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Case Notes

CASE NOTES

Domestic Relations—Mexican Bilateral Divorce Decree Declared Void in New York for Lack of Jurisdiction.—In a suit for separation, the husband counterclaimed for a judgment declaring the nullity of his marriage to the plaintiff on the ground that the divorce which she had obtained from her former husband in Chihuahua, Mexico, was void, and her marriage to him occurred during the lifetime of that husband. The divorce was procured when the plaintiff traveled to Mexico, appeared in court with an attorney and lodged a complaint against her prior husband on the ground of incompatibility. The defendant, in the divorce action, appeared through a Mexican attorney, authorized to appear on his behalf. The answer admitted the allegations of the complaint and, without further proof, a decree was granted in favor of plaintiff, although she had never signed the Municipal Register of Residence. The New York Supreme Court declared the Mexican divorce invalid, basing its decision primarily on the ground that the Mexican court did not have jurisdiction of the marital *res*. In so holding, the court stated that the jurisdictional predicate need not necessarily be that which is required under New York law, but that there must be a connection of some length of time and degree of permanence, either actual or prospective, between the parties and the state, so that the divorce forum may acquire jurisdiction under our generally accepted notions of that term. *Wood v. Wood*, 245 N.Y.S.2d 800 (Sup. Ct. 1963).[1]

The "opinion differs from a line of authorities (short of the Court of Appeals) enunciated . . . over the past twenty-five years,"[2] and raises the problem of what standards of jurisdiction must be applied before New York will recognize the validity of a bilateral foreign country decree.[3]

Were this a decree of a sister state in an action in which the defendant appeared, it most probably would not be subject to collateral attack.[4] However,

1. The opinion appears in two parts, the second termed "On Reargument." The latter was written subsequently to the main decision, pursuant to a motion to make findings of fact and conclusions of law as to those matters not covered in the earlier opinion and for which relief was sought. This gave Justice Coleman an opportunity to restate his views on the validity of the Mexican divorce despite the fact that the motion was not technically one for reargument. It was also an opportunity to correct an obvious oversight as to the disposition of Heine v. Heine, 10 App. Div. 2d 864, 199 N.Y.S.2d 788 (2d Dep't 1960) (memorandum decision). See Wood v. Wood, 245 N.Y.S.2d at 818.

2. Letter from Joseph L. Forscher & Gustave Berman to New York Law Journal, N.Y.L.J., Sept. 13, 1963, p. 4, col. 1 (Mexican Divorce Decrees Based on Physical Presence of One Spouse and Appearance of Other by Attorney).

3. A bilateral foreign country decree requires the physical appearance of one party and the appearance of the other, either personally or by an attorney, in the foreign jurisdiction. See Forscher & Berman, supra note 2, at n.2.

4. In Davis v. Davis, 305 U.S. 32 (1938), the Supreme Court held that a defendant who had specially appeared and litigated the question of the plaintiff's domicile in the rendering state was barred by the full faith and credit clause from later attacking the decree on that ground in another state. Later, in Sherrer v. Sherrer, 334 U.S. 343 (1948), and Coe v. Coe, 334 U.S. 378 (1948), the Court held that where the defendant had appeared and there had

in the case of a decree of a foreign nation the full faith and credit mandate of the Constitution[5] is not applicable,[6] and recognition is based rather on the principle of comity of nations.[7]

Briefly, comity is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[8] Not being a rule of law, "but [merely] one of practice, convenience and expediency,"[9] New York will recognize a Mexican divorce as a matter of comity, although not bound to do so under the federal constitution, where (1) the rendering court had proper jurisdiction of the parties, and (2) where such recognition will not violate the public policy of the State.[10]

The historical view that a divorce suit is in the nature of an in rem proceeding is no longer sound, although it is clear that it is not a purely personal action[11] because, for a court to acquire jurisdiction of a divorce suit, it is necessary for it to secure jurisdiction over the marital *res*, the subject of the action. Generally, domicile of the plaintiff in the divorce forum is the contact which gives the court this jurisdiction. Nevertheless, while it has been stated many times that jurisdiction of a divorce suit under our system of law is based on domicile,[12] the

been a full opportunity to challenge the jurisdiction of the court, even though there had in fact been no challenge, and where the decree was not susceptible to collateral attack by the parties in the rendering state, they may not contest the question of jurisdiction in any other state, even though neither party was domiciled in the divorce forum. In Johnson v. Muelberger, 340 U.S. 581 (1951), the doctrine of Sherrer as applied to consenting spouses was further extended to include third parties. The Court held that if the parties before the court, or strangers, were precluded from attacking jurisdiction in the state of rendition, the decree must always be given full faith and credit. Further, in Cook v. Cook, 342 U.S. 126 (1951), the Court held that where the decree is collaterally attacked in another state a presumption arises, in absence of proof to the contrary, that the divorce forum had jurisdiction and the decree is res judicata. Thus, it is only where the law of the state issuing the bilateral decree permits a person to attack it there, that it may be attacked by that person elsewhere.

