a passport where subversive nature of the organization was denied.
14. "[C]itizenship or allegiance . . . or unlawful conduct . . . are the only ones which it could fairly be argued were adopted by Congress . . . ." 357 U.S. at 128.
15. "Where activities . . . such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them." *Id.* at 129.
16. "Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement." *Id.* at 130.
17. *Ibid.*
18. Universal Declaration of Human Rights, art. 13, para. 2, YEARBOOK OF THE UNITED NATIONS 535 (1948-49).

citizens to "see for themselves" and to seek knowledge wherever it may be found.[19] On the other hand there is the necessity for preventing members of subversive groups from passing freely in and out of the country on their missions.[20] As pointed out in the dissent, the period during which petitioner's passport was refused was not really peacetime[21] and the legislature had already indicated that in such situations the individual right might have to be limited in the interest of national security.[22] This decision in favor of the individual's interest may foretell other judicial restrictions on the Secretary's discretion and an eventual legislative reaction which will probably face a test of constitutionality.[23]

CORPORATIONS—CORPORATE EXECUTIVES' STOCK OPTION PLAN

Minority stockholders brought a derivative action against the directors and an officer of a corporation alleging that a stock option plan[1] and certain other transactions[2] constituted waste of corporate assets

19. 357 U.S. at 126.
20. *Id.* at 132.
21. "In a wholly realistic sense there is no peace today, and there was no peace in 1952." *Id.* at 141.
22. *Id.* at 132.
23. The President in a message to Congress, U.S. CODE CONG. & AD. NEWS, 85th Cong., 2d Sess., 2713 (1958), asked Congress to pass a bill returning the Secretary's discretionary power in regard to issuing passports and to safeguard the discretionary power to put certain countries off limits to American citizens. The Senate bill, S. 4110, 85th Cong., 2d Sess. (1958), failed to get Senate approval but the House bill, H.R. 13760, 85th Cong., 2d Sess. (1958), did receive House approval August 23, 1958.

1. Options were exercisable 20% on or after May 1, 1951, and 20% on the option dates in 1952, 1953, 1954, and 1955. If the net income of the company fell below an amount equal to $3.50 per share of the common stock outstanding at the end of the calendar years 1951, 1952, 1953, or 1954, the option was revoked as to the number of additional shares otherwise becoming available for purchase by each participant. The purchase price was $36.125 per share, the fair market value of the stock on January 9, 1951, the date of the grant. The options were not transferable otherwise than by will or the laws of descent and distribution, and could only be exercised by the optionee during his lifetime. If the optionee left the company during the years 1951, 1952, 1953, or 1954, for each full month of employment he was entitled to exercise the options with respect to 1/12 of the entire number of shares to become available to him during the following calendar year. Options had to be exercised within three months after leaving the company's employ. As a condition subsequent to validity the plan had to receive shareholder ratification. The options expired December 31, 1957.

2. Waste of the corporate assets was alleged in four separate causes of action. The first cause of action, lack of consideration for the options, is the subject of this comment. The second and third causes of action concerned the company's payment of $20,000 to a resigning officer for that officer's option to 3,000 shares (worth only $9,000 to the optionee). The court said that in the

in that the corporation received no consideration for the options from the employee—optionees, nor could it reasonably expect to benefit from the plan. The options were exercisable in installments, and although a participant could exercise 26 2/3 per cent of his option within four months of the grant, the option could not be exercised *in toto* until four years later. *Held,* summary judgment for defendents. An executive stock option plan is supported by sufficient consideration and does not constitute a waste or gift of corporate assets where the rights granted a participant are conditioned upon further rendition of his services. *Gruber v. Chesapeake & Ohio Ry.,* 158 F.Supp. 593 (N.D. Ohio 1958).

Restricted stock options[3] are currently a popular means of management compensation in public issue corporations.[4] Under such plans key executives are given an opportunity to buy stock of the corporation in the future at or slightly below the market price on the date of the grant. The corporation expects to benefit by providing its competent executives with an incentive that will ultimately result in higher corporate earnings through more efficient management. For a plan to be valid the corporation must receive legal consideration from the optionee,[5] and there must be a reasonable relationship between the

absense of usurpation, fraud, or gross negligence, it would not interfere merely to overrule and control discretion of directors on questions of corporate management, policy, or business. The court held that the fourth cause of action, an amendment to the president's employment contract, was a matter within the discretion of the directors concerning internal affairs of the corporation.

3. "Restricted" in that they must comply with the applicable provisions of the Internal Revenue Code to receive favorable tax treatment. INT. REV. CODE OF 1954, § 421. The Securities Act of 1933 also contains provisions relating to stock option plans. 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77b-v (Supp. IV, 1957). Provisions of state statutes must also be complied with. These problems are beyond the scope of this comment. See generally, WASHINGTON & ROTHSCHILD, COMPENSATING THE CORPORATE EXECUTIVE (rev. ed. 1951); Dean, *Employee Stock Options,* 66 HARV. L. REV. 1403 (1953); Grossman and Herzel, *Employee Stock Options,* 1958 U. ILL. L.F. 45.

4. Stock options have not found wide use in closely held corporations because of restrictions on 10% owners. On the use of stock options as incentive compensation in closely held corporations see 2 O'NEAL, CLOSE CORPORATIONS: LAW AND PRACTICE §§ 8:11- :12 (1958).

5. Otherwise the option is considered a gift of corporate assets regardless of majority shareholder ratification. Holthusen v. Edward G. Budd Mfg. Co., 53 F. Supp. 488 (E.D. Pa. 1943); Frankel v. Donovan, 120 A.2d 311 (Del. Ch. 1956); Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952), 34 A.L.R.2d 839 (1954). *But see,* Clamitz v. Thatcher Mfg. Co., 158 F.2d 687 (2d Cir. 1947) regarding plaintiff's contention that the option could be exercised at any time after they were granted, the court said that whether or not such a condition would have helped or hurt the incentive features of the arrangement was a business problem for the directors to solve; McPhail v. L.S. Starrett Co., 257 F.2d 388 (1st Cir. 1958), *affirming,* 157 F. Supp. 560 (D. Mass. 1957), holding that options which all employees with more than six months service could purchase within a thirty-day period at a price equal to the fair market value at the time of the grant need not be supported by consideration because the options were only offers which the optionor could revoke at any time before acceptance. The optionees were

value of the option granted and the anticipated benefit to the corporation.[6] Difficulty arises in determining reasonableness,[7] and the courts have not been inclined to substitute their judgment for that of the corporation's directors in the absence of bad faith or fraud.[8] Retention of key employees is the basic objective of executive option plans,[9] and assurance that the optionee will remain in employment for a specified length of time is ordinarily the legal consideration for the option.[10] Options which were exercisable immediately from the date of issuance have been held invalid for lack of consideration,[11] however, an option exercisable in one year has been held valid.[12] Past services do not normally constitute consideration,[13] but exceptions have been made.[14] Merely increasing an optionee's proprietary interest in the

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given ten years to pay for the stock without being charged interest, however upon termination of employment an optionee's right to pay for his stock in installments without interest terminated. The court felt that the plan offered a reasonable assurance that participants would continue in the company's employ: "[T]he fact remains that the Company could reasonably expect to receive as consideration for the options not only the increased loyalty and effort of its employees but also that its employees who were given options would stay on in their employment to take advantage of the privilege of paying for their stock in installments without interest." 257 F.2d at 394.

6. Sandler v. Schenley Industries, Inc., 32 Del. Ch. 46, 79 A.2d 606 (Ch. 1951); Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (Ch. 1948). Absent such a relationship the plan is open to attack by minority shareholders even though a majority of the shareholders have ratified the plan. *Cf.* Rogers v. Hill, 289 U.S. 582 (1933).

7. See Rogers v. Hill 289 U.S. 582 (1933); Clamitz v. Thatcher Mfg. Co., 158 F.2d 687 (2d Cir. 1947); Wyles v. Campbell, 77 F. Supp. 343 (D.Del. 1948); Holthusen v. Edward G. Budd Mfg. Co., 52 F. Supp. 125 (E.D. Pa. 1943); Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (1948); Heller v. Boylan, 29 N.Y.S.2d 653 (Sup. Ct.), *aff'd mem.*, 263 App. Div. 815, 32 N.Y.S.2d 131 (Sup. Ct., App. T. 1941).

8. Wright v. Heublein, 238 Fed. 321 (4th Cir. 1916); Wyles v. Campbell, 77 F. Supp. 343 (D.Del. 1948); McQuillen v. National Cash Register Co., 27 F. Supp. 639 (D. Md. 1939). BALLENTINE, CORPORATIONS § 76 (rev. ed. 1946).

9. "Sufficient consideration to the corporation may be, *inter alia*, the retention of the services of an employee, or the gaining of the services of a new employee . . . ." Kerbs v. California Eastern Airways Inc., 33 Del. Ch. 69, 90 A.2d 652, 656 (Sup. Ct. 1952).

