Decisions

DECISIONS

ATTORNEYS—REFUSAL TO ANSWER QUESTIONS IN JUDICIAL INVESTIGATION ON CHARGES OF ILLEGAL PRACTICES HELD GROUND FOR DISBARMENT.—In a recent decision[1] the Court of Appeals of New York held that in a judicial inquiry concerning illegal practices of attorneys, an attorney may exercise his constitutional right to refuse to answer questions on the ground that his answer may incriminate him; but this refusal is a breach of his duty as an officer of the court and gives rise to a valid reason for disbarment.

Upon being advised by a Brooklyn Bar Association's petition showing serious abuses and unethical practices by attorneys in Kings County in the procurement of negligence cases, the Appellate Division through the exercise of its inherent and statutory power and duty,[2] ordered a judicial inquiry.

The appellant twice appeared before the Supreme Court Justice presiding at the inquiry. He was told that this was an investigation and not an adversary proceeding;[3] that the appellant was not being charged with anything, but was to be questioned as to pertinent facts "within the scope of the Inquiry" which were thought to "bear on or relate to" appellant's professional conduct; also that the counsel for the inquiry had "information" that indicated appellant's "participation in professional misconduct."

The counsel put into evidence 228 "Statements of Retainer" filed by the appellant from the years 1954 through 1958 in obedience to the Appellate Division's Special Rule 3. This Rule requires that an attorney who makes contingent-fee agreements for his services either in personal injury, wrongful death, or property damage cases, as well as in certain other kinds of cases, must file the agreements with the court, and, if he enters into five or more such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained. These Statements constituted the basis for several questions at the inquiry.

With the exception of a few preliminary questions. appellant refused to answer approximately sixty questions[4] alleging that answers thereto might tend to incriminate, degrade or expose him to a penalty or forfeiture.[5] The inquiry's counsel pointed out that such refusal to answer was a breach of professional ethics, but appellant persisted in his refusal to answer. Subsequently the Supreme Court Justice presiding at the judicial inquiry filed a transcript of the proceedings with the Appellate Division with a recommendation that disciplinary proceedings be instituted against appellant. Such proceedings were had, and as a consequence thereof appellant was disbarred.

In view of the circumstance that the practice of law has not always been recognized

[1] Matter of Cohen, 7 N.Y.2d 488, 166 N.E.2d 672 (1960).

[2] N.Y. Const. art. VI, § 2; N.Y. Judiciary Law, § 90; People ex rel. Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928).

[3] See supra note 2, People ex rel. Karlin v. Culkin, at 479, 162 N.E. at 492, where Cardozo, C.J. described this proceeding as "a preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right . . . [a] quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter . . . ."; Anonymous v. Baker, 360 U.S. 287, 79 S. Ct. 1157, 3 L. Ed. 2d 1234 (1959).

[4] Those unanswered questions related to the identity of his law office partners, associates and employees; to his possession of the records of the cases described in his statements of retainer; to any destruction of such records; to his bank accounts; to his paying police officers or others for referring claimants to him; to his paying insurance company employees for referring cases to him; and to his promising to pay any "lay person" ten percent of recoveries or settlements.

[5] New York Const. art. I, § 6.

as a profession,[6] codes to regulate the conduct of those who advocated the causes of others before courts did not from early times exist. Historians relate that the earliest practitioners, at least in England, were not what could be properly called professional men.[7] Rather, they were learned and capable men who merely appeared in court on behalf of a friend or relation.[8] As the evolutionary development of the law continued and its complexities multiplied, however, a need for trained specialists capable of responding to the new demands became apparent.[9] The attention of the King was called to this situation and under his encouragement and license a group of trained advocates arose.[10] In time these officers of the courts were recognized as belonging to a profession under the aegis of the crown. Today it is well established that the right to practice law is a privilege conferred upon a few citizens by the state,[11] successor to the King.[12]

Concurrent with the privilege of being granted a license to represent others legally, went a set of principles to which all selected for membership in the bar must adhere. Otherwise the confidence of the public in the profession, whose welfare its members so constantly hold in trust, might be damaged, if not destroyed entirely.[13]

These principles of self-discipline have been codified by the American Bar Association and the bar associations of the individual States through their Canons of Professional Ethics for the guidance of attorneys in their professional practices. Though the most obvious of such concerns is the attorney-client relationship, the practice of law involves other equally important relationships with the public, the courts, and other members of the profession. Because the right to practice law is a privilege emanating from the state with the enforceability of the state's powers intrusted to the courts, these legal tribunals have a rightful claim to the primary loyalty of the attorney, whom they refer to as "an officer of the court."[14]

When such duty to the court has been breached by an attorney the courts reserve the power to censure the violator,[15] either temporarily by suspension or permanently by disbarment, depending most usually upon the nature and frequency of the offense.[16]

[6] Plucknett, A Concise History of the Common Law 204 (4th ed. 1948); 1 Pollock and Maitland, The History of English Law 213 (2d ed. 1898).

[7] Plucknett, op. cit. supra note 6; 1 Pollock and Maitland, op. cit. supra note 6.

[8] Plucknett, op. cit. supra note 6 at 205.

[9] Ibid.

[10] 1 Pollock and Maitland, op. cit. supra note 6 at 217.

[11] See N.Y. Penal Law § 270, which makes it unlawful to practice or appear as an attorney "without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state . . . ."

[12] 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957).

[13] ". . . [I]t is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." Preamble, Canons of Professional Ethics of the New York Bar Association (1950).

[14] Ex parte Garland, 71 U.S. 333, 378, 18 L. Ed. 366, 370 (1866); People v. Gorman, 346 Ill. 432, 178 N.E. 880 (1931); Danforth v. Egan, 23 S.D. 43, 119 N.W. 1021 (1909).

[15] N.Y. Judiciary Law § 90: "The [S]upreme [C]ourt shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney or counsellor-at-law . . . who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice. . . ."

[16] Re Isserman, 354 U.S. 286, 73 S. Ct. 676, 97 L. Ed. 1013 (1952).

In order to uphold the highest ideals of the legal profession,[17] New York State has enacted legislation making it unlawful to solicit,[18] aid, assist, or abet in the solicitation of business[19] on behalf of any attorney; nor may an attorney employ a person to aid, assist, or abet him in such solicitation.[20] Furthermore, the sharing of compensation by attorneys with any person, partnership, corporation, or association, unless an agreement between attorneys has been entered into to divide among themselves the compensation to be received, is strictly prohibited.[21] These rules have been adopted by the New York State Bar Association in its Canons of Professional Ethics.[22]

The New York State Bar Association in its Ethics Canons has made provision for the enforcement of these rules.[23] Canon 29 provides that "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession", and Canon 22[24] states that "the conduct of the lawyer . . . should be characterized by candor and fairness."

With this basic statement of the law governing the conduct of attorneys in New York, viewed against the Constitutional provision against self-incrimination,[25] the issue in *Matter of Cohen*[26] appears: does an attorney's constitutional privilege against self-incrimination shield him not only from possible criminal prosecution, but also from disciplinary action as a member of the Bar for failing in his duties, obligations and responsibilities as a lawyer to the court.

One of the earliest cases deciding this issue was *Matter of Kaffenburgh*,[27] a disbarment proceeding instituted upon the respondent's failure to testify at the conspiracy trial of his employers, two attorneys. In order to elicit his connection with the matters pertaining to such alleged conspiracy, respondent was asked several questions each of which he refused to answer on constitutional grounds. The Court of Appeals, upholding the respondent's defense, said that he "had the right to refrain from answering any question which might form the basis of or lead to the prosecution of himself for a forfeiture of his office of attorney and counsellor at law."[28]

A similar case[29] involved an attorney's refusal to waive immunity in a grand jury investigation. Despite his refusal, the attorney volunteered to answer all questions asked of him. The District Attorney thereupon discontinued the examination of the witness. In ensuing disbarment proceeding the court upheld the attorney, relying upon the *Kaffenburgh* case.[30] The court reasoned that if a lawyer is not amenable to discipline for refusing to answer a question during a trial on the ground that it would tend to incriminate him, then surely if he refused to waive immunity while appearing before a grand jury he should not be the subject of discipline.

17 Jessup, The Professional Ideals of the Lawyer (1st ed. 1925).
18 N.Y. Penal Law § 270-a.
19 Id. § 270-c.
20 Id. § 270-d.
21 Id. § 276.
22 Canons of Professional Ethics of the New York State Bar Association § 28 (1950).
23 Id. § 29.
24 Id. § 24.
25 Supra note 2.
26 Supra note 1.
27 188 N.Y. 49, 80 N.E. 570 (1907).
28 Id. at 53, 80 N.E. at 571.
29 Matter of Solvei, 250 App. Div. 117, 293 N.Y.S. 640, aff'd, 276 N.Y. 647, 12 N.E.2d 802 (1938).
30 Supra note 27.

Two other cases upon which the appellant relied are *Matter of Grae*[31] and *Matter of Ellis*,[32] both arising out of the same proceeding. At a judicial inquiry into the practice of so-called "ambulance chasing" and conduct of attorneys in reference thereto, both Grae and Ellis were called to testify and were asked to waive immunity. They refused to do so but asserted that they were willing to answer all questions at the direction of the presiding judge and would bring to the hearings all office records and "everything that the court desires." No questions were thereafter asked of them. At a subsequent proceeding to disbar the respondents for their failure to waive immunity, the majority opinion in *Matter of Grae*[33] (adopted in *Matter of Ellis*[34]) held that the privilege against self-incrimination is a Constitutional guarantee of a fundamental personal right of which the respondents could not be deprived. The disbarment proceedings were dismissed.

The majority holding in *Matter of Cohen*,[35] is seemingly inconsistent with prior decisions. Writing for the majority, Chief Justice Desmond differentiated the instant case[36] from the *Grae*[37] and *Ellis*[38] cases, asserting that the issue in the latter two cases was whether a lawyer who offered to answer all pertinent questions could be compelled in such investigation to waive immunity in advance of questioning. The *Kaffenburgh* case,[39] was differentiated because the attorney's refusal to testify occurred at a criminal trial, while in the *Solvei* case[40] the refusal to testify was before a grand jury.

In the dissenting opinion, Mr. Justice Fuld showed that both the *Grae* and *Ellis* cases decided the very point in issue in the instant case,[41] namely, the refusal of the respondent to yield a constitutional privilege. He further criticized the majority for their attempt to distinguish the *Kaffenburgh* case[42] on the ground that the latter involved a trial and not an inquiry into the conduct of lawyers taking the form of criminal prosecution.

Close examination of the majority opinion in the *Cohen* case seems to indicate a change in policy by the Court of Appeals. The differences between the case under discussion and prior decisions are negligible. After he had attempted to differentiate past decisions, Mr. Justice Desmond expressed the Court's change of position. He stated: "[T]he difference between those cases and the present one may be slight but it is enough to permit a fresh examination [or re-examination] of the question now directly presented."[43]

What then can be concluded in attempting to predict the future position of the Court of Appeals on this issue? Upon what ground can the Court justify its present position? The Court has indicated that the attorney has a dual status.[44] As a citizen, he cannot be denied any of the common rights of citizens. Yet when standing before

[31] 282 N.Y. 428, 26 N.E.2d 963 (1940).
[32] 282 N.Y. 435, 26 N.E.2d 967 (1940).
[33] Supra note 31.
[34] Supra note 32.
[35] Supra note 1.
[36] Ibid.
[37] Supra note 31.
[38] Supra note 32.
[39] Supra note 27.
[40] Supra note 29.
[41] Supra note 1 at 498, 166 N.E.2d at 677.
[42] Supra note 27.
[43] Supra note 1 at 498, 166 N.E.2d at 677.
[44] Id. at 495, 166 N.E.2d at 675.

a judicial tribunal, he occupies another, quite a different capacity. As a lawyer, he is an "officer of the court,"[45] and like the court itself, an instrument of justice. "The key word is 'duty' and the imposition on a lawyer . . . of strict and special duties produces this situation where, at the very time he is exercising a common privilege of every citizen in refusing to answer incriminating inquiries, he is failing in his duty as a lawyer and endangering his professional life."[46]

A situation analogous to the case under discussion occurred in *Canteline v. McClellon*.[47] In that controversy, police force members attending a grand jury inquiry into police corruption refused to waive immunity from subsequent criminal prosecution. The Court of Appeals, in affirming their dismissal from the department, held that although the Constitutional privilege permitted them to refuse to answer, duty required them to respond. Their choice of exercising this constitutional privilege was wholly inconsistent with their duty as police officers. The Court stated, ". . . it is certain that they had no Constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them."[48] Other courts,[49] have used the same reasoning in reaching the identical conclusion, indicating that there is nothing startling in the conception that a public servant's right to retain his office or employment should depend upon his willingness to forego his constitutional rights and privileges to the extent that they may be inconsistent with the performance of his office or employment.[50]

The conclusion that must be drawn from this latest decision of the New York Court of Appeals[51] is that an attorney is under an obligation to give his full cooperation in a judicial inquiry concerning unethical practices by attorneys even to the extent of waiving his constitutional privilege against self-incrimination. In the apt words of Justice Cardozo,[52] "membership in the bar is a privilege burdened with conditions . . . whenever the condition is broken the privilege is lost." R. S. E.

CONSTITUTIONAL LAW—WATERFRONT COMMISSION ACT—PERSON CONVICTED OF A FELONY MAY NOT SOLICIT DUES FOR WATERFRONT UNION.—Is a provision in the New York Waterfront Commission Act of 1953,[1] providing that no person shall solicit or receive any dues on behalf of any waterfront union if any officer of such union has been convicted of a felony, unless he has been subsequently pardoned or has received a certificate of good conduct, a violation of the Federal Constitution?

In a recent decision,[2] the Supreme Court of the United States held that such a provision was not unconstitutional in that it constituted a reasonable means for achiev-

[45] Supra note 1 at 496, 166 N.E.2d at 676.
[46] Supra note 1 at 496, 166 N.E.2d at 676.
[47] 282 N.Y. 166, 25 N.E.2d 972 (1940).
[48] Id. at 172, 25 N.E.2d at 974.
[49] Beilan v. Board of Education, 357 U.S. 399, 78 S. Ct. 1317, 2 L. Ed. 2d 1414 (1958), Lerner v. Casey, 2 N.Y.2d 355, 141 N.E.2d 533, aff'd, 357 U.S. 468, 78 S. Ct. 1311, 2 L. Ed. 2d 1423 (1957).
[50] Christal v. Police Commissioner, 33 Cal. App. 2d 564, 92 P.2d 416 (1939).
[51] Supra note 1.
[52] Matter of Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).