5. U.S. Const. art. IV, § 1.

6. "It is . . . clear that the recognition of a foreign country judgment is far less certain, the judgment itself is far more assailable and vulnerable, than sister State judgments, and is subject to a test of policy. There is thus no significant basis for treating sister State and foreign country divorce judgments as identical in legal effect within this State." Rosenbaum v. Rosenbaum, 309 N.Y. 371, 376, 130 N.E.2d 902, 904 (1955).

7. Martens v. Martens, 260 App. Div. 30, 20 N.Y.S.2d 206 (1st Dep't), rev'd on other grounds, 284 N.Y. 363, 31 N.E.2d 489 (1940) (German divorce); Weil v. Weil, 26 N.Y.S.2d 467 (Dom. Rel. Ct. 1941) (Danish divorce).

8. Hilton v. Guyot, 159 U.S. 113, 164 (1895).

9. Mast, Foos & Co. v. Stover Mfg. Co., 177 U.S. 485, 488 (1900).

10. Glaser v. Glaser, 276 N.Y. 296, 12 N.E.2d 305 (1938); cf. Dunstan v. Higgins, 138 N.Y. 70, 33 N.E. 729 (1893).

11. Williams v. North Carolina, 317 U.S. 287, 297 (1942).

12. Williams v. North Carolina, 325 U.S. 226, 229 (1945), where the Court said: "Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is

Supreme Court has never expressly held it to be a constitutional requirement.[13] The question of whether the domicile of one of the parties is the only jurisdictional basis upon which divorces may be granted has been discussed by commentators[14] and judges.[15] It is sufficient to note at this point that New York requires some connection between the marital *res* and the State, but not necessarily domicile within the divorce forum, before an action for divorce may be brought.[16] It is obvious, however, that New York does not regard divorce as a mere transitory personal action.

The problem with respect to the recognition of Mexican divorces on the basis of comity arises because Mexico's jurisdictional requirements in some cases are less than would be required of a state under the due process clause. In Mexico, jurisdiction of the subject matter of a divorce action may be based solely upon the express or implied submission of the parties to the jurisdiction of a particular court.[17] Once this has been done, under Mexican law[18] the court is competent to try the action. In fact, even collusive divorces do not violate that nation's

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founded on domicile." See also Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901).

13. In Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), cert. granted, 347 U.S. 911, dismissed as moot, 347 U.S. 610 (1954), the Court of Appeals for the Third Circuit held unconstitutional, as a denial of due process, a statute which provided that six weeks' presence of the plaintiff was prima facie evidence of domicile, and that no further proof was necessary if the court had personal jurisdiction of the defendant. The Supreme Court granted certiorari, but, the husband having procured a Connecticut divorce in the interim, the case was dismissed as moot. One year later, in a case involving a similar statute of the Virgin Islands, the court of appeals relied on Alton to dismiss a divorce suit on the ground that plaintiff had not proved domicile. The Supreme Court affirmed on the ground that Congress had not given the Virgin Islands power to pass such a statute. Granville-Smith v. Granville-Smith, 214 F.2d 820 (3d Cir. 1954) (per curiam), aff'd, 349 U.S. 1 (1955). However, the constitutional question was not answered, and yet remains to be decided.

14. See, e.g., Stimson, Jurisdiction in Divorce Cases: The Unsoundness of the Domiciliary Theory, 42 A.B.A.J. 222 (1956); Sumner, Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes, 9 Vand. L. Rev. 1 (1955).

15. See Wheat v. Wheat, 229 Ark. 842, 318 S.W.2d 793 (1958); David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S.2d 649 (Sup. Ct. 1954).

16. New York will accept jurisdiction where both parties were residents when the offense was committed, or where the parties were married in the state, even though they are not domiciled there at the commencement of the action. N.Y. Dom. Rel. Law § 170.

17. In several Mexican states (e.g., Lower California, Chihuahua, Guerrerro, Morelos, Nuevo Leon, Sonora and Tamaulipas) no bona fide residence or domicile is required for jurisdiction. See Berke, Mexican Divorces, 7 Prac. Law, March, 1961, p. 84, at 85. It is possible to establish a "residence" in some of these states merely by signing a Municipal Register. One who does this becomes a resident only for the limited purpose of obtaining a divorce. Id. at 89. See, e.g., Ley de Divorcio para E.L. y S. de Chihuahua art. 24 (1933), Colleción de Yeyes Mexicanas: Codigo de Procedimientos Civiles para E.L. y S. de Chihuahua 263 (1955).

18. Ley de Divorcio para E.L. y S. de Chihuahua art. 22 (1933), Colleción de Leyes Mexicanas: Codigo de Procedimientos Civiles para E.I. y S. de Chihuahua 263 (1955).

public policy, and divorces may be obtained upon the mutual consent of the parties.[19]

Under civil law procedure there is no examination of witnesses.[20] A case is tried by written depositions and interrogatories, which constitute the record of the case. If the defendant answers the complaint and admits the allegations contained therein, a divorce will be granted, nothing more being required.[21] Thus, a New York domiciliary may acquire a Mexican divorce, dissolving the marital status, and be back in New York within the space of a few hours.