10. Retention can be assured by an employment contract entered into at the time of the grant, or by the terms of the option itself. McPhail v. L. S. Starrett Co., 257 F.2d 388 (1st Cir. 1958) (benefit to corporation implied in terms of option); Holthusen v. Edward G. Budd Mfg. Co., 53 F. Supp. 488 (E.D. Pa. 1943); Sandler v. Schenley Industries, Inc., 32 Del. Ch. 46, 79 A.2d 606 (Ch. 1951) (contract).

11. Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 90 A.2d 652 (Sup. Ct. 1952); Frankel v. Donovan, 120. A.2d 311, (Del. Ch. 1956).

12. Holthusen v. Edward G. Budd Mfg. Co., 53 F. Supp. 488 (E.D. Pa. 1953).

13. *Accord, In re* Fergus Falls Wollen Mills Co., 127 F.2d 491 (8th Cir. 1942); Richardson v. Blue Grass Mining Co., 29 F. Supp. 658 (E.D. Ky. 1939), *aff'd*, 127 F.2d 291 (6th Cir.) (per curiam), *cert. denied*, 317 U.S. 639 (1942); Von Arnim v. American Tubeworks, 188 Mass. 515, 74 N.E. 680 (1905).

14. Hurt v. Cotton States Fertilizer Co., 159 F.2d 52, 59 (5th Cr.), *cert. denied*, 331 U.S 828 (1947) (employee's services of sufficient merit to warrant a reasonable retroactive bonus); Vaught v. Charleston Nat'l Bank, 62 F.2d 817, 820 (10th Cir. 1933) (consideration present where employee took on duties other than those for which he was compensated).

corporation does not assure the corporation of receiving any benefit[15] and therefore would constitute a gift of corporate assets.

In the instant case the court disposed of the plaintiffs' contention that there was lack of consideration running to the corporation by pointing out that the plan required rendition of services after the date of adoption as a condition to participation.[16] Plaintiffs emphasized the fact that a participant could have served his employment on the first option date[17] and still have exercised up to 26 2/3 per cent of his total allocation. They felt that consideration for this part of the option was weak, thus implying that there was not a reasonable relationship between the value of the option and the benefit to the corporation. Plaintiffs cited *Holthusen v. Edward G. Budd Mfg. Co.*[18] in support of their contentions. In prior litigation between the parties in the *Budd* case[19] the court enjoined issuance of options that were exercisable *in toto* immediately after the grant on the ground that the only consideration was the hope of retaining the employees. The injunction was dissolved when the plan was subsequently amended to provide that the options were not exercisable until after one year of employment.[20] The court in the instant case stressed the fact that here the options were not exercisable *in toto* until four years after the grant.[21] The court also ascribed importance to the fact that continued business success was necessary for the plan to operate and reasoned that this provision of the plan further insured the corporation of receiving a benefit.[22]

The holding in the instant case is in accord with the generally recognized requisites of valid stock option plans.[23] However, it provides little guidance for a determination of what is a reasonable relationship between the value of the option granted and the anticipated benefit to

15. Rosenthal v. Burry Biscuit Corp., 30 Del. Ch. 299, 60 A.2d 106 (Ch. 1948).

16. "Consideration for the options is inherent in the plan itself because the optionee is unable to exercise his option unless he first renders service to the company." 158 F. Supp. at 599.

17. May 1, 1951. See note 1 *supra.*

18. 53 F. Supp. 488 (E.D. Pa. 1943).

19. Holthusen v. Edward G. Budd Mfg. Co., 52 F. Supp. 125 (E.D. Pa. 1943).

20. Holthusen v. Edward G. Budd Mfg. Co., 53 F. Supp. 488 (E.D. Pa. 1943).

21. "How much more reasonable is the C & O plan herein where the participants are unable to exercise their options at all unless they *work* at least 4 months for 26 2/3% and then must work for 4 years to exercise fully their options to the remaining 73 1/3%." 158 F. Supp. at 600.

22. "To insure further that the C & O would receive a 'benefit' the plan imposes a requirement not included in plans of other corporations that have been involved in litigation through shareholder suits. As a condition precedent to the right to exercise options maturing in each of the years from 1952 through 1955, the C & O's net income must be at least equal to $3.50 per share of common stock for each preceding year." 158 F. Supp. at 599.

23. The corporation must receive legal consideration from the optionee and the plan must be so designed as to reasonably assure the corporation that it will receive the benefit bargained for.

the corporation.[24] The protection furnished by the requirement of continued business success[25] is illusory since a participant will not exercise his option unless the corporation has prospered and the stock has in fact appreciated in value. The requirement of legal consideration for the grant of a stock option should be re-examined. *McPhail v. L. S. Starrett Co.*[26] is apparently the only case directly holding that the grant of an option need not be supported by consideration:

> [I]t is elementary law that an option is not always a contract but an offer to enter into a contract coupled with a promise to hold the offer open for a given period of time, which promise is or is not binding on the offeror depending on whether or not it is supported by consideration . . . . The only effect on an option of lack of consideration is to make the promise to keep the offer open unenforceable against the optionor.[27]

Where the optionee has given no consideration for the grant of the option and is not bound by an employment contract but stays on in the corporation's employ in reliance on the grant the corporation should be barred by promisory estoppel from revoking the option.[28] This should raise no problem since the corporation in that case will in fact have received the benefit it bargained for, *i.e.*, retention of key employees. A minority shareholder does not have grounds for complaint if the directors have inaugurated a program which they in their business judgment reasonably believe will benefit the corporation. If the stock option plan is so unwise or improvident as to constitute waste or a gift of the corporate assets then the individual directors should be held liable for their negligence or fraud. Such was not the case here.

DOMESTIC RELATIONS—SEPARATION AGREEMENTS—UNENFORCEABILITY OF PROVISION IN SEPARATION AGREEMENT AS TO RELIGIOUS TRAINING OF MINOR CHILD

Plaintiff a protestant, was granted a divorce from her husband, a Roman Catholic, and was awarded custody of their only child.[1] In the

24. Some courts have held that no gauge can be found to measure executive compensation, *e.g.*, Heller v. Boylan, 29 N.Y.S.2d 653, 680 (Sup. Ct.), *aff'd mem.*, 263 App. Div. 815, 32 N.Y.S.2d 131 (Sup. Ct., App. T. 1941). See generally, Baker, *A Just Gauge for Executive Compensation,* 22 HARV. BUS. REV. 75 (1943) (advocating the use of statistical data).
25. See note 22 *supra.*
26. 257 F.2d 388 (1st Cir. 1958). See note 5 *supra.*
27. 257 F.2d at 393.
28. See RESTATEMENT, CONTRACTS § 90 (1932).

1. The child was seven years old at the time the motion was filed, 146 N.E.2d at 477.

decree, the court adopted a separation agreement between the parties[2] which provided that the minor would be reared and educated exclusively in the Roman Catholic faith.[3] Plaintiff violated the agreement by entering the child in a public school, whereupon the defendant moved for an order under the original divorce decree that the plaintiff be held in contempt of court. The motion was denied.[4] On appeal, *held,* affirmed. A provision in a separation agreement which has been incorporated into a divorce decree, directing that the party who has been awarded the custody of a minor child rear that child in a particular religious faith and to send such child to a school affiliated with that faith is judicially unenforceable. *Hackett v. Hackett,* 150 N.E.2d 431 (Ohio App. 1958).

The present state of the law regarding the enforceability of antenuptial and separation agreements[5] providing that children be reared and educated within a particular religious faith is uncertain.[6] The weight of authority, however, favors the position that these provisions are not judicially enforceable.[7] The reasons generally given in support

2. The provisions of the separation agreement were incorporated by reference into the divorce decree.

3. The separation agreement provided in substance that the daughter of the parties shall be reared in the Roman Catholic faith exclusively, that she make her first communion and be confirmed therein, attend all services as prescribed by the church, and observe all abstinence and Lent regulations. It was provided that the daughter attend a private school operated by the Roman Catholics or a Roman Catholic Order.

4. 146 N.E.2d at 477.

5. Although only a separation agreement is at issue in the instant case, because of its similarity with some antenuptial agreements required by a few religious faiths, both agreements are discussed, though most frequently referred to merely as separation agreements.

Divorce courts are generally bound by valid separation agreements, North v. North, 339 Mo. 1226, 100 S.W.2d 582 (1936), but if they are not so bound and yet desire to give effect to the agreement, the court has the power to incorporate it into its divorce decree even though they would not have the power to make the decree resulting therefrom in the absence of the agreement. Dickey v. Dickey, 154 Md. 675, 141 Atl. 387 (1928). But this does not apply to agreements which are unenforceable and invalid at the time of making. 150 N.E.2d at 434.

6. A historical survey of this question is set forth in 29 HARV. L. REV. 485 (1916). It was noted there that, for reasons discussed, it was generally thought that the courts neither would nor could enforce these agreements. But at that time this country was relatively free from litigation on the subject.