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[1] N.Y. Laws, 1935, cc. 882, 883.
[2] De Veau v. Braisted, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109 (1960).

ing a legitimate state aim.[3] The Court also added that the provision did not violate due process, and was not a bill of attainder or *ex post facto* law.[4]

The relevant part of the Waterfront Commission Act under attack was provision § 8:

"No person shall solicit, collect or receive any dues, assessments, levies, fines or contributions within the state from employees registered or licensed pursuant to the provisions of this act [pier superintendents, hiring agents, longshoremen and port watchmen] for or on behalf of any labor organization representing any such employees, if any officer or agent of such organization has been convicted by a court of the United States, or any state or territory thereof, of a felony unless he has been subsequently pardoned thereof by the governor or other appropriate authority of the state or jurisdiction in which such conviction was had or has received a certificate of good conduct from the board of parole pursuant to the provisions of the executive law to remove the disability."[5]

The appellant contended that the above provision is in conflict with the National Labor Relations Act[6] which granted employees the right to bargain collectively through representatives of their own choice; that the above section is in conflict with the Supremacy Clause of the United States Constitution; that it violates the Due Process Clause of the Fourteenth Amendment; and that it is an *ex post facto* law and bill of attainder forbidden by Art. I, § 10, of the Constitution.[7]

As a result of the Waterfront Commission Act, appellant had been suspended as Secretary-Treasurer of Local 1346, International Longshoremen's Association, because in 1920 he had pleaded guilty to a charge of grand larceny in New York and had received a suspended sentence.[8] The present action was brought by appellant against the District Attorney of Richmond County, New York. The Supreme Court of New York dismissed the complaint,[9] which judgement was affirmed by the Appellate Division,[10] and subsequently approved by the Court of Appeals of New York.[11]

The New York Waterfront Commission Act followed investigations begun in 1951 by the New York State Crime Commission and the Law Enforcement Council of New Jersey.[12] The Commission discovered that much of the evil situation on the waterfront stemmed from the domination by the International Longshoremen's Association over waterfront employment by having convicted felons in influential union positions.[13] In its report to Congress,[14] the Commission said:

". . . [T]he conditions under which waterfront labor is employed within the Port of New York district are depressing and degrading to such labor, resulting from the lack of any systematic method of hiring, the lack of adequate information as to the availability of employment, corrupt hiring practices and the fact that persons conducting such hiring are frequently criminals and persons notoriously lacking in moral character and integrity and neither responsive or responsible to the employer nor to the un-

[3] Id. at 157, 80 S. Ct. at 1153, 4 L. Ed. 2d at 1119.
[4] Id. at 160, 80 S. Ct. at 1155, 4 L. Ed. 2d at 1120.
[5] N.Y. Laws, 1953, cc. 882, 883.
[6] National Labor Relations Act, § 7, as amended 29 U.S.C.A.
[7] Supra note 2 at 145, 80 S. Ct. at 1147, 4 L. Ed. 2d at 1112.
[8] Id.
[9] 11 Misc. 2d 661, 166 N.Y.S.2d 751 (1957).
[10] 5 A.D.2d 603, 174 N.Y.S.2d 596 (1958).
[11] 5 N.Y.2d 236, 157 N.E.2d 165 (1959).
[12] Their detailed report published as the 4th Report of the New York State Crime Commission, New York State Leg. Doc. No. 70 (1953).
[13] Supra note 2 at 147, 80 S. Ct. at 1148, 4 L. Ed. 2d at 1113.
[14] 67 Stat. 541-542. In the compact submitted to Congress the material of § 8 was omitted.

coerced will of the majority of the members of the labor organizations of the employees; that as a result waterfront laborers suffer from irregularity of employment, fear and insecurity, inadequate earnings, and unduly high accident rate, subjection to borrowing at usurious rates of interest, exploitation and extortion as the price of securing employment and a loss of respect for the law; that not only does there result a destruction of the dignity of an important segment of American labor, but a direct encouragement of crime which imposes a levy of greatly increased costs on food, fuel and other necessaries handled in and through the Port of New York district."[15]

After the Commission presented its report to Congress,[16] the Governor of New York conducted hearings and the Waterfront Commission Act was introduced into and passed by the Legislatures of both New York and New Jersey in June, 1953.[17]

As to appellant's charge that the Waterfront Commission Act was in conflict with the National Labor Relations Act,[18] the Court emphasized that the Waterfront Commission Act "does not operate to deprive waterfront employees of opportunity to choose bargaining representatives. It does disable them from choosing as their representatives ex-felons who have neither been pardoned nor received 'good conduct' certificates."[19] The Court also held that the National Labor Relations Act "does not exclude every state policy that may in fact restrict the complete freedom of a group of employees to designate 'representatives of their own choosing.' "[20]

In regard to appellant's contention that the Act violated the Due Process Clause of the Fourteenth Amendment in that it was not a reasonable way for achieving a legitimate state aim (namely, eliminating corruption on the waterfront),[21] the Court stated that while the legislation may have seemed drastic, the facts as presented in the Commission reports called for drastic action.[22]

To appellant's contention that the Waterfront Commission Act was a bill of attainder and an *ex post facto* law, the Court replied that, in regard to the attainder, § 8 "embodies no further implications of appellant's guilt than are contained in his 1920 judicial conviction."[23] As to the *ex post facto* law, the Court stated that New York "sought not to punish ex-felons, but to devise what was felt to be a much-needed scheme of regulation of the waterfront, and for the effectuation of that scheme it became important whether individuals had previously been convicted of a felony."[24]

The barring of convicted felons from certain federal activities has long been established.[25] Likewise, state provisions have disqualified convicted felons from certain

[15] Supra note 2 at 148, 80 S. Ct. at 1149, 4 L. Ed. 2d at 1114.

[16] Supra note 14.

[17] N.Y. Laws, 1953, cc. 882, 883; N.J. Laws 1953, cc. 202, 203, N.J.S.A. 32:23-1 et seq.

[18] National Labor Relations Act, § 7 as amended 29 U.S.C.A.: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[19] Supra note 2 at 152, 80 S. Ct. at 1151, 4 L. Ed. 2d at 1116.

[20] Id.

[21] Supra note 2 at 157, 80 S. Ct. at 1153, 4 L. Ed. 2d at 1119.

[22] Id.

[23] Supra note 2 at 160, 80 S. Ct. at 1155, 4 L. Ed. 2d at 1120.

[24] Id.

[25] For example, convicted felons are not entitled to enlist in the United States Army or Air Force (with certain exceptions) and citizens are not permitted on federal juries if convicted in state or federal courts of record for a crime punishable by imprisonment for more than a year. (Supra note 2 at 80 S. Ct. 1154.) Also, federal

employments important to the public interest. A leading New York case in this area is *Hawker v. People of State of New York*.[26]

In 1893 the legislature of the State of New York passed an act entitled "The Public Health Law"[27] which provided, among other things, that any person convicted of a felony would be guilty of a misdemeanor if he attempted the practice of medicine. Under this statute defendant Hawker was indicted in April, 1896, for treating and prescribing medical aid for a patient. (Hawker in 1878 had been convicted of the crime of abortion and sentenced to imprisonment in the penitentiary for ten years.) He was tried and convicted, which conviction was sustained by the Court of Appeals of New York. In his appeal before the Supreme Court of the United States the defendant argued that the statute should be construed prospectively;[28] that if said law were construed retrospectively, then it is null and void, because it is in conflict with the Constitution of the United States;[29] that if the law is construed retrospectively it is an *ex post facto* law which inflicts a greater punishment than the law annexed to the crime when committed;[30] and that it deprived the defendant of liberty and property without due process of law.[31] The prosecution contended, among other arguments, that the legislation was intended to protect the public comfort and safety and, as such, was not the subject of judicial review.[32]

The Court in the *Hawker* case reasoned that since the state might require good character as a condition to the practice of medicine, it might rightfully determine what shall be the evidence of that character.[33] The Court also stated that there was a relation between violation of penal laws and evidence of character.[34] The vital matter was

statutes disqualify persons from holding offices of trust if convicted of official misconduct. (18 U.S.C. 202, 205, 206, 207, 216, 281, 282, 592, 1901.)

[26] 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002 (1896).

[27] Laws 1893, c. 661, amended 1895, c. 398.

[28] Citing "Amsbry v. Hands, 48 N.Y. 57; Johnson v. Burrell, 2 Hill 238; Fairbanks v. Wood, 17 Wend. 329; Wood v. Oakley, 11 Paige 400; Quinn v. New York, 63 Barb. 595; Wilson v. Baptist Education So. 10 Barb. 308; Quackenbush v. Danks, 1 Denio, 128, 1 N.Y. 129." Supre note 26 at 42 L. Ed. 1003.

[29] U.S. Const. Art. 1 § 10. A state is forbidden to pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contract.

[30] Citing "Calder v. Bull, 3 Dall. 386 (1:648); Cummings v. Missouri, 4 Wall. 321 (18:362)." Supra note 26 at 42 L. Ed. 1003.

[31] Citing "Bertholf v. O'Reilly, 74 N.Y. 509, 30 Am. Rep. 323; Re Jacobs, 98 N.Y. 98, 50 Am. Rep. 636; Livestock D. & B. Asso. v. Crescent City L.S.L. & S.H. Co. 1 Abb. (U.S.) 388, 398; Slaughter-House Cases, 16 Wall. 36, 106 (21:394, 418); People v. Marx, 99 N.Y. 377, 52 Am. Rep. 34; 5 Webster's Works, p. 487; Dartmouth College Case, 4 Wheat. 519 (4:630); People v. Gillson, 109 N.Y. 398-404; Mugler v. Kansas, 123 U.S. 661 (31:210); Cummings v. Missouri, 4 Wall. 277 (18:356); Ex Parte Garland, 4 Wall. 333 (18:366); Ex Parte Tenny, 2 Duv. 351; Ex Parte Law, 35 Ga. 285; Re Dorsey, 7 Port. (Ala.) 293; Green v. Shumway, 39 N.Y. 418." Supra note 26 at 42 L. Ed. 1003.

[32] Citing "People v. Gillson, 109 N.Y. 389; People v. King, 110 N.Y. 4182, 1 L.R.A. 293; People v. Ewer, 141 N.Y. 129, 25 L.R.A. 794; People, Nechamcus, v. Warden of City Prison, 144 N.Y. 529, 27 L.R.A. 718; People v. Havnor, 149 N.Y. 195, 31 L.R.A. 689." Supra note 26 at 42 L. Ed. 1004.

[33] Supra note 26 at 195, 18 S. Ct. at 576, 42 L. Ed. at 1005.

[34] "It is not open to doubt that the commission of crime, the violation of the penal laws of a state, has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the state shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule,—one having no relation

not the earlier conviction but the violation of the later law; that the former was merely prescribed evidence of the latter.[35]

A strong dissenting opinion in the *Hawker* case written by Mr. Justice Harlan expressed the feeling that the action against the defendant was in violation of the *ex post facto* provision of the Constitution since the defendant's crime had been committed nearly twenty years before the misdemeanor for which he was charged. Justice Harlan quoted Mr. Justice Washington who declared: ". . . [A]n *ex post facto* law is one which, in its operation, makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense, or its consequences, alters the situation of a party to his disadvantage."[36] Justice Harlan contended that the defendant had committed no new crime except that which the statute had created out of the old and that his civil rights were not extinguished, but only suspended during his imprisonment.[37]

In the *Hawker* case, the Court relied on a statement made in an earlier Supreme Court Case:[38] "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud."[39] In the *Dent* case, the validity of a statute requiring every practitioner of medicine to obtain a certificate from the state board of health before practicing was attacked.[40] There, the defendant had been indicted for practicing medicine without the required certificate.[41] As part of his defense the defendant alleged that the statute violated the Fourteenth Amendment of the United States Constitution in that it denied him the right to practice his profession, and constituted a deprivation of his vested right and estate in his profession which he had previously acquired.[42] In answer the Court stated that it was the right of each citizen to follow any profession of choice but that there is no deprivation of right where exercise of that profession is not permitted because of a failure to comply with conditions imposed by the state for the protection of society.[43]

That the Court in the instant case relied heavily on the public interest approach of the *Hawker* case is shown by its primary rationale for the holding:

to the subject matter,—but is only appealing to a well recognized fact of human experience; and if it may make a violation of a criminal law a test of bad character, what more conclusive evidence of the fact of such violation can there be than a conviction duly had in one of the courts of the State? The conviction is, as between the state and the defendant, an adjudication of the fact. So, if the legislature enacts that one who has been convicted of a crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care." Supra note 26 at 196, 18 S. Ct. at 576, 42 L. Ed. at 1006.

[35] Id.

[36] Supra note 26 at 202, 18 S. Ct. at 578, 42 L. Ed. at 1008.

[37] Supra note 26 at 205, 18 S. Ct. at 580, 42 L. Ed. at 1009.

[38] Dent v. West Virginia, 129 U.S. 114, 122, 9 S. Ct. 231, 233, 32 L. Ed. 623, 626 (1889).

[39] Id. at 122, 9 S. Ct. at 233, 32 L. Ed. at 626.

[40] Id. at 114, 9 S. Ct. at 231, 32 L. Ed. at 624.

[41] The defendant, who had been practicing medicine for six years, applied for the required certificate but it was not issued to him because his preparation had not been at a reputable college. 129 U.S. 118, 9 S. Ct. 232, 32 L. Ed. 625.

[42] Id. at 121, 9 S. Ct. at 233, 32 L. Ed. at 625.

[43] Id. at 122, 9 S. Ct. at 233, 32 L. Ed. at 626.

"In the face of this wide utilization of disqualification of convicted felons for certain employments closely touching the public interest, remitting them to exclusive discretion to have the bar removed, we cannot say that it was not open to New York to clean up its waterfront the way it has. New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive if mortifying evidence that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation."[44]

Three Supreme Court Justices dissented in the instant case, primarily on the ground that in a similar case,[45] originating in Florida, the Supreme Court found it unconstitutional for Florida to bar the appointment of a business agent in a union solely on his conviction of a felony.[46] The Florida statute[47] required business agents of labor unions to pay $1.00 for an annual license, to be withheld from one who had not been a citizen for ten years or had been convicted of a felony or was not of good moral character. It also required a union to pay $1.00 and file annual reports of its name, officers, and location of offices. Violation of the statute resulted in the commission of a misdemeanor.[48] The Attorney General of Florida had filed an injunction against the union and its business agent, Hill, in a state court seeking to restrain them from functioning until they had complied with the Florida statute.

The Florida law relied on in the *Hill* case was declared unconstitutional:

"It is apparent that the Florida statute has been so construed and applied that the union and its selected representatives are prohibited from functioning as collective bargaining agents, or in any other capacity, except upon conditions fixed by Florida. The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective bargaining, and to protect the 'full freedom' of the workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedoms of choice in this respect. Their own judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications. Section 4 of the Florida Act circumscribes the 'full freedom' of choice which Congress said employees should possess. It does this by requiring a 'business agent' to prove to the satisfaction of a Florida Board that he measures up to standards set up by the State of Florida as one who, among other things, performs the exact function of a collective bargaining representative. To the extent that Section 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the worker's judgment."[49]

The dissenters in the instant case reason that to sustain the New York law when the Florida law was struck down in the *Hill* case "is to make constitutional adjudications turn on whimsical circumstances."[50] They also question how the employees can maintain their right to act "through representatives of their own choosing" if New York

[44] Supra note 2 at 160, 80 S. Ct. at 1154, 4 L. Ed. 2d at 1120.

[45] Hill v. State of Florida, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945).

[46] In the Hill case, the dissenting opinion was written by Justice Frankfurter, the author of the opinion in the instant case.

[47] House Bill No. 142, Laws of Florida 1943, Chap. 21968, p. 565, F.S.A. 481.01 et seq.

[48] Supra note 45 at 539, 65 S. Ct. at 1373, 89 L. Ed. at 1784.

[49] Supra note 45 at 541, 65 S. Ct. at 1374, 89 L. Ed. at 1784. In distinguishing the Hill case from the instant case the Court said that there was not in the Hill situation "a program, fully canvassed by Congress through its own investigations, to vindicate a legitimate and compelling state interest, namely, the interest in combating local crime infested in a particular industry." Supra note 2 at 155, 80 S. Ct. at 1152, 4 L. Ed. 2d at 1117.

[50] 363 U.S. 161, 80 S. Ct. 1155, 4 L. Ed. 2d 1121.

can tell them whom they may not choose.[51] The dissenting justices stressed the fact that Congress, in passing the Labor-Management Reporting and Disclosure Act of 1959,[52] retained control of the qualifications of labor unions. Section 2(a) of that Act provides in part: "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employee's rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection."[53] Also, § 504 of that Act barred felons from holding union office "during or for five years after" the conviction or end of imprisonment. Because of Section 2(a) and § 504 of that Act, the dissenters contended that Congress has left the qualifications for union offices to be determined by federal and not by state law, and they concluded that because of the Supremacy Clause of Article VI of the Constitution, the judgment of the New York Court of Appeals should be reversed.

The writer of this paper is concerned about the power which the state has displayed in determining employment in private organizations "touching the public interest." Certainly every employment may be construed as affecting public interest thereby allowing the state to dictate who may be employed and who may not, in violation of the Fourteenth Amendment of the Federal Constitution. The writer is also concerned about the looseness with which the courts equate violation of penal laws and evidence of character. Reference to this point need only be made to Thoreau's remarks concerning civil disobedience and its necessity at certain times.[54] F. C. J.

CONTRACTS—DISCLAIMER OF BENEFITS BY THIRD PARTY BENEFICIARIES—NOT IMPOSSIBILITY OF PERFORMANCE WHERE PROMISOR FAILS TO MAKE REASONABLE EFFORT TO OBTAIN CONSENT OF BENEFICIARIES.—In a recent decision[1] rendered by Mr. Chief Justice Desmond, a sharply divided New York Court of Appeals[2] held that where homeowners refuse to allow a builder to come upon their lands to do certain remedial work provided for under a contract with the County Health Department, the builder's obligation is

[51] Supra note 2 at 164, 80 S. Ct. at 1157, 4 L. Ed. 2d at 1122.

[52] 73 Stat. 519, 29 U.S.C. (1958 ed. Supp. I) 401, 29 U.S.C.A. 401.

[53] Supra note 2 at 164, 80 S. Ct. at 1157, 4 L. Ed. 2d at 1123.

[54] Thoreau's remarks: "It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume, is to do at any time what I think right. . . . Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice. . . . Unjust laws exist; shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once . . . . If the injustice is part of the necessary friction of the machine of government, let it go, let it go; perchance it will wear smooth,—certainly the machine will wear out. If the injustice has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn." Henry David Thoreau, Walden and on the Duty of Civil Disobedience, New York: New American Library, 1960, pp. 223-29.

[1] Yorktown Homes Inc. v. County of Westchester, 7 N.Y.2d 321, 165 N.E.2d 175, (1960).

[2] JJ. Dye, Fuld, Burke Concurred with C.J. Desmond; JJ. Froessel, Van Voorhis dissented with J. Foster.

not discharged for impossibility, where he fails to make a reasonable effort to secure the homeowners consent.

In 1955, the defendant in the instant case[3] filed notices of sanitary code violations against seventy six one-family homes built by the plaintiff, for alleged defective surface water drainage and faulty septic tanks. At this time most of the properties had been conveyed to customers and there had been many complaints regarding the surface and sanitary disposal systems. The winter weather and the necessity of making plans and surveys prevented the immediate performance of the corrective work. Nevertheless, the builder, wishing to convey good title to the dozen or so properties not yet sold, and the commissioner, in an effort to protect all interests, drew up the contract sued upon.

The commissioner agreed to withdraw the notices of violation and the builder agreed to:

1. Have surveys and plans made by a competent engineer as to surface drainage requirements and to carry out his recommendations.
2. To guarantee septic tank installations against failure of workmanship and construction for one year of normal use and
3. To deposit $10,000 as assurance of performance.

The builder engaged an engineer who submitted four plans, one of which was satisfactory to both parties to the agreement. In August and September, 1956, the plaintiff sent a letter to each property owner outlining the proposed corrective plan and asking for individual consents. Before these letters were sent out, they were submitted to the Director of Sanitation who not only approved the form but suggested a cut-off date. Consents from the property owners were either never received or refused.

The builder accordingly instituted this action[4] to recover the $10,000 escrow deposit. The theory of the suit was that while the covenants were in form running to the Health Commissioner, they were primarily for the benefit of the homeowners and that since the homeowners made execution impossible, the collateral fund must be returned. The county defended on the grounds that the plaintiff's performance was not prevented by the homeowners and that the homeowners never rejected the promised benefits.

The jury was instructed to determine whether the plaintiff made a reasonable effort to get the consents, and if so, whether the homeowners by their refusals made performance impossible. Furthermore, before the jury could find that the builder was discharged for impossibility where the third party beneficiaries refuse the tendered benefits, they had to find that the agreement was made *solely* for the benefit of the property owners. The jury answered all questions in the negative and the trial term entered judgment on the verdict for the defendant. The Appellate Division, Second Department,[5] unanimously affirmed.

The Court of Appeals,[6] affirming the Appellate Division 4-3, held that the plaintiff was not prevented by the property owners from carrying out its stipulations. Although there was nothing in the agreement as to the consents, the majority's position was

[3] Supra note 1.

[4] Supreme Court, Trial Term, Westchester County.

[5] 7 A.D.2d 649, 181 N.Y.S.2d 184 (1958).

[6] Motion for leave to appeal denied 7 A.D. 2d 919, 183 N.Y.S.2d 1002 (1959); Motion for leave granted by special permission of Court of Appeals 6 N.Y.2d 706, 159 N.E.2d 706 (1959).

that "the necessity thereof must have been apparent to (the) plaintiff".[7] The jury's finding that the plaintiff failed to make a reasonable effort to secure the consent was justified and no errors were found in the court's charge to the jury.

Judge Foster dissented,[8] stating, that after the corrective plan was submitted and approved by the defendant, the plaintiff "was not obliged under any direct or implied obligation of the agreement to *cajole* or *persuade* the owners to accept it".[9] He reasoned that the filing of notices of violation by the County was not conclusive proof of fault and that it is clear the plaintiff entered the agreement in question rather than litigate the issue of fault, since some of the failures were probably due to overloading on the part of the homeowners themselves.

The minority view, reasoned that when the third party beneficiary refuses to accept the tendered benefits, the promisor is excused from performance, since implicit in the agreement is the covenant that no corrective action could be taken without the property owners consent. The dissenters found error in the trial court's refusal to clearly and specifically so charge. Instead they "hedged it about with the restriction that before applying the rule the jury had to find that the agreement was made *solely* for the benefit of the property owners. . . . It was sufficient for the application of the rule if the jury found the property owners, as *primary* beneficiaries, refused consent".[10]

The English decision of *Parading v. Jane*[11] is recognized as the leading decision on the law of impossibility of performance. It established:

"Where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him. . . but when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity because he might have provided against it by his contract".[12]

This general doctrine of impossibility has found repeated expression in New York.[13] Exceptions to the general rule have arisen where the impossibility stems from operation of law,[14] where the impossibility stems directly or indirectly from the acts of the promisee,[15] where a specific thing, on whose continued existence performance depends, is destroyed,[16] where conditions or a state of things essential to performance do not exist,[17] where it was the intention of the parties that performance would be excused

[7] 7 N.Y.2d at 324, 165 N.E.2d at 176, (1960).

[8] Supra note 2.

[9] 7 N.Y.2d at 327, 165 N.E.2d at 178 (1960).

[10] 7 N.Y.2d at 326, 165 N.E.2d at 178 (1960).

[11] Aleyn, 26, Eng. Rep. 897. (1646).

[12] Id. quoted in 33 L.R.A. 690.

[13] Harmony v. Bingham, 12 N.Y. 99, 62 Am. Dec. 142 (1854); Beebe v. Johnson, 19 Wend. 500, 32 Am. Dec. 518 (1838); Cameron-Hawn Realty Co. v. City of Albany, 207 N.Y. 377, 101 N.E. 162 (1913).

[14] Lorillard v. Clyde, 142 N.Y. 456, 37 N.E. 489, 24 L.R.A. 113 (1894); J. H. Labaree Co. v. Crossman, 100 App. Div. 499, 92 N.Y. Supp. 565 (1st Dep't. 1905), aff'd 184 N.Y. 586, 77 N.E. 1189 (1906).

[15] Act of Promisee: Fitzgibbons Boiler Co. v. Nat'l City Bank, 287 N.Y. 326, 39 N.E.2d, 897 (1942). Lyon v. Starr Piano Co., 192 App. Div. 531, 183 N.Y. Supp. 286 (1st Dep't. 1920).

[16] Destruction of Specific Thing: Stewart v. Stone, 127 N.Y. 500, 28 N.E. 595 (1891).

[17] Cessation of Condition: Lorillard v. Clyde, Supra note 14; Mason v. Standard Distilling & Distributing Co., 85 App. Div. 520, 83 N.Y. Supp. 343 (1st Dep't., 1903); Columbus Trust Co. v. Moshier, 51 Misc. 270, 100 N.Y. Supp. 1066 (1906), aff'd 121 App. Div. 906, 106 N.Y. Supp. 1121 (1907), aff'd 193 N.Y. 660, 87 N.E. 1117. (1908).

by an Act of God, inevitable accident or unforseen contingency,[18] where there is an express provision in the contract absolving the parties for nonperformance under certain contingencies or occurrences[19] and where by sickness or death, personal services become impossible.[20]

The plaintiff, in the *Yorktown* case,[21] attempted to come within the pale of the exception providing that where performance is rendered impossible by an act of the promisee, the obligation is discharged. In order to accomplish this, he took the position that the acts of the property owners were acts of the "promisee" within the meaning of the exclusion.

Professor Corbin in his work on Contracts lends support to this position:[22]

"In some cases the beneficiary would have the power to make performance by the promisor impossible, and in others, not. Probably his power in this respect would exist *pari passu* with his power to make performance impossible if he were promisee of the same performance. He can not avoid the usual effects of a tender of performance. If he makes performance impossible this would prevent the nonperformance from being a breach of duty to himself and would generally prevent it from being a breach of duty on the promisors part to the promisee."

Under this view the rule of *Patterson v. Meyerhofer*[23] applies with equal force to the case at hand.[24] In that case[25] the defendant contracted to purchase certain houses which the plaintiff was to obtain at public auction. The defendant subsequently repudiated the agreement and outbid the plaintiff at the auction. The court, in awarding to the plaintiff the difference between the contract price and the substantially lesser auction price paid by the defendant, stated that there is an implied undertaking by each party to a contract, that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement.[26]

It would seem that the court, in failing to find a third-party beneficiary relationship, was unable to impute to the non-existent beneficiary such acts which when done by the promisee would discharge the obligation. The court assumes that even if the rule of *Patterson v. Meyerhofer* applies to hindrance by one who is not a party, but a third party beneficiary,[27] the plaintiff is still liable since he failed to make reasonable efforts to secure the homeowners consents.

[18] Intention of Parties: Wolfe v. Howes, 20 N.Y. 197 (1859).

[19] Conditional Contracts: Meade v. Poppenberg, 167 App. Div. 411, 153 N.Y Supp. 182 (4th Dep't. 1915).

[20] Sickness or Death: Freund v. Zephyr Laundry Machinery Co., 180 Misc. 249, 39 N.Y.S.2d 250 (1942), aff'd, 266 App. Div. 734, 41 N.Y.S.2d 909 (1943); Spalding v. Rosa, 71 N.Y. 40, 27 Am.Rep. 7 (1877). Buccini v. Paterno Constr. Co., 253 N.Y. 256, 170 N.E. 910 (1930); Segar v. King Features Syndicates Inc., 262 App. Div. 221, 28 N.Y.S.2d 542 (1st Dep't. 1941); aff'd, 289 N.Y. 579, 43 N.E.2d 717 (1942).

[21] Supra note 1.

[22] 4 Corbin, Contracts §811, p. 237 "Power of Beneficiary to Discharge or Assign".

[23] 204 N.Y. 96, 97 N.E. 472 (1912). Accord, United States v. Peck, 102 U.S. 64, 26 L.Ed. 46 (1880).

[24] Supra note 1.

[25] Supra note 23.

[26] Similarly, where the work to be performed by a builder can not be performed until other work by the owner is finished, the builder was discharged from liability, where the owners untimely completion prevented the builder from completing within the time limited by the contract. Weeks v. Little, 89 N.Y. 566 (1882). Accord, Village of Argyle v. Plunkett, 175 App. Div. 751, 162 N.Y. Supp. 242 (1916, 3rd Dep't) rev'd on other grounds 226 N.Y. 306, 124 N.E. 1 (1919).

[27] Supra note 1 at 323, 165 N.E.2d at 176 (1960).

Other cases[28] in which the promisor has been excused where a third party fails to take action essential to performance[29] can be distinguished.[30] In these cases the act of the promisee or his agent prevented performance. In the *Mosler Safe*[31] case a contractor agreed to install safes within a specified time and was prevented by the act of the owner's architect. It was held that performance is excused and liquidated damages are waived where the third-party and the promisor were *mutually* responsible for the breach. In the *MacKnight Flintic Stone*[32] case, a water-tight cellar was made according to defective plans submitted by the City and the City's superintendent refused to grant a certificate which was a condition precedent to payment. Recovery was allowed because of impossibility of performance.

In the *Yorktown* case,[33] the act of the third party was a bar to entire performance, which should have been foreseen by the promisor. The language[34] of the majority, that the necessity of obtaining the consents must have been apparent to the plaintiff indicates that they consider the builders' failure to provide for the contingency as an assumption of the risk. The dissent urged that the builders were not under an obligation to "cajole" or "persuade" the property owners, intimating that there was implicit in the contract that the parties would be excused from further performance if consent was unobtainable.[35]

Although the language of the contract does not indicate that the plaintiff would be excused from performance if "consents" were unobtainable, it is difficult to see what more the plaintiff had to do than send out the letter (which the defendant approved) outlining the proposed corrective plan.

The majority apparently felt that not only did the plaintiff fail to "cajole" the homeowners, but he even failed to make a reasonable effort to obtain their consents.

The *Yorktown* case[36] is indeed a curious display of judicial gymnastics. It appears that the invocation of the rules regarding impossibility were contingent upon whether or not the contract was one for the benefit of a third party. But the court strangely enough does not rest its decision on impossibility but rather on the unrealistic criteria of "reasonableness".

The issue, however, was further circumscribed by the trial courts requirement that in order to excuse the builders performance the jury must find the contract was made *solely* for the benefit of the property owners. Such a finding, of course, gave the jury no third party beneficiary upon whose disclaimer of tendered benefits, the excusal of the plaintiff's performance could be predicated. The plaintiff's objection to this charge was met by the Court of Appeals' avoidance of the issue entirely. This is evident in C. J. Desmond's statement that:

"As to the denied request for an instruction that this agreement was for the benefits not for the commissioners, but of the landowners, the court had already clearly described the purpose and meaning of the contract"[37]

[28] Mosler Safe Co. v. Maiden Lane Safe Deposit Co. 199 N.Y. 479, 93 N.E. 81, 37 L.R.A. (N.S.) 362 (1910); Macknight Flintic Stone Co. v. Mayor, 160 N.Y. 72, 54 N.E. 661 (1899).

[29] See, 33 L.R.A. (N.S.) 698, "Effect Upon Contract Obligation of Failure of Third Person to Take Action Essential to Performance".

[30] See Cobb v. Harmon, 23 N.Y. 148 (1861). But see, Delong v. Zeto, 135 App. Div. 79, 119 N.Y. Supp. 765 (1909).

[31] Supra note 28.

[32] Ibid.

[33] Supra note 1.

[34] 7 N.Y.2d at 324, 165 N.E.2d at 178 (1960).

[35] See Dolan v. Rodgers, 149 N.Y. 489, 44 N.E. 167 (1896).

[36] Supra note 1.

[37] 7 N.Y.2d at 325, 165 N.E.2d at 177 (1960).

The concurrence of the high court with the trial term by *implication* would seem to ascribe New York law as requiring a *sole* beneficiary. To evaluate this decision, it is therefore necessary to review the historical development of the phase of the law dealing with third party beneficiaries.

Lawrence v. Fox,[38] the well-known landmark case in New York, laid down the rule that where the promisee is indebted to a stranger to a contract, a promise made on sufficient consideration, may be enforced by the third party. It was originally conceived that the case gave any third party the right to enforce an agreement made for his benefit. However, eighteen years later, in *Vrooman v. Turner*[39] the New York court held that the broad doctrine must be limited to the facts of the case which formulated it. Accordingly, a stranger to the contract was deemed to have an enforceable right only where the promised performance would satisfy a legal or equitable obligation owed to him by the promisee.

The restriction was subsequently relaxed by holdings that by virtue of the close relationship of parent and child,[40] husband and wife,[41] affianced wife and fiance,[42] a contract made for their benefits was enforceable. In 1918, the New York court, in *Seaver v. Ransom*,[43] extended the doctrine by holding that a moral obligation owed by the promisee to the third party was sufficient for recovery and indicated in its dictum that the tendency of American authority is to permit recovery by a donee beneficiary.

The rights of the third party were similarly upheld in the public contract cases[44] where the municipality sought to protect its inhabitants by covenants for their benefit. In an early case[45] the court held that:

"Contractors with the State, who assume for a consideration received from the sovereign power, by covenant, express or implied, to do certain things are liable, in cases of neglect to perform such covenant to a private action at the suit of the party injured by such neglect, and such contract inures to the benefit of the individual who is interested in its performance."[46]

Consequently, where a city or state contracts for the benefit of its inhabitants, an individual citizen may enforce the contract as an intended beneficiary. Thus a contractor who kept the state's canals in repair was held liable for injuries sustained by the canal boat of a *private individual*.[47]

[38] 20 N.Y. 268 (1859).

[39] 69 N.Y. 280, 25 Am. Rep. 195 (1877).

[40] Todd v. Weber 95 N.Y. 181, 47 Am. Rep. 20 (1884).

[41] Buchanan v. Tilden, 158 N.Y. 109, 52 N.E. 724 (1899).

[42] De Cicco v. Schweizer, 221 N.Y. 431, 117 N.E. 807 (1917).

[43] 224 N.Y. 233, 120 N.E. 639, 2 A.L.R. 1187 (1918).

[44] Robinson v. Chamberlain 34 N.Y. 389, 90 Am. Dec. 713 (1866); Little v. Banks, 85 N.Y. 258 (1881); Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211 (1906); Rochester Tel. Co. v. Ross, 195 N.Y. 429, 88 N.E. 793 (1909). Smyth v. City of New York, 203 N.Y. 106, 96 N.E. 409 (1911). Farnsworth v. Boro Oil & Gas Co., 216 N.Y. 40, 109 N.E. 860 (1915). Rigney v. New York Cent. H.R.R. Co., 217 N.Y. 31, 111 N.E. 226 (1916). Int'l Ry. Co. v. Rann, 224 N.Y. 83, 120 N.E. 153 (1918). Cf. German Appliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220, 33 S. Ct. 32, 57 L. Ed. 195 (1912).

[45] Little v. Banks, 85 N.Y. 258 (1881).

[46] Id. at 263. Quoted with approval in New York Pneumatic Services Co. v. Cox Construction Co., 201 App. Div. 33, 193 N.Y. Supp. 655 (1st Dep't (1922)), aff'd, 235 N.Y. 567, 139 N.E. 737 (1923).

[47] Robinson v. Chamberlain, 34 N.Y. 389, 90 Am. Dec. 713 (1866).

The more recent public construction cases indicate[48] that to come within the doctrine of *Lawrence v. Fox*[49] there must be an intent on the part of the municipality to secure a benefit for the abutting land owners. A clause in which the contractor assumes to indemnify the city for damages does not manifest this intent. A clause whereby the contractor promises to pay damages to abutting owners irrespective of negligence, does.

Also contracts of public utilities to supply water,[50] gas,[51] railroad transportation[52] or telephone service[53] at fixed rates have been held to be enforceable by a private citizen. In *Ponds v. New Rochelle Water Co.*,[54] a municipality gave a water company the right to lay water mains in its streets for a period of years in exchange for water supply to inhabitants at fixed rates. A resident, as beneficiary of the contract, was allowed to enjoin the water company from changing its rates, the court saying that:

"While there is not presented a domestic relation like that of father and child or husband and wife . . . it can not be said that this contract was made for the benefit of a stranger. . . . Here the municapility sought to protect its inhabitants, who were at the time of the execution of the contract, consumers of water and those who might thereafter become same, from extortion by a corporation having granted to it a valuable franchise extended over a long period of time."[55]

Reconcilable, however, are the later water cases[56] which hold that a water company is not liable to property owners for damage from failure to furnish adequate water for fire protection, according to the terms of a contract with the city. There is no liability unless an *intention* appears that the promisor is to be answerable to individual members of the public as well as to the city.

Judge Cardozo reasoned[57] that in a broad sense every city contract, not improvident or wasteful is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party. The benefit must be one that is not incidental and secondary. It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of the duty to make reparations directly to the individual members of the public if the benefit is lost.

The cases that have applied the rule of *Lawrence v. Fox* to contracts by a city for the benefit of the public are not at variance with this conclusion. Through them all runs a unifying principle—the presence of an intention to compensate the individual members of the public in the event of default.

Thus in the *Pond* case[58] the rates fixed by the city were not for water supplied to

[48] (Public Improvement Construction Cases) Smyth v. City of New York 203 N.Y. 106, 96 N.E. 409 (1911); Rigney v. New York Cent. & H.R.R. Co., 217 N.Y. 31, 111 N.E. 220 (1916); Coley v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942); Wolcott v. Johnson, Drake and Piper, 198 Misc. 874, 100 N.Y. Supp. 2d 990, (Supreme Ct., Chemung City, 1950).

[49] Supra note 38.

[50] Pond v. New Rochelle Water Co., 183 N.Y. 330, 76 N.E. 211 (1906).

[51] Farnsworth v. Boro Oil & Gas Co., 216 N.Y. 40, 109 N.E. 869 (1915).

[52] Int'l Ry. Co. v. Rann, 224 N.Y. 83, 120 N.E. 153 (1918).

[53] Rochester Tel. Co. v. Ross, 195 N.Y. 429, 88 N.E. 793 (1909).

[54] Supra note 50.

[55] Id. at 76 N.E. 211, 214.

[56] German Appliance Co. v. Home Water Supply Co., 226 U.S. 220, 33 S. Ct. 32, 57 L. Ed. 195 (1912); Moch Co. v. Rensselaer Water Co. 247 N.Y. 150, 159 N.E. 896, 62 A. L. R. 1205 (1938).

[57] Moch Co. v. Rensselaer Water Co., note 49 supra.

[58] Supra note 50.

public buildings but to private users at their homes. In the *Int'l Ry. Co. v. Rann*[59] case rates fixed for railway travel were for the benefit of the private citizen. In *Smyth v. New York*[60] and *Rigney v. New York Cent. & H.R.R. Co.*[61] (the public construction cases) the covenant to pay damages ran to the citizen as well as to the city.

The existence of a third party beneficiary contract appears where there is an intent to confer a benefit upon a third party. The intent and not the fact that the third party is the sole or only beneficiary is the determinative factor. The plaintiff's objection to the courts charge in the *Yorktown* case[62] thus appears to be plausible.

The decision in the instant case[63] places future draftsmen of similar instruments on notice to take extreme care in delineating the intended beneficiary of the agreement and not to create a beneficiary as an afterthought in the pleadings. Although the Court of Appeals avoids the question of whether New York law requires a *sole* beneficiary, the concurrence with the charge of the trial court raises the possibility that the view of the trial court was affirmed by implication. Such a proposition flies in the face of the authorities previously cited and general commentators who indicate that we are re-approaching the rule of *Lawrence v. Fox*[64]

It is possible that the court decided that on the facts there was no third party beneficiary contract and therefore, it is unnecessary to decide whether the test is the finding of a sole or primary beneficiary. Section 137 of the Restatement of the Law of Contracts is indicative of the law had the court found that the property owners were the third party beneficiaries. It provides:

"A donee beneficiary or a creditor beneficiary who has not previously assented to the promise for his benefit, may, in a reasonable time after learning of its existence and terms, render the duty to himself inoperative from the beginning by disclaimer unless such action is a fraud on creditors."

This indicates that the court at some future time can contend that the law is unaltered. An alternative speculation which may be indulged in, is that this case may be subsequently distinguished on the basis that the property owners were incidental beneficiaries of the agreement.

However, the stronger view of the case projects a view that the court neither predicated its conclusion on the finding of a sole beneficiary nor upon the law of impossibility, but rather upon a standard of reasonableness which had no apparent relation to the pleadings or issues of the case.

We are therefore, relegated to the conclusion that the exact effect this decision portends for Third Party Beneficiaries of a municipal contract is at this time, unknown. I.L.B.

CRIMINAL LAW—MAIL FRAUD STATUTE—NO VIOLATION OF STATUTE WHERE MAILINGS ARE MADE UNDER IMPERATIVE COMMAND OF STATE LAW.—In a recent decision the United States Supreme Court,[1] reversing a United States Court of Appeals,[2] held that members of a Board of Trustees of a District Corporation who use the mails under an

59 Supra note 52.
60 Supra note 48.
61 Id.
62 Supra note 1.
63 Ibid.
64 Supra note 38.

1 Parr v. United States, 363 U.S. 370, 80 S. Ct. 1171, 4 L. Ed. 2d 1277 (1960).
2 Parr v. United States, 265 F.2d 894 (5th Cir. 1959).

express duty imposed by state law to assess and collect taxes for the benefit of such District, do not violate the Mail Fraud Statute even where such members intend to and do misappropriate that which is received in response to the mailings.

Petitioners were indicted for the alleged violation of 18 U.S.C. 1341 and 18 U.S.C. 371, which sections prohibit the use of the mails for the purpose of carrying out a scheme to defraud[3] and make it a conspiracy to commit a Federal crime where two or more join in the act.[4] A conviction in the trial court was affirmed on appeal by the United States Court of Appeals,[5] and Certiorari was granted by the United States Supreme Court.[6]

The indictment briefly alleges that: (1) The Benavides Independent School District of Duval is a public corporation organized under the laws of Texas[7] to acquire and hold the facilities necessary for the operation of the public schools within the District, and for the stated purposes to assess and collect taxes. The laws of Texas vest exclusive control of the property and management of the affairs of the District in its seven member Board of Trustees. (2) Petitioners and the six other members of the Board of Trustees of the Benavides Independent District of Duval devised a scheme to defraud the District and its taxpayers. (3) As part of the scheme, petitioners falsely represented that the District checks were being issued for services and materials furnished to the District, and that the Board of Trustees' Annual Report to the Commissioner of Education representing these appropriations was correct. (4) As a part of the scheme, petitioners maintained control over the District, and the Texas State Bank of Alice, which was the authorized depository of the District's funds, and of the San Diego State Bank, where numerous taxpayers' checks were endorsed by forgery and cashed. (5) As a part of the scheme, petitioners used and caused to be used the United States mails to send letters and tax statements. The checks received from the taxpayers in response to the mailings were subsequently misappropriated by the petitioners.

Justice Whittaker, writing for the majority opinion, held that the indictment did not allege, nor did the facts prove any violation of the Mail Fraud Statute. The court reasoned that a legal duty was imposed upon the members of the Board to use the mail. Moreover, the indictment and the evidence did not show that the carrying out of this duty was in any way illegal. It must, therefore, be assumed that the mailings were lawful and did not violate the Statute. The dissenting opinion, on the other hand, maintained that the petitioners impliedly represented to the taxpayers that their monies would be properly appropriated. By gaining complete control over the District's affairs with the intention of violating this representation, petitioners showed a continuous scheme to defraud. Thus the minority concluded that the mailings used for such pur-

[3] 18 U.S.C. 1341, 18 U.S.C.A. 1341: "Whoever, having devised . . . any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter . . . to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon . . . any such matter or thing, shall be fined not more that $1,000 or imprisoned not more than five years, or both."

[4] 18 U.S.C. 371, 18 U.S.C.A. 371. "If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to affect the object of the conspiracy, each shall be fined not more that $10,000 or imprisoned not more than five years, or both."

[5] Supra note 2.

[6] Parr v. United States, 361 U.S. 912, 80 S. Ct. 254, 4 L. Ed. 2d 182 (1960).

[7] Vernons Ann. Stat. Const. Texas, Art. 1, § 3 (1876).

pose were illegal and an essential part to the scheme, and that this would then clearly bring it within the meaning of the Mail Fraud Statute.

The enactment and development of the Mail Fraud Statute originally stems from the constitutional provision[8] giving Congress the power to establish post offices and roads.[9] The purpose of the statute was, therefore, to protect the public against all intentional efforts to "despoil" and to prevent the post office from being used to carry these efforts into effect.[10]

The gist of the offense is the use or attempted use of the mails in the execution of an illegal scheme.[11] The scheme to defraud[12] and the actual devising of such a scheme,[13] however, are mere elements in determining whether such mailings constitute the federal offense.[14] Since the earliest cases[15] defining the Mail Fraud Statute, the federal courts have given the statute a broader interpretation than the common law concept of fraud in civil suits.[16] An early case held that,

"It would strip it [the statute] of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact and exclude those in which [there] is only the allurement of a promise."[17]

A false promise as to a future act must therefore be considered as a scheme to defraud, and if the mails are used for that purpose, it is a violation of the Mail Fraud Statute. The promise, a misrepresentation of a future happening, is the illegal purpose by which the mails are to be used to perpetrate the fraud.

In 1916, *Badders v. United States*[18] greatly enlarged the scope of the Mail Fraud Statute. The court therein stated that Congress

". . . may forbid any (mailings) in furtherance of a scheme that it regards as contrary to public policy whether it can forbid the scheme or not."[19]

The court further reasoned that "Intent may make an otherwise innocent act criminal, if it is a step in a plot."[20] Thus, the intent of the parties using the mails may turn an innocent act into a crime against the federal government.

[8] U.S. Const. Art. 1 § 8(7).

[9] Ex Parte Jackson, 96 U.S. 727 (1878): "The power possessed by Congress embraces the regulation of the entire postal system of the country. The right to designate what shall be carried necessarily involves the right to determine what shall be excluded."

[10] Durland v. United States, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896).

[11] Cochran v. United States, 41 F.2d 193 (8th Cir. 1930).

[12] Boatright v. United States, 105 F.2d 737, (8th Cir. 1939).

[13] Holmes v. United States, 137 F.2d 125 (8th Cir. 1943), certiorari denied, 39 U.S. 776, 63 S. Ct. 1434, 87 L. Ed. 1722 (1943).

[14] Whitehead v. United States, 245 F. 385, 157 C.C.A. 547 (5th Cir. 1917), certiorari denied, 245 U.S. 670, 38 S. Ct. 191, 62 L. Ed. 540 (1918).

[15] Durland v. United States, 161 U.S. 306, 16 S. Ct. 508, 40 L. Ed. 709 (1896).

[16] People v. Garnett 35 Cal. 470, 90 Am. Dec. 125 (1868) (Under the common law, obtaining property by false and fraudulent pretenses was not a criminal offense); Clark and Marshall—Crimes, p. 814 § 12.23 (It has, however, become punishable in most jurisdictions by statute); People v. Behee, 90 Mich. 356, 51 N.W. 515 (1892); People v. Johnson, 12 Johns. (N.Y.) 292 (1815): Taylor v. Com., 94 Ky. 281, 22 S.W. 217 (1893); Regina v. Kilham, L.R. 1 c.c. 261, 11 Cox c.c. 561 (1870); (It is basically an intentional misrepresentation of an existing fact, with the intent to deprive the owner of his property); Watson v. People, 27 Ill. App. 493 (1888); Jamison v. State, 37 Ark. 445, 40 Am. Rep. 103 (1881) (The representation must be the proximate cause of the deception and injury to the owner).

[17] Supra note 15 at 314, 16 S. Ct. at 511, 40 L. Ed. at 712.

[18] Badders v. United States, 240 U.S. 391, 36 S. Ct. 367, 60 L. Ed. 706 (1916).

[19] Supra note 18 at 393, 394, 36 S. Ct. 3 at 368, 60 L. Ed. at 709 (1916).

[20] Ibid.; This principle of law was subsequently reiterated in United States v.

A subsequent case in 1917[21] further broadened the application of the statute. An attempt was made to defraud the depositors and creditors of a bank by false representations as to its financial conditions. The bank was solvent and the only misrepresentation was as to the bank's ability to pay its creditors when debts were due. The court stated that false pretenses, communicated by mail, although used in the prosecution of an established business, legitimate if honestly conducted, would constitute a violation of the Mail Fraud Statute. Nine years later, a federal court decided that it was not necessary that all or even the main part of the business or scheme should be of a fraudulent character to constitute a violation of the statute.[22]

The courts have further maintained[23] that a representation or pretense need not be expressly stated in the mailing. It may also be reasonably implied therefrom.

In 1944, the United States Supreme Court declared[24] that the scheme must be an integral part of the execution of the fraud. This was subsequently broadened in 1954 in *Pereira v. United States*.[25] Chief Justice Warren there stated that the scheme need not ". . . contemplate the use of the mail as an essential element." It can be ". . . incident to an essential part of the scheme."[26]

A summation of the previous mentioned cases and the principles of law evoked therefrom leads to the conclusion that in order to constitute the federal offense, there must have been use of the mails with an express or implied[27] intentional[28] misrepresentation[29] of a past, present, or future occurrence,[30] which although innocent in itself, may be in a plot to defraud,[31] and which need only be incidental to the essential part of the scheme to defraud.[32]

The case at bar, however, presents a unique factual pattern.[33] The majority opinion negates the application of the previous mentioned cases and principles of law to the facts presented, since there is no case with the same factual pattern from which an analogy can be drawn.[34] In none of the cases heretofore decided did a legal duty exist which compelled the use of the mails. For example, *Durland v. United States*[35] dealt with a fraudulent investment company which sent out false statements as to future profits which would accrue to prospective investors. Certainly no legal duty of mailing was involved there. The *Butler* case,[36] too, merely concerned the fraudulent offering of notes and mortgages for sale to banks by a private concern. There was,

Kinofsky, 243 U.S. 440, 442, 37 S. Ct. 438, 61 L. Ed. 836, 838 (1917): "Furthermore, in order to constitute a crime, the mailing of the letter must have been a step in the execution of a fraudulent scheme."

[21] Sparks v. United States, 241 F. 771 (6th Cir. 1917).

[22] Barnes v. United States, 25 F.2d 61 (8th Cir. 1928), certiorari denied 278 U.S. 607, 49 S. Ct. 12, 73 L. Ed. 533 (1928).

[23] Butler v. United States, 53 F.2d 800 (10th Cir. 1931); See also Zimmerman v. United States, 171 F.2d 790 (5th Cir. 1949).

[24] Kann v. United States, 323 U.S. 88, 65 S. Ct. 148, 89 L. Ed. 88 (1944).

[25] Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435 (1954).

[26] Id. at 8, 74 S. Ct. at 362, 98 L. Ed. at 44.

[27] Butler v. United States, supra note 23.

[28] Fournier v. United States, 58 F.2d 3 (7th Cir. 1932).

[29] Yusem v. United States, 8 F.2d 6 (3rd Cir. 1925).

[30] Supra note 15.

[31] Supra note 18.

[32] Supra note 25.

[33] Supra note 1.

[34] Ibid.

[35] Supra note 10.

[36] Supra note 23.

again, no legal duty. The respondents maintained that an innocent act may form part of an illegal scheme and based this contention on *Aikens v. Wisconsin*.[37] That case involved a purported violation of a Wisconsin statute prohibiting combinations to injure another in his reputation, trade, or business. Defendants there entered into an agreement to boycott advertisers in certain newspapers. The court held that the mere refraining from contracting is an innocent act in itself, but becomes illegal where there is a wilful combining by two or more persons to do such injury. It is therefore the combination which makes the act illegal. For that matter the use of the mails is by itself an innocent act and it only becomes illegal when used for the purpose of carrying out a scheme to defraud. Although agreeing that an innocent act may form part of an illegal scheme, the majority concluded that when the mailings were made imperative by state law, these acts would not be considered illegal.[38] Prophesying, the majority noted that if the indictment alleged and the evidence proved that the defendants were "padding" or overassessing the taxes, they might have been convicted.[39] This would have constituted a breach of their duty and then the situation would have been present in which the mails were being used to carry out an unlawful representation. However, the evidence submitted in fact proved that the money was actually needed for new school facilities and improvements.[40] In the opinion of the court, the use of the mails to fulfill a legal duty cannot be considered an integral part of the scheme[41] nor even incidental to an essential part thereof.[42] Neither the *Kann*[43] case nor the *Pereira* case,[44] which present the aforementioned principle of law, was concerned with the question of legal duties. Therefore, since the indictment and evidence did not show any illegal use of the mails; and since the mailings were legally compelled, no federal offense was committed.

The dissenting opinion presents the previous mentioned cases as analogous to the case at bar. The minority concluded that there is an implied representation by the District that the taxes will not be misappropriated; but that they will be used for lawful purposes. Continuing, the minority maintained that the duty made imperative by the state to assess taxes extends to the proper handling of such funds upon receipt. The intention to steal constitutes a violation of this duty, and the use of the mails would, therefore, be an essential element in its fulfillment. The fact that the defendants took complete control over the District and its affairs for quite some time; assessing, collecting, and misappropriating the taxpayers' money, and using the mails for such purpose, made it all one continuous scheme with each mailing constituting a step in the plot to defraud. Hence, the minority concluded that the intent to steal, coupled with the use of the mails for that purpose, constituted a violation of the Mail Fraud Statute.

Despite the strong dissenting opinion, the United States Supreme Court ruled that the Federal Mail Statute must be limited to schemes which contemplate the use of the mails for the purpose of an illegal act. Mailings made or caused to be made under an imperative command of state law are not illegal even where the ultimate intention of the parties required to do the mailing is to steal that which is received in response to the mailings. M. K.

[37] Aikens v. Wisconsin, 195 U.S. 194, 25 S. Ct. 3, 49 L. Ed. 154 (1904).
[38] Supra note 1.
[39] Ibid.
[40] Ibid.
[41] Supra note 24.
[42] Supra note 25.
[43] Supra note 24.
[44] Supra note 25.

DOMESTIC RELATIONS—SEPARATION ACTION—ENFORCEABILITY OF ANTENUPTIAL AGREEMENT TO REAR CHILDREN IN SPECIFIC RELIGIOUS FAITH.—*In Doe v. Roe*,[1] recently decided by the Supreme Court—Special Term of Kings County, the court held as valid an antenuptial agreement providing that the children of the marriage would be reared in the Catholic faith.

The plaintiff (husband), a Catholic, sued for separation; the defendant, a Protestant, counter-claimed for separation in her favor. Both parties based their actions on cruel and inhuman treatment and both sought the custody of their three children ranging in age from one to four years. Defendant alleged that plaintiff's habitual drunkenness was the cause of the marital rift; not religious differences. This the plaintiff denied. Prior to the marriage defendant had signed an agreement providing that children of the marriage would be brought up in the Catholic faith.

Judge Beckinella decided that the defendant's allegations were false but were injected to becloud the real issue, that of the parents' differences over the religious training of their children. "Defendant apparently reasoned, so said the court, "that if a separation was granted in her favor the children would be awarded to her and she could then raise them in her religion. This I believe, she feels is the most important mission in her life."[2]

A separation was granted in the plaintiff's favor on the ground of cruel and inhuman treatment the court holding the antenuptial agreement to be enforceable.[3] Custody of the children was given to the plaintiff.

In determining the custody award, the court gave great weight to the defendant's testimony that she would not rear the children as Catholics under any circumstances, even if the court ordered her to do so. There was an implication that she would have been awarded custody if the court had felt that she would have obeyed an order to comply with the terms of the antenuptial agreement.[4]

In reaching its decision the court relied on two New York lower court decisions, *Ramon v. Ramon*[5] and *Shearer v. Shearer*.[6]

In the former case,[7] the wife was seeking support from her husband for herself and their child. The husband admitted his liability but asserted that the child was not being reared in the Catholic religion according to the terms of an antenuptial agreement.

The court held that the agreement was enforceable. The court reasoned that the

[1] Doe v. Roe, 143 N.Y.L.J. 114, p. 14 (June 14, 1960).

[2] Ibid.

[3] Ibid. "That there was ample consideration for the agreement there can be no question. Plaintiff was under no legal compulsion to marry defendant. Accordingly I find the agreement to be valid and enforceable." The fact that the defendant was pregnant at the time of the marriage and claimed duress in signing the agreement, did not influence the court. The couple had been engaging in sexual intercourse for about two years prior to the marriage. The court said, "Moreover, this case does not present the picture of a young girl seduced by the promise of marriage. According to her own testimony she was perfectly willing to have continued the out of—wedlock sexual intercourse had it not resulted in her pregnancy, perhaps up to the present time."

[4] Ibid. "Ordinarily, with children of the tender years as these, and where as here, the mother is not charged with unfittness on moral or other grounds, she would be awarded their custody with a direction or mandate that she raise them in accordance with the Catholic faith. But here the defendant is so uncompromising on the religious question that such a course would be ineffectual."

[5] Ramon v. Ramon, 34 N.Y.S. 2d 100 (Dom. Rel. Ct., N.Y.C. 1942).

[6] Shearer v. Shearer, 73 N.Y.S. 2d 337 (Sup. Ct. Steuben Cty. 1947).

[7] Ramon v. Ramon, supra note 5.

agreement, since it was a prerequisite to the consent of the church to the marriage, was the enducement to the Catholic party to enter into the marriage. In addition, the marriage being indissoluble to the Catholic party, his status is permanently changed[8] notwithstanding the fact that his civil freedom has been obtained.[9]

The court cited several cases favoring antenuptial agreements in general,[10] and held that Section 53 of the Domestic Relations Law[11] is applicable to religious agreements.

An agreement between the parents to place the child in a Catholic boarding school was approved by the court.

Shearer v. Shearer[12] followed the *Ramon* case[13] in upholding a similar agreement, but with the qualification that the religious requirement in it was not the decisive factor in determining the children's religious instruction. The referee wrote:[14] " . . . but I am charged with a responsibility even more impelling than the religious rights of the father. The controlling consideration here in the welfare of the children." The court ruled that it would not be harmful to the children if the agreement were enforced. Their custody was awarded to the mother with a right in the father to take them to the Roman Catholic church for instruction when each reached four years of age, and to place them in a parochial school at the age of five if the parents could not mutually agree on their education otherwise.

In *Ross v. Ross*,[15] a recent New York lower court decision enforcing a religious

[8] Id., at 112 "An ante-nuptial agreement providing for the Catholic faith and education of the children of the parties, in reliance upon which a Catholic has thereby irrevocably changed the status of the Catholic party, is an enforceable contract having a valid consideration."

[9] In Pfeffer, Religion In The Upbringing of Children, 35 B.U.L. Rev. 333, the author discusses the holding in the Ramon case. "Where the agreement is made in contemplation of a marriage which would otherwise not have been entered into, the principles of estoppel would seem to dictate its enforceability. The estoppel argument . . . although it appears . . . cogent, is vulnerable to closer scrutiny. The indissolubility of a Catholic's marriage does not give him a greater claim to enforce the antenuptial contract, because only secular grounds for dissolubility are recognized in a secular court and non-performance of an ante-nuptial agreement for religious upbringing is not such a ground whether the promisee is a Catholic or a non-Catholic. (footnotes omitted) There is in any event no basis for estoppel because the promisee . . . got exactly what he bargained for—a promise that the children would be brought up in his faith. He could not bargain for judicial enforcement of the promise because it was not the promisor's to give. The agreement is viewed by the parties as a religious act rather than a secular one having legal consequences. The Catholic church, which insists upon the agreement, is under no illusions as to its enforceability in a secular court." (footnotes omitted).

[10] Strebler v. Wolf, 152 Misc. 859, 273 N.Y.S. 653 (Sup. Ct. N.Y. Cty. 1934): "The law favors ante-nuptial agreements and they will be enforced in equity according to the intention of the parties."; Johnston v. Spicer, 107 N.Y. 185, at 191, 13 N.E. 753, at 755 (1887): "Antenuptial contracts . . . are enforced in equity according to the intention of the parties whenever the contingency provided by the contract arises."; See also De Cicco v. Schweizer, 221 N.Y. 431 at 438, 117 N.E. 807 at 810. (1917).

[11] N.Y. Dom. Rel. Law, § 53, "A contract made between persons in contemplation of marriage remains in full force after the marriage takes place."

[12] Shearer v. Shearer, supra note 6.

[13] Ramon v. Ramon, supra note 5.

[14] Shearer v. Shearer, supra note 6 at 358.

[15] Ross v. Ross, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. Erie Cty. 1956), appeal dismissed, 4 A.D.2d 1001, 170 N.Y.S.2d 1006 (1957).

prenuptial agreement, the court said,[16] "A promise of this kind cannot be treated lightly and although it is but a spiritual right, it is nonetheless as real and as valuable as any property right." Although in this case the court was inclined to award the custody of the child to the father because of his ability to provide a more suitable home than could the mother, it considered the interests of the child best served by awarding custody to both parents. The mother was ordered to educate and rear the child in the Roman Catholic faith whenever she had custody.

Some New York decisions have not enforced religious antenuptial agreements. In a 1954 New York case,[17] where the parents were legally separated; the Court of Appeals upheld a lower court decision which had disregarded the antenuptial agreement. The decree had given custody of the child to the mother with the proviso that the child was to be reared as a Catholic. The mother sought a modification of the order to enable the child, who was then twelve, to attend the church of his own choice. Subsequent to an interview with the boy, the referee granted the modification requested declaring that the child was mature enough to testify intelligently, and that evidently he wished to change to his mother's religion. The best interests of the child required that the agreement not be enforced.[18]

In *Hehman v. Hehman*,[19] a similar conclusion was reached, when the court found that to have enforced the agreement would have adversely affected the child's welfare.[20]

In the instant case[21] the court held that *Martin v. Martin*[22] was not in point, saying,[23] "The Martin case simply held that when a child is of sufficient maturity and intelligence he has the right to choose his own religion."

Courts in other states have generally held that antenuptial agreements concerning the religious upbringing of children of a marriage are of no legal effect. A majority of the decisions have indicated that not only would it be inconsistent with a child's best

[16] Id., at 403, 149 N.Y.S.2d at 589.

[17] Martin v. Martin, 308 N.Y. 136, 123 N.E.2d 812 (1954).

[18] Id., at 139-140, 123 N.E.2d at 812-813. The dissenting opinion in the Martin case stated: "This sort of prenuptial agreement is enforceable like any other, unless and until its enforcement is shown to be harmful to the child. The idea that a child of twelve is competent to make a choice binding on the Supreme Court and on his parents in such a matter is not only contrary to our decisions, (citations omitted) and contrary to all human experience, but is directly opposed to the parens patriae public policy of New York." (citations omitted). Speaking of the referee's decision to grant the modification the dissent added, "that was not within the Referee's competency, in the face of a Supreme Court judgment as to the place and nature of his religious training, based on a solemn prenuptial agreement."

[19] Hehman v. Hehman, 13 Misc. 2d 318, 178 N.Y.S.2d 328 (Sup. Ct. Queens Cty. 1958).

[20] Ibid. In this case, the pre-nuptial agreement and the separation agreement provided that one of the three children would be raised in the father's Lutheran religion, and the other two children would be raised in the mother's religion, as Catholics. The mother had custody of the choldren and refused to allow the father to take the 12 year old boy to the Lutheran church. The court reasoned that the existing religious arrangement was most likely confusing the boy, therefore, to enforce the Agreements would not be in his best interests. In following Martin v. Martin, (supra note 17.) the court added that the child should be allowed to decide for himself which church he preferred.

[21] Doe v. Roe, supra note 1.

[22] Martin v. Martin, supra note 17.

[23] Doe v. Roe, supra note 1.

interests to allow religion to be used as a factor in determining custody,[24] but also that after one of the parties has been awarded custody a child's religious training should be left to that party's complete discretion.[25] It has necessarily followed that any antenuptial agreement on this matter was void.

It would also appear that many courts have been reluctant to enforce these agreements because of guarantees in both federal[26] and state[27] constitutions providing for "freedom of religion" and "separation of church and state," and that by giving effect to the agreements the court might be accused of favoring one church over another, or of depriving the custodial party of his right to change his religious beliefs as his conscience dictated.

Boerger v. Boerger[28] was a 1953 case decided by the Superior Court of New Jersey. The father sought to enforce a prenuptial agreement to rear children of the marriage as Catholics, against his former wife who had custody of their child. It was held that the health and welfare of the child were the fundamental considerations. To order the parent having custody to bring the child up in a religion different from her own would be undesirable.[29] The court also held that to enforce the agreement would infringe upon one's right to freedom from religious interference on the part of the state.[30]

In a recent Connecticut case,[31] the father applied for a writ of habeas corpus to obtain custody of his children, or alternately for an order from the court enforcing the antenuptial agreement to rear the children as Catholics. It was decided that to grant

[24] The New York courts also adhere to this policy. See Shearer v. Shearer, supra note 6; Martin v. Martin, supra note 17; Hehman v. Hehman, supra note 19.

[25] On this point the New York courts differ. They have no reservations about ordering the custodian to rear the child in a religion different from his or her own. From reading the cases it appears that they have not seriously considered the effects of such an order upon the child's welfare. See: Doe v. Roe, supra note 1; Ramon v. Ramon, supra note 5; Shearer v. Shearer, supra note 6.

[26] U.S. Const. Amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amend. XIV: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ." The fourteenth amendment makes the first amendment applicable to the states, e.g., Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943); Rase v. U.S., 129 F. 2d 204 (6th Cir. 1942).

[27] See e.g. N.Y. Const. Art. 1, Sec. III: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . . ." Most other states have similar provisions.

[28] Boerger v. Boerger, 26 N.J. Super. 90, 97 A.2d 419 (Super. Ct. 1953).

[29] Id. at 104, 97 A.2d at 427: "The parent to whom custody is awarded must logically and naturally be the one who lawfully exercises the greater control and influence over the child. To create a basic religious conflict in the mind of the child, and between it and its custodian would be detrimental to its welfare."

[30] Id. at 101, 97 A. 2d at 425, "In addition, it would deprive the mother of her right to change her mind-to choose a religion which apparently gives her greater spiritual comfort-and to inculate in the children entrusted to her custody the religious principles which, for the time being, seem to her best."

[31] Mc Laughlin v. Mc Laughlin, 20 Conn. Supp. 274, 132 A.2d 420 (Super. Ct. 1957).

his request would be detrimental to the children's interests and welfare. In discussing its constitutional limitations, in reference to the application specifically to enforce the agreement, the court discussed its constitutional limitations, and said:[32]

" . . . this a civil court will not order. . . . The law is absolutely impartial in matters of religion. . . . The provisions of the Connecticut constitution furthermore expressly prohibit such an order as the plaintiff seeks—to require by judicial decree that when parents are in disagreement their children will be required to be raised as members of one Christian sect rather than another."

In *Hackett v. Hackett*,[33] a 1958 Ohio case, the agreement in question was regarded as being void. In addition to their prenuptial agreement, the parents' separation agreement provided that the children would be reared by the mother as Catholics. This agreement having been incorporated by the court in a subsequent divorce decree, the husband sought by contempt proceedings to have enforced against the wife for her failure of compliance. In holding the agreement to be void, the court said:[34]

" . . . the religious training of children is a family matter, subject to the wishes of the parents or either one of them, and a disagreement between them on this subject, while living together as husband and wife is not a justiciable matter.[35] Certainly if an agreement is unenforceable at the time it is made, it does not gain in stature with respect to its unenforceable provisions because of the subsequent divorce of the parties."

It was further decided that to uphold the agreement would be in disregard of the children's best interests.

In a 1957 Georgia divorce action,[36] the father objected to awarding custody of the children to the mother on the grounds that they would not be reared in the Catholic faith in accordance with the parents' antenuptial agreement. In sustaining the award the court said:[37]

"It is the law in this state that in awarding custody of minor children, the primary and controlling question is their welfare, and it is the duty of the court . . . to look to the best interest of the child or children and what will promote their welfare and happiness, and make award accordingly." [citation omitted]

In addition, it was noted that it was not within the realm of the court's power to direct religious upbringing of children:[38]

"That when the question of its [the child's] welfare turns on the direction of its

[32] Id. at 276-277, 132 A.2d at 421-422.

[33] Hackett v. Hackett, 78 Ohio L. Abs. 485, 150 N.E.2d 431 (Ct. App. 1958), appeal dismissed 168 Ohio St. 373, 154 N.E.2d 820 (1958).

[34] Id. at 487, 150 N.E.2d at 433.

[35] The case most frequently cited for this holding is People ex rel. Sisson v. Sisson, 271 N.Y. 285, 2 N.E.2d 660 (1936). The decision stated, "The court cannot regulate by its processes the internal affairs of the home. . . . No end of difficulties would arise should judges try to tell parents how to bring up their children. Only when moral, mental and physical conditions are so bad as seriously to affect the health or morals of children should the courts be called upon to act." This case did not involve religion but merely the education of the child. In addition, the parents were living together as husband and wife. In Doe v. Roe (supra note 1.) the court said in discussing this point, "it cannot be said that the religious issue is merely an internal affair, because it has actually wrecked the home and undoubtedly is doing violence to the children's sense of security and subjects them to great psychological tensions."

[36] Stanton v. Stanton, 213 Ga. 545, 100 S.E.2d 289 (1957).

[37] Id. at 549, 100 S.E.2d at 293.

[38] Ibid.

training and upbringing in one belief or another, our courts, save as controlled by statute, have no power; that to do so would be determination by the court as to differences in religious belief, which is incompatable with religious freedom."

It should be noted that there have been few decisions from the courts of states other than New York, enforcing religious prenuptial agreements.[39]

That is, in enforcing antenuptial agreements to rear children in a specific religion, the New York courts have taken a position which differs from most, if not all of the other jurisdictions.[40]

Whether or not the New York position is sound justiciably is debatable. Since antenuptial agreements generally are enforceable,[41] why should not the antenuptial agreement providing for the rearing of children in a specified religious faith be enforced?

A legal maxim in divorce and separation cases stipulates that decisions concerning children are to be made only with regard to the children's welfare. It is therefore questionable whether it is in the best interests of a child to order, as do the New York courts that he be brought up in a religious faith different from that of the parent having custody.

From a practical standpoint such an order raises a problem difficult to resolve. As a recent Iowa case[42] pointed out, there is ". . . the difficulty of policing this part of the decree. . . ." Briefly stated, is it possible for a court to keep a constant watch upon parent and child to ensure that the latter is receiving duly authorized religious training? Further, how may the court prevent the custodian from inculcating into the child ideas which are in opposition to those of the church which the child is being *forced* to attend by court order?[43]

The word *forced* implies a constitutional question which the New York courts have noticeably avoided. May the courts constitutionally enforce such an agreement? Although this question has not been passed upon by a federal court, most of the state courts have answered it in the negative.[44] The New York position appears to be that the agreement will be enforced if to do so will not be harmful to the child, the decision being dependant upon the circumstances and facts of each case.

Whether the court in *Doe v. Roe*[45] acted in the best interests of the children, by awarding custody to the father, is debatable. The mother of course did not help her cause by flouting the authority of the court. She also appears to have been the chief cause of the marital difficulties. Thus the court, no doubt, felt justified in not granting

[39] See In Re Luck, 7 Ohio NP 49, 10 Ohio Dec NP 1 (1899), not followed in that jurisdiction (see Hackett v. Hackett, supra note 34.); See also Commonwealth ex rel. Stack v. Stack, 141 Pa. Super. 147, 15 A.2d 76 (Super Ct. 1940).

[40] See: Boerger v. Boerger, supra note 28; Mc Laughlin v. Mc Laughlin, supra note 31; Hackett v. Hackett, supra note 33; Stanton v. Stanton, supra note 36.

[41] Supra notes 10 and 11.

[42] Lynch v. Uhlenhopp, 248 Iowa 68, 80, 78 N.W.2d 491, 499 (1956).

[43] In the Martin case, supra note 17 at 140, 123 N.E.2d at 813), the dissent criticized the mother for exerting, what they considered, an adverse influence upon the boy which led to his desire to change his religion. "She did prove affirmatively that she herself had created this troublesome position by violating not only her solemn agreement, but the plain condition under which custody was given to her." Most likely the order was obeyed literally, but it was impossible for the court to see that the intent of the order was being followed.

[44] See: Boerger v. Boerger, supra note 28; Mc Laughlin v. Mc Laughlin supra note 31; Stanton v. Stanton, supra note 36.

[45] Doe v. Roe, supra note 1.

custody to her. In any event, this case reiterates the New York rule that antenuptial agreements concerning the religious upbringing of children are generally enforceable. L.P.

LABOR RELATIONS—LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT—ACTION BROUGHT BY UNION MEMBER IN OWN BEHALF.—In March, 1960, the Federal District Court of New Jersey, in granting an order for the dismissal of a complaint, held that in the absence of the requisite allegations and proofs as to diversity of citizenship and the minimum jurisdictional amount being involved, the Court could find no basis for assuming jurisdiction in a suit involving members of a local union and their international.[1] The Court further decided that Section 304(a)[2] of the Labor-Management Disclosure Act of 1959 did not provide a means of circumventing these jurisdictional requirements.[3]

This case came before the Court on the defendants' motion to dismiss the complaint pursuant to the Federal Rules for Civil Procedure, Rule 12(b).[4]

Plaintiffs in this action were members of Local No. 1262 (Local) of Retail Clerks' International Association (International) AFL-CIO, suing in their own right and ostensibly in behalf of all the members of the Local. Among other things their complaint was founded on the alleged mismanagement and mishandling of property belonging to the local union under a trusteeship imposed by the International Union. Named as defendants were the president and secretary-treasurer, respectively, of the International Union, the International Union as an unincorporated labor organization and two other individuals, a trustee appointed by the president of the International Union and his deputy, appointed by the trustee.

Plaintiffs invoked the diversity jurisdiction of the Court by alleging plaintiffs' residence in New Jersey with that of the individual defendants in other states, and the fact that the International Union's principal office is in the District of Columbia. Other than prayers for compensatory and punitive damages, no specific statement appeared in the complaint respecting the pecuniary amount involved in the litigation.

Defendants contended that the fact that the International Union is an unincorporated association, having many New Jersey citizens within its membership, plus the fact that plaintiffs were residents of New Jersey indicated that no diversity of citizenship existed sufficient to support jurisdiction by the Court; and that the requisite minimum amount involved to confer jurisdiction, even assuming diversity, had not been pleaded or shown to exist.

Plaintiffs argued that this was a class action as contemplated by Rule 23(a)[5] and that the representative status of the defendant international union offset the affect upon the Court's diversity jurisdiction of the conceded fact that many of the members of International were citizens of New Jersey. On this point, the Court cited *Lowry v. International Brotherhood of Boilermakers.*[6] This was an action brought by a union member, resident of Mississippi, against the International Union which was domiciled in Kansas but had a lodge with many members in Mississippi:

1 Rizzo v. Ammond, 182 F. Supp. 456 (D.C.N.J. 1960).
2 Labor-Management Disclosure Act of 1959, 29 U.S.C.A. § 464(a) (Supp. 1959).
3 Supra note 1.
4 FED. R. CIV. P., Rule 12, 28 U.S.C. (1958).
5 FED. R. CIV. P., Rule 23(a), 28 U.S.C. (1958).
6 Lowry v. International Brotherhood of Boilermakers, Iron Ship Builders, and Helpers of America, 259 F.2d 568, 573 (5th Cir. 1958).

"While alternative methods of suit are provided by Rules 17(b) and 23(a), diversity of citizenship for federal jurisdiction must still exist between all of the parties on one side and all of the parties on the other. If the association is sued or sues as an entity under Rule 17(b), citizenship is determined by the individual members; if the association is a class party under Rule 23(a) the representatives named must have complete diversity from the other side. If the association in the capacity as an entity is joined with persons fairly representing that association as a class, then no doubt the association itself is a party and citizenship is determined accordingly. In the present case, that was the situation—the defendant union, as an entity was joined with named non-resident officers as fairly representing the membership. Thus to determine diversity of citizenship, we must look to all of the members of the union as well as to the named representatives of the class."

In the case at hand,[7] the International Union was joined as a defendant and the Court, under Rule 17(b),[8] had the duty of applying the New Jersey statute applicable to suits against unincorporated associations, in order to determine the effect of this joinder upon the diversity of citizenship of the parties. The statute states that a suit against an unincorporated association is a suit against all of the members thereof.[9]

Plaintiffs conceded that if the suit was only against the International Union, the problem of diversity would be an insuperable one, but they relied on *Supreme Tribe of Ben-Hur v. Cauble*[10] as an authority for the employment of a class action for circumvention of the obstacle of non-diversity.

The *Supreme Tribe* case[11] decided that the federal courts have jurisdiction to bind absentees in class actions. In a prior action in a lower federal court, representatives of a class, all of whom had residence outside of Indiana, brought suit against a faternal organization and certain of its officers, all of whom had residence within the State of Indiana.[12]

The Court also rejected plaintiffs' reliance on *Cross v. Oneida Paper Products*[13] *Company* and *Harker v. McKissock*[14] as inefficacious.

Giordano v. Radio Corporation of America[15] was cited by the Court as an important example of precedent in this type of case. Although diversity of citizenship was established, the suit failed because of the absence of an allegation of the required jurisdictional amount.

In the instant case the Court found that if the allegations in the complaint were sustained by proof, none of the plaintiffs nor all of them as a group could recover a specific amount of money.[16] Neither did it appear that any of the plaintiffs nor all of them as a group would lose any money if denied the relief which they sought. The contention that the matter in controversy exceeded the requisite jurisdictional minimum

[7] Supra note 1.

[8] FED. R. CIV. P., Rule 17(b), 28 U.S.C. (1958).

[9] N.J.S.A. 2A:64-1.

"Any unincorporated organization or association, consisting of 7 or more persons and having a recognized name, may sue or be sued in any court of this state by such name in any civil action affecting its common property, rights and liabilities, with the same force and effect as regards such common property, rights and liabilities as if the action were prosecuted by or against all of the members thereof. . . ."

[10] Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S. Ct. 338, 65 L. Ed. 673 (1921).

[11] Ibid.

[12] Balme v. Supreme Tribe of Ben-Hur, (D.C. Ind. 1915).

[13] Cross v. Oneida Paper Products Co., 117 F. Supp. 919 (D.C.N.J. 1954).

[14] Harker v. McKissock, 12 N.J. 310, 96 A.2d 660 (1953).

[15] Giordano v. Radio Corp. of America, 183 F.2d 558 (3rd Cir. 1950).

[16] Supra note 1.

found no support in either the allegations of the complaint, or in the facts disclosed in the affidavits attached thereto.

Plaintiffs sought jurisdictional support for their action in the Labor-Management Reporting and disclosure Act of 1959, apparently relying on Section 304(a)[17] of the Act which offers two avenues of relief from the abuses of a trusteeship, to wit:

"Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this subchapter (except section 301 of this title) the Secretary (of Labor) shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any District Court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this subchapter (except section 301 of this title) may bring a civil action in any District Court of the United States having jurisdiction of the labor organization for such relief (including injunctions as may be appropriate)."[18]

The court construed the authorization for bringing a civil action by a member of a local, contained in the last sentence of subsection (a), as a supplemental and accessory method of securing relief where appropriate jurisdictional grounds exist for direct action by the member against the labor organization. The Court explained that by seeking relief through the Secretary of Labor pursuant to Section 304(a)[19] of the Act, plaintiffs would be afforded expeditious, effective and complete relief for any cause of action to which they might be entitled.

This case has twofold significance. First, it is another in a long line of cases interpreting the Federal Rules for Civil Procedure.[20] In the matter of the diversity of citizenship required to establish Federal jurisdiction, and its application to class actions, the Court has added its voice to the apparently unanimous decisions from all over the nation which hold that class representation having been established, so must absolute diversity of citizenship be established as to the opposing parties.[21]

Secondly and of even greater significance is the fact that this is the first case reported in which Section 304(a)[22] of the Labor-Management Disclosure Act of 1959 is construed. The Court decided that the primary mode of relief offered is the written complaint to the Secretary of Labor and his subsequent actions on the matter, and that the authorization for bringing a civil action by a member of a local is supplementary and accessory only. In partial agreement with this view is that expressed in *Flaherty v. McDonald*[23] wherein the Court said:

"The language of Section 304(a) in providing that 'any member . . . affected by any violation of (Title III)' may bring suit, must lead to the logical supposition that a violation must have been determined to exist before suit may be brought, and the only procedure for determination of such violation is provided for also in Section 304(a) by

[17] 29 U.S.C.A. § 464(a) (Supp. 1959).

[18] Ibid.

[19] Ibid.

[20] FED. R. CIV. P., 28 U.S.C. (1958).

[21] Airline Dispatchers' Association, A.F. of L. v. California Eastern Airways, 127 F. Supp. 521 (N.D. Calif. 1954); Speed v. Transamerica Corp., 135 F. Supp. 176 (D.C. Del. 1955), modified 235 F.2d 369 (3rd Cir. 1956); Metropolis Theatre Co. v. Barkhausen, 170 F.2d 481 (7th Cir. 1948); Malarney v. Upholsterers' International Union of North America, 7 F.R.D. 403 (E.D. Pa. 1947); Schuckman v. Rubenstein, 164 F.2d 952 (6th Cir. 1947).

[22] Supra note 17.

[23] Flaherty v. McDonald, 183 F. Supp. 300 (S.D. Calif. 1960).

filing a complaint with the Secretary of Labor, who may then investigate the alleged violation and bring suit if he had 'probable cause to believe that such violation has occurred.' "

The Court in *Flaherty v. McDonald*[24] then went on to say that it could have no jurisdiction over the subject matter of the case until the administrative remedies provided in Section 304(a)[25] had been exhausted.

Neither the *Ammond*[26] nor the *McDonald* case[27] interpretation is strengthened by reference to the House and Senate reports on the Act prior to its passage. Both House Report No. 741[28] and Senate Report No. 187[29] are silent in regard to which, if either, method of relief is primary and which is secondary. Both reports do express one reason for the provision of the subsection dealing with the complaint to the Secretary of Labor:

" . . . The name of the complainant is to be disclosed in order to protect him from reprisals."[30]

Thus we might infer that one mode of relief being less susceptible to reprisal than another, the former could be considered primary.

The opposing point of view, that the modes of relief offered in Section 304(a)[31] are equal and alternative, has some merit. The House report on the Act, in discussing the principal area covered by the bill, reads, in part, as follows:

" . . . The Secretary of Labor . . . shall . . . bring a civil action in any District Court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate. Also, any member or subordinate body of a labor organization affected may bring a civil action in a District Court of the United States to prevent and restrain [such abuses]. . . ."[32]

The word "also" indicates an alternative. It is missing in the text of the Act,[33] but it is reasonable to assume, in the absence of contradictory evidence, that Congress may have intended to provide equal and alternative means of action.

Section 304(a)[34] of the Labor-Management Disclosure Act of 1959 is, at this time, new law. Two cases have interpreted its provisions.[35] These cases hold that the primary mode of relief for a union member under the provisions of Section 304(a)[36] is to file a written complaint with the Secretary of Labor who then may bring an action in his behalf.

The union member cannot, at the outset, bring an independent civil action in his own behalf, as provided by the statute, since the courts consider this mode of relief supplementary and accessory only. D.A.A.

[24] Ibid.
[25] Supra note 17.
[26] Rizzo v. Ammond, 182 F. Supp. 456 (D.C.N.J. 1960).
[27] Supra note 23.
[28] U.S.C.C. & A. Vol. 2, p. 2424 (1959).
[29] U.S.C.C. & A. Vol. 2, p. 2318 (1959).
[30] U.S.C.C. & A. Vol. 2, pp. 2335, 2437 (1959).
[31] Labor-Management Disclosure Act of 1959, 29 U.S.C.A. § 464(a) (Supp. 1959).
[32] Supra note 28 at p. 2437.
[33] Supra note 31.
[34] Ibid.
[35] Rizzo v. Ammond, 182 F. Supp. 456 (D.C.N.J. 1960); Flaherty v. McDonald, 183 F. Supp. 300 (S.D. Calif. 1960).
[36] Supra note 31.

LABOR RELATIONS—RIGHT OF NATIONAL LABOR RELATIONS BOARD TO RESTRAIN PEACEFUL PICKETING OF UNION NOT REPRESENTING MAJORITY OF EMPLOYEES.—In March, 1960, the United States Supreme Court held[1] that peaceful picketing by a union, which does not represent a majority of the employees, to compel recognition of that union as the employees exclusive bargaining agent is not conduct of the union "to restrain or coerce" the employees in the exercise of rights guaranteed in § 157[2] of the Taft-Hartley Act, and therefore is not an unfair labor practice within the meaning of § 158(B)(1)[3] of the Taft-Hartley Act.

Curtis Brothers, Inc., operate a retail store and warehouse in Washington, D.C. In 1953, the respondent, Teamsters Local 639, was Certified by the National Labor Relations Board as the exclusive representative of the Company's drivers, helpers, warehousemen, and furniture finishers. In 1954, the Local called a strike over contract terms. Only nine of twenty-one employees left their jobs. The nine employees were replaced. Curtis Brothers petitioned the National Labor Relations Board to conduct another election. The Local, in attempting to forestall an election, advised the Board that it did not claim to represent a majority of the employees. The Board ordered another election nonetheless, and in October, 1955, the eligible Curtis Brothers employees voted 28 to 1 in favor of "no union".

In November, 1955, the picket line which had been maintained at the Curtis Warehouse was withdrawn. Orderly picketing continued however at the Customers' entrance to the retail store.

After picketing continued at the retail store for six months, Curtis Brothers issued a complaint, alleging, in substance, that the picketing was activity to "restrain or coerce" the employees in the exercise of their rights guaranteed under § 157[4] and an unfair labor practice under § 158(b)(1)(A),[5] because it was "recognitional picketing", that is, picketing designed to induce Curtis Brothers to recognize the Local as the exclusive bargaining agent for the employees, although the union did not represent a majority of the employees.

The Trial Examiner recommended dismissal of the complaint on the ground that even if the picketing was "recognitional", it was not conduct to "restrain or coerce". The National Labor Relations Board disagreed and issued a cease and desist order.[6] The Court of Appeals, by a divided court, set aside the Board's Order holding that § 158(B)(1)(A)[7] "is inapplicable to peaceful picketing whether 'organizational' or

[1] National Labor Relations Board v. Drivers, Chauffers, etc., Local Union No. 639, 362 U.S. 274, 80 S. Ct. 706, 4 L. Ed. 2d 710 (1960).

[2] 29 U.S.C.A. § 157 provides: "Employees shall have the right to self organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(A)(3)".

[3] 29 U.S.C.A. 158(B)(1)(A) provides in part: "It shall be an unfair labor practice for a labor organization or its agents . . . (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in § 157 . . . ."

[4] Supra note 1.

[5] Supra note 2.

[6] Drivers, Chauffers, etc., Local Union No. 639, 119 N.L.R.B. 232 (1957).

[7] Supra note 3.

'recognitional' in nature . . . ."[8] The Supreme Court granted certiorari.[9]

After certiorari was granted in April, 1959, Congress enacted the Labor Management Reporting and Disclosure Act of 1959, which, among other things, added a new section to the National Labor Relations Act.[10] This section, in substance, banned picketing for recognition or organizational purposes where the employer is lawfully recognizing another labor organization and a question of representation cannot be raised under § 159(c); a valid election has been held within the preceding 12 months; or picketing has been in progress for an unreasonable period without the filing of a representative petition.

The Board relied essentially on the provisions of § 158(1)(A)[11] to sustain its previous ruling. However, they did orally argue that if the case arose under the 1959 act, the Board might have proceeded against the local under the new § 158(b)(7).[12]

It was the Board's position that peaceful picketing is not lawfully employed as an economic weapon to further self organization if the object is recognitional. They contended that the Union's picketing in this case was to force the company to recognize and contract with the Local although it was not the chosen representative of the majority of the Curtis Brothers' employees. This object was to force the company to commit an act prohibited by the statute itself.

The court, in rejecting the Board's argument stated that § 158(B)(1)(A)[13] must

[8] National Labor Relations Board v. Drivers, Chauffers, etc., Local Union No. 639, 274 F.2d 551 at 552 (D.C. 1958).

[9] National Labor Relations Board v. Drivers, Chauffers, etc., Local Union No. 639, 359 U.S. 965, 79 S. Ct. 876, 3 L. Ed. 2d 833 (1959).

[10] 29 U.S.C.A. 158(B)(7) povides: "It shall be an unfair labor practice for a labor organization or its agents (7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 159 (c) of this Act, (B) where within the preceding twelve months a valid election under section 159 (c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 159 (c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketings; provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159 (c) (1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit and picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 158(b)."

[11] Supra note 3.

[12] Supra note 10.

[13] Supra note 3.

be construed in conjunction with Section 163,[14] which essentially provides that no provision of the Taft-Hartley Act shall be taken as restricting or expanding the right to strike or either the limitations or qualifications on that right, as these were understood prior to 1947, unless "specifically provided for" in the Act itself.

The Court found that, prior to 1947, the Norris-La Guardia Act[15] protected peaceful "recognitional" picketing. Therefore, the Board's position could only be sustained if "specifically provided for" in the Act itself.

The Court found, in examining the legislative history of § 158(B)(1)(A),[16] that this section was designed for

"[T]he elimination of the use of repressive tactics bordering on violence or involving particularized threats of economics reprisal. The plainest indication negating an intention to restrict the use by unions of methods of peaceful picketing is seen in the comments of Senator Taft near the close of the debate. He said: 'It seems to me very clear that so long as a union-organizing drive is conducted by persuasion, by propaganda, so long as it has every legitimate purpose, the Board cannot in any way interfere with it. . . .' "[17]

The Court concluded that the Taft-Hartley Act authorized the Board to regulate peaceful "recognitional" picketing only when it is employed to accomplish objectives in § 158(B)(A)(4)[18] and that §158(B)(1)(A)[19] limits the Board "to proceed against

[14] 29 U.S.C.A. 163 provides: "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or dimish in any way the right to strike, or to affect the limitations or qualification on that right." For the purposes of § 163, picketing has been equated with striking. See National Labor Relations Board v. International Rice Milling Co., 341 U.S. 665, 71 S. Ct. 961, 95 L. Ed. 1277 (1951).

[15] 29 U.S.C.A. § 101-110, 113-115.

[16] Supra note 3.

[17] Supra note 1 at 287, 80 S. Ct. at 714, 4 L. Ed. 2d at — (1960).

[18] 29 U.S.C.A. § 158(B)(A) provides: "It shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization as the representative of such employees under the provisions of section 159; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159; (D) forcing or requiring any employer to assign particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

[19] Supra note 3.

union tactics involving violence, intimidation, and reprisal, or threats thereof-conduct involving more than general pressures upon persons employed by the affected employers implicit in economic strikes."[20]

The Board in a long line of cases has adhered to the Court's present position.[21] Mr. Justice Stewart, joined by Mr. Justices Frankfurter and Whittaker, in a separate memorandum felt that the case should be remanded to the Board for reconsideration in view of the new § 158(B)(7) which had been added since the granting of certiorari.

There is little doubt that the decision of the Supreme Court as to the Board's power to restrain peaceful picketing under § 158(B)(1)(A)[22] is heavily supported by precedent.

The unsettled question, however, is the extent of the Board's power to restrain peaceful picketing under the new § 158(B)(4).[23] The present measure was substituted for the original Senate Bill and House amendment by a House-Senate Conference Committee. The avowed intent[24] was to overcome the ruling of the National Labor Relations Board in the *Curtis* case.[25]

An analysis of the *Curtis* case and the legislative history of § 158(B)(4), the new provision purporting to restrict organizational and recognitional picketing, discloses one salient fact; that the abuses of organizational and recognitional picketing uncovered during the McCellan Committee Hearings cannot be dealt with effectively under existing labor law.

It is generally agreed that one of the great objects of labor management legislation is to promote industrial stability and peace. Clearly, this object is not served when a union, after being rejected by an employee vote of 28 to 1, is permitted to continue the picketing of a retail establishment. Although such picketing be peaceful, it can nonetheless be strongly urged that such picketing is not without its coercive aspects. A loss in customers means fewer employees or a reduction in hours worked. To say that such pressures are not felt by both employees and employer is unrealistic.

It must also be recognized that the right of employees to form a union is firmly entrenched in our law and must be jealously guarded. This right must never be curtailed but the law should allow for the effective correction of abuses. The *Curtis* case is illustrative of the need for such corrective legislation. C. R. Y.

[20] Supra note 1 at 290, 80 S. Ct. 706 at 715, 4 L. Ed. 2d at — (1960).

[21] National Maritime Union, 78 N.L.R.B. 971 (1948), enforcement granted 175 F.2d 686 (2 Cir. 1949); Local 74, United Brotherhood of Carpenters (Watson's Specialty Store), 80 N.L.R.B. 533 (1948), enforcement granted 181 F.2d 126 (6 Cir. 1950), affirmed 341 U.S. 707, 71 S. Ct. 966, 95 L. Ed. 1309 (1951); Perry Norvell Co. 80 N.L.R.B. 225 (1948); Miami Copper Co. 92 N.L.R.B. 322 (1950); United Mine Workers (Teamster Mining Corp.), 106 N.L.R.B. 903 (1953).

[22] Supra note 3.

[23] Supra note 10.

[24] U.S.C.C. and A., Conference Report No. 1147, Vol. II, Pp. 2512-2513.

[25] Supra note 6.

SEARCH AND SEIZURE—INCRIMINATING EVIDENCE INADMISSIBLE IN FEDERAL PROSECUTION WHERE ARREST WAS MADE WITHOUT PROBABLE CAUSE.—The Supreme Court of the United States in a recent decision[1] held that a search and seizure of incriminating evidence was unlawful when made incidental to an arrest not supported by probable cause, and that a conviction based upon such evidence must be set aside. The opinion of the Court, as delivered by Mr. Justice Douglas, stated that, under our federal system, suspicion alone will not justify a federal officer to make an arrest. The Fourth Amendment[2] teaches, so said the court, that it is sometimes better to allow a guilty man to go free than to permit citizens to be arrested without proper authorization.

In the instant case, F.B.I. agents, while investigating a theft from an interstate shipment of whiskey at a terminal in Chicago, received undisclosed information from the employer of one Pierotti concerning the involvement of the latter in interstate shipments. Pierotti was placed under surveillance and was observed driving off in an automobile with defendant. The agents followed the car, saw it enter an alley adjoining residential premises, and stop. Thereupon, the defendant entered the premises nearby returning later carrying a number of cartons which were placed in the car. He then drove off, but the agents were unable to follow him. Some time later, the agents again found the car parked in the same alley; again observed the defendant carry a number of cartons from the same premises; and again saw him place them in the automobile. Having observed these actions from a distance of about 300 feet, the agents could not determine the size, number, or contents of the cartons. However, after the defendant had driven off, the agents overtook the car and waved it to a stop, a circumstance which later at the trial assumed great significance since the Government conceded that the arrest was perfected when the defendant's car was stopped. As defendant stepped from the automobile, the agents heard him say to Pierotti: "Hold it; it is the G's," followed by, "Tell him he [you] just picked me up." The agents interrogated defendant and one of them, looking at the cartons through the window of the car, noticed that they were addressed to an out-of-state company. Defendant was taken to the agents' office where the cartons were opened disclosing that they contained radios addressed to the out-of-state company. The defendant was then formally arrested and charged with a violation of federal law.[3] The radios valued at more than $100 were part of an interstate shipment.

At his trial the defendant's timely motion to suppress the incriminating evidence on the ground that it was secured through an illegal search and seizure was overruled,

[1] Henry v. United States, 361 U.S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

[2] U.S. Const. amend. IV: "The right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[3] 18 U.S.C. § 659 (1949), provides in part as follows: "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal, or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express . . . shall in each case be fined not more than $5000.00 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels shall not exceed $100.00 he shall be fined not more than $1000.00, or imprisoned not more than one year, or both. . . ."

and he was convicted. The Court of Appeals affirmed,[4] and the case went to the Supreme Court of the United States on a writ of certiorari.[5]

Before the Supreme Court the issue presented was whether there was probable cause for the arrest of the defendant. If there was probable cause, the subsequent search was lawful and the radios could have been properly introduced into evidence at defendant's trial, since, where there is a lawful arrest, it is undisputed that whatever is found on the suspect's person or within his control that is unlawful, and which may be used to help prove the offense, may be seized and held as evidence.[6] An arrest without a warrant, or probable cause, cannot, however, be supported on the basis that the "fruits of the search" justified the arrest.[7] In other words, a successful search does not cure an otherwise defective arrest. Furthermore, when an arrest and a search incident thereto are attacked as illegal, the arresting officers must make a factual showing of probable cause. The theory underlying this rule has been stated by Mr. Justice Cardozo[9]:

"The Government may search the person of one legally arrested to discover and seize the fruits and evidences of crime. Search of the person is unlawful when the seizure of the body is a trespass, and the purpose of the search is to discover grounds as yet unknown for the arrest or accusation. The search becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical domination."

F.B.I. agents are authorized by statute[10] to make arrests without a warrant if they have reasonable grounds to believe that the person to be arrested has committed or is committing a felony. Since the term reasonable grounds and the concept probable cause have been held to be interchangeable,[11] the statutory enactment is merely declaratory of the constitutional standard.[12]

The Government conceded in the instant case that the arrest was completed when the agents waved the defendant's car to a halt. Therefore, the question whether there was probable cause for the arrest became vital to the prosecution's case, and when the Supreme Court of the United States concluded there was no probable cause for the arrest, defendant's conviction had to be reversed. In coming to its conclusion the court reasoned that the actions of the defendant preceding the arrest—riding in the car, stopping in an alley, picking up packages, driving away-were all acts that were outwardly

[4] 259 F.2d 725 (7th Cir. 1958).

[5] 359 U.S. 904, 79 S. Ct. 580, 3 L. Ed. 2d 570 (1959).

[6] Carroll v. United States, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652 (1941); Agnello v. United States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925); Harris v. United States, 331 U.S. 145, 67 S. Ct. 1098, 91 L. Ed. 1399 (1947).

[7] United States v. DiRe, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210 (1948); United States v. Walker, 246 F.2d 519 (7th Cir. 1957).

[8] Director General of Railroads v. Kastenbaum, 263 U.S. 25, 44 S. Ct. 52, 68 L. Ed. 146 (1923); Poldo v. United States, 55 F.2d 866 (9th Cir. 1932).

[9] People v. Chiagles, 237 N.Y. 193, 142 N.E. 583 (1923).

[10] 18 U.S.C. § 3052 (1948), provides: "The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and make arrests without warrants for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."

[11] Supra note 7, United States v. Walker.

[12] Supra note 2.

innocent. A magistrate, so stated the court, would not have issued a warrant of arrest based upon these facts. Prudent men in the shoes of these agents would not have seen enough to permit them to believe that the defendant was violating, or had violated, the law. The fact that the cartons were stolen was not determinative of probable cause; the agents must have had reasonable grounds to believe that the particular packages carried by the defendant were contraband. (What happened after the defendant's car was stopped was irrelevant to the issue so the Supreme Court stated.)

This element, "probable cause", that was found lacking in the instant case has been defined to be reasonable grounds of suspicion, supported by circumstances sufficiently strong in themselves, to warrant a cautious man to believe that the party is guilty of the offense with which he is charged.[13] It is in effect a reasonable belief of guilt.[14] Moreover, the arresting officer may be guided in his determination of whether or not he has probable cause to make an arrest by evidence that is not admissible in a court of law.[15] Furthermore, a great difference exists between the two essentials to be proved, guilt and probable cause; between the *quanta* and modes of proof required to establish these essentials,[16] as well as the tribunals which determine them. Earlier decisions which appeared to hold to the contrary[17] have been overruled or qualified.[18]

In order to establish probable cause, an officer is limited to the facts and circumstances within his knowledge. Probable cause is either established or not when the arrest is made, and subsequent developments will not change its character. The substance of all the definitions of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice.[19] Flight is a significant factor to be considered in determining probable cause, but a failure to protest innocence is not controlling.[20]

The dissenting opinion written by Mr. Justice Clark, with whom Chief Justice Warren joined, took sharp issue with the Government's concession that the arrest took place when the defendant's car was waved to a stop. He said that the Court was not bound by the Government's mistakes and concluded that there was probable cause for the arrest, and consequently urged that the conviction should be affirmed. The dissent held that the arrest took place when the agents questioned the defendant as to his activities and when they noticed the cartons addressed to an out-of-state company through the defendant's car window. At this point the arrest took place, and therefore there was undisputed probable cause for the arrest.

[13] Stacey v. Emery, 97 U.S. 642, 645, 24 L. Ed. 1035 (1878).

[14] Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

[15] United States v. Voikell, 251 F.2d 333 (2d Cir. 1958), cert. denied, 356 U.S. 962, 78 S. Ct. 1000, 2 L. Ed. 2d 1068 (1958).

[16] Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959).

[17] Grau v. United States, 287 U.S. 124, 53 S. Ct. 38, 77 L. Ed. 212 (1932); Giles v. United States, 284 Fed. 20 (1st Cir. 1922); Simmons v. United States, 18 F.2d 85 (8th Cir. 1927); Worthington v. United States, 166 F.2d 557 (6th Cir. 1948); United States v. Novera, 58 F. Supp. 275 (E.D. Mo. 1944); Reeve v. Howe, 33 F. Supp. 619 (E.D. Pa. 1940).

[18] Wrightson v. United States, 236 F.2d 672 (D.C. 1956); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945); United States v. Bianco, 189 F.2d 519 (3rd Cir. 1951); Wisniewski v. United States, 47 F.2d 825 (6th Cir. 1931); Mueller v. Powell, 203 F.2d 787 (8th Cir. 1953).

[19] Supra note 14.

[20] Husty v. United States, 282 U.S. 694, 51 S. Ct. 240, 75 L. Ed. 629 (1931).

Consequently, the exact moment the arrest was made became very important. Tested by the majority opinion, and the Government's concession that the arrest took place at the time the defendant's car was stopped, there was not probable cause to support the arrest and incidental search. By concluding that the arrest took place when the agent saw the cartons in the defendant's car, coupled with the other circumstances, it would appear, as the dissent held, that there was probable cause since the agents then had reasonable grounds to believe that the defendant was committing or had committed a felony. The Government by conceding that the arrest took place when the agents stopped the defendant's car, apparently was attempting to use this case as a test case to determine if there was any relaxation of the standards incident to the probable cause requirement.

In another case decided subsequently to the instant case, the precise time of the arrest became of paramount importance. In *Rios v. United States*,[21] in order to validate a subsequent search and seizure of narcotics, one of the issues was whether there was probable cause for the arrest. The defendant in that case was observed by police officers, who were staked out in a neighborhood notorious for narcotic peddling, to look up and down the street before getting into a taxi. For a while the officers followed the cab at a distance, and then halted it. They proceeded to open the door of the cab and observed the defendant drop a package. The package contained narcotics. The incriminating evidence was introduced at defendant's trial resulting in his conviction. Among other contentions the defendant argued that the arrest was not valid and that therefore the package was obtained by an illegal search and seizure. On its part the Government claimed that the arrest took place when the officer observed the defendant drop the package to the floor of the cab; that up to such time the police were merely conducting a routine interrogation.

In remanding the case for a new trial, the Supreme Court said it was for the jury to resolve the conflicting testimony. Should the jury find that the police officers stopped the taxicab during the course of a routine interrogation, and that while engaged in such mission, the defendant voluntarily exposed the contraband to the officer's view, then the arrest was valid and the subsequent seizure lawful. However, should the jury find that the police officers approached the taxi-cab with the purpose of arresting the defendant, then the arrest was invalid and the subsequent seizure unlawful, as the officers did not have probable cause to sustain a valid arrest when the taxi-cab was halted.

The case of *Carroll v. United States*[22] set the trend that an arrest supported by probable cause validates an incidental search. In this landmark case, the agents had personal knowledge that the defendants were engaged in the illicit transportation of liquor, since one of the defendants had attempted to sell some liquor to one of the agents. Later, the agents observed the defendants driving a heavily laden car from a direction known to be a source of supply. Upon appeal, the Supreme Court of the United States held that the agents not only had probable cause to make the arrest, but that it was impractical for them to secure a search warrant. The *Carroll* case liberalized the rule governing searches where a moving vehicle is involved, but it did not dispense with the need for probable cause. The dissent in the instant case held that the rationale of the *Carroll* case applied to the case at bar, but the majority held that the fact that the suspects were in a moving automobile was not enough since the essential element of probable cause was lacking.

[21] 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960).

[22] Supra note 6, Carroll v. United States.

The *Johnson* case[23] reached the highwater mark of the probable cause doctrinnaire requirement. Here police officers were notified by an informer that a strong odor of opium was emanating from a certain hotel room. The officers investigated, detected the odor, knocked on the door and requested admittance. They entered and arrested defendant. At the trial the question was whether they had probable cause to arrest the occupant although subsequent search of the room had produced incriminating evidence. The Supreme Court held that the officers did not have probable cause to make a valid arrest for they were unaware of the number of occupants in the room when they gained admission. The court went on to say that had the officers made an application for a warrant of arrest, it would undoubtedly have been issued since there was probable cause to support it. But any assumption by an officer, so continued the court, that evidence sufficient to support a Magistrate's disinterested determination to issue a search warrant will justify the officer in making a search without a warrant, would reduce the Fourth Amendment to a nullity, and leave the home secure only in the discretion of police officers.

The *Johnson* decision apparently departed from the doctrine of the *Carroll* case as far as probable cause was concerned. Shortly thereafter, the *Brinegar* case[24] re-affirmed the probable cause rule of the *Carroll* case. Factually, both the *Carroll* and *Brinegar* cases were very much alike. The defendant in the *Brinegar* case was engaged in the illegal transportation of liquor of which fact the agents had personal knowledge. In holding that the agents had probable cause to make the arrest and consequently the incidental search of the defendant's automobile, the Court quoted approvingly from the *Carroll* case.

Draper v. United States[25] seemed to set a new trend and is indicative that the Court will be sensitive to practicalities respecting probable cause. In it an arrest without a warrant was made by a federal narcotic agent acting on information received from an informer. Concededly, the officer acted on hearsay evidence, but the Court found probable cause for the arrest. The court seemed to have been influenced by the circumstances that the officer had verified the informant's disclosures by observing the defendant's clothing, walking mannerisms and physical characteristics before he made the formal arrest. This decision bordered closely on the pronouncement that strong suspicion was sufficient to constitute probable cause, and evoked a warning by Mr. Justice Douglas in a vigorous dissenting opinion. He maintained that the reliability of an informer's information should not serve to form the basis of probable cause for the agent to make the arrest, and that if such an arrest were sustained the "court would break with tradition."

The *Giordenello* case,[26] cited by the majority in the instant case, related to a defective arrest warrant. The affidavit sworn to by the agent upon which the arrest warrant was issued did not recite facts necessary to support the conclusion that a crime was being committed by the defendant. The Court held that the Commissioner who signed the warrant should not have accepted without question the agent's conclusion that the defendant had committed a crime; that necessary facts supporting this conclusion should be recited in the agent's affidavit. However, since the agent observed the defendant violating a federal law as he went to make the arrest, there was probable cause to validate the arrest without the warrant, and the Court inferred that the Government would adopt this argument at the new trial.

[23] Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436 (1948).
[24] Supra note 14.
[25] Supra note 16.
[26] Giordenello v. United States, 357 U.S. 480, 78 S. Ct. 1245, 2 L. Ed. 2d 1503 (1958).

The difficulty is to distinguish between suspicion and probable cause, for the police may not arrest on mere suspicion.[27] The round-up, or dragnet arrest, the arrest on "investigation", or on "open charge" are all prohibited by the law.[28] The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. To these individuals the concept of probable cause protects them from undue harrassment brought on by over-zealous police officers.[29]

Probable cause becomes very important when a search incidental to the arrest discloses evidence that may be used to convict a defendant at his trial. State courts which follow the "federal exclusionary rule" laid down in the *Week* case,[30] would prohibit the fruits of an illegal search and seizure to be introduced into evidence. Other states, including New York, which follow the "common law rule" that all evidence is admissible provided it is relevant to the issue, regardless of whether it was obtained illegally, offer no protection to the accused even though he is arrested without probable cause.[31] Consequently, if the subsequent search discloses incriminating evidence, it will be introduced at the defendant's trial. Of course the defendant has resort to civil redress[32] to compensate him for the trespass, and may even challenge such invasions by force; but on the question of his guilt before a criminal tribunal, the products of the illegal search and seizure are properly admissible, if relevant. This doctrine has been held not to violate "due process."[33] The only qualification is that the state should not affirmatively sanction such police intrusion into privacy, in order to avoid condemnation by the mandate laid down in the Fourteenth Amendment.[34]

Since probable cause is determined by the circumstances, and these circumstances are determined at the moment of the arrest,[35] the pivotal point of when the arrest took place assumed great importance in the case at bar. The dissent differed with the majority as to the exact time it took place, not with the facts necessary to constitute probable cause. The holding demonstrates that the facts necessary to constitute probable cause will not be liberalized because a moving vehicle is carrying contraband, and that the rule laid down in the *Carroll* case[36] will not be extended. While the practical aspects surrounding the arrest will be given due consideration by the Court,[37] the indispensable requirement of probable cause must be found before the arrest will be held to be lawful. It is clearly evident that every citizen is protected from being easily susceptible to arrest as far as the federal law enforcement agencies are concerned. Unfortunately, how-

[27] Mallory v. United States, 354 U.S. 449, 77 S. Ct. 1356, 1 L. Ed. 2d 1479 (1957); Miller v. United States, 357 U.S. 301, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958).

[28] Ibid.

[29] Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L.J. 1 (1958).

[30] Supra note 6, Weeks v. United States.

[31] People v. Adams, 176 N.Y. 351, 68 N.E. 636 (1903); People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926); People v. Richter's Jewelers, Inc., 291 N.Y. 161, 51 N.E. 2d 690 (1943).

[32] United States ex rel. Farnum v. McNeill, 157 F. Supp. 882 (D.C. N.Y. 1958).

[33] Wolf v. Colorado, 338 U.S. 25, 69 S. Ct. 1359, 93 L. Ed. 1782 (1949).

[34] Ibid.

[35] Trupiano v. United States, 334 U.S. 699, 68 S. Ct. 1229, 92 L. Ed. 1663 (1948).

[36] Supra note 6, Carroll v. United States.

[37] Supra note 16; 36 N.C.L. Rev. 328 (1958); 8 Catholic U.L. Rev. 117 (1959); 26 Tenn. L. Rev. 305 (1959); 5 N.Y.L.F. 287 (1959); 28 Geo. W.L.R. 661 (1960).

ever, the abuses on a national scale of arresting individuals on mere conjecture and suspicion have yet to be remedied.[38] B. K.

[38] UNIFORM CRIME REPORTS FOR THE UNITED STATES, Federal Bureau of Investigation, Washington, D.C. Vol. 28, No. 1, Semiannual Bulletin 1957, pp. 64, 65, shows 1956 arrest statistics for 1,025 cities in the United States, including 26 cities over 250,000 population and 458 cities under 10,000 population. 111,274 were arrested on suspicion (but not in connection with any specific offense) and subsequently released without prosecution. This was at the rate of 280.4 people per 100,000 inhabitants.

The grand total of persons arrested—both for a specific offense (but excluding traffic offenses) and on suspicion alone—and released without bail held for prosecution was 264,601. This was at the rate of 666.7 per 100,000 inhabitants.