New York has recognized extranational bilateral divorce decrees, although not bound to do so, where the rendering court had proper jurisdiction of the parties, as that term is understood in the foreign country.[22] In *Gould v. Gould*,[23] the New York Court of Appeals upheld a French decree on the basis of comity even though it was decided that the parties were domiciled in New York. The decree did not offend New York's public policy because the ground upon which it was granted was recognized in New York, both parties appeared in the action, and both were bona fide residents of France. The court, however, expressly refused to pass on the question of whether the divorce would have been valid if the parties had not resided in France, or if the ground for divorce had not been recognized in New York.[24]

Leviton v. Leviton[25] was the first case in which a Mexican bilateral decree was upheld on the basis of comity. Both parties appeared personally in the action after procuring residence certificates. The court found the decree valid in all respects, including domicile under Mexican law, even though the entire proceeding transpired within twenty-four hours. In holding that the parties to the decree could not collaterally attack it, the court recognized a Mexican decree in which neither the ground for the action nor the jurisdictional requirements would have been sufficient for a New York decree. The court relied solely upon the case of *Glaser v. Glaser*[26] to support its position that New York's public policy had not been offended. *Glaser* was an action for separation in which defendant

19. Ibid.

20. For a discussion of the Mexican law in divorce proceedings, see Stern, Mexican Divorces—The Mexican Law, 7 Prac. Law., May, 1961, p. 78; Berle, Mexican Divorce Decrees, pt. II, N.Y.L.J., March 24, 1961, p. 4, col. 1; Letter From David Haber to New York Law Journal, N.Y.L.J., April 25, 1961, p. 4, col. 2 (Mexican Divorce Decrees); Letter From Lorenzo J. Roel to New York Law Journal, N.Y.L.J., May 22, 1961, p. 4, col. 3 (Residence Requirements of Mexican Divorce Law); Letter From Luis Rojas de la Torre to New York Law Journal, July 6, 1961, p. 4, col. 2 (Residence Requirements for Mexican Divorce Decrees).

21. Ley de Divorcio para E.L. y S. de Chihuahua art. 23 (1933), Collectión de Leyes Mexicanas: Codigo de Procedimientos Civiles para E.L. y S. de Chihuahua 263 (1955).

22. E.g., Boissevain v. Boissevain, 252 N.Y. 178, 169 N.E. 130 (1929); Gould v. Gould, 235 N.Y. 14, 138 N.E. 490 (1923); Weil v. Weil, 26 N.Y.S.2d 467 (Dom. Rel. Ct. 1941).

23. 235 N.Y. 14, 138 N.E. 490 (1923).

24. Id. at 29-30, 138 N.E. at 494-95.

25. 6 N.Y.S.2d 535 (Sup. Ct.), modified on other grounds, 254 App. Div. 670, 4 N.Y.S.2d 992 (1st Dep't 1938) (memorandum decision).

26. 276 N.Y. 296, 12 N.E.2d 305 (1938).

husband answered by alleging a valid Nevada divorce. The lower court dismissed the complaint on a finding that the husband, at the time of the divorce, was a resident of the state where the divorce was granted and that the wife voluntarily appeared in the action through an attorney. In affirming, the New York Court of Appeals held that under these circumstances, even though the defendant had gone to Nevada for the sole purpose of procuring the divorce, the decree was not offensive to New York's public policy.[27]

In *Matter of Fleischer*[28] a New York court extended recognition to the decree where only the plaintiff was in Mexico and the defendant had appeared through an attorney and consented to the decree. The court, in citing *Leviton*, said: "No reason appears [in this case] for the public policy of our State to differently regard the resort of the parties to a foreign country."[29] The court found that the Mexican court was competent to act by having acquired jurisdiction under its laws, despite the absence of a real domicile.[30]

In both of the preceding cases, one of the parties to the action sought to invalidate the Mexican decree. However, *Mountain v. Mountain*[31] extended the rule of *Leviton* and *Fleischer* to attempts by third parties to attack the decree. The effect was, therefore, to apply the full faith and credit rule of *Johnson v. Muelberger*[32] to a foreign country decree. The holding in *Mountain* is even more surprising in that the plaintiff in the original divorce action never physically appeared in Mexico, but, rather, appeared through an attorney. The defendant, however, did appear in person after the complaint had been served. The validity of such a decree under Mexican law demonstrates that a divorce can be granted by the express submission of the parties to the jurisdiction of the court, and that no other connection between the parties and the state is necessary.

While it has often been held that where one of the parties to a Mexican decree personally appears before the court, and the other party is either present or represented by counsel, the decree will be upheld against any collateral attack, the cases supporting this proposition either follow *Leviton* and *Fleischer* and do not discuss the jurisdictional issue in terms of jurisdiction under New York law,[33] or base their decisions on a theory of estoppel.[34]

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27. Id. at 300, 12 N.E.2d at 306.

28. 192 Misc. 777, 80 N.Y.S.2d 543 (Surr. Ct. 1948).

29. Id. at 782, 80 N.Y.S.2d at 547.

30. Id. at 781-82, 80 N.Y.S.2d at 547. Accord, Drew v. Hobby, 123 F. Supp. 245 (S.D.N.Y. 1954).

31. 109 N.Y.S.2d 828 (Sup. Ct. 1951).

32. 340 U.S. 581 (1951). See note 3 supra.

33. E.g., Heine v. Heine, 231 N.Y.S.2d 239 (Sup. Ct. 1962), aff'd, 19 App. Div. 2d 695, 242 N.Y.S.2d 705 (2d Dep't 1963) (memorandum decision); Weibel v. Weibel, 37 Misc. 2d 162, 234 N.Y.S.2d 298 (Sup. Ct. 1962); Busk v. Busk, 229 N.Y.S.2d 904 (Sup. Ct.), modified mem. on other grounds, 18 App. Div. 2d 700, 236 N.Y.S.2d 336 (2d Dep't 1962); Skolnick v. Skolnick, 24 Misc. 2d 1077, 204 N.Y.S.2d 63 (Sup. Ct. 1960); Millman v. Millman, 27 Misc. 2d 669, 207 N.Y.S.2d 159 (Sup. Ct. 1960).

34. Estoppel prevents a party who has appeared in the action from asserting the

The doctrine of res judicata does not bar inquiry into a foreign country decree where both parties had personally appeared. In ascertaining the effect of a Mexican decree containing a finding of fact as to domicile, a New York court cannot question that finding in terms of Mexican law. It can, however, compare what is commonly regarded as domicile in New York with the standard of the foreign country. This the New York courts have every right to do, and they may reject the foreign court's basis of jurisdiction as being inadequate to grant a divorce and offensive to New York's public policy. There are at least two compelling reasons for New York to re-examine the jurisdictional basis of a foreign country divorce decree: first, there is no guarantee, even where both parties appear, that the defendant will be afforded due process; and second, absent some nexus between the divorce forum and the parties, New York retains its primary interest in the marital status of its domiciliaries.

Jurisdiction of the rendering court must necessarily conform to jurisdiction as it is known generally in the United States. That this is a prerequisite to recognition of an extranational decree is illustrated by an examination of the other types of Mexican decrees which have not been recognized in New York.

"Mail order" decrees, in which neither party establishes a domicile or residence in the divorce forum, or even visits there, are complete nullities from which no rights can arise, and to which comity will not be extended on the ground that at all times Mexico was a complete stranger to the marital *res*.[35] The court in *Caldwell v. Caldwell*,[36] in striking down such a decree, stated: "There is not even the slightest semblance or color of jurisdiction justifying action by a court. The spouses here never submitted themselves to nor invoked the jurisdiction of a court of the foreign nation *as we understand those terms*."[37] Such a decree, in effect, violates New York's policy that a husband and wife cannot contract to alter or dissolve the marriage.[38]

Further, ex parte decrees, in which one party is present in Mexico and the other has neither appeared nor been personally served within the jurisdiction of the divorce forum, will be recognized as a matter of comity only where the plaintiff had been a bona fide domiciliary of the divorce forum.[39] If the divorce forum was not the matrimonial domicile, then the decree has no more validity than the "mail order" type.[40] The same result follows where a bilateral divorce

invalidity of the decree. New York courts have estopped parties to Mexican divorces only where property rights are at stake. Considine v. Rawl, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (Sup. Ct. 1963); Dorn v. Dorn, 202 Misc. 1057, 112 N.Y.S.2d 90 (Sup. Ct. 1952), aff'd, 282 App. Div. 597, 126 N.Y.S.2d 713 (2d Dep't 1953).

35. Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948); Querze v. Querze, 290 N.Y. 13, 47 N.E.2d 423 (1943).

36. 298 N.Y. 146, 81 N.E.2d 60 (1948).

37. Id. at 150, 81 N.E.2d at 62-63. (Emphasis added.)

38. N.Y. Dom. Rel. Law § 51.

39. Imbrioscia v. Quayle, 197 Misc. 1049, 96 N.Y.S.2d 635 (Sup. Ct. 1950), rev'd on other grounds, 278 App. Div. 144, 103 N.Y.S.2d 593 (1st Dep't 1951).

40. Marum v. Marum, 8 App. Div. 2d 975, 190 N.Y.S.2d 812 (2d Dep't 1959) (memorandum decision); Alfaro v. Alfaro, 5 App. Div. 2d 770, 169 N.Y.S.2d 943 (2d Dep't 1958), aff'd

is sought without proper execution of a power of attorney by the nonappearing spouse.[41]

In each of these cases in which a Mexican divorce has been held invalid, either for lack of jurisdiction or because offensive to public policy, the Mexican court had jurisdiction under *its* laws, and the decree was valid within *its* borders. New York chose not to recognize such divorces because they were contrary to New York's notions of what constitutes jurisdiction.

The court in the instant case found that the plaintiff had never signed the Municipal Register of Residence. Therefore, the divorce was the "submission" type under Mexican law,[42] and consequently no better than the "mail order" divorce, since in both cases the parties need not have physically appeared in the jurisdiction. Justice Coleman's conclusions, which are based on broader grounds, certainly cast doubt upon the validity of the Mexican bilateral decree in the absence of domicile or some other connection with that forum. The New York Court of Appeals has never expressed an opinion as to whether such meager contacts between the parties and the divorce forum would be sufficient for recognition.

The present case held that authority to dissolve a marriage rests upon the power of the state over the marriage, and consequently, jurisdiction arises because of a nexus of some permanence between the spouses and the state, which they themselves are powerless to confer upon the rendering court. This case, however, goes beyond existing law in that it seeks to question the jurisdiction of bilateral Mexican decrees, not in terms of the formal requirements of the divorce forum, but in light of New York's concepts of what constitutes jurisdiction.

Whether the court of appeals will follow what appears to be a strong trend in favor of the bilateral Mexican decree is subject to some doubt, since the Mexican courts do not acquire jurisdiction of the parties, as the concept is defined in New York. Moreover, it would be tantamount to permitting the parties to contract to dissolve the marriage.

Installment Sales Financing—Usury—Difference Between Time Price and Cash Price in a Conditional Sales Contract Is Interest and Subject to the Usury Laws.—Plaintiffs ordered a house trailer from defendant seller. On delivery the plaintiffs were presented with a contract in which the difference between the cash price and the time price exceeded the lawful rate of interest. Plaintiffs signed this contract to which there was attached a form for a promis-

mem., 7 N.Y.2d 949, 165 N.E.2d 880, 198 N.Y.S.2d 318 (1960); Ruderman v. Ruderman, 193 Misc. 85, 82 N.Y.S.2d 479 (Sup. Ct. 1948), aff'd mem., 275 App. Div. 834, 89 N.Y.S.2d 894 (1st Dep't 1949).

41. MacPherson v. MacPherson, 1 Misc. 2d 1049, 149 N.Y.S.2d 525 (Sup. Ct. 1956); Molnar v. Molnar, 131 N.Y.S.2d 120 (Sup. Ct.), aff'd mem., 284 App. Div. 948, 135 N.Y.S.2d 623 (1st Dep't 1954).

42. Ley de Divorcio para E.L. y S. de Chihuahua art. 23 (1933), Collectión de Leyes Mexicanas: Codigo de Procedimientos Civiles para E.L. y S. de Chihuahua 263 (1955).

sory note payable to seller at defendant finance company's place of business. In addition, there was a form for assignment of this note to defendant finance company.[1] The plaintiffs brought an action to cancel the note on the ground that it was usurious, and sought to have their payments returned, and to secure full title to the trailer. The lower court granted this relief against both the seller and the finance company. Only the finance company appealed. The Supreme Court of Nebraska affirmed,[2] holding that the difference between the seller's cash price and the time sale price was interest,[3] and that the defense of usury, good against the assignor, was also good against the assignee of the note. *Lloyd v. Gutgsell*, — Neb. —, 124 N.W.2d 198 (1963).

Usury is broadly defined as the charging of an illegal rate of interest for the loan, use, or forbearance of payment of any money, goods or things in action.[4] The holding in the instant case that the difference between a time price and a cash price is in reality a charge for forbearance of payment of the original cash price is not new,[5] but it has generally received little favor in the courts. There are exceptions, however. Where the time sale price was arrived at by the addition of interest to the original cash price with no mention by the parties of the specific time sale price, the transaction has been held usurious.[6] The courts have also upheld the defense of usury where there was an original *contract for cash* which, after a *substantial* period was superseded by another contract which provided for a time price differential.[7] Finally, the same result has been reached where the contract of sale was obviously meant to circumvent the usury laws.[8]

1. This is an indication that the rates were actually fixed by defendant finance company.

2. The court did hold that defendant need not return part of the price awarded to plaintiffs by the lower court, but this was because the price had never in fact been paid.

3. An earlier decision had held that a Nebraska statute, Neb. Rev. Stat. §§ 45-305 to -312 (1960), which allowed the time price differential on automobiles to be as much as 15% and on other merchandise to reach a maximum of 12% in given instances, was void since it applied only to retail sales and excluded wholesale transactions. Thus Nebraska's general usury law applied. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

4. See, e.g., N.Y. Gen. Bus. Law § 371.73.

5. See Universal Credit Co. v. Lowell, 166 Misc. 15, 2 N.Y.S.2d 743 (Rochester City Ct. 1938), in which the court asked, "why should [the dealer] . . . be allowed to charge [a usurious sum] . . . for the forbearance of . . . the cash purchase price secured by a conditional contract of sale, under the guise of calling it a 'differential'? Does calling it 'differential' instead of interest save it from illegality? May interest masquerade as a 'differential' and so escape the penalty?" Id. at 22, 2 N.Y.S.2d at 750.

6. See Curtis v. Securities Acceptance Corp., 166 Neb. 815, 91 N.W.2d 19 (1958), in which the court gave great weight to the fact that the plaintiff was never actually quoted a time sale price.

7. Bonetti v. United Beauty Supply, Inc., 31 N.Y.S.2d 463 (Sup. Ct. 1941). But see Failing v. National Bond & Inv. Corp., 12 N.Y.S.2d 260 (Monroe County Ct. 1938), aff'd mem., 258 App. Div. 778, 14 N.Y.S.2d 1011 (4th Dep't 1939), in which interest was added as a matter of form to the contract price as theretofore agreed on by the parties.

8. Quackenbos v. Sayer, 62 N.Y. 344 (1875); People v. Silverberg, 33 N.Y. Crim. 46, 160 N.Y. Supp. 727 (Ct. Spec. Sess. 1915) (defendant, when he was asked for a loan of

With these exceptions, a substantial majority continues to hold this differential not to be subject to the usury laws. Nevertheless, since 1946 and the ensuing boom of credit buying,[9] an increasing minority has held that this time price differential is in fact interest.[10] Common sense would seem to dictate that the majority position is untenable. In the present case the court emphasized that when one looks through the form to the facts, he must reach the conclusion that the intent in these transactions is to loan money.[11] Particularly is this so where, as here, the finance company actually appeared to set the rates the seller was to charge the buyer.[12] What is the difference between a time price differential and a case in which a buyer borrows money outright from a seller at usurious rates and uses the borrowed money in a separate transaction to buy goods from the same vendor?[13] The conclusion must be that the intent in both cases is to loan money.

The rationale behind the majority rule is variously expressed by one of three basic theories: (1) the "necessity" theory, which embodies the idea that usuary laws are designed to protect only those in desperate need of money and not those who are merely seeking to purchase goods and can voluntarily choose whether or not to buy;[14] (2) the "right of contract" theory, which revolves about the concept that a merchant has a right to make contracts for the sale of his goods at any price he wishes, including the right to raise the actual sale price when the goods are sold on time;[15] and (3) the "reimbursement" theory, the point of which is that a merchant who will have his money tied up over

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$100 told the applicant he only had a diamond ring on which a time price of $295 was agreed; the borrower immediately pawned the ring, the actual value of which was only $180; the sale was held usurious).

9. See Comment, 45 Marq. L. Rev. 555, 557 (1962).

10. See Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); Associates Inv. Co. v. Baker, 221 S.W.2d 363 (Tex. Civ. App. 1949); Seebold v. Eustermann, 216 Minn. 566, 13 N.W.2d 739 (1944). See also Md. Ann. Code art. 83, § 132 (1957), and N.Y. Pers. Prop. Law §§ 303, 404, both of which limit the time price differential but do not call it interest within the scope of the states' general usury laws.

11. Lloyd v. Gutgsell, —— Neb. ——, 124 N.W.2d 198, 204 (1963).

12. Id. at 202.

13. Universal Credit Co. v. Lowell, 166 Misc. 15, 2 N.Y.S.2d 743 (Rochester City Ct. 1938).

14. See General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S.W. 425 (Kansas City Ct. App. 1924). The court there commented, "The statute against usury is striking at and forbidding the exaction or receipt of more than a specified legal rate for the hire of money . . . and a purchaser is not like the needy borrower, a victim of a rapacious lender, since he can refrain from the purchase if he does not choose to pay the price . . . ." Id. at 78, 262 S.W. at 428. (Emphasis omitted.)

15. See Archer Motor Co. v. Relin, 255 App. Div. 333, 8 N.Y.S.2d 469 (4th Dep't 1938). The issue was whether a $10 carrying charge over and above the 6% interest constituted interest. "Had plaintiff said to defendant: 'My price is one hundred and thirty-five dollars, but I will throw off ten dollars for cash,' no one would have thought of usury." Id. at 334-35, 8 N.Y.S.2d at 471.

a long period of time should be allowed the same profit on the money as if he had been able to use it to restock his inventory and sell more goods.[16]

None of these theories is sufficiently dispositive of the issue. As for the "necessity" theory, Judge Brower, after pointing out in his concurring opinion in the instant case that present-day credit buying is far more widespread than it was only a few years ago, commented that

> the person without adequate funds to buy an automobile or household furniture or appliances, radios . . . or many other items for cash who must have one for his business or family is in about the same position as far as being able to walk away from the dealer and go elsewhere as a debtor is to go from one finance company to another.[17]

The "right of contract" theory ignores the possible usurious intent of the parties and thus emphasizes form over substance.[18] Surely where both a cash price and time price are mentioned in the contract and the time price is formally put down as the selling price, the intent of the parties to charge interest is clear.[19] In fact, the courts may find the same intent even where the cash price is not actually mentioned in the contract, for parol evidence is admissible to show the usurious nature of a transaction.[20] The "reimbursement" theory is reasonable, but no longer applicable, for few, if any, dealers actually collect the notes themselves.[21] The general practice is for the dealer, upon receipt of the buyer's promissory note, to assign it to a financing agency or bank which gives him cash with which he can replenish his inventory.[22] Except in scattered instances where dealers have been known to charge absurd rates,[23] they receive in exchange for the notes only the original cash price for the merchandise.[24] This is all the dealer wants; the finance companies and banks actually set the rates,[25] which in general are high due to the large risk involved.

16. See Comment, 24 Mo. L. Rev. 225, 233 (1959).

17. —— Neb. ——, 124 N.W.2d at 205.

18. General Motors Acceptance Corp. v. Weinrich, 218 Mo. App. 68, 262 S.W. 425 (1924). "In the investigation of a transaction to see whether usury has been exacted, the law intends that the search shall penetrate, through form, device or makeshift, to the very substance." Id. at 77, 262 S.W. at 428. See also cases cited note 5 supra.

19. See cases cited note 10 supra; 57 Mich. L. Rev. 298 (1958).

20. National Bond & Inv. Co. v. Atkinson, 254 S.W.2d 885, 887 (Tex. Civ. App. 1952); Seebold v. Eustermann, 216 Minn. 566, 575, 13 N.W.2d 739, 744 (1944).

21. See Comment, 71 Harv. L. Rev. 1143, 1146 (1958).

22. Ibid.

23. "In one case, a purchaser made a $250 down payment on an automobile selling for $1100, leaving an $850 balance due, signed a note in blank, and later learned that he was to pay $53.61 a month for twenty-four months." Comment, 24 Mo. L. Rev. 225, 232 (1959).

24. See 71 Harv. L. Rev. 1143, 1146 (1958).

25. A few cases have held that the finance companies and banks, by setting the rates the dealer may charge, are actually making a usurious loan to the buyer. See Daniel v. First Nat'l Bank, 227 F.2d 353 (5th Cir. 1955); Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952); see also Mossler Acceptance Co. v. McNeal, 252

Thus on first impression it seems strange that the present court did not at least suggest that the legislature place a limit on the rates at which banks and finance companies may discount these notes. However, the court held only that where the original transaction was usurious, the defense of usury exists against an assignee of the note.[26] It may be argued that the banks and finance companies will continue to charge the same rates[27] as in the past and that the dealers will be the real losers. Or it may be that the banks and finance companies will reduce their rates to what the dealers are permitted to charge (which in fact has happened in general), but that they then might take far fewer notes at the reduced terms, the result being that less merchandise will be bought and that they, the dealers, and the economy in general will suffer. Thus even if the finance companies do not exploit the seller by maintaining high rates, the outlook might seem grim. And yet neither of these results has actually occurred. It is interesting to note that an Arkansas decision[28] similar to the present case was actually followed by a significant *increase* in the amount of such "automobile paper" held by the banks of that state.[29] This is surprising since the decrease in rates was substantial. If this differential is to be called simple interest in Nebraska, the decrease in rates would be comparable.

S.W.2d 593 (Tex. Civ. App. 1952) (mere knowledge of the time price differential by the finance company was sufficient). Nevertheless, the majority of courts continue to hold that the banks and finance companies are merely buying commercial paper and may pay whatever price for it they wish. See, e.g., Thomas v. Knickerbocker Operating Co., 202 Misc. 286, 288, 108 N.Y.S.2d 234, 236 (Sup. Ct. 1951) ("Clearly, if the instrument was valid in the hands of the original party, its validity could not be destroyed by its subsequent assignment to another."); American Loan Plan v. Frazell, 135 Neb. 718, 283 N.W. 836 (1939); Commercial Credit Co. v. Tarwater, 215 Ala. 123, 110 So. 39, 41 (1926).

26. —— Neb. ——, 124 N.W.2d at 204.

27. In Nebraska the purchasing of a note at a discount beyond the legal rate of interest does not render the transaction usurious. American Loan Plan v. Frazell, 135 Neb. 718, 722, 283 N.W. 836, 838 (1939). See cases cited note 25 supra. The discounting transaction between the seller and finance company is generally not affected by these decisions.

28. Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952).

29. The court in Hare, supra note 28, held that when the bank or finance company is in any way close to the transaction between seller and buyer, then in reality the finance company is making a loan to the buyer. Thus, banks and finance companies were restricted to the legal limit in these transactions; yet, in the four years following the Hare decision retail automobile paper held by national banks in Arkansas increased from $9,662,000 to $19,344,000. Comment, 71 Harv. L. Rev. 1143, 1149-50 n.38 (1958). This is particularly signficant in the light of the fact that while commercial banks throughout the United States increased the percentage of automobile paper loans from 30.5% to 33.8% of their total loans between 1952 and 1955 (1955 FDIC Ann. Rep. at 30), the total percentage of assets which banks had tied up in loans increased only 5.3% for the same period. 1955 FDIC Ann. Rep. at 29. In the four years after Daniel v. First Nat'l Bank, 227 F.2d 353 (5th Cir. 1955), a decision similar to Hare, retail automobile installment paper held by national banks in the Fifth Circuit similarly increased. This phenomenon has occurred on numerous occasions. See 71 Harv. L. Rev. 1143, 1149-50 (1958).

The rates will be figured on the amount of the debt outstanding instead of on the original debt. The present decision followed an earlier Nebraska decision,[30] which rendered void a time sale law which limited rather liberally the time price differential on the basis of the total debt. Nevertheless, experience in Arkansas has shown that with the reduction of the time sale price of merchandise, there were many more consumers ready to buy. From this greater number of willing buyers the finance companies and banks were able to find a proportionately greater number of people who were good credit risks even at the lower rates. This resulted in competition among banks and credit companies and they were forced to reduce their rates, at least to the rate the seller may charge the buyer. Thus, the argument that banks and finance companies will maintain high rates at the expense of the seller has proved groundless.

Another problem raised by the recent Nebraska cases, however, is difficult of solution. In 1959 Nebraska passed a statute permitting a time price differential of not more than fifteen per cent on auto sales and not more than twelve per cent on sales of other merchandise. Nevertheless, if this differential is to be called interest, then Nebraska's usury statutes will apply.[31] Is it possible that the courts will construe this decision retroactively and hold that all credit buyers from the time the statute was enacted until it was declared void are entitled both to their goods and to a return of the price? The deleterious effect on the economic structure of Nebraska which a retroactive application of this decision would have indicates that the better course would be to apply the holding prospectively only.[32] If this is done, few will be hurt by the instant decision. It is to be expected that the banks will buy more commercial paper at less risk; that the dealers will sell more merchandise and receive the same cash price they have always received; and that consumers will be able to purchase merchandise at lower cost. The entire economy might well be stimulated. Besides the irresponsible dealer who has been charging such high rates that he actually receives more for the notes than the original cash price

30. Elder v. Doerr, 175 Neb. 483, 122 N.W.2d 528 (1963).

31. Ibid.

32. Test cases now are pending. It is true that this would be contrary to the general proposition that courts do not make law; nevertheless, courts in the past have sacrificed this principle for practicality, and it appears that such a remedy would be possible in Nebraska. Judge Boslaugh, in his concurring opinion in the instant case, pointed out: "[I]f the change is to be made by judicial decision, then the decision should operate prospectively only." —— Neb. at ——, 124 N.W.2d at 205. See also Judge Brower's concurring opinion, Id. at —, 124 N.W.2d at 206. The same method was used in Hare v. General Contract Purchase Corp., 220 Ark. 601, 249 S.W.2d 973 (1952), in which the court commented, "The doctrine of *stare decisis* prevents us from overruling our previous holdings with a retroactive effect . . . . But the constitutional mandate against usury no longer can be chiseled away by opinions gradually following the previous holdings more and more away from the spirit of the Constitution." Id. at 609, 249 S.W.2d at 978. (Emphasis omitted.) See also cases holding that a claim of this nature, once vested, may not constitutionally be taken away by the Legislature by mean of a retroactive law. Messersmith v. Reilly,

of the merchandise,[33] and the financially irresponsible buyer who is likely to abscond with the merchandise and on whom banks and finance companies will be unwilling to take a risk at the lower rates, the only group which may suffer as a result of this decision is composed of small businesses with great potential but little capital. Nevertheless, this court in facing the fact that "a rose is still a rose,"[34] appears to have benefited many more than it has hurt.

Labor Law—Dairy Company's Decision To Change Its Distribution Methods for Economic Reasons Not a Required Subject of Collective Bargaining.—Respondent, a wholesale processor and distributor of milk, utilized both its own employees and independent contractors in its distribution system. The employees were represented by the Independent Wholesale Dairy Products Salesmen's Association which had negotiated a contract with respondent, effective September 1, 1959, through September 1, 1962. The Association, when negotiating the contract, attempted but failed to include a clause which would have prevented respondent from converting its entire distribution staff to independent contractors. During the contract period, respondent sought to reduce distribution costs in order to compete favorably with other wholesalers in its market. Discussions were conducted with the Association, but they failed to provide a method which would have successfully reduced delivery costs. In February 1960, respondent, without having previously mentioned the possibility, announced a plan whereby its entire distribution was to be handled by independent contractors. As a result, the employees were discharged with one week's severance pay and all accumulated vacation pay. The Association filed a complaint with the National Labor Relations Board. The Trial Examiner found that respondent's failure to submit its decision to change distribution methods to collective bargaining violated Sections 8(a)(5) and (1),[1] 8(d),[2] and 8(a)(3) and (1)[3] of the National Labor Relations Act. The Board did

70 N.D. 638, 296 N.W. 920 (1941); Williar v. Baltimore Butchers' Loan & Annuity Ass'n, 45 Md. 546 (1876).

33. See Comment, supra note 16.

34. ——Neb. ——, 124 N.W.2d at 204.

1. National Labor Relations Act § 8(a)(5), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(5) (1958): "(a) It shall be an unfair labor practice for an employer— . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." