Vanderbilt Law Review

Volume 7
Issue 1 *Issue 1 - December 1953*

Article 8

12-1953

Recent Cases

Law Review Staff

RECENT CASES

ATTORNEY AND CLIENT — CONTINGENT FEE CONTRACTS — DIVORCE ACTION

Plaintiffs, attorneys, were engaged by defendant to protect his property interests in a pending divorce action previously commenced by his wife. Defendant agreed to a contingent fee arrangement allowing plaintiffs ten per cent of all property secured for him, but in no case was the fee to be less than $5,000 or more than $7,500. Plaintiffs negotiated a property settlement but defendant refused to accept it and permitted his wife to obtain the divorce without contest. Plaintiffs obtained a judgment against defendant and levied execution on property to which a third party claimant alleged ownership. From a judgment for plaintiffs, third party claimant appealed. *Held,* judgment affirmed. A judgment based on a contingent fee contract whereby plaintiffs agreed to protect defendant's property interests in a pending divorce action is valid and enforceable. *Krieger v. Bulpitt,* 251 P.2d 673 (Cal. 1953).

At common law and in England today, contracts between attorney and client providing for the payment of contingent fees were not allowed in any type of action.[1] This rule evolved from the theory that a minimum of litigation was essential to a well-ordered society.[2] The courts foresaw the danger of attorneys bringing suit where little or no cause existed and felt that contingent fee contracts were an incentive to the attorney to pursue the case without making a reasonable effort to avoid litigation.[3]

In this country, however, it is well-settled by the weight of authority that contingent fee agreements are valid and binding[4] provided: (1) they are not obtained by fraud, mistake, undue influence

1. Haseldine v. Hosken, [1933] 1 K.B. 831; Wiggens v. Lavy, 44 T.L.R. 721 (1928); *cf.* Solicitor's Act, 1932, 22 & 23 GEO. V, c. 37, 63 (1); Wild v. Simpson, [1919] 2 K.B. 544, 550. Massachusetts is the only state to treat all contingent fees void. Sherwin Williams Co. v. J. Mannos & Sons, Inc., 287 Mass. 304, 191 N.E. 438 (1934); Holdsworth v. Healy, 249 Mass. 436, 144 N.E. 386 (1924). In Massachusetts, however, a contingent fee contract is champertous only if the fee is to be paid solely from the amount recovered without personal liability of the client. If he is personally, though contingently, liable the contract is valid. Reed v. Chase, 283 Mass. 83, 130 N.E. 257 (1921); Blaisdell v. Ahern, 144 Mass. 393, 11 N.E. 681 (1887).

2. Radin, *Contingent Fees in California,* 28 CALIF. L. REV. 587, 588 (1940). See also, 5 AM. JUR., *Attorneys at Law* §§ 163-67 (1936) (thoroughly annotated with cases from every jurisdiction).

3. *Ibid.*

4. United States v. Call, 287 Fed. 520 (5th Cir. 1923); Neudeck v. Horvath, 244 Mich. 685, 222 N.W. 106 (1928); *In re* Meng, 227 N.Y. 264, 125 N.E. 508 (1919).

or suppression of facts on the part of the attorney,[5] and (2) there are no elements in the contract which render it contrary to public policy,[6] as in the case of contracts solicited by the attorney[7] or which prohibit the client from compromising or settling.[8] The fact that contracts of this character are often the only way by which the indigent can have their "day in court" has influenced the acceptance of the modern American rule.[9]

A well-recognized exception to this principle is found in the area of domestic relations.[10] It is generally accepted that any contract for the payment of a fee to an attorney, conditioned upon his procuring a divorce for his client or contingent upon the amount of alimony obtained, is invalid. A few cases find such contracts void because champertous,[11] but they are more frequently held void as against public policy, since the law favors a lifetime marital status and a contingent fee contract induces an attorney to secure a divorce rather than to attempt to effect a reconciliation.[12] Moreover, alimony is not assignable since it is intended to provide for the maintenance of the former wife.[13] Even when holding these contracts void and unenforceable, however, the court will award the attorney a reasonable fee.[14]

The court in the instant case in holding that this contract was not void as against public policy based its decision on the premise that the contract "does not involve vitiating considerations contrary to public policy or . . . 'promotive of divorce'."[15] While it is true that property settlement agreements between husband and wife are upheld

5. Taylor v. Bemiss, 110 U.S. 42, 3 Sup. Ct. 441, 28 L. Ed. 64 (1884); Davis v. Webber, 66 Ark. 190, 49 S.W. 822 (1889); High Point Casket Co. v. Wheeler, 182 N.C. 459, 109 S.E. 378 (1921); Dorr v. Camden, 55 W. Va. 226, 46 S.E. 1014 (1904).

6. Morehouse v. Brooklyn Heights R.R., 185 N.Y. 520, 78 N.E. 179 (1906).

7. Kelley v. Boyne, 239 Mich. 204, 214 N.W. 316, 53 A.L.R. 273 (1927); Ingersoll v. Coal Creek Coal Co., 117 Tenn. 263, 98 S.W. 178 (1906).

8. Davy v. Fidelity & Casualty Ins. Co., 78 Ohio 256, 85 N.E. 504 (1908).

9. Gruskay v. Simenauskas, 107 Conn. 380, 140 Atl. 724, 727 (1928).

10. Newman v. Freitas, 129 Cal. 283, 61 Pac. 907 (1900) (agreement to pay attorney one-third "of all amounts recovered or received" in divorce action as wife's share of community property); Jordan v. Kittle, 88 Ind. App. 275, 150 N.E. 817 (1926) (agreement to pay attorneys if divorce should be granted without opposition); Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886) (solicitors to receive one-half of any alimony over $300).

11. Brindley v. Brindley, 121 Ala. 429, 25 So. 751 (1899); *cf.* Donaldson v. Eaton & Estes, 136 Iowa 650, 114 N.W. 19 (1907).

12. Wilhelm v. Rush, 18 Cal. App.2d 366, 63 P.2d 1158 (1937); Opperud v. Bussey, 172 Okla. 625, 46 P.2d 319 (1935); cases cited note 10 *supra.*

13. Jordan v. Westerman, 62 Mich. 170, 28 N.W. 826 (1886).

14. McCurdy v. Dillon, 135 Mich. 678, 98 N.W. 746, 748 (1904).

15. Instant case, 251 P.2d at 675. The court seems also to have been influenced by the fact that the attorneys in the instant case were to defend rather than prosecute the divorce action.

even though made in contemplation of divorce,[16] it seems nonetheless erroneous to uphold agreements whereby the attorney is to procure the property settlement upon a contingent fee basis. Public policy favors the preservation of the marital relationship, and the contingent fee contract would place the attorney in the position of working to dissolve this relationship. It would seem, therefore, that the decision in the instant case is an undesirable departure from the principle underlying the majority rule.

CORPORATIONS — CORPORATE POWER — CONTRIBUTIONS TO PHILANTHROPIC INSTITUTIONS

The plaintiff, a corporation manufacturing valves and fire hydrants, instituted a declaratory judgment proceeding to determine its power to contribute to Princeton University. A New Jersey statute authorized domestic corporations to make limited contributions to educational institutions. Stockholders objected that the contribution was *ultra vires* and that the statute was inapplicable as the plaintiff was incorporated prior to its passage. *Held,* corporate power exists to make reasonable charitable contributions even apart from the statute. *A. P. Smith Mfg. Co. v. Barlow,* 98 A.2d 581 (N.J. 1953).[1]

The common-law rule[2] is that a corporation may not contribute to philanthropic causes unless the contribution would be "reasonably conducing to the benefit of the company."[3] The early cases, by a narrow interpretation of the rule, required that the contribution tend to produce a direct and proximate benefit,[4] but the modern majority rule recognizes the power of a business corporation to contribute to humanitarian and welfare objects if there is an expectancy of advancing the general business interest and welfare of the corporation.[5] The requirement of corporate benefit has been liberalized so that the old

16. Hill v. Hill, 23 Cal.2d 82, 142 P.2d 417 (1943); Amspoker v. Amspoker, 99 Neb. 122, 155 N.W. 602 (1915); Dennison v. Dennison, 98 N.J. Eq. 230, 130 Atl. 463 (1925); Killibrew v. Killibrew, 24 Tenn. App. 24, 137 S.W.2d 953 (1939).

1. On appeal to the Supreme Court of the United States the appeal was dismissed for want of a substantial federal question. 74 Sup. Ct. 107 (U.S. 1953).

2. See Hutton v. West Cork Ry., 23 Ch. D. 654, 671, 673 (1883). There the court said: "There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose." See also Note, 3 A.L.R. 444 (1919).

3. Hutton v. West Cork Ry., 23 Ch. D. 654, 666 (1883).

4. See Vandall v. The South San Francisco Dock Co., 40 Cal. 83, 90, 91 (1870); 6A FLETCHER, PRIVATE CORPORATIONS § 2938 (Perm. ed. 1950).

5. 6A FLETCHER, PRIVATE CORPORATIONS § 2940 (Perm. ed. 1950); also citations collected 6A *id.* § 2940 n.20.

cases no longer state the law applicable.[6] The present rule requires that the contribution be made with an intent to benefit the corporation,[7] that the benefit accrue to the corporation to a greater extent than it does to society in general and that the benefit be substantial though it may be indirect.[8] However, one case, at least, has upheld a contribution by a corporation which might benefit both its competitors and the donor more than society in general.[9]

Recognizing corporate responsibility to others in addition to shareholders, many states have passed statutes authorizing contributions by business corporations to philanthropic institutions.[10] Most of these restrict the class of recipients to some extent;[11] others limit the amount of the contribution.[12] In line with such state action Congress has made corporate contributions to charity from gross income a deductible expense.[13]

The retroactive applicability of these state statutes is questionable only in a minority of the states, since it depends upon the power reserved by the state to amend or repeal corporate charters. By the minority view this reserved power extends no further than the contract between the state and the corporation;[14] thus a statute, similar to the one in question, may be held to alter the contract between the stockholders and the corporation and to be beyond the reserved power and, therefore, inapplicable.[15] The early case of *Zabriskie v. Hacken-*

6. See Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y. Supp. 718, 720 (Sup. Ct. 1896). There it is said: "As industrial conditions change, business methods must change with them, and acts become permissible which at an earlier period would not have been considered to be within corporate power." *Cf.* Virgil v. Virgil Practice Claiver Co., 33 Misc. 200, 202, 68 N.Y. Supp. 335, 337 (Sup. Ct. 1900); Blicken, *Corporate Contributions to Charities: The Modern Rule*, 38 A.B.A.J. 999, 1001 (1952); Cousens, *How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401, 423 (1949).

7. Hutton v. West Cork Ry., 23 Ch. D. 654, 673 (1883).

8. Greene County Nat. Farm Loan Ass'n v. Federal Land Bank, 57 F. Supp. 783, 789 (D.C. Ky. 1944); Blicken, *Corporate Contributions to Charities: The Modern Rule*, 38 A.B.A.J. 999, 1060 (1952).

9. Evans v. Brunner, Mond & Co., Ltd., [1921] 1 Ch. 359 (1920). The validity of this case has been questioned. Cousens, *How Far Corporations May Contribute to Charity*, 35 VA. L. REV. 401, 423 (1949).

10. For statutory citations see Blicken, *Corporate Contributions to Charities: The Modern Rule*, 38 A.B.A.J. 999, app. at 1061 (1952).

11. "[F]or the public welfare or for charitable, scientific, or educational purposes. . . ." ARK. STAT. ANN. § 64-112 (Supp. 1951).

12. "[C]ontributions in any fiscal year shall not in the aggregate exceed one percentum (1%) of the capital and surplus as of the end of the preceding fiscal year, unless . . . authorized by the stockholders. . . ." N.J. STAT. ANN. § 14:3-13.2 (Supp. 1952). Tennessee limits the contribution to earnings. TENN. CODE ANN. § 4085 (Williams Supp. 1952).

13. INT. REV. CODE § 23(q).

14. See Lattin, *A Primer on Fundamental Corporate Changes*, 1 WEST. RES. L. REV. 3, 18 (1949).

15. See Keller v. Wilson & Co., 21 Del. Ch. 391, 190 Atl. 115 (1936) (the statute allowed reclassification of outstanding stock). *Cf.* Zabriskie v. Hackensack & New York R.R., 18 N.J. Eq. 178 (Ch. 1867) (the court refused to allow the railroad to extend its line in spite of broad statutory authority on the ground that the reserved power does not extend to the contract between the corporation and its shareholders).

sack & N.Y.R.R.,[16] aligned New Jersey with those jurisdictions which limit the reserved power of a state to making changes in the contract between the state and the corporation. The instant case, as do other New Jersey cases,[17] does not disavow the *Zabriskie* case but finds "that where justified by the advancement of the public interest the reserve power may be invoked to sustain later charter alterations even though they affect contractual rights between the corporation and its stockholders and between the stockholders *inter se*"[18] and compares the legislation to an exercise of the police power where private interests are required to give way to the paramount public interest.

In holding that a contribution by a business corporation to a privately supported educational institution was *intra vires* as a proper exercise of implied and incidental power under common-law principles, the court in the instant case considered the important position corporations occupy in the modern economic system and pointed out that their continued success depends upon a sound economic and social environment which in turn depends upon free and vigorous nongovernmental educational institutions. Referring to the common-law requirements of corporate benefit, the court concluded that it might be considered in terms of survival of the corporation in the free enterprise system.

The instant case further liberalizes the common-law rule in that the benefit received by the corporation need be no greater than the benefit received by the free enterprise system in general.[19] The minority shareholder is still amply protected as both the statute and the expanded common-law rule require the contribution to be reasonable in amount. As a matter of public policy the decision seems sound.

16. 18 N.J. Eq. 178 (Ch. 1867).

17. See, *e.g.*, Bingham v. Savings Investment & Trust Co., 101 N.J. Eq. 413, 415, 138 Atl. 659 (Ch. 1927), *aff'd*, 102 N.J. Eq. 302, 140 Atl. 321 (Ct. Err. & App. 1928); *In re* Collins-Doan Co., 3 N.J. 382, 391, 70 A.2d 159, 13 A.L.R.2d 1250 (1949).

18. Instant case, 98 A.2d at 587.

19. There are a few cases in which a contribution for the purpose of inducing other businesses to locate in the vicinity of the contributing corporation has been held *intra vires*. See, *e.g.*, Merchants' Bldg. Improvement Co. v. Chicago Exchange Bldg. Co., 210 Ill. 26, 71 N.E. 22, 27 (1904). But where the new business would locate in a different part of the city the contribution was *ultra vires*. Orpheum Theater & Realty Co. v. Seavey & Flarsheim Brokerage Co., 197 Mo. App. 661, 199 S.W. 257, 260 (1917).

CORPORATIONS — CRIMINAL ANTI-TRUST ACTION — INDEMNIFICATION OF DIRECTORS FOR LITIGATION EXPENSES

Plaintiff and defendant corporation were indicted for alleged violations of the Sherman Anti-Trust Act which occurred during the time he served as vice-president and director of the corporation. Plaintiff employed legal counsel and paid $7500 for counsel services rendered up to the time of trial. To avoid substantial attorneys' trial fees, plaintiff changed his plea to *nolo contendere.* He then brought action against the defendant corporation under a statute providing for reimbursement by corporations to their directors for reasonable litigation expenses incurred in defending actions brought against them by virtue of their office. The lower court gave judgment for the defendant. On appeal, *held* (4-3) affirmed. The statute was not intended to embrace expenses incurred in defending criminal anti-trust actions.[1] *Schwarz v. General Aniline & Film Corp.,* 113 N.E.2d 533 (N.Y. 1953).

In *New York Dock Co. v. McCollom,*[2] the New York Supreme Court held, contrary to most jurisdictions,[3] that the common law did not allow a director's claim of reimbursement against the corporation for litigation expenses incurred in successfully defending a stockholder's suit, unless the corporation also derived a benefit from the litigation. New York, as have other states,[4] subsequently enacted a statute which permitted directors and other corporate officers to be indemnified for "reasonable expenses, including attorney's fees, actually and necessarily incurred by him in connection with the defense of such action, suit or proceeding . . . assessed against the corporation. . . ."[5]

The instant case, one of first impression, presents the problem of whether the statute[6] was intended to provide indemnification for di-

1. The court did not hold that the director's plea of *nolo contendere* would be equivalent to a conviction, but by dictum indicated that a plea of *nolo contendere* would be sufficient to prevent the director from claiming an adjudication of his innocence; his suit against the corporation would thereby be automatically eliminated. Instant case, 113 N.E.2d at 536, 537.

2. 173 Misc. 106, 16 N.Y.S.2d 844 (Sup. Ct. 1939).

3. *E.g., In re* E. C. Warner Co., 232 Minn. 207, 45 N.W.2d 388 (1950); Solimine v. Hollander, 129 N.J. Eq. 264, 19 A.2d 344 (Ch. 1941); Figge v. Bergenthal, 130 Wis. 594, 109 N.W. 581 (1906), *rehearing denied,* 130 Wis. 594, 110 N.W. 798 (1907). See Hornstein, *The Counsel Fee in Stockholder's Derivative Suits,* 39 COL. L. REV. 784 (1939). "The only case outside of New York clearly denying reimbursement after a successful defense by the director to a shareholder's action is Griesse v. Lang, 37 Ohio App. 553, 175 N.E. 222 (1931)." Note, 37 CORNELL L.Q. 78, 80 n.10 (1951).

4. The following statutes provide that corporations may enact by-laws which permit indemnification of directors for litigation expenses: CONN. GEN. STAT. § 5129 (1949); ME. REV. STAT. c. 49, § 23 (1944); MD. ANN. CODE GEN. LAWS art. 23, § 60 (1951); N.J. STAT. ANN. § 14:3-14 (Supp. 1952).

The following statutes provide that directors shall be indemnified for expenses incurred in successfully defended suits: CAL. CORP. CODE ANN. § 830 (1953); KY. REV. STAT. ANN. § 271.375 (Baldwin Cum. Supp. 1953); MO. REV. STAT. § 351.355 (1949); MONT. REV. CODES ANN. § 15-412 (1947).

5. N.Y. GEN. CORP. LAW § 64.

6. *Ibid.*

rectors' expenses incurred in Sherman Act criminal prosecutions as well as successfully defended derivative stockholder suits.

Because the statute[7] does not expressly deny corporate directors indemnification for litigation expenses in such criminal cases, the court could have allowed the director's claim without regard to the intention[8] of the legislature in enacting the statute. However, if the court was convinced that the statute was ambiguous, it should properly have included the report of the Law Revision Commission[9] which proposed the act in its determination of the legislative intent.[10] The report suggested that the statute might apply to "a criminal proceeding against the corporation or directors for violation of the anti-trust laws."[11] The report also stated that the maintenance of a special proceeding by a director against a corporation might be appropriate to determine the corporation's liability for indemnification of the director. As Judge Fuld pointed out in his dissenting opinion,[12] sub-division (b) of section 65[13] provided for the suggested special proceeding.

As it is customary to automatically join directors as defendants in anti-trust actions,[14] it seems unjust to deny the director recovery of attorneys' fees expended in such actions when he was not guilty of negligence or misconduct in the performance of his duties. When the director rather than the corporation is at fault, reimbursement is rightly denied;[15] however, to apply the same reasoning and result to criminal anti-trust actions in which the corporation is at fault, is to place an unfair burden upon the director who, at best, may have difficulty avoiding violations of hazily defined anti-trust laws. It is hoped, in fairness to corporate directors, that the decision of the instant case will not set the trend which states with similar statutes will follow in future cases of this kind.

7. CRAWFORD, THE CONSTRUCTION OF STATUTES § 164 (1940) and cases there cited.
8. "Most cases blandly recognize the existence of a legislative intention." CRAWFORD, THE CONSTRUCTION OF STATUTES § 163 at 253 (1940).
9. *Id.* at 161 n.36.
10. STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION 149 (1945).
11. Instant case, 113 N.E.2d at 540.
12. N.Y. GEN. CORP. LAW § 65(b).
13. 38 STAT. 736, 15 U.S.C.A. § 24 (1951).
14. Du Puy v. Crucible Steel Co. of America, 288 Fed. 583 (W.D. Pa. 1923); see Hoch v. Duluth Brewing & Malting Co., 173 Minn. 374, 217 N.W. 503 (1928).
15. See note 4 *supra*.

EVIDENCE — PRESUMPTION OF LAW AND INFERENCE OF FACT — RETROSPECTIVE PRESUMPTION OF CONTINUITY

In 1952 plaintiff, administrator of deceased's estate, brought action against a fraternal benefit society and defendant beneficiary to recover the proceeds of a policy issued by the society to deceased in 1932 and paid to defendant beneficiary. Plaintiff contended that the beneficiary's right to proceeds was dependent upon whether she could show that she was a legal beneficiary under the constitution, laws and by-laws of the society at the time the policy was issued in 1932. The evidence failed to show what the laws were in 1932, but did show such laws as of June, 1949 and July, 1951 under which laws defendant was a proper beneficiary. *Held,* for defendant. The laws in 1932 are presumed to be the same as those in 1949-1951; the presumption of continuity can act retrospectively and in this connection each case stands on its own peculiar facts. *Brice v. Edwards,* 260 S.W.2d 132 (Tex. Civ. App. 1953).

The only true presumption is a presumption of law.[1] It is to be distinguished from a conclusive presumption of law,[2] presumption of fact[3] and inference.[4] In its characteristic use it is not a synonym for inference[5] but is a rule of evidence which operates to place the burden of producing evidence of the nonexistence of the presumed fact on the party contesting its validity.[6] Once the basic fact is established, the presumed fact must be assumed[7] until it is rebutted by the introduction of evidence opposed to it[8] or another contradictory presump-

1. See Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65, 68, 69, 32 A.L.R. 1490 (1924); MORGAN, PRESUMPTIONS: THEIR NATURE, PURPOSE AND REASON 3, 4 (An address published by Brandeis Lawyers Society, 1949); THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 339-42 (1898); 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

2. See Farnsworth v. Hazelett, 197 Iowa 1367, 199 N.W. 410, 412, 38 A.L.R. 814 (1924).

3. See Podolski v. Stone, 186 Ill. 540, 58 N.E. 340, 343 (1900). Professor Thayer attributes the origin of the misapprehension as to the distinction to the influence of the continental law on the English courts. He states that the phrase presumption of fact was first mentioned by the text writers in 1791, but that it was not until 1842-1844 that the phraseology was fairly well shaped. THAYER, *op. cit. supra* note 1, at 343.

4. See Rose v. Missouri Dist. Telegraph Co., 328 Mo. 1009, 43 S.W.2d 562, 569, 81 A.L.R. 400 (1931). But note Ohio Building Safety Vault Co. v. Industrial Board, 277 Ill. 96, 115 N.E. 149 (1917). See also, Note, Ann. Cas. 1913B 897; 10 R.C.L., *Evidence* §§ 10, 11 (1915).

5. See Rose v. Missouri Dist. Telegraph Co., 328 Mo. 1009, 43 S.W.2d 562, 569, 81 A.L.R. 400 (1931).

6. See Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 Atl. 644, 647, 95 A.L.R. 869 (1934). This is recognized as the Thayerian rule and is the only effect of a presumption. MODEL CODE OF EVIDENCE, Rule 55 (1942). But see Morgan, *Some Observations Concerning Presumptions,* 44 HARV. L. REV. 906 (1931).

7. See Joyce v. Missouri and Kansas Telephone Co., 211 S.W. 900, 901 (Mo. App. 1918).

8. *See* City of Montpelier v. Town of Calais, 114 Vt. 5, 39 A.2d 350, 356 (1944).

tion[9] is raised; but in no instance will the basic fact lose its probative value.[10] The phrase "presumption of fact" is a misnomer, being in truth nothing more than an inference.[11] It does not compel the trier of fact to assume the presumed fact,[12] nor operate to shift the duty of going forward with evidence to contradict the presumed fact.[13] It is a mere logical inference which common sense and experience will allow.[14]

Early Texas decision recognize both presumptions of law and presumptions of fact.[15] Later opinions use the terms prima facie case, presumption and inference interchangeably,[16] while others distinguish the terms[17] by their consequences. Again the court calls a presumption of law a presumption of fact, which is required by "positive law" but is rebuttable.[18] Also, a presumption of fact as used in Texas does not compel a shift in the burden of producing evidence nor compel an assumption of the presumed fact in the absence of evidence, but rather, it raises an inference from a proven basic fact which the trier of fact may or may not find.[19] Thus the court in the principal case followed its past decisions and, under the label of presumption, inferred what the laws of the society were in 1932.[20]

When presumption is used in its true sense, all courts agree that

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9. *Ibid.*

10. Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854 (1942); MODEL CODE OF EVIDENCE, Rule 704 (1942).

11. See Modern Woodmen of America v. Kincheloe, 47 Ind. App. 331, 93 N.E. 452, 454 (1910).

12. Basham v. Prudential Ins. Co. of America, 232 Mo. App. 782, 113 S.W.2d 126 (1938).

13. See Page v. Lockley, 176 S.W.2d 991, 998 (Tex. Civ. App. 1943), *rev'd on other grounds*, 142 Tex. 594, 180 S.W.2d 616 (1944); 9 WIGMORE, EVIDENCE § 2491 (3d ed. 1940).

14. See Chicago, R.I. & P. Ry. v. Rhodes, 64 Kan. 553, 68 Pac. 58 (1902).

15. "[T]he latter [presumptions of fact] are merely those natural promptings which are derived wholly and directly from the circumstances of the particular case, without the aid or control of any rule of law, and which are sufficient to satisfy the understandings and consciences of an ordinary jury." Johnson v. Timmons, 50 Tex. 521, 535-36 (1878). "They are not rules of law to be obeyed, but of reason, to be considered." Brown v. State, 23 Tex. 200 (1859).

16. See Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 858 (1942). *But cf.* Page v. Lockley, 176 S.W.2d 991, 1001 (Tex. Civ. App. 1943), where the court said of the *Greenwade* Case, "[C]onclusion [there] was based upon failure to recognize the distinction between a presumption and an inference."

17. "[A] presumption is a rule which the law makes upon a given state of facts, while an inference is a conclusion which by means of data founded upon common experience, natural reason draws from facts which are proved." Page v. Lockley, 176 S.W.2d 991, 998 (Tex. Civ. App. 1943), *rev'd on other grounds*, 142 Tex. 594, 180 S.W.2d 616 (1944).

18. See Stooksberry v. Swann, 85 Tex. 563, 22 S.W. 963, 967 (1893).

19. Page v. Lockley, 176 S.W.2d 991, 999 (Tex. Civ. App. 1943), *rev'd on other grounds*, 142 Tex. 594, 180 S.W.2d 616 (1944).

20. Other states use the terms presumption and inference interchangeably: Ohio Building Safety Vault Co. v. Industrial Board, 227 Ill. 96, 115 N.E. 149 (1917); State v. Kelley, 57 Iowa 644, 11 N.W. 635, 636 (1882).

the presumption of continuity is prospective and not retrospective,[21] which would, strictly speaking, be contrary to the present case. When the so-called retrospective presumption is indulged, the courts are in reality using the term as a synonym for inference.[22] Whether the inference will be allowed depends upon considerations of time,[23] tendency of condition toward change[24] and the circumstances of each case.[25] Thus, the distinction has been recognized between inference and presumption as applied to the doctrine of continuity in its retrospective use.[26]

The Texas decisions recognize the view that the doctrine of continuity will not be applied as a retrospective presumption.[27] Rather, that court expressly adopts Professor Wigmore's view which is stated in terms of an inference and not a presumption.[28] Thus the decision in the instant case is in harmony with those of other jurisdictions allowing the retrospective operation of a condition when properly inferred; presumption as used here is synonymous with inference. It did not shift the burden of proof, but under the circumstances was sufficiently strong to allow the court to infer the laws of 1932 from the establishment of those in 1949 and 1951. It is not contrary to the proposition that a presumption of continuity only operates prospectively and not retrospectively, but is merely an example of what Professor Wigmore termed "the variegated inconsistences" in this field. The adoption of the American Law Institute's *Model Code of Evidence* would have a stabilizing influence in this regard.[29]

21. See Killoren Electric Co. v. Hon, 211 Ark. 403, 200 S.W.2d 775 (1947); 20 AM. JUR., *Evidence* § 210 (1939); 31 C.J.S., *Evidence* § 140 (1942).

22. Gibson v. Brown, 214 Ill. 330, 73 N.E. 578 (1905); Phipps v. Consolidated Flour Mills Co., 113 Kan. 118, 213 Pac. 637 (1923); Grand Forks County v. Baird, 54 N.D. 315, 209 N.W. 732 (1926). Examination of these cases will show that the conclusions drawn are based on the surrounding circumstances and do not follow from the operation of any rule of law.

23. Johnson v. Charles William Palomba Co., 114 Conn. 108, 157 Atl. 902 (1932).

24. Bolomey v. Houchins, 227 S.W.2d 752 (Mo. App. 1950).

25. Harlin v. Calvert's Adm'x, 253 Ky. 752, 70 S.W.2d 524 (1934).

26. Presumptions of continuity do not run backwards. Conduitt v. Trenton Gas & Elec. Co., 326 Mo. 133, 31 S.W.2d 21 (1930); depending on the facts and circumstances of a particular case a retrospective inference may be indulged. Bolomey v. Houchins, 227 S.W.2d 752 (Mo. App. 1950).

27. "The presumption will not prevail retrospectively, but the situation in 1910 was a circumstance which can be looked to for what it is worth. It does not rise to the dignity of a presumption, but it is nevertheless a fact or circumstance which may be entitled to some consideration." Ralls v. Parish, 151 S.W. 1091 (Tex. Civ. App. 1912).

28. See Ross v. Green, 135 Tex. 103, 139 S.W.2d 565, 571 (1940), citing 1 WIGMORE, EVIDENCE § 437 (2d ed. 1923). Professor Wigmore recognizes that an inference may have previously existed depending on the circumstances of the case and reasonable limits as to remoteness of time.

29. MODEL CODE OF EVIDENCE, Rule 701 (1942). Inconsistencies in the meaning and use of the term "presumption" would be eliminated by adoption of Rule 701.

FEDERAL PROCEDURE — CLASS ACTIONS — DISCRETION OF TRIAL COURT

Plaintiffs, Negro residents of Kansas City, Missouri, filed suit in the federal district court against the City and Board of Park Commissioners, seeking individually, and as representatives of their race, a declaratory judgment and injunctive relief to eliminate racial discrimination allegedly implicit in the segregation policy under which plaintiffs were denied admittance to a municipally owned swimming pool. The court, finding that separate facilities provided Negroes were unequal and that denial of swimming privileges in the park constituted unequal treatment, held such inequalities to be violative of civil rights protected by the Fourteenth Amendment. Accordingly, the relief prayed was granted individually, but class relief was denied on the ground[1] that other Negroes had not been shown to have tendered the admission price and been denied admittance. *Held,* affirmed. Unequal treatment was unconstitutional and violative of Civil Rights Act;[2] propriety of class relief is in trial court's judgment as to its usefulness in the particular situation. *Kansas City, Mo. v. Williams,* 205 F.2d 47 (8th Cir.), *cert. denied,* 74 Sup. Ct. 45 (U.S. 1953).[3]

Under Rule 23 of the Federal Rules of Civil Procedure, one or more individuals who adequately represent a class whose rights have been violated may, if the class is so numerous as to make it impracticable to bring each member before the court, sue on behalf of all.[4] Situa-

1. The trial court's first basis for the denial of class relief was that "it is the individual who is entitled to the equal protection of the law, and . . . he has no standing to sue for the deprivation of similar civil rights of others." This ground was expressly refuted by the court of appeals. Instant case, 205 F.2d at 51-52.

2. REV. STAT. §§ 1977, 1979 (1875), 8 U.S.C.A. §§ 41, 43 (1942).

3. The petition for certiorari was filed by the City, and apparently the procedural issue was not before the court for consideration. 22 U.S.L. WEEK 3085 (1953).

4. FED. R. CIV. P. 23(a). Rule 23 "is a substantial restatement of former Equity Rule 38 (Representatives of Class) as that rule has been construed." NOTES OF ADVISORY COMMITTEE ON RULES, 28 U.S.C.A. 83 (1948). Three types of class actions (popularly called the true, the hybrid and the spurious) are authorized by Rule 23. In the true class action the character of the right sought to be enforced for or against the class is joint, common or secondary. FED. R. CIV. P. 23(a)(1). In hybrid class action the right involved is several and the object is the adjudication of claims which may affect specific property. FED. R. CIV. P. 23(a)(2). In the spurious class action the right is several and there must be a common question of law or fact and common relief sought. FED. R. CIV. P. 23(a)(3). Great difficulty has been experienced by the bench and bar in properly categorizing the cases as they have arisen, and the value of the classifications has been judicially and academically challenged. See comment by McAllister, J., in System Federation No. 91 v. Reed, 180 F.2d 991, 996 (6th Cir. 1950); Wright, *Joinder of Claims and Parties under Modern Pleading Rules,* 36 MINN. L. REV. 580, 626 (1952). See critical discussion of the rule in CHAFEE, SOME PROBLEMS OF EQUITY 243-95 (1950). But see argument for classifications in 3 MOORE, FEDERAL PRACTICE §§ 23.02-23.12 (2d ed. 1948). The court in the instant case, denying class relief on other grounds, was not faced with the necessity of classifying the right asserted as common or several. Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950), *aff'd,*

tions in which civil rights have been abrogated or infringed by administrative policy or legislative mandate have in recent years been prolific breeding grounds for class actions.[5] Because racial discrimination by definition delimits the particular class affected and because entrenched prejudices characteristic of civil rights disputes encourage litigation by each individual discriminated against, the class action, whose *raison d'etre* is the avoidance of a multiplicity of suits,[6] is particularly appropriate in such situations.

The district court in the principal case takes the position that class relief is inappropriate because the evidence does not disclose that Negroes other than the plaintiffs have been denied admittance to the pool on the basis of race.[7] This position is apparently based upon the theory that it is only the act of denying admittance rather than the establishment of a policy of exclusion which is unconstitutional, and that those who have not been denied admittance are without the class affected by the defendant's unconstitutional conduct.[8]

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340 U.S. 909 (1951), and Johnson v. Board of Trustees, 83 F. Supp. 707 (E.D. Ky. 1949), both indistinguishable from the instant case on the facts, were considered true class actions. *Accord,* Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944). See 2 BARRON & HOLTZOFF, FEDERAL PRACTICE & PROCEDURE § 148 (1950). *But cf.* Gonzales v. Sheely, 96 F. Supp. 1004 (D. Ariz. 1951) (discrimination in public school system a basis for spurious class action). The writer in 21 KAN. CITY L. REV. 215 (1953), commenting on the instant case, considered it a spurious class action. For an interesting discussion of the classification problem, see Lesar, *Class Suits and the Federal Rules,* 22 MINN. L. REV. 34 (1937).

5. Class actions involving discrimination in admittance to educational institutions: Wilson v. City of Paducah, 100 F. Supp. 116 (W.D. Ky. 1951); Wilson v. Board of Supervisors, *supra* note 4; Johnson v. Board of Trustees, *supra* note 4; Wrighten v. Board of Trustees, 72 F. Supp. 948 (E.D. S.C. 1947). Class actions based on discrimination in public school system: Carter v. School Board, 182 F.2d 531 (4th Cir. 1950); Gonzales v. Sheely, *supra* note 4. Class actions founded on salary discrimination against Negro teachers: Morris v. Williams, 149 F.2d 703 (8th Cir. 1945); Alston v. School Board, 112 F.2d 992, 130 A.L.R. 1506 (4th Cir. 1940); Davis v. Cook, 80 F. Supp. 443 (N.D. Ga. 1948); Whitmyer v. Lincoln Parish School Board, 75 F. Supp. 686 (W.D. La. 1948); Thomas v. Hibbitts, 46 F. Supp. 368 (M.D. Tenn. 1942); McDaniel v. Board of Public Instruction, 39 F. Supp. 638 (N.D. Fla. 1941). Class actions based on discrimination in admittance to municipally operated places of recreation: Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951) (golf course); Harris v. Daytona Beach, 105 F. Supp. 572 (S.D. Fla. 1952) (city auditorium); Draper v. St. Louis, 92 F. Supp. 546 (E.D. Mo. 1950) (swimming pool); Lopez v. Seccombe, 71 F. Supp. 769 (S.D. Cal. 1944) (swimming pool). The class action device was used to attack discriminatory zoning regulations in Birmingham v. Monk, 185 F.2d 859 (5th Cir. 1950).

6. *See* Kainz v. Anheuser-Busch, 194 F.2d 737, 740 (7th Cir. 1952). The purpose of the rule as stated by Mr. Justice Stone in *Hansberry v. Lee* is "to enable it [equity courts] to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity with the usual rules of procedure is impracticable." 311 U.S. 32, 41, 61 Sup. Ct. 115, 85 L. Ed. 22, 132 A.L.R. 741 (1940). It is submitted that in the absence of a class action device the impossibility or impracticability of joinder would tend to produce a multiplicity. Therefore both reasons are but different aspects of one idea: convenience. See System Federation No. 91 v. Reed, *supra* note 4; CHAFEE, *op. cit. supra* note 5, at 201, 280.

7. Williams v. Kansas City, Mo., 104 F. Supp. 848, 857 (W.D. Mo. 1952).

8. The unstated reason back of the district court's requirement of actual

Plaintiffs, however, seek *declaratory* and injunctive relief. Neither a cause of action nor an invasion of rights is prerequisite to the maintenance of a declaratory judgment action.[9] The provisions of the Federal Declaratory Judgment Act are satisfied if an actual controversy exists between the parties to the action.[10] In several recent cases one or more individuals, who in addition to being members of the class affected by the defendants' discriminatory policy also had causes of action because of defendants' acts under that policy, have successfully maintained class suits for declaratory judgments.[11] Since in none of these cases is actual denial made a condition precedent to membership in the aggrieved class, the only basis for class relief is the unconstitutionality of the "policy, custom and usage" of which the overt acts of exclusion are but incidents. Frequently injunctive relief has been granted to protect the civil rights thus declared.[12]

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denial seems to be that in the absence of such denial defendants had not breached any duty which they owed to the broad class which plaintiffs seek to represent or to the individual members thereof. Defendants, however, admitted a policy of exclusion, and the trial court conceded that "had other Negro citizens so applied they likewise would have received the same treatment as did plaintiffs." Williams v. Kansas City, Mo., *supra* note 7 at 857. The question remains whether the policy sufficiently affected the Negroes in Kansas City to be a basis for judicial action thus creating a genuine community of interest. See generally, on the necessity of a community of interest, Note, 132 A.L.R. 749 (1941).

9. "It may be stated unhesitatingly that one of the very purposes of the declaratory action is to be relieved, of the more or less technical rule obtaining at common law, that no right may be judicially adjudged until such right has been violated or invaded . . . a cause of action, in the sense in which that term is ordinarily used, is not essential to the assumption of jurisdiction in this form of procedure." 1 ANDERSON, DECLARATORY JUDGMENTS § 238 (2d ed. 1951). "[A]ctual breach or violation, violence, accrual of damages, etc. are not necessary to maturity of the declartory judgment action." Spark, *The Scope of Declaratory Judgment Suits* (to be published in REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO). The exact point at which a dispute becomes judicially cognizable seems to be generally defined by alluding to what requirements need not exist, and as yet no formula seems to have evolved by means of which a justiciable controversy can safely be predicted in advance of actual litigation of the case in question. *Compare* United Public Workers v. Mitchell, 330 U.S. 75, 67 Sup. Ct. 556, 91 L. Ed. 754 (1947) (where federal employees who had not violated the Hatch Act were held to be premature in contesting the constitutionality of the act) *with* cases cited *infra* note 12 (where individuals who had not been actually denied admittance were considered members of the class in whose behalf representative actions were brought by individuals who had in fact been denied admittance under exclusionary policy). See generally on the characteristics of the declaratory judgment, BORCHARD, DECLARATORY JUDGMENTS 25-86 (2d ed. 1941).

10. 28 U.S.C.A. § 2201 (1950).

11. Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951); Harris v. Daytona Beach, 105 F. Supp. 572 (S.D. Fla. 1952); Johnson v. Board of Trustees, 83 F. Supp. 707 (E.D. Ky. 1949); Wrighten v. Board of Trustees, 72 F. Supp. 948 (E.D.S.C. 1947). *Accord,* Wilson v. City of Paducah, 100 F. Supp. 116 (W.D. Ky. 1951). *Cf.* Wilson v. Board of Supervisors, 92 F. Supp. 986 (E.D. La. 1950) (where an administrative order denying admission of Negroes to state university was held to violate equal protection clause of United States Constitution and was enjoined in a class action without resort to a declaratory action).

12. Beal v. Holcombe, *supra* note 11; Harris v. Daytona Beach, *supra* note 11; Wilson v. City of Paducah, *supra* note 11; Wrighten v. Board of Trustees, *supra* note 11. The federal courts are authorized to grant "further necessary

The court of appeals, in harmony with the cases mentioned above, commented on the "technical and unrealistic" viewpoint that proof of exclusion of others was essential to the granting of class relief, noting "the Park Board's admitted policy of exclusion."[13] The court, however, influenced by the consideration that the defendant presumably would voluntarily give the adjudication a class operation, affirmed on the basis[14] that "a trial court is not without some measure of judgment as to whether a class adjudication can serve any useful [legal][15] purpose in a particular situation."[16]

It is well-settled that the trial court may deny class relief if in its judgment the plaintiffs do not adequately represent the class[17] or the class is not so numerous as to make it impracticable to bring each member before the court.[18] Both of these bases are rooted in the wording of Rule 23 as express limitations on the class action device.[19] The "useful legal purpose" test herein enunciated, however, is neither provided for in the rule itself nor applied in any case heretofore interpreting the rule. This test represents a new judicial limitation on the class action device.

In the recent case of *Wilson v. City of Paducah*,[20] Negro plaintiffs had been denied admission to a junior college because of their race. A declaratory judgment to the effect that such segregation was unconstitutional had been entered against the defendant city in a class suit a year previously. It was held that plaintiffs were members of the class in whose behalf the prior judgment had been rendered and they were allowed to intervene and secure an injunction to enforce their established right. In that case, as in the principal case, the defendant is a city possessed of funds for the relitigation of issues in which the

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or proper relief . . . against any adverse party whose rights have been determined by such [declaratory] judgment." 28 U.S.C.A. § 2202 (1950).

13. Instant case, 205 F.2d at 52.

14. It must be noted that the basis on which the denial of class relief was affirmed was not discussed by the trial court in its memorandum opinion as a basis for the denial of such relief. Williams v. Kansas City, Mo., 104 F. Supp. 848 (W.D. Mo. 1952). Apparently the affirmation rests on a basis that was not an issue in the hearing or consideration of the case.

15. The qualifying adjective may properly be incorporated into the holding since elsewhere in the opinion, the court, in discussing the criteria for class relief, says it is appropriate "where the granting of such relief seems likely to serve some useful legal purpose — for example, preventing a multiplicity of suits." Instant case, 205 F.2d at 52.

16. Instant case, 205 F.2d at 52.

17. Weeks v. Bareco Oil Co., 125 F.2d 84 (7th Cir. 1941); Pelelas v. Caterpillar Tractor Co., 113 F.2d 629 (9th Cir.), *cert. denied*, 311 U.S. 700 (1940); Molina v. Sovereign Camp, W.O.W., 6 F.R.D. 385 (D. Neb. 1947); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 567 (1950); 3 MOORE, FEDERAL PRACTICE § 23.07 (2d ed. 1948); 3 OHLINGER, FEDERAL PRACTICE, 414-16 (1948).

18. *In re* Engelhard, 231 U.S. 646, 34 Sup. Ct. 258, 58 L. Ed. 416 (1914); Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950); 3 MOORE, FEDERAL PRACTICE § 23.05 (2d ed. 1948); 3 OHLINGER, FEDERAL PRACTICE 413-14 (1948).

19. FED. R. CIV. P. 23(a).

20. 100 F. Supp. 116 (W.D. Ky. 1951).

public interest is sufficiently strong. It is probably true that class prejudice is stronger against mixed races in the swimming pool than in the classroom. The city's failure to abide in good faith by a judgment in a class action in the *Paducah* case necessitated intervention to secure the right already adjudicated, while in the instant case the presumption that the defendant would voluntarily give the *individual* relief granted a *class* application was made the basis for affirming the denial of class relief.

It may be that the court's assumption is based on factors not disclosed in its opinion and that in this particular situation substantial justice will obtain.[21] In applying the "useful legal purpose" test to reach this result, however, a precedent has been laid which, if followed, will endanger the growth and usefulness of Rule 23.[22] Predictability is as essential to the usefulness of a procedural device as it is desirable in the realm of substantive law. The determination of the appropriateness of class relief in a particular situation by judicial speculation as to the future course of the defendant's conduct would go far toward destroying that predictability.

INCOME TAXATION — DEDUCTIONS — "ORDINARY AND NECESSARY" EXPENSES

Taxpayer, a member of a law firm which engaged in considerable tax practice and which relied on taxpayer to keep abreast of developments in the field of tax law, attended a New York University Institute on Federal Taxation. He incurred expenses of $305 for tuition, board and lodging in attending the Institute for which he claimed a deduction under section 23(a)(1)(A) of the Internal Revenue Code as ordinary and necessary expenses. The Tax Court sustained the Commissioner's disallowance of the deduction, four judges dissenting.[1] On appeal, *held,* reversed. Since these expenses were incurred through immediate, over-all professional requirements regarding the current status of tax law, they are deductible as ordinary and necessary expenses. *Coughlin v. Commissioner,* 203 F.2d 307 (2d Cir. 1953).

To be deductible as "ordinary and necessary" within section 23(a)

21. The city authorities, restrained from operating the pool under a policy of segregation, closed the half-million dollar pool to both races pending the outcome of their appeal and petition for certiorari. Joint Memorandum, American Jewish Committee, Anti-Defamation League of B'nai B'rith (Oct. 27, 1953).

22. As to the extension of the class action device to all fields of civil litigation by Rule 23, the court in *Montgomery Ward v. Langer* said, "If the device is to be loaded down with arbitrary and technical restrictions, it will serve no very useful purpose in the enlarged field. If, on the other hand, the courts will . . . permit the Rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose." 168 F.2d 182, 187 (8th Cir. 1948).

1. 18 T.C. 528 (1952).

(1) (A),[2] the expense must bear a direct relation to the conduct of the business in which the taxpayer is engaged.[3] What is included as "ordinary and necessary" must be determined according to the particular facts and circumstances surrounding the expense.[4] The test may be "what the average hardheaded businessman would have done under like circumstances."[5] The words used in the statute are to be taken in their usual everyday meaning and construed broadly "to facilitate business generally, so that any necessary expense, not actually a capital investment, incurred in good faith . . . is to be considered an ordinary expense of that business."[6]

Nondeductible personal expenses and capital expenditures are to be distinguished from business expenses. An item ordinarily falls within the deductible business expenses classification only if it is incurred in producing, or in the expectation of producing, revenues. Situations where expenses for personal enjoyment merge with those for business interests provide the hard cases. To be deductible they must meet the "ordinary and necessary" requirement and must be reasonable in amount.[7] However, if the result of an outlay of money is the acquisition of an asset which has a lasting or improving nature, then the outlay is a nondeductible capital expenditure.[8] To qualify as a deductible business expense, the benefits received therefrom must not carry over into later years to an appreciable extent. There must be no continuing benefit of an indefinite duration.

Deductible professional expenses incurred by one practicing his profession are subject to the same requirements and restrictions. Under Regulation 118[9] a professional man is allowed to deduct expenses incurred in the practice of his profession. In particular, a lawyer has been allowed to deduct Bar Association expenses, dues, costs of publishing his card in newspapers and certain client entertainment expenses.[10]

2. "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. . . ." INT. REV. CODE § 23(a) (1) (A).

3. See Deputy v. DuPont, 308 U.S. 488, 495, 60 Sup. Ct. 363, 84 L. Ed. 416 (1940); Welch v. Helvering, 290 U.S. 111, 54 Sup. Ct. 8, 78 L. Ed. 212 (1933); Kornhauser v. United States, 276 U.S. 145, 153, 48 Sup. Ct. 219, 72 L. Ed. 505 (1928).

4. See cases cited note 3 *supra*; 4 MERTENS, FEDERAL INCOME TAXATION § 25.07 (1942).

5. 4 MERTENS, *op. cit. supra* note 4, at 319.

6. Harris & Co. v. Lucas, 48 F.2d 187, 188 (5th Cir. 1931). This is in effect the construction given by the Treasury Department and the Courts.

7. 4 MERTENS, *op. cit. supra* note 4, § 25.14; Dean, *Deductible Expenses of the Professional Person*, N.Y.U. NINTH ANNUAL INSTITUTE ON FEDERAL TAXATION 349 (1950); Comment, *Income Tax Deductions for the Lawyer*, 24 BAR BULL. 43 (1953).

8. 4 MERTENS, *op. cit. supra* note 4, § 25.17.

9. U.S. Treas. Reg. 118, § 39.23(a)-5 (1953).

10. Wade H. Ellis, 15 B.T.A. 1075, *aff'd*, 50 F.2d 343 (D.C. Cir. 1931) (traveling expenses in attending a meeting of the American Bar Association deductible); Henry P. Keith, P-H 1942 T.C. MEM. DEC. ¶ 42,630 (1942) (deduction

Money expended for reputation, good will or education generally has not been allowed under section 23(a) (1) (A) because it is considered a capital investment.[11] However, *Hill v. Commissioner*[12] held that a school teacher's summer school expenses, incurred for the purpose of maintaining her position, were deductible. Where expenses are incurred to obtain a teaching position or to qualify for permanent status, a higher position, an advance in salary schedule, or to fulfill general cultural aspirations, they are nondeductible because they are capital expenditures. The decision in the instant case is in accord with the limited application of *Hill v. Commissioner*,[13] to be distinguished only by the degree of necessity prompting the expense. The allowance of this deduction finds further justification in the restricted purpose of the expense. To stay abreast of the changing tax laws one must keep informed.[14] Consequently, money expended for such knowledge is a current expense, the benefit from which is realized during the taxable year; the cost is, therefore, a business expense. Even though educational in nature, expenses incurred in attending conventions also have been held deductible on the theory that no lasting benefit is received therefrom.[15] Furthermore, they are incurred for the purpose of allowing the taxpayer to keep informed of the new developments, trends and practices in the particular trade, business or profession. Likewise, the expenses necessary to keep informed on current tax changes appear deductible for the same reasons.

Thus, in order for educational expenses of professional persons to be deductible, they must withstand attack both as to their personal character and their capital nature. These expenditures seem to fall into three categories: capital expenditure, personal expense and business expenses.[16] The instant case certainly is included in the

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allowed for annual bar association dues); Comment, 24 BAR BULL. 43 (1953) (includes entertainment expenses for clients).

11. "Reputation and learning are akin to capital assets, like the good will of an old partnership.... For many, they are the only tools with which to hew a pathway to success. The money spent in acquiring them is well and wisely spent. It is not an ordinary expense of the operation of a business." Welch v. Helvering, 290 U.S. 111, 115-16, 54 Sup. Ct. 8, 78 L. Ed. 212 (1933). See Manoel Cardozo, 17 T.C. 3 (1951); Knut F. Larson, 15 T.C. 956 (1950).

12. 181 F.2d 906 (4th Cir. 1950), *reversing* 13 T.C. 291.

13. In both instances the petitioner claims the expenses were incurred: (1) to maintain an existing position, not to attain a new one; (2) to preserve the position, not to expand or increase it; (3) to carry on a profession, not to commence one.

14. The Institute was not conducted for students or for those unversed in federal taxation. Only tax specialists attended. It "was designed by its sponsors to provide a place and atmosphere where practitioners could gather trends, thinking, and developments in the field of Federal taxation from experts accomplished in that field." George G. Coughlin, 18 T.C. 528, 529 (1952).

15. 4 MERTENS, FEDERAL INCOME TAXATION § 25.107 (1942).

16. Expenditures for educational purposes are distinguishable by classification: (1) When an education is obtained to equip one for his life's vocation, it is a capital expenditure. Knut F. Larson, 15 T.C. 956 (1950). (2) Sometimes an education is purely personal in nature when it is sought to gain

"current information" class of the business expense category. Although the decision is not authority for cases where a taxpayer has enrolled in courses to obtain an education, it should control in those instances where current knowledge is needed in carrying on a business or profession.

INCOME TAXATION — FALSE STATEMENTS — CRIMINAL PENALTIES

Section 1001 of the Criminal Code[1] provides that it is unlawful to make false statements to departments or agencies of the United States concerning any matter within their jurisdiction. After the three year statute of limitations had run on this section, the defendant was indicted under § 145(b) of the Internal Revenue Code[2] which is governed by a six year statute, for willfully making false statements to Treasury representatives in order to evade taxes. The District Court, reasoning that Congress must have intended the making of false statements to be punishable only under the section dealing specifically therewith, dismissed the indictment as not charging an offense under 145(b). *Held,* reversed. Section 145(b), which outlaws willful attempts to evade taxes in any manner, is broad enough to cover false statements made to Treasury representatives for the purpose of concealing unreported income. *United States v. Beacon Brass Co.,* 344 U.S. 43, 73 Sup. Ct. 77, 97 L. Ed. 1 (1952).

Section 145 is the primary criminal penalty statute of the Internal Revenue Code.[3] Subsection (a) makes a willful failure to file a return,[4] keep records or submit information[5] a misdemeanor. To prove a violation of § 145(a) it must be shown that the taxpayer had a duty to perform the omitted act;[6] that he failed to perform within the prescribed time; and that his failure to perform was due to an evil

prestige, to acquire culture or to improve one's reputation. Manoel Cardozo, 17 T.C. 3 (1951). (3) When current information is necessary to equip one for a year's work, the cost of such an education is considered a business expense. Instant case, 203 F.2d at 309.

1. 18 U.S.C.A. § 1001 (1950).

2. INT. REV. CODE § 145(b). "[A]ny person who willfully attempts in any manner to evade or defeat any tax imposed by this Chapter . . . shall be guilty of a felony. . . ."

3. For an article on income tax penalties, see Gordon, *Income Tax Penalties,* 5 TAX L. REV. 131 (1950).

4. United States v. Sullivan, 98 F.2d 79 (2d Cir. 1938); Kittrell v. United States, 76 F.2d 333 (10th Cir.), *cert. denied,* 296 U.S. 643 (1935); Hargrove v. United States, 67 F.2d 820 (5th Cir. 1933); United States v. Commerford, 64 F.2d 28 (2d Cir.) *cert. denied,* 289 U.S. 759 (1933); United States v. Miro, 60 F.2d 58 (2d Cir. 1932); Oliver v. United States, 54 F.2d 48 (7th Cir. 1931), *cert. denied,* 285 U.S. 543 (1932); O'Brien v. United States, 51 F.2d 193 (7th Cir.), *cert. denied,* 284 U.S. 673 (1931).

5. United States v. Murdock, 290 U.S. 389, 54 Sup. Ct. 223, 78 L. Ed. 381 (1933).

6. *See* United States v. McCormick, 67 F.2d 867, 868 (2d Cir. 1933), *cert.*

motive.[7] Subsection (b) makes it a felony to attempt willfully[8] to defeat or evade a tax in any manner. In order to prove a violation of § 145(b), it need only be shown that some tax was due or unpaid,[9] and there was a willful attempt to evade it.[10] Prior to the *Spies*[11] case it had been held that willfully failing to file a return not only violated subsection (a), but was also a willful attempt within subsection (b).[12] In overruling the earlier decisions the court in the *Spies* case held that in order to violate § 145(b) there must be affirmative attempts to evade, in addition to the omissions of duty under § 145(a).

Willful attempts have been found where taxpayers kept a double set of books,[13] made excessive deductions,[14] concealed assets[15] or income,[16] paid fictitious bonuses or salaries,[17] understated[18] or did not

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denied, 291 U.S. 662 (1934).

7. United States v. Murdock, 290 U.S. 389, 54 Sup. Ct. 223, 78 L. Ed. 381 (1933); United States v. Commerford, 64 F.2d 28 (2d Cir.), *cert. denied*, 289 U.S. 759 (1933).

8. See United States v. Murdock, 290 U.S. 389, 396, 54 Sup. Ct. 223, 226, 78 L. Ed. 381, 386 (1933) (bona fide misunderstanding of tax liability is not willful). That direct proof of willful intent is not necessary, but may be inferred from the acts of the parties, *see* Battjes v. United States, 172 F.2d 1, 5 (6th Cir. 1949); United States v. Rosenblum, 176 F.2d 321, 329 (7th Cir.), *cert. denied*, 338 U.S. 893 (1949), *rehearing denied*, 338 U.S. 940 (1950).

9. The United States need not prove the exact amount of evasion, but only that there has been some evasion. See United States v. Johnson, 319 U.S. 503, 63 Sup. Ct. 1233, 87 L. Ed. 1546 (1943); United States v. Rosenblum, 176 F.2d 321 (7th Cir.), *cert. denied*, 338 U.S. 893 (1949), *rehearing denied*, 338 U.S. 940 (1950); Schuermann v. United States, 174 F.2d 397 (8th Cir.), *cert. denied*, 338 U.S. 831, *rehearing denied*, 338 U.S. 881 (1949); Stinnett v. United States, 173 F.2d 129 (4th Cir.), *cert. denied*, 337 U.S. 957 (1949); Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), *cert. denied*, 297 U.S. 709 (1936).

10. *See* Spies v. United States, 317 U.S. 492, 493, 63 Sup. Ct. 364, 365, 87 L. Ed. 418, 420 (1943); Jones v. United States, 164 F.2d 398, 400 (5th Cir. 1948). A fraudulent return is always a willful attempt to evade a tax. Rick v. United States, 161 F.2d 897, 898 (D.C. Cir. 1947) (construing § 1542(b) of D.C. Code [later repealed, 61 STAT. 331 (1947)] which uses same language as 145(b)); United States v. Rosenblum, 176 F.2d 321, 329 (7th Cir.), *cert. denied*, 338 U.S. 893 (1949), *rehearing denied*, 338 U.S. 940 (1950).

11. 317 U.S. 492, 63 Sup. Ct. 364, 87 L. Ed. 418 (1943).

12. United States v. Sullivan, 98 F.2d 79 (2d Cir. 1938); Kittrell v. United States, 76 F.2d 333 (10th Cir.), *cert. denied*, 296 U.S. 643 (1935); United States v. Commerford, 64 F.2d 28 (2d Cir.), *cert. denied*, 289 U.S. 759 (1933); United States v. Miro, 60 F.2d 58 (2d Cir. 1932); O'Brien v. United States, 51 F.2d 193 (7th Cir.), *cert. denied*, 284 U.S. 673 (1931).

13. United States v. Yeoman-Henderson, Inc., 193 F.2d 867 (7th Cir. 1952); Shinyu Noro v. United States, 148 F.2d 696 (5th Cir.), *cert. denied*, 326 U.S. 720 (1945); *accord*, Maxfield v. United States, 152 F.2d 593 (9th Cir. 1945), *cert. denied*, 327 U.S. 794 (1946) (planned to keep a double set of books).

14. United States v. Ragen, 314 U.S. 513, 62 Sup. Ct. 374, 86 L. Ed. 383 (1942); United States v. Lange, 161 F.2d 699 (7th Cir. 1947).

15. United States v. Zimmerman, 108 F.2d 370 (7th Cir. 1939); Paschen v. United States, 70 F.2d 491 (7th Cir. 1934); Guzik v. United States, 54 F.2d 618 (7th Cir. 1931), *cert. denied*, 285 U.S. 545 (1932).

16. United States v. Johnson, 319 U.S. 503, 63 Sup. Ct. 1233, 87 L. Ed. 1546 (1943); United States v. Yeoman-Henderson, Inc., 193 F.2d 867 (7th Cir. 1952); Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950), *cert. denied*, 340 U.S. 917, *rehearing denied*, 340 U.S. 939 (1951); Schuermann v. United States, 174 F.2d 397 (8th Cir.), *cert. denied*, 338 U.S. 831, *rehearing denied*, 338 U.S. 881 (1949); Stinnett v. United States, 173 F.2d 129 (4th Cir.), *cert. denied*, 337 U.S. 957

report[19] sales, or prepared false returns for others.[20] Taxpayers have contended that the filing of a false and fraudulent return is not per se a willful attempt within § 145(b), but this contention has uniformly been rejected.[21] Where inadequate records have been kept, the United States has had to prove the return false and fraudulent by evidence of bank deposits,[22] expenditures,[23] or an increase in net worth[24] for the year in excess of reported income. In the instant case, however, none of the acts previously interpreted as willful attempts to evade a tax were relied upon. The United States relied solely on the false statements made during the course of an investigation of the taxpayer's return.[25]

(1949); United States v. Chapman, 168 F.2d 997 (7th Cir.), *cert. denied,* 335 U.S. 853 (1948).

17. Battjes v. United States, 172 F.2d 1 (6th Cir. 1949); Locke v. United States, 166 F.2d 449 (5th Cir.), *cert. denied,* 334 U.S. 837 (1948); United States v. Lange, 161 F.2d 699 (7th Cir. 1947).

18. Barrow v. United States, 171 F.2d 286 (5th Cir. 1948).

19. Kirsch v. United States, 174 F.2d 595 (8th Cir. 1949); Battjes v. United States, 172 F.2d 1 (6th Cir. 1949); United States v. Lange, 161 F.2d 699 (7th Cir. 1947).

20. Tinkoff v. United States, 86 F.2d 868 (7th Cir. 1936), *cert. denied,* 301 U.S. 689, *rehearing denied,* 301 U.S. 715 (1937).

21. United States v. Croessant, 178 F.2d 96 (3d Cir. 1949); Rick v. United States, 161 F.2d 897 (D.C. Cir. 1947) (construing § 1542(b) of D.C. Code [later repealed, 61 STAT. 331 (1947)] which used same language as 145(b)); Cave v. United States, 159 F.2d 464 (8th Cir. 1947); *see,* United States v. Rosenblum, 176 F.2d 321, 330 (7th Cir.), *cert. denied,* 338 U.S. 893 (1949), *rehearing denied,* 338 U.S. 940 (1950); *cf.* Kirsch v. United States, 174 F.2d 595 (8th Cir. 1949).

22. United States v. Yeoman-Henderson, Inc., 193 F.2d 867 (7th Cir. 1952); Stinnett v. United States, 173 F.2d 129 (4th Cir.), *cert. denied,* 337 U.S. 957 (1949); Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), *cert. denied,* 297 U.S. 709 (1936); Chadick v. United States, 77 F.2d 961 (5th Cir.), *cert. denied,* 296 U.S. 609 (1935); Guzik v. United States, 54 F.2d 618 (7th Cir. 1931), *cert. denied,* 285 U.S. 545 (1932). See Webster, *Section 145(b) and Prior Accumulated Funds,* 28 TAXES 1065, 1066 (1950).

23. United States v. Johnson, 319 U.S. 503, 63 Sup. Ct. 1233, 87 L. Ed. 1546 (1943); United States v. Yeoman-Henderson, Inc., 193 F.2d 867 (7th Cir. 1952); Schuermann v. United States, 174 F.2d 397 (8th Cir.), *cert. denied,* 338 U.S. 831, *rehearing denied,* 338 U.S. 881 (1949); Stinnett v. United States, 173 F.2d 129 (4th Cir.), *cert. denied,* 337 U.S. 957 (1949); United States v. Skidmore, 123 F.2d 604 (7th Cir. 1941), *cert. denied,* 315 U.S. 800, *rehearing denied,* 315 U.S. 828 (1942).

24. Schuermann v. United States, 174 F.2d 397 (8th Cir.), *cert. denied,* 338 U.S. 831, *rehearing denied,* 338 U.S. 881 (1949); United States v. Chapman, 168 F.2d 997 (7th Cir.), *cert. denied,* 335 U.S. 853 (1948); Gleckman v. United States, 80 F.2d 394 (8th Cir. 1935), *cert. denied,* 297 U.S. 709 (1936); United States v. Messick, 85 F. Supp. 928 (D. Del. 1949). Before there can be a conviction the United States must establish the starting point from which to prove the increased net worth. United States v. Fenwick, 177 F.2d 488 (7th Cir. 1949); Bryan v. United States, 175 F.2d 223 (5th Cir. 1949), *aff'd on other grounds,* 338 U.S. 552 (1950). See Avakian, *The Net Worth Method of Establishing Fraud,* N.Y.U. ELEVENTH ANNUAL INSTITUTE ON FEDERAL TAXATION 707 (1952).

25. The statute of limitations had already run on the filing of a false and fraudulent return. The statute of limitations begins running criminally on the false and fraudulent return from the day it is filed. *See* Myres v. United States, 174 F.2d 329, 334 (8th Cir.), *cert. denied,* 338 U.S. 849 (1949); United States v. Mathis, 28 F. Supp. 582 (D.N.J. 1939).

This case extended § 145(b) beyond any previous application, but the broad language of the statute seems to justify the result. Since § 145(b) is governed by a six year period of limitations, the effect of this case renders Criminal Code § 1001, which is governed by a three year statute of limitations, obsolete insofar as prosecution is based on false statements made to the Internal Revenue Service. In view of the liberal interpretation of § 145(b) the implication of the instant case is that any willful act, the effect of which is to evade or defeat the income tax, is within the coverage of § 145(b).

LABOR LAW — ARBITRATION AGREEMENTS — SPECIFIC ENFORCEMENT IN FEDERAL COURTS

Plaintiff, a union representing employees in an industry affecting commerce, sought a federal district court order, pursuant to § 301 of the Taft-Hartley Act,[1] to compel specific enforcement of an executory arbitration agreement. Defendant employer refused to submit the question of separation pay of ten employees to arbitration and contended that the federal district court was without authority to direct specific performance of arbitration agreements. *Held,* Congress intended that § 301 of the Taft-Hartley Act should provide a nationally available remedy of specific performance of arbitration clauses in labor contracts. *Textile Workers Union of America (CIO) v. American Thread Co.,* 113 F. Supp. 137 (D. Mass. 1953).

At common law an executory contract to arbitrate future disputes was legal but unenforceable;[2] the courts jealously protected their jurisdiction from encroachment by extra-judicial bodies.[3] Although this anomalous principle of legality without enforceability has been changed by statute in some instances,[4] it still generally applies to arbi-

1. "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 STAT. 156 (1947), 29 U.S.C.A. § 185(a) (Supp. 1952).

2. See Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006, 1012 (S.D.N.Y. 1915); Comment, *Arbitration of Labor Contract Interpretation Disputes,* 43 ILL. L. REV. 678 (1948); *See* Latter v. Holsom Bread Co., 108 Utah 364, 160 P.2d 421, 424 (1945) (concurring opinion).

3. Scott v. Avery, 5 H.L. Cas. 811, 853, 10 Eng. Rep. 1121, 1138 (1855-56); note the incorporation of this doctrine, RESTATEMENT, CONTRACTS § 550 (1932). See also Pound, *The American Arbitration Association,* 8 ARB. J. 21-22 (1953). "[T]here was at one time some jealousy of agreements to arbitrate . . . . It was considered that such agreements tended to oust the courts from their jurisdiction, but long ago this attitude was given up."

4. Interpretation of the statutes has varied. Seven states which have enacted the Draft State Arbitration Act have held that future disputes in collective bargaining contracts are thereby made enforceable. At least nine

tration clauses in collective bargaining agreements.[5] It diminishes the usefulness of such clauses and deprives the parties of a previously bargained for and undoubtedly valuable instrument for maintaining industrial peace.[6]

Congress, persuaded that adequate means of remedying violations of collective bargaining agreements did not exist, sought to encourage the performance of such agreements by the enactment of § 301 of the Taft-Hartley Act which expressly provides a federal forum in which employers and labor organizations may sue for violation of collective bargaining agreements.[7] Whether this section also afforded legislative authority for the specific enforcement of an arbitration contract depends upon what law, substantive and remedial, Congress intended the federal courts to apply under § 301.

If Congress' only intention in the enactment of § 301 was to create a federal forum in which employers and labor organizations could sue and be sued, then the legislation is only jurisdictional in terms and meaning. Under this theory the sole purpose of § 301 would be to avoid only the procedural obstacles existing in the several states,[8] the rights of the parties being determined by state substantive law.[9] This would assume that Congress neither specified nor intended to specify any substantive criteria by which to determine the enforceability of an arbitration agreement. Although some of the legislative history of

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other states which have enacted the Draft State Arbitration Act have held that labor contracts are not covered by the statute. This problem is clarified in the new proposed Draft of an Arbitration Act, 7 ARB. J. 201, 202 (1952). See, for further details, Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. OF CHI. L. REV. 233, 238 (1950); Comment, 43 ILL. L. REV. 678, 683 (1948).

5. Utility Workers Union of America v. Ohio Power Co., 77 N.E.2d 629, 630 (Ohio Ct. C.P. 1947); Local 1111 of Elec., Radio, and Machine Workers of America v. Allen-Bradley Co., 259 Wis. 609, 49 N.W.2d 720, 724 (1951) (interprets statute as declaring public policy against enforcement of arbitration clauses). Compare not 4 *supra*.

6. See National Electric Products Corp., 80 N.L.R.B. 995, 23 L.R.R.M. 1148 (1948); Katz and Jaffe, *Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act*, 8 ARB. J. 80, 81 (1953); Note, *Specific Performance of Collective Bargaining Agreements*, 37 VA. L. REV. 739, 751 (1951); Pound, *supra* note 3, at 22.

7. See Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp. 162, 166 (S.D.N.Y. 1949); Note, 17 A.L.R.2d 614, 615 (1951); Cox, *Some Aspects of the Labor Management Relations Act*, 1947, 61 HARV. L. REV. 274, 304 (1948); Mishkin, *The Federal "Question" in the District Courts*, 53 COL. L. REV. 157, 186 n.130 (1953).

8. Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers, 191 F.2d 252, 253 (3rd Cir. 1951), *cert. denied*, 342 U.S. 933 (1952) (construed in accordance with Penn. law); Mercury Oil Refining Co. v. Oil Workers International Union, 187 F.2d 980, 983 (10th Cir. 1951) (§ 301 only gives jurisdiction to federal courts).

9. *E.g.*, Paterson Parchment Paper Co. v. International Brotherhood of Paper Makers, 191 F.2d 252 (3d Cir. 1951), *cert. denied*, 342 U.S. 933 (1952); Boeing Airplane Co. v. Aeronautical Industrial Dist., 91 F. Supp. 596, 614 (W.D. Wash. 1950), *aff'd per curiam*, 188 F.2d 356 (9th Cir.), *cert. denied*, 342 U.S. 821 (1951).

the Taft-Hartley Act substantiates this theory,[10] it is indecisive and fails to rule out the possibility of federal substantive rights arising under the Taft-Hartley Act. However, while this interpretation would be an extension of federal courts jurisdiction over a state-created right in a non-diversity case,[11] it involves no serious question of constitutionality.[12]

If Congress' purpose in enacting §301 was not only to create a federal forum but also to direct the federal courts to develop a federal labor common law, then federal substantive rights are implicit in the terms of the section. The majority of the courts which have dealt with the problem have adopted this construction, that Congress created both a substantive right and a procedure for its enforcement,[13] and have upheld § 301 under the power of Congress to regulate interstate commerce.[14] Judge Wyzanski criticizes this interpretation because it vastly extends the reach of federal law without adequate Congressional expression of such an intention.[15] This is literally true, but after a consideration of the Majority Report of the Committee on Labor and Public Welfare[16] and the numerous declarations of purpose and policy,[17]

10. While Senator Taft failed to make a determinative statement in his Majority Report, SEN. REP. No. 105, 80th Cong., 1st Sess. 15 *et seq.* (1947), Senator Thomas speaking for the minority stated, "Every district court would still be required to look to State substantive law to determine the question of violation. This section [301] does not, therefore, create a new cause of action but merely makes the existing remedy available to more persons. . . ." PART 2, *id.*, at 13.

11. See 6 VAND. L. REV. 401 (1953).

12. See instant case, 113 F. Supp. at 140 (a discussion of the constitutionality of this viewpoint). Also *see* Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158, 164 (9th Cir. 1950). See Forrester, *The Jurisdiction of Federal Courts in Labor Disputes*, 13 LAW & CONTEMP. PROB. 114, 118 *et. seq.* (1948); Note, 57 YALE L.J. 630 (1948).

13. It seems probable that federal substantive rights may be distilled by implication from the grant of jurisdiction. Note, 57 YALE L.J. 630, 635 (1948). See also note 15 *infra*.

14. Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp. 162 (S.D.N.Y. 1949) (§ 301 must create federal substantive right for elsewise it creates a remedy and a forum without creating a right); Colonial Hardwood Flooring Co. v. International Union U.F.W., 76 F. Supp. 493 (D. Md.), *aff'd*, 168 F.2d 33 (4th Cir. 1948) (Taft-Hartley creates important substantive rights and § 301(a) authorizes their enforcement); *see* Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158, 164 (9th Cir. 1950) (§ 301 creates a new federal substantive right); Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806, 808-09 (2d Cir. 1950). See Cox, *supra* note 7, at 304 (close relationship of § 301 and NLRA is sufficient to make case one arising under laws of United States); Forrester, *supra* note 12 at 128-31; Note, *Section 301(A) of Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, 57 YALE L.J. 630 (1948); Note, 17 A.L.R.2d 614, 615 (1951).

15. Instant case, 113 F. Supp. at 140. Section 301 is jurisdictional in its terms and there is no satisfactory declaration in the legislative history of Taft-Hartley Act to clearly show whether Congress intended anything further. Note, 57 YALE L.J. 630, 633-34 (1948); see note 10 *supra*.

16. "The Congress has protected the right of workers to organize. It has passed laws to encourage and promote collective bargaining.

"Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher

the majority holding seems to be a very defensible interpretation. Having legislated under its commerce clause powers, Congress can, as a matter of federal concern, extend its special federal question jurisdiction to protect federally created rights.[18]

Although the Supreme Court has not yet resolved the conflicting decisions on this point, the instant case does not require such a determination; for here, under either state or federal law, the contract to arbitrate is valid and creates rights in the parties. The holding of the instant case, that "Congress . . . would have preferred"[19] that the remedies (*inter alia* specific performance of arbitration contracts), irrespective of the rights, should be made uniformly available under § 301 without regard to state law, has several implications. While the enforcement of the agreement may be a matter of remedy governed by the procedure in the federal forum,[20] this alone would obviously not be sufficient for the decision because traditionally the federal courts

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degree of responsibility . . . and will thereby promote industrial peace." SEN. REP. No. 105, 80th Cong., 1st Sess. 17 (1947).

17. One of the declared purposes of the Federal Mediation Service is to "exert every reasonable effort to make and maintain agreements. . . ." 61 STAT. 154, 29 U.S.C.A. § 174(a)(1) (Supp. 1952). "Indeed, the Board has frequently stated that the stability of labor relations which the statute seeks to accomplish through the encouragement of the collective bargaining process ultimately depends upon the channelization of the collective bargaining relationship within the procedures of a collective bargaining agreement. By encouraging the utilization of such procedures . . . we believe that statutory policy will best be effectuated." Crown Zellerbach Corp., 95 N.L.R.B. 753, 754 (1951). See Wilson & Co. v. United Packinghouse Workers of America, 83 F. Supp. 162 (S.D.N.Y. 1949). See also, Katz and Jaffe, *Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act,* 8 ARB. J. 80, 83 (1953).

18. "The district courts shall have original jurisdiction of any civil action . . . arising under any Act of Congress regulating commerce or protecting trade. . . ." 28 U.S.C.A. § 1337 (1950). "[F]ederal question jurisdiction . . . was intended to make the federal judicial power 'coextensive' in the legislative." Forrester, *supra* note 12, at 118.

19. Instant case, 113 F. Supp. at 141.

20. Section 301 created a remedy where none existed before and provided a forum (federal) in which to enforce that remedy. Shirley-Herman Co. v. International Hod Carriers, 182 F.2d 806 (2d Cir. 1950). Labor organizations should be subject to the same judicial remedies and proceedings as all other citizens. H.R. REP. No. 245, 80th Cong., 1st Sess. 46 (1947). Generally the state courts on questions of conflict of laws or concurrent jurisdiction with federal courts have held arbitration to be a matter of procedure controlled by the forum. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 44 Sup. Ct. 274, 68 L. Ed. 582 (1924) (in personam concurrent jurisdiction with Admiralty, state court applies the state remedy of specific performance of arbitration contract); Lappe v. Wilcox, 14 F.2d 861 (N.D.N.Y. 1926) (New York statute pertaining to enforcement of arbitration contract affects the remedies in state courts only); Meacham v. Jamestown, F. & C.R.R., 211 N.Y. 346, 105 N.E. 653 (1914) (Arbitration contract relates to law of remedies, and the law of forum governs); Gregory and Orlikoff, *supra* note 4, at 257. Federal courts have held that arbitration contracts relate to remedies which are governed by procedure of the forum. Murray Oil Products Co. v. Mitsui & Co., 146 F. 2d 381 (2d Cir. (1944) (under Federal Arbitration Act); Boston & Maine Transp. Co. v. Amalgamated Ass'n of Street & Elec. Ry. & Motor Coach Employees, 106 F. Supp. 334 (D. Mass. 1952) (provisions for enforcement of arbitration contract are exclusively remedial, governed solely by the law of the forum).

have denied the remedy of specific performance of an executory arbitration contract.[21] The court must have further concluded that § 301 established a substantive right of specific performance of arbitration contracts in the federal courts. This reasoning is the *sine qua non* of the remedy granted.

The result here may be justified by a finding that § 301 expresses Congress' intent to afford collective bargaining agreements a maximum degree of enforceability.[22] The obvious utility of arbitration clauses should cause other federal courts to abandon their traditional view. Since the words of the statute are ambiguous, however, Congress or the Supreme Court should act to clarify the existing confusion.

MILITARY LAW — DISCHARGED PERSONNEL — POWER TO ARREST FOR SERIOUS CRIMES

Petitioner, an honorably discharged veteran, was arrested in Pittsburgh by military authorities and flown back to Korea to stand trial for murder. The arrest was made under the purported authority of Article 3(a) of the Uniform Code of Military Justice,[1] which provides that one who commits an offense against the code punishable by imprisonment for five years or more and who cannot be tried in a federal or state court, shall remain amenable to trial by court-martial. A habeas corpus petition was filed before the United States District Court for the District of Columbia. *Held,* petition granted. There was no authority in the military to arrest a civilian inasmuch as no arrest machinery was provided in Article 3(a) by which the rights of the accused would be protected. The military authorities had no more power of arrest than a private citizen, who would be required by Rule 5 of the Federal Rules of Criminal Procedure to take the accused immediately before the nearest United States Commissioner for preliminary hearing. *Toth v. Talbot,* 113 F. Supp. 330 (D.D.C. 1953). On return to the writ of habeas corpus, *held,* writ sustained and petitioner discharged. Petitioner, as a civilian, was not subject to the authority

21. Tobey v. County of Bristol, 23 Fed. Cas. 1313, No. 14,065 C.C.D. Mass. 1845) (Justice Story declined to compel specific performance of the arbitration agreement); United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., 222 Fed. 1006 (S.D.N.Y. 1915) (held arbitration agreement void in federal forum for it would oust court of its jurisdiction); *see* Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120, 44 Sup. Ct. 274, 68 L. Ed. 582 (1924) (federal courts have denied, both in equity and at law, the enforcement of executory arbitration agreements); Latter v. Holsom Bread Co., 108 Utah 364, 375, 160 P.2d 421, 426 (1945) (concurring opinion) (pointing out federal courts criticism of this judicial hostility). But compare, Gregory and Orlikoff, *supra* note 4, at 259 (federal enforcement of arbitration agreements under Federal Arbitration Act).

22. Instant case, 113 F. Supp. at 142. Also *see* Latter v. Holsom Bread Co., 108 Utah 364, 160 P.2d 421, 426 (1948) (concurring opinion).

1. 64 STAT. 109 (1950), 50 U.S.C.A. § 553(a) (1951).

of any commanding officer who could, under Article 9(c)[2] of the Uniform Code, order him into "arrest". Furthermore, Congress did not give authority to the military to transport the accused to so distant a point as Korea. *Toth v. Talbot,* 114 F. Supp. 468 (D.D.C. 1953).

In drafting the Uniform Code of Military Justice, Congress was particularly interested in retaining for military courts-martial jurisdiction over serious offenses committed by personnel who were discharged before discovery of the crime and who would go free in the absence of an assumption of jurisdiction by federal or state courts.[3] The Committee on Armed Services felt that some method was needed to retain jurisdiction, but that it should be limited to those offenses of a more serious nature;[4] Article 3(a) was designed to serve this function.[5]

In finding that no machinery or authority to arrest discharged servicemen exists, the court ignored the intent of the legislature and of Article 7(b) of the Uniform Code,[6] which expressly sets forth the power of arrest and includes as subject to the code all those persons subject to trial thereunder. A fundamental rule of statutory construction provides that the court shall use all possible means to give effect to the intention and purpose of the legislature unless the statute is in conflict with the Constitution or organic law.[7] In effect, the instant

2. 64 STAT. 111 (1950), 50 U.S.C.A. § 563 (1951).

3. H.R. REP. No. 491, 81st Cong., 1st Sess. 5 (1949). In U.S. *ex rel.* Hirshberg v. Cooke, 336 U.S. 210, 69 Sup. Ct. 530, 93 L. Ed. 621 (1949), it was held that a court-martial had no jurisdiction over a serviceman who had been discharged and who had re-enlisted the next day and had been arrested on a charge of mistreating fellow prisoners in a Japanese prison camp during the prior enlistment. In Hironimus v. Durant, 168 F.2d 288 (4th Cir. 1948), a WAC officer on terminal leave nearly escaped jurisdiction of a court-martial, but was held only on the ground that the terminal leave status was enough to allow a retention of jurisdiction. The Committee on Armed Services discussed these two cases and considered the fact that both defendants would have remained at large had they been totally and honorably discharged before discovery of the crime. See *Hearings before Committee on Armed Services on H.R. 2498,* 81st Cong., 1st Sess. 617, 800, 880, 882 (1949); H.R. REP. No. 491, *supra.*

4. H.R. REP. No. 491, *supra* note 3, at 11.

5. *Hearings, supra* note 3, at 1262. It is interesting to note, however, that Maj. Gen. Green, Judge Advocate General of the Army, proposed to the Senate Committee on Armed Services that jurisdiction over such offenses as the one in question here be granted expressly to the federal district courts to prevent adverse criticism of the military for usurping too much civilian power. *Hearings before Committee on Armed Services on S. 857 and H.R. 4080,* 81st Cong., 1st Sess. 256 (1949). See also Myers and Kaplan, *Crime Without Punishment,* 35 GEO. L.J. 303 (1947), for a discussion of situations in which criminals escape punishment and remedies therefor.

6. "Any person authorized under regulations governing the armed forces to apprehend persons subject to this chapter or to trial thereunder may do so upon reasonable belief that an offense has been committed and that the person apprehended committed it." 64 STAT. 111 (1950), 50 U.S.C.A. § 561(b) (1951).

7. See, *e.g.,* United States v. N. E. Rosenblum Truck Lines, Inc., 315 U.S. 50, 62 Sup. Ct. 445, 86 L. Ed. 671 (1942); Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 52 Sup. Ct. 322, 76 L. Ed. 704 (1932); *Ex parte* Public Nat. Bank of New York, 278 U.S. 101, 49 Sup. Ct. 43, 73 L. Ed. 202 (1928); Washington Market Co. v. Hoffman, 101 U.S. 112, 25 L. Ed. 782 (1879). For a further collection of cases on this point see 82 C.J.S., *Statutes* 561 n.25 (1953).

case deprives Article 3(a) of all force and renders it a nullity. Inasmuch as Article 3(a) provides that discharged personnel shall not be relieved from amenability to trial by court-martial, the power to arrest petitioner could easily be found in the Uniform Code. Furthermore, as a rule of construction, statutes which are in *pari materia* and relate to the same person or thing should be read together as constituting one law.[8] Here Article 7(b) and Article 3(a) read together give the necessary statutory power to the military to arrest discharged personnel.

Of course Article 9(c) could be interpreted so as to nullify Article 3(a) and render it futile, but this would be to ignore section (e) of that same Article 9, which provides that nothing in the Article should be construed to limit the authority to apprehend offenders to secure their custody until the proper officials are notified. If the "apprehension" is interpreted to mean arrest in the popular sense, then, of course, Article 3(a) becomes useless here. But it is obvious that "arrest" in Article 9 does not mean apprehension because of the provision in Article 9(e) and the fact that 9(a) defines arrest as the restraint of a person by an order directing him to remain within certain limits. Thus it would be consistent and reasonable to conclude that after the accused has been apprehended under authority of Article 7(b), he then comes under the authority of the commander who ordered the apprehension, and it is this commander who can order his arrest and confinement under Article 9 until time for the court-martial. Once it is established that the accused is subject to the Code, his removal to Korea is of no significance because there are no territorial restrictions on the power of the courts-martial.[9]

Article of War 94,[10] superseded and repealed by the passage of the Uniform Code, is an example of a workable law which does in one statute what Article 3(a) and Article 7(b) accomplish together, namely retain jurisdiction over discharged personnel (in this case those who have committed certain frauds against the government) and provide for the arrest of these offenders. *United States* ex rel *Marino v. Hildreth*[11] is an example of the retention of jurisdiction and the exercise thereof under Article of War 94. In that case petitioner had been arrested in New Jersey by military authorities but was tried, convicted and imprisoned in New York. The petition for habeas corpus was denied because of the statutory authorization of Article

8. United States v. Stewart, 311 U.S. 60, 61 Sup. Ct. 102, 85 L. Ed. 40 (1940); White v. United States, 305 U.S. 281, 59 Sup. Ct. 179, 83 L. Ed. 172 (1938); Hayes v. Hunter, 83 F. Supp. 940 (D.C. Kan. 1948). In this latter case the court held that Article of War 11 and Article of War 17 should be construed together in determining the necessary qualifications for defense counsel in a court-martial trial.

9. Art. 5, UCMJ, 64 STAT. 110 (1950), 50 U.S.C.A. § 555 (1951).

10. 41 STAT. 805 (1920).

11. 61 F. Supp. 667 (E.D.N.Y. 1945).

of War 94. In *Kronberg v. White*[12] plaintiff was arrested under authority of Article of War 94. On his subsequent release he brought suit against the responsible military authorities for false arrest and false imprisonment. In granting defendant's motion for summary judgment, the court held that the arrest and detention under Article of War 94 were valid and refused to declare the Article unconstitutional.[13]

Thus the machinery to arrest and try a discharged serviceman for a serious offense committed while in the service is present in the Uniform Code, and such an arrest has been held valid under similar provisions in Article of War 94. Therefore, it would seem that the decision in the instant case disregards a pertinent provision of the Code and applicable judicial precedents. Since the court expressly refrained from passing on the constitutionality of Article 3(a) at this stage of the proceedings,[14] this issue remains unsettled.[15]

MILITARY LAW — PRIVILEGE AGAINST SELF INCRIMINATION — ADMISSIBILITY OF HANDWRITING SPECIMEN OBTAINED INVOLUNTARILY

Defendant was convicted of forgery in a Navy court-martial. Specimens of his handwriting, involuntarily given before trial, were introduced in evidence over defendant's objection. The Board of Review held such evidence inadmissible as a violation of the privilege against self incrimination. The Judge Advocate General of the Navy certified the question to the Court of Military Appeals. *Held,* compelling defendant to give a specimen of his handwriting before trial violates the privilege against self incrimination set forth in Article 31 of the Uniform Code of Military Justice;[1] the provision in the *Manual for*

12. 84 F. Supp. 392 (N.D. Cal. 1949), *aff'd per curiam sub nom.* Kronberg v. Hale, 180 F.2d 128 (9th Cir.), *cert. denied,* 339 U.S. 969 (1950).

13. The constitutionality and application of Article of War 94 was also upheld in Terry v. United States, 2 F. Supp. 962 (W.D. Wash. 1933), and *Ex parte* Joly, 290 Fed. 858 (S.D.N.Y. 1922). In the *Joly* case the article was upheld primarily because it had been in effect for more than sixty years, but a more substantial basis was set forth in the *Terry* case, in which the court said, "[I]n pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, *for offenses committed while the party is in the military or naval service.*" Terry v. United States, *supra,* at 963. *Contra:* U.S. *ex rel.* Flannery v. Commanding General, Second Service Command, 69 F. Supp. 661 (S.D.N.Y. 1946), in which Article of War 94 was held unconstitutional. (However, the authority of this case was questioned in Kronberg v. Hale, *supra* note 11, on the basis that the case was reversed on appeal in an unpublished order by stipulation of the parties.)

14. Instant case, 113 F. Supp. at 330.

15. The decision in the instant case is a protest against petitioner's summarily being removed from his civilian status and flown to Korea without benefit of a hearing. This view has much merit and calls for a more adequate definition of procedural protection of civil rights by the legislature.

1. "(a) No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

Courts-Martial to the contrary is invalidated.[2] United States v. Eggers, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

American courts have followed divergent paths[3] in the interpretation of the privilege against self incrimination.[4] The overwhelming weight of authority appears to follow the view of Professor Wigmore in saying that the privilege applies only to "testimonial utterances," that is, words, written or oral, extracted from a person as a witness by the use of legal process.[5] Consequently, it is usually held that the privilege does not prohibit taking fingerprints[6] or footprints;[7] requiring a person to submit to a physical examination[8] or give a specimen of his body fluid;[9] or requiring a person to exhibit his body or perform acts for identification purposes in the presence of the jury.[10] In these cases the courts says that the person, usually the accused, is not being compelled to give evidence against himself, but is only compelled to furnish "real" or "physical" evidence. Further, they reason that since duress cannot cause the defendant to fabricate or act falsely in these circum-

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"(b) No person subject to this code shall interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." UCMJ art. 31, 50 U.S.C.A. § 602 (1951).

2. "Also, the prohibition is not violated by requiring a person (including an accused) to try on clothing or shoes, to place his feet in tracks, *to make a sample of his handwriting,* to utter words for the purpose of voice identification, or to submit to having fingerprints or a sample of his blood taken." MCM 1951, ¶ 150b. (Italics added)

3. The privilege against self incrimination is usually considered an outgrowth of the infamous English Star Chamber, and the ecclesiastical inquisitions. Early recognition in America law is evidenced by its inclusion in the constitutions of forty-six of the states and in the Bill of Rights of the Federal Constitution. For an illuminating discussion of the history of the privilege, see Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1 (1949); 8 WIGMORE, EVIDENCE 276 (3d ed. 1940).

4. The American courts usually say that the "main purpose of the provision was to prohibit the compulsory oral examination of the prisoners before trial, or upon trial for the purpose of extorting unwilling confessions or declarations implicating them in crime." People v. Gardner, 144 N.Y. 119, 38 N.E. 1003, 1005, 28 L.R.A. 699 (1894). The courts still seem to follow the test laid down by Chief Justice Marshall as to what matters are within the protection of the privilege. He said, "[T]he court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws." 1 ROBERTSON, TRIAL OF AARON BURR 244 (1808). For a discussion of this test, see Falknor, *Self-Crimination Privilege: "Links in the Chain,"* 5 VAND. L. REV. 479 (1952).

5. 8 WIGMORE, EVIDENCE 362 (3d ed. 1940). See also, Comment, *To What Extent Does The Privilege Against Self-Incrimination Protect An Accused From Physical Disclosures?,* 1 VAND. L. REV. 243 (1948).

6. See Notes, 16 A.L.R. 370 (1923), 63 A.L.R. 1324 (1929).

7. See Note, 64 A.L.R. 1089 (1929).

8. See Notes, 164 A.L.R. 967-72 (1946), 25 A.L.R.2d 1409 (1952).

9. See Note, 159 A.L.R. 209-16 (1945).

10. See Note 171 A.L.R. 1144-50 (1947). There is a strong split of authority on this particular point. Wigmore asserts that such matters are not privileged. 8 WIGMORE, EVIDENCE 374 (3d ed. 1940). As to compulsory voice exhibition, see Note, 24 IND. L.J. 587 (1949).

stances, such evidence is beyond the scope and purpose of the privilege and is not entitled to its protection.[11]

It appears to be held universally that a person may refuse to produce documents or chattels in his possession on the grounds that they might incriminate him,[12] when such production is sought by a subpoena or other process treating the person as a witness. "[D]ocuments or chattels obtained from the person's control *without the use of process against him as a witness,* are not in the scope of the privilege, and may be used evidentially. . . ."[13]

The Court of Military Appeals is apparently the first American or English court presented squarely with the question of whether compelling an accused to give a specimen of his handwriting falls within the protection of the privilege.[14] Due to the lack of controlling authorities, the court deduced two possible analogies from the decided cases. The handwriting specimen could be compared with the fingerprint and footprint cases, and other matters long held to be mere "physical" evidence, and thereby withdrawn from the protection of the privilege; or an analogy could be drawn from the cases where the accused or witness is asked to produce documents or chattels within his possession, and thereby be brought within the privilege. The court chose the latter analogy: "Indeed, there is a distinct difference between the present handwriting problem, on the one hand, and the fingerprint and the foot-in-footprint situations, on the other. The latter require only *passive* cooperation, whereas the former requires *active* participation and *affirmative* conduct in the production of an incriminating document not theretofore in existence."[15]

A minority of courts exclude any incriminating evidence obtained from a person by means of legal process.[16] There has been little dis-

11. See notes 6, 7, 8, 9 and 10 *supra.*

12. United States v. White, 322 U.S. 694, 64 Sup. Ct. 1248, 88 L. Ed. 1542, 152 A.L.R. 1202 (1944); Boyd v. United States, 116 U.S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746 (1886); 8 WIGMORE, EVIDENCE 363 (3d ed. 1940).

13. 8 WIGMORE, *op. cit. supra* note 12, at 364. On compulsory production of documents, see Notes 120 A.L.R. 1102 (1939), 110 A.L.R. 101 (1937), 103 A.L.R. 522 (1936). See also Comment, *To What Extent Does The Privilege Against Self-Incrimination Protect a Witness Against Forced Production of Documents?*, 1 VAND. L. REV. 626 (1948).

14. The problem has arisen in Texas and, although the result was in accord with the instant case, it was based on the peculiar state confessions statute. Kennison v. State, 97 Tex. Crim. Rep. 154, 260 S.W. 174 (1925), 3 TEXAS L. REV. 485. As the instant opinion indicates, the only remaining decision on the point was rendered by the Supreme Court of The Philippine Islands. Beltran v. Samson and Jose, 53 Philippine 570 (1929) (trial judge could not compel a defendant charged with forgery to execute a specimen of his handwriting). The court there condemned such a practice also, and reaffirmed this position in a subsequent decision. Bernudez v. Castillo, 64 Philippine 483 (1937) (defendant could not be compelled to give a specimen of her handwriting although she had denied under oath that she had written the document in question).

15. Instant case, 3 U.S.C.M.A. at 198.

16. *E.g.,* Smith v. State, 247 Ala. 354, 24 So.2d 546 (1946) (defendant could not be compelled to stand up before the jury for identification purposes). See

pute among the courts as to admissibility where the specimen of handwriting was given voluntarily by the defendant, as there is no compulsion by legal process in obtaining the evidence.[17] As the only compulsion used in obtaining the handwriting in the instant case was the order of the investigating officer, this would seem to fall short of the legal process spoken of by the civilian authorities. However, an accused under UCMJ must be informed of his privilege from the moment of his arrest — a benefit his civilian brother can only obtain upon trial.[18] It would be possible to interpret this as an indication that any compulsion between arrest and trial by the authorities is sufficient; if so, the analogy is sound.

As the *Manual for Courts-Martial* allowed such evidence,[19] it would have been possible for the court to hold that the handwriting was mere physical evidence and not within the scope of the privilege. In so doing, it would have had the support of one leading text writer who has stated emphatically: "A specimen of handwriting, obtained for purposes of comparison with a questioned document, can logically be considered as nothing more than mere physical evidence. It differs very little, in principle, from a fingerprint impression secured by compulsion for purposes of comparison with a fingerprint found at the scene of a crime."[20] Further, such a holding would have given effect to the settled rule of construction that the related provisions of UCMJ and *Manual for Courts-Martial* "should, if possible, be so construed that effect is given to every provision of each . . . so that no part will be inoperative, superfluous, void or ineffective."[21]

The decision reached by the court, however, is in keeping with its previous liberal interpretations of the privilege in favor of the accused,[22] and appears to be logically sound. The compulsion of such

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also, State v. Taylor, 213 S.C. 330, 49 S.E.2d 289 (1948), 24 IND. L.J. 587 (defendant could not be compelled to exhibit his voice).

17. People v. Molineux, 169 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193 (1901); State v. Scott, 63 Ore. 444, 128 Pac. 441 (1912); Sprouse v. Commonwealth, 81 Va. 374 (1886). The English courts appear to be in accord. Rex v. Voisin, [1918] 1 K.B. 531, 1 A.L.R. 1298. The courts further allow the introduction of such a specimen for the purpose of impeaching the testimony given by the defendant on direct examination. United States v. Mullaney, 32 Fed. 370 (8th Cir. 1887); Bradford v. People, 22 Colo. 157, 43 Pac. 1013 (1896). But see, Bermudez v. Castillo, *supra* note 15. By taking the witness chair and testifying in his own behalf, the accused is held to have waived the application of the privilege.

18. Instant case, 3 U.S.C.M.A. at 195. One of the peculiarities of the privilege under the military law is that the Court of Military Appeals has termed it a part of "military due process." It differs from civilian law in this respect. On the subject, see Wurfel, *"Military Due Process": What Is It?*, 6 VAND. L. REV. 251 (1953).

19. See note 2 *supra*.

20. INBAU, SELF INCRIMINATION 46 (1950).

21. United States v. Lucas, 1 C.M.R. 19, 22 (U.S.C.M.A. 1951).

22. *E.g.*, United States v. Rosato, 11 C.M.R. 143 (U.S.C.M.A. 1953) (fact situation substantially similar to instant case); United States v. Burton, 7 C.M.R. 848 (Bo. Rev. 1953); United States v. Bellucci, 2 C.M.R. 379 (Bo. Rev.

specimens is hardly distinguishable from asking the accused, "What are the characteristics of your handwriting?" Where evidence of his signature is essential to the establishment of his guilt, as in the instant case, it seems difficult to maintain that he is not thereby being compelled to make "testimonial utterances" against himself. It is submitted that the court was correct in holding that the result should not be different where the defendant is forced to give the same evidence by writing.

TORTS — AUTOMOBILE GUEST — CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW

Two girls, aged thirteen and fourteen, were injured while riding as gratuitous guests of thirteen year old defendant, who was known by them to be an incompetent, reckless and unlicensed driver. Immediately before the accident took place the defendant had been driving 110 miles per hour which speed the girls had protested. Plaintiffs brought suit on behalf of the minors under the Texas "guest statute"[1] against defendant and his father, owner of the car. The jury returned a verdict for plaintiffs. The Court of Civil Appeals reversed, holding that plaintiffs were barred from recovery as a matter of law. *Held,* affirmed. The minor girls were contributorily negligent as a matter of law in riding with a person known to be an incompetent, reckless and unlicensed driver, and such contributory negligence was the proximate cause of injury. *Sargent v. Williams,* 258 S.W.2d 787 (Tex. 1953).

The gratuitous automobile guest has often been denied recovery as a matter of law where it has been found that "reasonable men could not differ" as to his contributory negligence.[2] Although each case is said to depend on its own particular facts,[3] directed verdicts have usually been given in those cases in which the guest entered the car with knowledge that the driver was too intoxicated to drive carefully;[4] the guest failed to disembark upon reasonable opportunity;[5]

1952); United States v. Phillips, 8 C.M.R. 519 (Bo. Rev. 1952); United States v. Thacker, 4 C.M.R. 432 (Bo. Rev. 1952); United States v. Walls, 3 C.M.R. 402 (Bo. Rev. 1952); United States v. Mardiss, 1 C.M.R. 283 (Bo. Rev. 1951); United States v. Bowles, 1 C.M.R. 474 (Bo. Rev. 1951). It is believed that the above cited cases are all that have been decided on the privilege since the adoption of UCMJ.

1. The guest may recover from the owner or operator only if "such accident shall have been intentional on the part of said owner or operator, or caused by his heedlessness or his reckless disregard of the rights of others." TEX. REV. CIV. STAT. ANN. Art. 6701b, § 1 (1948).

2. Hirsch v. D'Autremont, 133 Cal. App. 106, 23 P.2d 1066 (1933).

3. Edenton v. McKelvey, 186 Tenn. 655, 212 S.W.2d 616 (1948).

4. Irby v. Williams, 313 Ky. 353, 231 S.W.2d 1 (1950); Elba v. Thomas, 59 So.2d 732 (La. App. 1952); Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947);

or the guest failed to protest the driver's obviously dangerous conduct.[6] The rule laid down in these cases is that the guest is contributorily negligent in voluntarily exposing himself to the risk of the known incompetence, recklessness or intoxication of the driver.

The defense relied on in the guest cases is usually contributory negligence[7] or assumption of risk,[8] but in some instances both defenses are said to be available.[9] In some of the early cases arising under the guest statutes, wherein the plaintiff was required to prove gross, willful or wanton misconduct, it was indicated that ordinary contributory negligence was no defense.[10] Today, however, it is generally held that either ordinary contributory negligence or assumption of risk will bar the guest's recovery.[11] It is doubtful whether the distinction between the two will be maintained in the modern guest cases, since the courts use the terms interchangeably.[12]

In cases in which the guest has made a timely protest of the dangerous conduct of the driver, the question of contributory negligence has heretofore been left to the jury, even though the guest knew upon entering the car that his host had consumed some intoxicants or was habitually reckless.[13] In such cases it has been said that the guest

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Hicks v. Herbert, 173 Tenn. 1, 113 S.W.2d 1197 (1938). See generally cases collected in Note, 15 A.L.R.2d 1165 (1951).

5. Hirsch v. D'Autremont, 133 Cal. App. 106, 23 P.2d 1066 (1933); Bogen v. Bogen, 220 N.C. 648, 18 S.E.2d 162 (1942); Schiller v. Rice, 246 S.W.2d 607 (Tex. 1952); Young v. Wheby, 126 W. Va. 741, 30 S.E.2d 6 (1944).

6. Irby v. Williams, 313 Ky. 353, 231 S.W.2d 1 (1950) (drunken driving); Haugen v. Wittkopf, 242 Wis. 276, 7 N.W.2d 886 (1943) (failure to keep a proper lookout). *Contra:* Ling v. Pease, 123 Colo. 518, 232 P.2d 189 (1951) (speeding toward dead-end street).

7. Hirsch v. D'Autremont, 133 Cal. App. 106, 23 P.2d 1066 (1933); Irby v. Williams, 313 Ky. 353, 231 S.W.2d 1 (1950).

8. Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1947); Bourestrom v. Bourestrom, 231 Wis. 666, 285 N.W. 426 (1939).

9. Mountain v. Wheatley, 106 Cal. App.2d 333, 234 P.2d 1031 (1951); Zullo v. Zullo, 138 Conn. 712, 89 A.2d 216 (1952); Elba v. Thomas, 59 So.2d 732 (La. App. 1952). See PROSSER, TORTS 378-79 (1941).

10. *See* Freedman v. Hurwitz, 116 Conn. 283, 164 Atl. 647 (1933); Aycock v. Green, 94 S.W.2d 894 (Tex. Civ. App. 1936).

11. Mountain v. Wheatley, 106 Cal. App.2d 333, 234 P.2d 1031 (1951); Henley v. Carter, 63 So.2d 192 (Fla. 1953); Schiller v. Rice, 246 S.W.2d 607 (Tex. 1952). See Note, 2 BAYLOR L. REV. 76 (1949).

12. See United Brotherhood of Carpenters v. Salter, 114 Colo. 513, 167 P.2d 954 (1946), 19 ROCKY MT. L. REV. 91; Elba v. Thomas, 59 So.2d 732 (La. App. 1952). In Schubring v. Weggen, 234 Wis. 517, 291 N.W. 788, 791 (1940), after applying the defense of assumption of risk, the court said: "[B]ut the thing is the same whether it be called the one thing or the other and it should be given the same effect." In Schiller v. Rice, 246 S.W.2d 607, 610 (Tex. 1952), after expressly denying the application of the defense of assumption of risk, the court said: "Even so, our courts have recognized that a recovery by a plaintiff may be barred by such doctrines as 'voluntary exposure to risk,' . . . or that known as volenti non fit injuria . . . which doctrines, if distinguishable from the doctrine of assumed risk, are nevertheless closely akin thereto."

13. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870 (1936) (host drinking); United Brotherhood of Carpenters v. Salter, 114 Colo. 513, 167 P.2d 954 (1946); Davis v. Hollowell, 326 Mich. 673, 40 N.W.2d 641 (1950) (host drinking, speeding, driving recklessly); Petersen v. Abrams, 188

does not, by riding with a known incompetent, submit to the driver's gross misconduct.[14] Also, where the plaintiff was under the increased burden of a guest statute, the courts usually have not taken the case from the jury.[15]

In view of these considerations, it would seem that the present decision represents an unprecedented ruling that the gratuitous guest is barred from recovery as a matter of law merely because he accepts a ride with an incompetent, reckless driver. The desirability of thus invading the province of the jury who have had a chance to see and hear the witnesses is doubtful, particularly where the guests are as young as these. Two states have constitutional provisions forbidding such a practice.[16] In the absence of a clearly defined policy to the contrary, it would seem more desirable to leave the question of the guest's contributory negligence to the jury.

WORKMEN'S COMPENSATION — EMPLOYEES' ALTERCATIONS — AGGRESSOR'S RIGHT TO COMPENSATION

Decedent was accused by a fellow employee of stealing bread baskets from their employer's truck. The accusation was made in the absence of decedent, but was communicated to him. Two days later on the employer's premises, at the first meeting subsequent to the accusation, the decedent assaulted his fellow worker, and in the ensuing altercation suffered a heart attack. In an action brought under the Workmen's Compensation Act the Industrial Commission awarded compensation. Employer brought certiorari. *Held,* affirmed. Where an injury results from a work-connected fight the injured party will be compensated even though he is the aggressor, as the legislature has not made aggression a defense to recovery. *Petro v. Martin Baking Co.,* 58 N.W.2d 731 (Minn. 1953).

Workmen's Compensation statutes generally deny recovery to participants in an altercation which is based upon personal animosity as distinguished from those assaults arising out of and in the course of

Ore. 518, 216 P.2d 664 (1950). *But cf.* Akins v. Hemphill, 33 Wash.2d 735, 207 P.2d 195 (1949), 3 VAND. L. REV. 149 (an invited guest cannot terminate the host-guest relationship merely by making protest); Taylor v. Taug, 17 Wash.2d 533, 136 P.2d 176 (1943) (insufficient protest). It is important to note, however, that the Washington statute precludes recovery "unless the accident shall have been intentional on the part of said owner or operator. . . ." WASH. REV. CODE § 46.08.080 (1951).

14. Davis v. Hollowell, 326 Mich. 673, 40 N.W.2d 641 (1950).

15. Ling v. Pease, 123 Colo. 518, 232 P.2d 189 (1951); Zullo v. Zullo, 138 Conn. 712, 89 A.2d 216 (1952); Henley v. Carter, 63 So.2d 192 (Fla. 1953); Booth v. General Mills, Inc., 243 Iowa 206, 49 N.W.2d 561 (1951); Davis v. Hollowell, 326 Mich. 673, 40 N.W.2d 641 (1950); Petersen v. Abrams, 188 Ore. 518, 216 P.2d 664 (1950). *Contra:* Schiller v. Rice, 246 S.W.2d 607 (Tex. 1952); Taylor v. Taug, 17 Wash.2d 533, 136 P.2d 176 (1943).

16. ARIZ. CONST. Art. XVIII, § 5; OKLA. CONST. Art. XXIII, § 6.

employment.[1] The majority of American courts in interpreting the workmen's compensation statutes, have complemented the above rule by denying compensation when the injuries result from an altercation in which the claimant is the aggressor;[2] the "aggressor" defense is entirely a court-imposed one. The majority rule denying recovery to the aggressor generally has been predicated upon one or more of three theories: that the fight he has provoked was not for the benefit of the employer, and hence did not arise out of the employment;[3] that it was not included within the risks of the employment;[4] or that it would be contrary to public policy to allow recovery for a man's own mischief.[5] However, some jurisdictions, though purporting to follow the majority theory, indirectly circumvent that rule by awarding compensation when the claimant has assaulted a third party whom he had reason to believe had struck him,[6] or when the claimant was induced to hit his fellow worker by vile words which are treated by the court as the initial aggression.[7] The courts, employing similar techniques, have also avoided application of the personal animosity rule. Thus, depending on whether the statute is broadly or strictly construed, the courts reach opposite results in very similar fact situations.[8]

The principle enunciated by the court in the instant case is expressly opposite to the majority rule concerning aggressors; it is also indirectly

1. Examples of states having this type of defense are: Alabama, ALA. CODE tit. 26, § 262(j) (1940); Delaware, DEL. REV. Code § 6115(b) (1935); Georgia, GA. CODE ANN. § 114-102 (1937); Iowa, IOWA CODE ANN. § 85.61(5b) (1946); Pennsylvania, PA. STAT. ANN. tit. 77, § 411 (1952); Texas, TEX. REV. CIV. STAT. ANN. art. 8309, § 1 (1941); Wyoming, WYO. COMP. STAT. ANN. §.72-106(m) (1945). The Minnesota Statute provides that compensation will not be awarded for "an injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him and not directed against him as an employee, or because of his employment." MINN. STAT. ANN. § 176.01(11) (West 1945).

2. Kimbro v. Black & White Cab Co., 50 Ga. App. 143, 177 S.E. 274 (1934); Fulton Bag & Cotton Mills v. Haynie, 43 Ga. App. 579, 159 S.E. 781 (1931); Triangle Auto Painting & Trimming Co. v. Industrial Comm'n, 346 Ill. 609, 178 N.E. 886 (1931); Horvath v. La Ford, 305 Mich. 69, 8 N.W.2d 915 (1943); Brown v. Philmac Sportswear Co., 23 N.J. Misc. 378, 44 A.2d 805 (Workmen's Comp. Bureau, Dep't Labor 1945); Merkel v. Gillespie, 10 N.J. Misc. 1081, 162 Atl. 250 (Sup. Ct. 1932); Vollmer v. Milwaukee, 254 Wis. 162, 35 N.W.2d 304 (1948); see also Armour & Co. v. Industrial Comm'n, 397 Ill. 433, 74 N.E.2d 704 (1947).

3. Vollmer v. Milwaukee, 254 Wis. 162, 35 N.W.2d 304 (1948).

4. Fischer v. Industrial Comm'n, 408 Ill. 115, 96 N.E.2d 478 (1951).

5. Horvath v. La Ford, 305 Mich. 69, 8 N.W.2d 915 (1943).

6. Verschleiser v. Joseph Stern Son, Inc., 229 N.Y. 192, 128 N.E. 126 (1920).

7. Haas v. Brotherhood of Transp. Workers, 158 Pa. Super. 291, 44 A.2d 776 (1945).

8. On the facts of an attack by a fellow employee for no known reason: recovery allowed in Ferguson v. Cady-McFarland Gravel Co., 156 La. 871, 101 So. 248 (1924) (which held that there existed a risk for such an assault); no recovery allowed in Igler's Casino v. Industrial Comm'n, 394 Ill. 330, 68 N.E.2d 773 (1946) (which declared such risk incidental to the general public). On a similar fact situation involving an attack upon a woman employee due to jealously of fellow worker: recovery allowed in Katz v. Reissman-Rothman Corp., 261 App. Div. 862, 24 N.Y.S.2d 807 (3d Dep't 1941); no recovery allowed in Scholtzhauer v. C. & L. Lunch Co., 233 N.Y. 12, 134 N.E. 701 (1922).

contrary to the personal animosity theory since it ignores that theory and awards compensation which might have been denied in many other jurisdictions. This is illustrated by the fact that the four decisions[9] relied upon by the instant case may be distinguished from the present facts on the basis that the events inducing the altercation in the supporting cases were followed immediately by the assault. A lapse of two days between the inducement and the assault might possibly have caused the dispute to be interpreted as a personal grudge in many jurisdictions.[10] Since the majority rule has often been ignored as in the instant case, or has been avoided as illustrated above, it is well to re-evaluate this rule which purportedly guides the courts.

The rationale of recent decisions and the exceptions stated above indicate it is time for the courts to phrase their opinions in language other than that of "aggression." As the purpose of the Workmen's Compensation Acts is to do away with fault as the basis for liability,[11] and since the statutes do not specifically exempt aggressors from recovery,[12] it is difficult to support the majority proposition. The courts have declared that the injury need not have been inflicted in furtherance of the employer's business to be compensable.[13] Moreover, many courts have also stated that altercations are within the risks of employment when men are forced to work closely together.[14] It is generally accepted that the Workmen's Compensation Acts should be broadly and liberally construed in favor of the claimant.[15] This suggests the conclusion that the question of aggression should have no weight in deciding rights to compensation.[16]

9. State Comp. Ins. Fund v. Industrial Acc. Comm'n of Cal., 38 Cal.2d 659, 242 P.2d 311 (1952); Dillon's Case, 324 Mass. 102, 85 N.E.2d 69 (1949); Newell v. Moreau, 94 N.H. 439, 55 A.2d 476 (1947) (the first case where the aggressor defense was disallowed); Commissioner of Taxation & Finance v. Bronx Hospital, 276 App. Div. 708, 97 N.Y.S.2d 120 (3d Dep't 1950).

10. Horvath v. La Ford, 305 Mich. 69, 8 N.W.2d 915 (1943) (twenty minutes between grievance and assault denied recovery); New Amsterdam Cas. Co. v. Collins, 289 S.W. 701 (Tex. Civ. App. 1926) (no recovery allowed when lapse of two hours separated the work-connected grievance and assault).

11. "It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault." Hartford Acc. & Indemn. Co. v. Cardillo, 112 F.2d 11, 17 (D.C. Cir. 1940).

12. "Courts are not justified in making exceptions for 'aggressors' where the legislature has not done so by express provisions." Horovitz, *The Litigious Phrase: "Arising Out of" Employment*, 4 NACCA L.J. 19 at 53 (1949).

13. Justice Cardozo, in allowing recovery to an employee hit in the eye by an apple thrown in horseplay, states, "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business. Many things that have no such tendency are done by workmen every day." Leonbruno v. Champlain Silk Mills, 229 N.Y. 470, 128 N.E. 711, 712 (1920).

14. Hansen v. Frankfort Chair Co., 249 Ky. 194, 60 S.W.2d 349 (1933); Ferguson v. Cady-McFarland Gravel Co., 156 La. 871, 101 So. 248 (1924).

15. Matlock v. Hollis, 153 Kan. 227, 109 P.2d 119 (1941); Cain v. State Ind. Acc. Comm'n, 149 Ore. 29, 37 P.2d 353 (1934); Fox Park Timber Co. v. Baker, 53 Wyo. 467, 84 P.2d 736 (1938).

16. "The difficulty with the defense . . . is that it imposes the necessity of

The nation-wide liberalizing trend has also affected the criteria which control in matters of personal animosity. This trend has accounted for the view that statutory exclusion of personal animosity should be strictly interpreted so as to include only those assaults with no connection whatever to the employment, work conditions, personal animosity expected among workers, personal grudges leading from the employment, or grudges originating from circumstances outside of employment, but culminating in a work-connected assault.[17] Thus, if there are concurrent reasons underlying the assault, and one of them is connected with the employment, recovery should be allowed. The Minnesota court, in strictly construing the personal animosity rule, stands as a guide light on which other courts may well focus.

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selecting one overt act out of a series of hostile verbal, psychological and physical acts as the one which, for compensation purposes, caused the quarrel and elicited the ultimate injury." 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION 127 (1952). "It is the character and nature of the assault which determines whether it arises out of the employment, not the culpability or lack of culpability or the parties involved. It is the assault itself which arises out of the employment; and who initiates the altercation has no bearing on that question. . . ." Horovitz, *Assaults and Horseplay Under Workmen's Compensation Laws*, 41 ILL. L. REV. 311, 347 (1946). "To create an artificial rule that he whose fist first made contact is an aggressor (and can never recover, even though the first fist did no harm, whereas the second fist permanently injured the fellow worker), is to forget the legislative command that injuries arising out of the employment be compensated. . . ." *Id.* at 346.

17. Keyhea v. Woodard-Walker Lumber Co., 147 So. 830 (La. App. 1933) (difficulty arose from jealously over a woman; compensation allowed to injured claimant); Winter v. U.S. Gypsum Co., 20 N.J. Misc. 425, 28 A.2d 545 (Workmen's Comp. Bureau, Dep't Labor 1942) (award made despite a long period of personal animosity culminating in a deliberate attack over methods of work); Janschewsky v. E. W. Bliss Co., 198 App. Div. 8, 189 N.Y. Supp. 154 (3d Dep't 1921) (compensation awarded to claimant when injured by fellow employees jealous of his doing superior work); Indian Territory Illuminating Oil Co. v. Jordan, 140 Okla. 238, 283 Pac. 240 (1929) (award made to injured employee although personal animosity existed before they were employed to work together).