For a present view of the controversy, see 6 WILLISTON, CONTRACTS § 1744A n.3 (rev. ed. 1938), where it was said, "Agreements between parents relating to the religious training of their children are generally upheld." See also Weinberger v. Van Hessen, 260 N.Y. 294, 183 N.E. 429, 431 (1932), where the court said, "Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country."

For the opinion to the contrary, that these agreements are without legal effect, and a criticism of the quotations from Williston and the *Weinberger* case, see Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 360 (1955).

7. Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957); Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491 (1956); Denton v. James, 107 Kan. 729, 193 Pac. 307 (1920); Dumais v. Dumais, 152 Me. 24, 122 A.2d 322 (1956); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910); Boerger v. Boerger, 26 N.J.

of this view are as follows: that, as a judical policy, the courts will not interfere with the internal affairs of the family except where the temporal welfare of the children is threatened and where the courts could justify their interference without regard to any religious controversy;[8] that the courts are constitutionally disabled from entering religious controversies;[9] that in all cases the primary consideration is the best interests of the children[10] and that these interests would not be served by requiring the children to be reared in a different religious faith than that of their parent or guardian;[11] that courts of equity generally limit the remedy of specific performance to controversies involving property;[12] and that damages are unprovable.[13] On the other hand, several courts have adopted the view that these agreements are enforceable, some of the reasons being that the consideration given for the agreement is of the highest moral caliber;[14] that the best interests of the children are in fact served by enforcement if the parent or guardian has shown utter disregard for moral and religious duties

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Super. 90, 97 A.2d 419, (Ch. 1953). See also ZOLLMAN, AMERICAN CHURCH LAW § 39 (1933); Friedman, *The Parental Right to Control the Religious Education of a Child,* 29 HARV. L. REV. 485 (1916); Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333 (1955); Note, *Enforceability of Antenuptial Contracts in Mixed Marriages,* 50 YALE L.J. 1286 (1941).

8. Donahue v. Donahue, 142 N.J.Eq. 701, 61 A.2d 243 (Ct. Err. & App. 1948). In Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936) the court said it was without jurisdiction in a proceeding for custody of a child arising out of a disagreement over the child's education where neither the child's health nor welfare was threatened. It was said in Purinton v. Jamrock, 195 Mass. 187, 199-200, 80 N.E. 802, 805 (1907), "The court will not itself prefer one church to another, but will act without bias for the welfare of the child under the circumstances of each case. This is a fair consensus of judicial opinion . . . ." See also 2 NELSON, DIVORCE AND ANNULMENT § 15.13 (2d ed. 1945).

9. Denton v. James, 107 Kan. 729, 193 Pac. 307, 310 (1920); Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685, 691-2 (1910). See Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 363-4 (1955). See also Note, *Enforceability of Antenuptial Contracts in Mixed Marriages,* 50 YALE L.J. 1286, 1293 (1941).

10. Pugh v. Pugh, 133 W. Va. 501, 56 S.E.2d 901 (1949). See also Annot., 15 A.L.R.2d 432, 435 (1951).

11. Boeger v. Boeger, 26 N.J. Super 90, 97 A.2d 419 (1953); *Ex parte* Flynn, 87 N.J. Eq. 413, 100 Atl. 861 (ch. 1917); *In re* Nevin, (1891) 2 ch. 299. See also Pfeffer, note 9 *supra.*

12. Brewer v. Cary, 148 Mo. App. 193, 127 S.W. 685 (1910); ZOLLMAN, AMERICAN CHURCH LAW § 39 (1933). This general maxim, however, has frequently been relaxed, especially in domestic relations cases. See Note, *Does Equity Protect Property Rights in the Domestic Relations,* 19 KY. L.J. 57 (1930). See also Note, 37 IOWA L. REV. 268 (1951).

13. ZOLLMAN, AMERICAN CHURCH LAW § 39 (1933); Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 363 (1955).

14. In Ramon v. Ramon, 34 N.Y.S.2d 100 (N.Y.C. Dom. Rel. Ct. 1942), it was said, in regard to antenuptial agreements made prior to mixed marriages in the Roman Catholic church and which contain provisions similar to the instant separation agreement, that these are the most important contracts ever made by a Roman Catholic participant in a mixed marriage. The implication is that the agreement transcends the parties and includes both the Church and God. For this reason the Roman Catholic participant depends upon the compliance of the contract for his continued spiritual existance. See Comment, 6 CATHOLIC U.L. REV. 169 (1956).

voluntarily assumed;[15] and that no constitutional disabilities are involved.[16]

The court in the instant case first rejected the movant's contention that a separation agreement, although originally unenforceable, may acquire legal effect by its incorporation into a court decree[17] and that a party to such an agreement is thereafter estopped from asserting its unenforceability.[18] The court then adopted the majority view that agreements of this nature between parents concerning the religious education of their children are unenforceable. Although there were no new reasons given by the court in support of this position the existing reasons, views and commentaries of other courts and legal writers were integrated for the first time into one persuasive decision. The result is the strongest authoritative stand to date against the enforceability of antenuptial or separation agreements that contain provisions requiring that the children of the parties to the agreement be reared exclusively in one religious faith and be educated in the schools affiliated with that faith.

As was pointed out by the court, the issue in this case involves a basic tenet of our political and religious heritage, that neither Church nor State should intermeddle in the affairs of the other. This is perhaps more than a legal doctrine—it is felt in some quarters to rest at the very foundation of religious freedoms.[19] The decision represents what now may be deemed the general rule rather than the mere weight of authority. The theories most often used in support of this position will probably include the aforementioned considerations of judicial policy, constitutional rights and limitations, and the best interests of the children.

LABOR LAW—LABOR MANAGEMENT RELATIONS ACT—AVAILABILITY OF STATE COMMON LAW REMEDIES THOUGH RELIEF OBTAINABLE UNDER LMRA

A machinist expelled from his union in California and a nonunion Alabama electrician kept from his job by a strike obtained state court damage judgments for the injurious consequences of the union activity against the unions concerned. Both judgments were

15. Shearer v. Shearer, 73 N.Y.S.2d 337 (Sup. Ct. 1947); Comment, 6 CATHOLIC U.L. REV. 169 (1956).
16. Zorach v. Clauson, 343 U.S. 306 (1952). See also Lynch v. Uhlenhopp, 248 Iowa 68, 78 N.W.2d 491, 500 (1956) (dissent).
17. 150 N.E. 2d at 433-434.
18. *Id.* N.E.2d at 434-435.
19. For a short discussion of this matter, see Pfeffer, *Religion in the Upbringing of Children,* 35 B.U.L. REV. 333, 358 (1955).

upheld by the state appellate courts. The unions protested that state jurisdiction was pre-empted by the Labor Management Relations Act (hereinafter Taft-Hartley or LMRA). On certiorari to the Supreme Court of the United States, *held,* affirmed. The Taft-Hartley Act does not preclude state court damage judgments for breach of contract or tortious conduct by labor unions where relief through the National Labor Relations Board, though available, would be inadequate. *International Ass'n of Machinists v. Gonzales,* 356 U.S. 617 (1958); *International Union, UAW-CIO v. Russell,* 356 U.S. 634 (1958).

In the field of labor relations no area has caused more litigation and comment[1] than what Mr. Justice Frankfurter has called "the rather subtle line of demarcation between exclusive federal and allowable state jurisdiction over labor problems."[2] The decisions do not yield themselves to any very satisfactory system of classification, but generally it can be said that the Taft-Hartley Act has reserved to the NLRB jurisdiction over conduct proscribed[3] by the act, as well as activities protected by it.[4] Taft-Hartley, however, represents Congressional regulation only in the field of labor relations. Hence, state jurisdiction has been consistently upheld where the state controls are directed at confirming union activity within the standards required of all citizens, rather than at outlawing the objectives of such activity. Within this area, state court injunctions may be issued to protect the person and property rights of citizens from unlawful conduct, or to restrain other conduct neither prohibited nor protected by the act.[5]

1. See generally on federal-state jurisdiction, Cox and Seidman, *Federalism and Labor Relations,* 64 HARV. L. REV. 211 (1950); Cox, *Federalism in the Law of Labor Relations,* 67 HARV. L. REV. 1297 (1954); Gerash, *Recent Action in the No-Man's Land of Labor Law,* 33 DICTA 199 (1956); Glushien, *Federal Preemption in Labor Relations,* 15 FED. B. J. 4 (1955); Isaacson, *Federal Versus State Jurisdiction in Labor Relations,* 42 A.B.A.J. 415 (1956); James, *State Against Federal Jurisdiction in Labor Relations,* 31 CONN. B.J. 5 (1957); Petro, *Labor Relations Law,* 32 N.Y.U.L. REV. 267 (1957); Rose, *The Labor Management Relations Act and the State's Power to Grant Relief,* 39 VA. L. REV. 765 (1953); Turnbull, *Federal-State Jurisdictional Problems,* 7 LAB. L.J. 5 (1956; Van de Water and Petrowitz, *Federal-State Jurisdiction and the Constitutional Framework in Industrial Relations,* 31 SO. CAL. L. REV. 111 (1958); Comment, 35 TEXAS L. REV. 555 (1957); Comment, 20 U. CHI. L. REV. 109 (1952).

2. Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 519 (1955).

3. Capital Serv., Inc. v. NLRB, 347 U.S. 501 (1954); Garner v. Teamsters Union, 346 U.S. 485 (1953); Plankinton Packing Co. v. Wisconsin Employment Relations Bd., 338 U.S. 953 (1950).

4. International Union UAW, CIO v. O'Brien, 339 U.S. 454 (1950); Amalgamated Ass'n of Street Employees v. Wisconsin Employment Relations Bd., 340 U.S. 383 (1951). *Cf.* Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955), 8 VAND. L. REV. 916 (1955). See Isaacson, *supra* note 1, at 415-16.

5. *E.g.,* Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); UAW v. Wisconsin Employment Relations Bd., 351 U.S. 266 (1956); International Union UAW, AFL v. Wisconsin Employment Relations Bd., 336 U.S. 245 (1949). Prior to Garner v. Teamsters Union, 346 U.S. 485 (1953), state courts felt free to enjoin concerted activities neither protected nor prohibited by Taft-Hartley. *E.g.,* Goodwins, Inc. v. Hagedorn, 303 N.Y. 300, 101 N.E.2d 697 (1951).

The instant cases raise anew the problem whether state courts may entertain common law suits for damages, where the actionable conduct is prohibited by Taft-Hartley but relief through the NLRB is unavailable[6] or inadequate. In *United Constr. Workers v. Laburnum Constr. Corp.*[7] the Supreme Court approved such state jurisdiction, as to tort, but there the plaintiff was an employer and there was no compensatory relief available under the LMRA. Alternately praised and denounced,[8] *Laburnum* has been the subject of speculation as to whether it would be extended beyond its own facts.[9] As to the jurisdiction of state courts to award damages in cases of unjust expulsion of a union member, the lower courts have been divided.[10]

Garner v. Teamsters Union[11] struck down a state court attempt to enjoin picketing which was illegal both under the LMRA and the Pennsylvania statute. This was done because the state court injunction duplicated available NLRB relief in the form of a cease and desist order.[12] But in *Laburnum* and the instant cases state court judgments in tort and contract, including punitive damages[13] and compensation for mental suffering, were sustained, despite the fact that the union conduct involved was an unfair labor practice.[14] In both *Gonzales* and

Later decisions have been undecided as to whether *Garner* should be confined to its exact facts. *E.g.*, Milwaukee Boston Store Co. v. American Fed'n of Hosiery Workers, 269 Wis. 338, 69 N.W.2d 762 (1955).

6. *Cf.* Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957), in which a "no-man's land" is created where the NLRB declines jurisdiction because the amount of interstate commerce involved does not meet its jurisdictional standards. This "tidelands" area will be much constricted by the new NLRB standards, recently announced. See N.L.R.B. Announces Changes in Exercise of Jurisdiction, NLRB Press Release, No. R-576, Oct. 2, 1958.

7. 347 U.S. 656 (1954). This was an action brought by an employer to recover damages from a union which had engaged in violent and destructive conduct in violation of both state law and presumably the LMRA. The Supreme Court held that state jurisdiction was permissible since it neither duplicated nor conflicted with remedies available under the LMRA.

8. *Compare* Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1323 (1954) *with* Petro, *Labor Relations Law*, 32 N.Y.U.L. REV. 267, 272-273 (1957).

9. See, *e.g.*, Isaacson, *Federal Versus State Jurisdiction in Labor Relations* 42 A.B.A.J. 415, 419 (1956); Van de Water and Petrowitz, *Federal-State Jurisdictional Problems and the Constitutional Framework in Industrial Relations*, 31 So. CAL. L. REV. 111, 129 (1958).

10. State court has jurisdiction, International Union UAW, CIO v. Hinz, 218 F.2d 664 (6th Cir. 1955). *Contra*, Born v. Laube, 213 F.2d 407 (9th Cir. 1954), *cert. denied*, 348 U.S. 855 (1954).

11. 346 U.S. 485 (1953); see 7 VAND. L. REV. 422 (1954).

12. "But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint . . . and . . . prevent irreparable injury to petitioners while their case was being considered." 346 U.S. at 489.

13. In the *Russell* case suits totaling $1,500,000, arising out of the same strike, were pending against the union, the majority of the amount being for punitive damages. 356 U.S. at 658.

14. In *Gonzales* the conduct could be classified under § 8(b)(2), because the expulsion might constitute an attempt to cause an employer 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 the periodic dues and the initiation fees . . . ." 61 Stat. 141 (1947), 29 U.S.C.

Russell a cease and desist order could have been issued, back wages restored, and, in the former, reinstatement ordered.[15] The emphasis in *Laburnum* and the instant cases is placed on the fact that, although there may be some potential conflict between state and federal remedies, the proposed state damage judgments do not duplicate federal remedy under Taft-Hartley.[16] The instant cases, when read with *Laburnum,* indicate clearly the approval of state court damage judgments in lieu of or as a complement to traditional remedies by state equity courts where state jurisdiction is founded on prevention of violence or any other conduct neither protected nor prohibited by the LMRA.[17] The federal act has not precluded state action to enjoin violence, such as was present in *Russell,* nor has it pre-empted state jurisdiction to determine and enforce the rights of union membership, which was the issue in *Gonzales.* In such cases the fact that there is incidentally a labor dispute does not pre-empt state jurisdiction, if the remedy of damages does not duplicate available relief under Taft-Hartley, but rather presents only a potential conflict. Such conflict with federal policy in the case of damages is actually less serious than it is in the case of injunctions or other equitable relief, because an improperly granted injunction, even though reversed on appeal, will destroy the collective action at the critical moment, whereas a damage judgment can be reversed with little or no effect on collective action. The

§ 158(b)(2) (1952). In *Russell* the Court assumed that the union's conduct violated § 8(b)(1)(A), which provides that it is an unfair labor practice "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 7 . . . ." *i.e.,* the right not to participate in collective activity. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1952).

15. "[T]he Board . . . shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and . . . take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .", 61 Stat 147 (1947), 29 U.S.C. § 160(c) (1952). See Petro, *supra,* note 1, for a suggestion that the statute should be construed as to include ordering the union to pay for any damage it does, over and above reimbursement for back pay.

16. *But cf.* Mr. Chief Justice Warren, dissenting in *Gonzales,* "[T]he necessity for uniformity in the regulation of labor relations subject to the Federal Act forbade recourse to potentially conflicting state remedies." 356 U.S. at 623.

17. *But cf.* Garmon v. San Diego Bldg. Trades Council, 49 Cal. 2d 595, 320 P.2d 473 (1958), *cert. granted,* 357 U.S. 925 (1958), in which damages were given for peaceful picketing. The employer had earlier been given an injunction and damages in the state court on the theory that, since he did not meet the NLRB jurisdictional standards, he would be remediless otherwise. 45 Cal. 2d 657, 291 P.2d 1 (1955). Since the state court felt it was filling a vacuum in federal law, it attempted to apply federal law. The Supreme Court of the United States vacated the injunction and remanded the case on the issue of damages, remarking that it was not clear whether the state court would have given damages had it applied state law. 353 U.S. 26 (1957). The state court interpreted this as sanctioning state court damages in the absence of available state equity relief. This seems to be a misinterpretation of the remand instructions, and the granting of certiorari apparently strengthens this assumption, but the forthcoming decision should settle the question whether state court damages may be given even though no state court injunction can be had.

difficulty, however, of ascertaining the boundaries of the "neither prohibited nor protected" area is still with us.

The mere fact that Taft-Hartley condemns and provides some relief for such union misconduct as was present in the instant cases would not justify a holding that state jurisdiction is pre-empted. Upon such facts the law of torts and contracts should lay hold of the union conduct without regard to its purpose or context, making the existence of a labor dispute irrelevant.[18] There is nothing in *Garner* which precludes the holding in the instant cases, since it was duplication and actual conflict which were forbidden there. These cases dispel some of the confusion which surrounded *Laburnum* and they add no new problems[19] which are not always present in any area where federal and state authority are intertwined.

LABOR LAW—LABOR MANAGEMENT RELATIONS ACT—HOT CARGO CLAUSE INSUFFICIENT AS A DEFENSE TO VIOLATION OF SECTION 8(b)(4)(A)

A collective bargaining agreement between general contractors and defendant Carpenters Union contained a so-called "hot cargo" clause providing that employees should not be required to handle non-union materials. The union told its members not to install certain non-union doors, and a complaint was filed with the National Labor Relations Board charging the union with a violation of section 8(b)(4)(A) of the Labor Management Relations Act of 1947 which makes it an unfair labor practice for a union to induce employees to engage in a secondary boycott.[1] The union asserted the hot cargo clause as a

18. The same kind of conduct interfering with any advantageous relationship would give rise to the same liability under other circumstances. See PROSSER, TORTS § 107 (2d ed. 1955).

19. *E.g.*, It can be argued that the instant cases will tend to cause aggrieved employees and employers to seek relief in the form of damage suits in favorable state forums in preference to the somewhat less benevolent administrative procedures of Taft-Hartley. *But see* Amalgamated Clothing Workers v. Richman Bros. Co., 348 U.S. 511, 520 (1955), in which it is suggested that a union might be able to force a National Labor Relations Board determination of the impropriety of the employer's resort to state courts by charging the employer with an unfair labor practice in seeking state court remedy.

1. The statute declares that it shall be an unfair labor practice for a labor organization or its agent:

> "(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services where an object thereof is: (A) forcing or requiring any employer . . . to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . ."

defense. The Board rejected this defense,[2] and the court of appeals for the ninth circuit affirmed.[3] On certiorari to the Supreme Court of the United States, *held,* affirmed. A collective bargaining agreement providing that employees shall not be required to handle non-union goods, even if legal, does not excuse union inducement of a secondary boycott in violation of section 8(b) (4) (A). *Local 1976, United Bhd. of Carpenters v. NLRB,* 357 U.S. 93 (1958).[4]

The hot cargo-secondary boycott problem springs from the conflict between the supposed intent of Congress that section 8(b) (4) (A) should prohibit all secondary boycotts[5] and the narrow language of the act which forbids only one means of effecting such a boycott. Whatever Congress may have intended, the language of the statute only prohibits a *union* from attempting to persuade *employees* to engage in a secondary boycott, and courts have consistently said that a union does not violate the act when it appeals directly to the employer[6] or when its members act on their own initiative to boycott the goods of another.[7] However, since the Board first ruled on the hot cargo question in 1949,[8] it has vacillated among four different positions: namely, (1) since section 8(b) (4) (A) was designed to protect only the neutral or secondary employer who is unwilling to boycott the goods of another and was not designed to protect the public or the primary employer, a hot cargo clause is a valid defense because the secondary employer has removed himself from the protected group

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Labor Management Relations Act (Taft-Hartley Act) § 8(b) (4) (A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b) (4) (A) (1952).

2. Sand Door & Plywood Co., 113 N.L.R.B. 1210 (1955).

3. NLRB v. United Bhd. of Carpenters, 241 F.2d 147 (9th Cir. 1957).

4. The Supreme Court combined for decision this case with two other hot cargo cases which were themselves combined for decision by the NLRB under the style of American Iron & Machine Works Co., 115 N.L.R.B. 800 (1956), and by the court of appeals *sub nom.,* General Drivers Union v. NLRB, 247 F.2d 71 (D.C. Cir. 1957). The Supreme Court's holding and reasoning in the instant case also applies to these two cases.

5. Senator Taft said:

"The Senator will find a great many decisions . . . which hold that under the common law a secondary boycott is unlawful. [*E.g.,* Burham v. Doud, 217 Mass. 351, 104 N.E. 841 (1914); see Annot., 52 A.L.R. 1144.] Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott [see *e.g.,* United States v. Hutcheson, 312 U.S. 219 (1941)] or any other kind of a strike no matter how unlawful it may have been at common law. All this provision [§ 8(b) (4) (A)] of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provisions dealing with secondary boycotts as to make them an unfair labor practice." 93 CONG. REC. 4198 (1947).

6. *E.g.,* Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158, 165 (9th Cir. 1950), *cert. denied,* 340 U.S. 827 (1950).

7. *E.g.,* Douds v. Milk Drivers Union, 133 F. Supp. 336, 341 (D.N.J. 1955) (dictum).

8. Conway's Express, 87 N.L.R.B. 972 (1949), *aff'd sub nom.* Rabouin v. NLRB, 195 F.2d 906 (2d Cir. 1952); Note, 54 MICH. L. REV. 253 (1955).

by signing such a contract;[9] (2) the clause is illegal and void because it is directly opposed to the policy of the statute which is to protect the public and the primary employer as well as the secondary employer from the disruptive effect of secondary boycott;[10] (3) a hot cargo clause is not a valid defense because the statute, literally interpreted, prohibits certain kinds of union conduct whether permitted by contract or not, but neither is the clause an illegal contract since there may be alternative ways of performing it which are not barred by the statute;[11] (4) a hot cargo clause is not a good defense in any case in which section 8(b) (4) (A) has been violated, and, moreover, is illegal in common carrier contracts for the reason that such a clause violates the antidiscrimination provision[12] of the Interstate Commerce Act.[13] Prior to its decision in the instant case, the Supreme Court had never passed on the hot cargo question,[14] but each one of the first three positions outlined above had been adopted by at least one of the several courts of appeal and federal district courts that had decided cases on the point.[15]

Strictly speaking, the Supreme Court did not adopt one of these four positions in the principal case. The case stands for the narrow proposition that an appeal by a union to employees that is prohibited under section 8(b) (4) (A) in the absence of a hot cargo clause is likewise prohibited when there is such a clause.[16] The Court's position

9. Pittsburgh Plate Glass Co., 105 N.L.R.B. 740 (1953); Conway's Express, 87 N.L.R.B. 972 (1949).

10. McAllister Transfer Co., 110 N.L.R.B. 1769 (1954); Note, 64 YALE L. J. 1201 (1955).

11. Crowley's Milk Co., 116 N.L.R.B. 1408 (1956); American Iron & Machine Works Co., 115 N.L.R.B. 800 (1956); Sand Door & Plywood Co., 113 N.L.R.B. 1210 (1955).

12. "It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce . . . to subject any particular person . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ." 54 Stat. 924 (1940), 49 U.S.C. § 316(d) (1952).

13. Genuine Parts Co., 41 L.R.R.M. 1087, 119 N.L.R.B. No. 53 (Nov. 8, 1957), 7 BUFFALO L. REV. 322 (1958).

14. Subsequent to its decision in the instant case, the Supreme Court decided another hot cargo case: NLRB v. Milk Drivers Union, 357 U.S. 345 (1958), *reversing* 245 F.2d 817 (2d Cir. 1957), see note 15 *infra*. In a memorandum opinion, the Court decided the case on the authority of the instant case.

15. Following the order given in the text, federal court authorities for the different positions are: (1) General Drivers Union v. NLRB, 247 F.2d 71 (D.C. Cir. 1957), 11 VAND. L. REV. 632 (1958); Milk Drivers Union v. NLRB, 245 F.2d. 817 (2d Cir. 1957), 42 MINN. L. REV. 502 (1958); Rabouin v. NLRB., 195 F.2d 906 (2d Cir. 1952); Madden v. Local 442, Teamsters Union, 114 F. Supp. 932 (W.D. Wis. 1953); (2) see Humphey v. Local 294, International Bhd. of Teamsters, 25 L.R.R.M. 2318 (N.D.N.Y. 1950) (dictum); (3) NLRB v. United Bhd. of Carpenters, 241 F.2d 147 (9th Cir. 1957); Alpert v. United Bhd. of Carpenters, 143 F. Supp. 371 (D. Mass 1956), 70 HARV. L. REV. 735 1957).

16. 357 U.S. at 108-09. If a hot cargo clause is not a good defense to a § 8(b) (4) violation, it follows that it is not a good defense to a violation of § 303 of the act which provides that an employer may sue a union for damages for the same offenses that are made unfair labor practices under § 8(b) (4). See

coincides with position one above to the extent that both assume that the statute was designed to protect only the secondary employer,[17] but an opposite result is reached in this decision by holding that the employer cannot contract away his protection under the statute by signing a hot cargo provision.[18] The Court expressly reserved judgment on the legality of the clause, finding that its ruling did not require a determination of this question.[19] However, the opinion contains dictum that the clause may still govern some of the relations between the parties[20] which seems to endorse the third position above. The Court further indicates its attitude on the question by disagreeing with the supposition that it was the intention of Congress to protect the public and all employers alike,[21] an assumption that most decisions have relied on in holding hot cargo clauses to be illegal.[22] It dismissed the argument that the clause is illegal under the Interstate Commerce Act by saying that it is the function of the Interstate Commerce Commission, not the NLRB, to decide the effect of a hot cargo clause on the obligations of a carrier to a shipper.[23] It seems from this reasoning that the Supreme Court, if called upon to decide the question directly, will hold that a hot cargo clause, though not a valid defense to a violation of section 8(b) (4) (A), is nevertheless a legal contract.

Should the courts in subsequent decisions construe narrowly the interpretation which this case gives to the language of the statute, an unusual situation could result. If a hot cargo clause is a valid contract, a union could enforce its provisions against the employer by a suit for specific performance or damages[24] even though the statute prohibits the union from enforcing it by self-help.[25] The Supreme Court's decision, if so interpreted, would perhaps delay some secondary boy-

Kon-Tempo Furniture, Inc. v. Kessler, 145 F. Supp. 341, 345 (E.D.N.Y. 1956) (by implication).

17. 357 U.S. at 99.
18. *Id.* at 105-06.
19. *Id.* at 108.
20. *Ibid.*
21. *Id.* at 99.
22. See note 10 *supra.*
23. 357 U.S. at 110. Subsequent to the Board's decision in the *Genuine Parts* case, note 13 *supra,* the Interstate Commerce Commission decided that a carrier cannot refuse to handle goods declared "unfair" by a union merely because he is a party to a hot cargo agreement. Galveston Truck Line v. Ada Motor Line, 73 M.C.C. 617 (1957). The effect of that decision together with the decision in the instant case is to make a hot cargo agreement between a carrier and a union meaningless. Neither party can enforce its provisions without violating a statute.
24. Section 301 of the act provides that either party to a collective-bargaining agreement may bring suit in the federal courts for damages for its breach. The Supreme Court has allowed specific performance of an arbitration clause in a union contract, Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); but the question of whether § 303 permits specific performance of other types of union contracts has not been finally decided.
25. *Cf.* 6 WILLISTON, CONTRACTS § 1779 (1938). *But cf. id.* §§ 1752-53.

cotts, but it would have little effect in reducing their number. However, in view of the fact that a union can coerce an employer to sign a hot cargo agreement almost as easily as it can force him to engage in a boycott, it is unlikely that the courts will take such a narrow position since it would permit a union to do indirectly what the statute prohibits it from doing directly.[26]

LIMITATION OF ACTIONS—ABSENCE FROM STATE AS A BASIS OF TOLLING STATUTE OF LIMITATIONS DESPITE AVAILABILITY OF SERVICE UNDER NONRESIDENT MOTORIST STATUTE

Plaintiff, a resident of Ohio, brought suit in the federal district court[1] of that state against a nonresident motorist on a personal injury claim arising out of an automobile collision on Ohio highways. The defendant had at all times subsequent to the accident continued to maintain a Michigan residence and had not returned to Ohio prior to commencement of this action. Service of process was had upon the Ohio Secretary of State in accordance with the nonresident motorist statute[2] almost four years after the collision. Also in effect at this time was a saving clause[3] to the Ohio, two year statute of limitations which provided for the tolling of the statute during periods of defendant's absence from the state. Upon appeal from an order dismissing the complaint, *held,* dismissal set aside and case remanded. A statute of limitations may be tolled by a defendant's nonresidence despite the fact that service of process can be obtained during this time under a nonresident motorist statute. *Chamberlain v. Lowe,* 252 F.2d 563 (6th Cir. 1958).

26. *Cf.* Barrows v. Jackson, 346 U.S. 249, 254 (1953); 6 CORBIN, CONTRACTS §§ 1376-77 (1954).

1. Jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332 (a) (1) (1952).

2. OHIO REV. CODE ANN. § 2703.20 (Baldwin 1958). Service of process upon nonresident owners or operators of motor vehicles: "Any nonresident of this state, being the operator or owner of any motor vehicle, who accepts the privilege extended by the laws of this state to nonresident operators and owners, of operating a motor vehicle or of having the same operated, within the state, or any resident of this state, being the licensed operator or owner of any motor vehicle under the laws of this state, who subsequently becomes a nonresident or conceals his whereabouts, by such acceptance or licensure and by the operation of such vehicle within this state makes the secretary of the state of Ohio his agent for the service of process in any civil suit or proceeding instituted in the courts of this state against such operator or owner of such motor vehicle, arising out of, or by reason of, any accident or collision occurring within this state in which such motor vehicle is involved."

3. OHIO REV. CODE ANN. § 2305.15 (Baldwin 1958). The saving clause reads in part: "After the cause of action accrues if he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought."

Saving clauses, which provide for the tolling of statutes of limitation during periods of a defendant's absence from the state, originated in England[4] and were adopted in this country long before the advent of concentrated interstate traffic.[5] In 1916 the Supreme Court of the United States held constitutional the first nonresident motorist statute[6] by which personal service of process could be had upon a nonresident motorist through the means of a statutorily designated officer of the state. Similar statutes have now been enacted throughout the country with little or no consideration being given to their proper relation with saving clauses.[7] These statutes generally do not specify whether substituted service of process upon the secretary of state is sufficient to prevent the tolling of a limitation period under the provisions of a saving clause. Lacking legislative guidance, it was perhaps inevitable that a split of authority would develop on this problem. The majority view looks to the basic concept of the saving clause in holding that the statute of limitations is not tolled where personal service of process can be had upon a statutorily appointed agent of the defendant.[8] On the other hand, the minority view holds that the limitation period is tolled despite the ability to obtain substituted service and that the letter of the law must be followed where at all possible, any other interpretation being open to criticism as judicial legislation.[9] Several

4. BUSWELL, THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION § 116 (1889). Statute 4 Anne, c. 16, § 19 first provided for the tolling of the statute of limitations while defendant was beyond the seas.

5. Note, 33 ILL. L. REV. 351, 352 (1938), indicates some eastern states enacted the saving clause in its original English form.

6. Kane v. New Jersey, 242 U.S. 160 (1916). See also Hess v. Pawloski, 274 U.S. 352 (1927).

7. Almost uniformly the courts have considered the argument that had the legislature intended an exception to the saving clause it would have done so by appropriate language. Macri v. Flaherty, 115 F. Supp. 739, 744 (E.D.S.C. 1953); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021, 1023 (1957); Haver v. Bassett, 287 S.W.2d 342, 346 (Mo. 1956); Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430, 432 (Sup. Ct. 1942); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139, 141 (1950); Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635, 636 (1947); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284, 286 (1934).

8. An expression of the majority view will be found in the following cases: Moore v. Dunham, 240 F.2d 198 (10th Cir. 1956) (applying Oklahoma law); Smith v. Pasqualetto, 146 F. Supp. 680 (D. Mass. 1956) (applying Massachusetts law); Peters v. Tuell Dairy Co., 250 Ala. 600, 35 So. 2d 344 (1948); Coombs v. Darling, 116 Conn. 643, 166 Atl. 70 (1933); Nelson v. Richardson, 295 Ill. App. 504, 15 N.E.2d 17 (1938); Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711 (1952); Haver v. Bassett, 287 S.W.2d 342 (Mo. 1956); Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S.2d 188 (Sup. Ct. 1956); Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635 (1947); Busby v. Shafer, 75 S.D. 428, 66 N.W.2d 910 (1954); Arrowood v. McMinn County, 173 Tenn. 562, 121 S.W.2d 566 (1938); Reed v. Rosenfield, 115 Vt. 76, 51 A.2d 189 (1947).

9. An expression of the minority view will be found in the following cases: Macri v. Flaherty, 115 F. Supp. 739 (E.D.S.C. 1953) (applying South Carolina law); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021 (1957); Gotheiner v. Lenihan, 20 N.J. Misc. 119, 25 A.2d 430 (Sup. Ct. 1942); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S.2d 749 (1st Dep't 1938); Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139 (1950); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284 (1934).

distinctions have been drawn to reconcile the divergent decisions, *e.g.*, the wording to be found in the individual statutes,[10] the influence of prior decisions within the jurisdiction with regard to promissory notes[11] and corporations,[12] and the somewhat nebulous feeling that service upon the secretary of state is not as fully satisfactory as actual service upon the defendant.[13] Basically, however, the conflict has been between the spirit of the law and the letter of the law.

The decision in the present case is based upon the holding of the Ohio Supreme Court in *Couts v. Rose*[14] which adopted the minority view despite the fact that there had been two prior lower court decisions to the contrary.[15] The federal court in the instant case considered both the *Couts* case and the prior view and concluded that the latter had been distinctly overruled. Thus the minority view appears to be the present reflection of Ohio law. This decision once again brings into focus the inherent conflict between the saving clause of the statutes of limitation and the nonresident motorist statutes, thus raising the problem of how the rights and liabilities of the country's many million nonresident motorists can be effectively harmonized.

The most practical answer to this conflict would be the enactment of

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10. It was said in conjunction with the wording of the South Carolina saving clause: "[T]his section applies not only to a resident of this State who has gone abroad temporarily, and then returns, but it also applies to one who has never been a resident." Macri v. Flaherty, 115 F. Supp. 739, 743 (E.D.S.C. 1953). In discussing those cases which have followed the minority view it was said: "The difference in the language of the statutes in those states as compared with the Ohio statute may account in part for the conclusions reached by the courts." Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635, 637 (1947).

11. The decision of prior promissory note cases has been followed in upholding the minority view. Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139, 141 (1950); Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021, 1022 (1957).

12. Kokenge v. Holthaus, 243 Iowa 571, 52 N.W.2d 711, 712 (1952) (following prior corporation case in holding with majority); Arrowood v. McMinn County, 173 Tenn. 562, 566, 121 S.W.2d 566, 568 (1938) (following prior railroad liability case in holding with majority); Bode v. Flynn, 213 Wis. 509, 252 N.W. 284, 285-86 (1934) (following prior insurance co. case in holding with minority).

13. Conceding that from the viewpoint of the defendant it would be more desirable to be served personally than by registered mail, yet it is difficult to see how the plaintiff has in any way been prejudiced since by either method he is able to secure an in personam judgment. This matter has been discussed in several cases. Staten v. Weiss, 78 Idaho 616, 308 P.2d 1021, 1023 (1957); Haver v. Bassett, 287 S.W.2d 342, 345-46 (Mo. 1956); Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S.2d 749, 752 (1st Dep't 1938).

14. 152 Ohio St. 458, 90 N.E.2d 139 (1950).

15. Canaday v. Hayden, 80 Ohio App. 1, 74 N.E.2d 635 (1947); Lile v. Powers, 24 Ohio Op. 124 (C.P. 1942). In the *Couts* case the court did not consider the reasoning of these two decisions and some doubt was expressed as to whether or not a distinction was intended to be drawn on the fact situation in the *Couts* case. The fact that the lower court had based its decision on the authority of the *Canaday* case was recognized in the statement of facts which preceded the decision in Couts v. Rose, 152 Ohio St. 458, 90 N.E.2d 139, 140 (1950).

clear and definitive statutes.[16] Should the legislatures give this matter full consideration it is felt that the more reasonable majority view would be adopted, giving effect to the purpose of the statute of limitations in preventing stale claims and also relieving the nonresident motorist of the burden of indefinite liability.[17] The question of whether or not the minority view is in conflict with the privileges and immunities clause[18] of the federal constitution, in denying to a nonresident defendant the privilege of pleading the statute of limitations which is granted to a resident defendant, was discussed in an early state supreme court decision.[19] It was there held that the ability to rely on the statute of limitations was not one of the fundamental privileges guaranteed by that clause. In view of the importance of this matter it would seem that all possible constitutional grounds should be fully explored. Both the equal protection clause[20] and the due process clause[21] might be grounds on which to challenge the minority holding.

16. It would seem that one of the national automobile or safety organizations would be interested in pressing for such uniform legislation throughout the country. This might also be a proper subject for the National Conference of Commissioners on Uniform State Laws.

17. At least one state has attempted to resolve the conflict through legislative action with something more than anticipated difficulty. In 1928 the following statute was enacted in conjunction with the saving clause: "But this section does not apply while a designation made in pursuance of law of a resident of the state on whom a summons may be served for another person or corporation remains in force." N.Y. CIV. PRAC. ACT § 19. However, it was held in Maguire v. Yellow Taxi Corp., 253 App. Div. 249, 1 N.Y.S.2d 749 (1st Dep't 1938) that the above section is not satisfied by the statutory appointment of the secretary of state since the legislature had in mind the appointment of a revocable agent. Later this section was amended to read:

"But this section does not apply in either of the following cases:

"1. While a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or non-resident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force."

The court's objection to the early statute appears now to have been adequately met and the intent of the legislature has been upheld in two recent cases. Maryland Cas. Co. v. Draney, 2 Misc. 2d 637, 155 N.Y.S.2d 845 (Sup. Ct. 1956); Fuller v. Stuart, 3 Misc. 2d 456, 153 N.Y.S.2d 188 (Sup. Ct. 1956).

Tennessee, although long committed to the majority view, has enacted legislation in this field by an addition to the nonresident motorist statute which reads in part: "The agency of the secretary of state to accept service of process shall continue for a period of one (1) year from the date of any accident or injury and shall not be revoked by the death of such nonresident within such period of one (1) year." TENN. CODE ANN. § 20-224 (1956).

18. U. S. CONST. art. IV, § 2.

19. Bode v. Flynn, 213 Wis. 509, 252 N.W. 284, 286-87 (1934).

20. U. S. CONST. amend. XIV, § 1. The test of validity of statutes under the equal protection clause centers about the unreasonable and arbitrary classification of the group against whom such legislation is directed. Can it not be said that the exposure to indefinite liability imposed by the minority view is an unreasonable and arbitrary discrimination against nonresident motorist as a group.

21. U. S. CONST. amend. XIV, § 1. In order to invalidate a statute under this clause it must be shown that the statute itself is unreasonable or arbitrary. Might it not be argued that the saving clause which once served a useful

Should such a challenge successfully invalidate the minority view it would be a bold step in the direction of stabilizing the rights and liabilities of our many nonresident motorists.

NEGLIGENCE—LANDOWNERS—DUTY OF BASEBALL CLUB TO PROTECT INVITEES FROM INJURIOUS ACTS OF THIRD PARTIES

While attending a baseball game, plaintiff, aged sixty-nine, sustained severe injuries by being pushed from her chair and trampled upon by spectators scrambling for a foul ball. In an action against the baseball club, plaintiff alleged that defendant was negligent in failing to have an usher near her box at the time of the incident to preserve order among the spectators and that this negligence was the proximate cause of her injuries. Plaintiff received a judgment for $3500. On appeal, *held,* affirmed. The duty of a landowner to use reasonable care to protect invitees from dangerous acts of third persons which may reasonably be anticipated extends to a baseball club in the protection of its spectators. *Lee v. National League Baseball Club of Milwaukee,* 4 Wis. 2d 168, 89 N.W.2d 811 (1958).

Although the operator of a place of amusement is not generally held to be an insurer of his patrons' safety, he must exercise reasonable care for their protection[1] and must guard against dangers of which he knows or should reasonably anticipate.[2] In particular, he has a duty to control third persons upon his premises in order to protect his invitees from injury caused by the misconduct of such parties.[3] This has

purpose in preserving a cause of action against a nonresident defendant has become unreasonable and arbitrary with regard to nonresident motorist who can be made subject to personal jurisdiction of the courts through service of process on the secretary of state.

1. Phoenix Amusement Co. v. White, 306 Ky. 361, 208 S.W.2d 64, 66 (1948); Henry v. Segal, 174 Pa. Super. 313, 101 A.2d 149, 151 (1953); Whitfield v. Cox, 189 Va. 219, 52 S.E.2d 72, 73-74 (1949); Leek v. Tacoma Baseball Club, 38 Wash. 2d 362, 229 P.2d 329, 330 (1951).

2. Legler v. Kennington-Saenger Theatres, Inc., 172 F.2d 982 (5th Cir. 1949); Johnson v. Amphitheatre Corp., 206 Minn. 282, 288 N.W. 386 (1939); Hughes v. St. Louis Nat'l League Baseball Club, 218 S.W.2d 632, *modified,* 224 S.W.2d 989 (Mo. 1949); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951). *But see* Travis v. Metropolitan Theatres Corp., 91 Cal. App. 2d 664, 205 P.2d 475, 476 (1949) (requiring the proprietor to have "superior knowledge" of dangers); Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W.2d 680, 683 (1949) (holding operator of public amusement to "stricter accountability for injuries to patrons than owners of private premises generally . . . ."); Tulsa Exposition & Fair Corp. v. Joyner, 208 Okla. 540, 257 P.2d 1077 (1953).

3. PROSSER, TORTS § 38 (2d ed. 1955); RESTATEMENT, TORTS § 348 (1934). The rule was derived from the long established liability of common carriers for injuries to its passengers caused by third persons. 13 TEXAS L. REV. 146 (1934).

often entailed the duty of supervision by a sufficient number of attendants.[4] In application of these rules, patrons have recovered from the proprietor of a place of amusement in numerous situations. For example: When hit by a ball thrown by other patrons at a swimming pool,[5] when injured at a roller rink by a visibly intoxicated party,[6] when pushed down a flight of stairs at a racetrack,[7] when set on fire by another patron in a theater,[8] when struck by several boys playing tag on skates in the lobby of a skating rink,[9] and when hit in the eye by a "spit ball" at a theater.[10]

The principal case simply extends to a new factual situation this duty of the landowner. In light of the above cases it seems that this is not a new rule,[11] but one which has been generally applied to operators of public amusements. The holding here appears to rely primarily on the court's assumption that the defendant should know that when people scramble for a foul ball some patron might be injured. This was determined despite testimony that no person had previously been injured in such a manner during the operation of the stadium by defendant. After requiring the defendant to anticipate such an injury, the court focused its attention on the duty violated in not having ushers present, and hastily passed over any question of assumption of risk on the part of the plaintiff.

It may seem inconsistent that one may be held to assume the risk of being hit by a foul ball,[12] and yet not assume the risk of being injured in a scramble for a ball. However, perhaps this inconsistency might be better explained if considered from the standpoint of the *duty* issue. According to Professor James, "the concept of assuming the risk is purely duplicative of other more widely understood concepts, such as scope of duty . . . . It adds nothing to modern law except confusion."[13] In other words, to say that a plaintiff assumes the risk in this type of situation is just another way of saying that

4. Antinucci v. Hellman, 5 App. Div. 2d 634, 174 N.Y.S.2d 343 (3d Dep't 1958); Mears v. Kelley, 59 Ohio App. 159, 17 N.E.2d 386 (1938); Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951); Annot., 20 A.L.R.2d 8, 32 (1951).

5. Boardman v. Ottinger, 161 Ore. 202, 88 P.2d 967 (1939).

6. Martin v. Philadelphia Gardens, Inc., 348 Pa. 232, 35 A.2d 317 (1944).

7. Paranzino v. Yonkers Raceway, Inc., 9 Misc. 2d 378, 170 N.Y.S.2d 280 (Sup. Ct., App. T. 1957).

8. Antinucci v. Hellman, 5 App. Div. 2d 634, 174 N.Y.S.2d 343 (3d Dep't 1958).

9. Jolmson v. Amphitheatre Corp., 206 Minn. 282, 288 N.W. 386 (1939).

10. Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951).

11. See cases commented on in 16 TENN. L. REV. 887 (1941); 13 TEXAS L. REV. 146 (1934); 12 U. DET. L.J. 169 (1949).

12. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); McNeil v. Fort Worth Baseball Club, 268 S.W.2d 244 (Tex. 1954); Hamilton v. Salt Lake City Corp., 120 Utah 647, 237 P.2d 841 (1951).

13. James, *Assumption of Risk,* 61 YALE L.J. 141, 169 (1952).

there was no duty to protect him from that risk.[14] Apparently the court in the instant case adopted this line of reasoning, and found that a duty did exist. Thus, an anomalous situation is found in this area of the law—a baseball club generally owes no duty to screen the entire stadium to prevent one from being hit by a foul ball[15] but may be held liable to a patron injured in a scramble for such a ball.

RADIO AND TELEVISION—FEDERAL COMMUNICATIONS ACT—IMPLIED IMMUNITY OF STATIONS FROM SUITS FOR DEFAMATION

Defendant, a candidate in a primary election, made certain defamatory remarks concerning plaintiff over the co-defendant's radio and television stations. Defendant candidate stated that the plaintiff was a known communist[1] and that the Federal Communications Commission had revoked his licenses to operate radio and television stations.[2] Several days prior to this broadcast the incumbent had made a speech over the same stations, and, under the provisions of the Federal Communications Act a mandatory duty was imposed on the station to grant all other candidates an equal opportunity to broadcast. In an action for defamation against all defendants, there was a jury verdict for plaintiff, and defendants moved to have this set aside on the grounds that the act granted them implied immunity from such suits. *Held,* motions sustained. The Federal Communications Act, by denying radio and television stations the right to censor political speeches, impliedly grants such stations immunity from suit for defamation arising from broadcasts of such speeches through their facilities by a

14. PROSSER, TORTS § 55 (2d ed. 1955).

15. Erickson v. Lexington Baseball Club, 233 N.C. 627, 65 S.E.2d 140 (1951); Schentzel v. Philadelphia Nat'l League Club, 173 Pa. Super. 179, 96 A.2d 181 (1953). In weighing the magnitude of the harm against the utility of the risk to determine the validity of this distinction, it would be pertinent to observe that there have been quite a number of cases involving injury from being hit by a batted ball and this appears to be the first case concerning serious injury resulting from the scramble for a ball. However, that screening the entire stadium would be too great a duty even in light of the risk, see Malone, *Contributory Negligence and the Landowner Cases,* 29 MINN. L. REV. 61, 76-79 (1945).

1. See 55 MICH. L. REV. 146 (1945), indicating that some jurisdictions hold that calling a person a communist is slander per se. See also Solosko v. Paxton, 383 Pa. 419, 119 A.2d 230 (1956).

2. This action arose during a heated senatorial primary election in Tennessee between incumbent United States Senator Estes Kefauver and candidate Pat Sutton. The defamatory remarks were made during a broadcast over defendant stations WSM and WLAC, when Sutton, in response to a query during the course of a "talkathon," stated that Kefauver supporter, Edward Lamb, was a communist.

qualified candidate for public office. *Lamb v. Sutton,* 164 F. Supp. 928 (M.D. Tenn. 1958).

The act provides that if any political candidate is granted broadcasting time, all other candidates must be granted equal time, and that the station shall have no power of censorship over the material to be broadcast by such candidates.[3] A basic problem is presented as to whether the section of the act prohibiting censorship, by implication, grants the station immunity from suit for any defamation, arising from such uncensored material. The few cases that have been decided in this field indicate that the status of the law is far from settled.[4] In *Sorensen v. Wood,*[5] the Nebraska Supreme Court, in construing the Federal Radio Act[6] (the forerunner of the Federal Communications Act), held a station liable on the theory that the Radio Act conferred no immunity on stations who published defamation.[7] A contrary decision was rendered in *Josephson v. Knickerbocker Broadcasting Co.*[8] There the station pleaded the prohibitory effect of the Federal Communications Act and was absolved of liability, the court reasoning that since the statute limited censorship, it was only fair that the station be protected from actions for defamation.[9] The state of the law was further clouded by *Houston Post Co. v. United States,* which refused to

3. The Federal Communications Act states that: "(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate." Federal Communications Act § 315, 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315 (1952).

4. For a discussion of different interpretations of the act in such cases see Leflar, *Legal Liability for the Exercise of Free Speech,* 10 ARK. L. REV. 155 (1956); Vold, *Defamatory Interpolations in Radio Broadcasts,* 88 U. PA. L. REV. 249 (1940); Legislation, 30 ST. JOHNS L. REV. 133 (1955); Legislation, 25 FORDHAM L. REV. 385 (1956); 36 N.C. L. REV. 355 (1958); 36 B.U.L. REV. 137 (1956). See also, PROSSER, TORTS §95 at 614 (2d ed. 1955).

5. 123 Neb. 348, 243 N.W. 82 (1932).

6. The Federal Radio Act of 1927, 44 Stat. 1162, was the forerunner of the Federal Communications Act and contained an identical censorship provision.

7. The defendant radio station was held liable for defamatory remarks concerning a candidate for re-election as attorney general. The defamatory words were spoken by a political opponent of plaintiff who was in no way connected with the station. The station was held liable despite the restrictive provisions of the Federal Radio Act. 123 Neb. 348, 243 N.W. 82 (1932).

8. 38 N.Y.S.2d 985 (Sup. Ct. 1942).

9. "The fourth and fifth defenses plead qualified privileges under Section 315 of the Federal Communications Act, 48 Stat. 1088 (1934), 47 U.S.C. § 315 (1952). This section prohibits discrimination among qualified candidates for public office in the use of the facilities of a radio station (the basis of the fifth defense) and denies a right of censorship to the radio station (the basis of the fourth defense). The person who uttered the alleged defamatory matter was such a candidate. Since this statute creates obligations and limitations, it is proper that the owner of the radio station be given corresponding qualified privileges against liability for statements which it has no power to control. The defenses as pleaded are sufficient." 38 N.Y.S.2d at 985.

give any weight to an opinion of the FCC that favored granting the broadcaster immunity in such cases.[10] The last decision in this field prior to the instant case was *Farmers Union v. WDAY, Inc.*[11] In finding for the station, the North Dakota Supreme Court held that the act confers immunity from liability for defamatory remarks made by a duly qualified candidate during a political broadcast.[12]

The court in the instant case took note of the fact that there is no express provision in the act exempting a broadcaster from liability for defamatory utterances of an office seeker. But in analyzing the text and the history of the act, it was concluded that such immunity was necessarily implied, inasmuch as the denial of censorship is complete.[13] The court reasoned that Congress could not have intended to expose stations to the possibility of having defamatory remarks broadcast through their facilities without exempting them from liability resulting therefrom.[14] Also relied on was the opinion in *Port Huron Broadcasting Co.*[15] in which the FCC ruled that by the passage of the act the federal government had exercised its rights of pre-emption and that the station was relieved of responsibility, even though there were state laws to the contrary.[16] It was considered as significant that since this interpretation, Congress had not acted to modify either the act or the aforementioned ruling.[17]

The fact that the two most recent cases have both granted the station immunity in such situations indicates that there may be developing a modern trend that will refuse to hold a station liable for publication of defamatory remarks of a political candidate. If immunity is not granted under the act, stations are faced with the alternative of permitting all candidates in a particular election to make uncensored broadcasts, or to exclude campaign speeches altogether. Since the latter course of action appears extremely undesirable, the better solution would seem to be a granting of immunity from suit to stations for defamatory statements made during political broadcasts.

10. 79 F. Supp. 199 (S.D. Tex. 1948).

11. 89 N.W.2d 102 (N.D. 1958).

12. "We cannot believe that it was the intent of Congress to compel a station to broadcast libelous statements and at the same time subject it to the risk of defending actions for damages." *Id.* at 109.

13. 164 F. Supp. at 932.

14. *Ibid.*

15. 12 F.C.C. 1069 (1948).

16. In the *Port Huron* case a station manager refused to allow a candidate to broadcast after an examination of the script indicated that it contained libelous material.

17. "The House amendment would further have added to the present law a provision providing that the licensee should not be liable in any civil or crimmal action in any local, State, or Federal Court because of any material in such a broadcast, except in cases where the licensee willfully, knowingly, and with intent to defame, participated in the broadcast." The Senate defeated this proposed amendment. 2 U.S. CODE CONG. & AD. NEWS 2263 (1952).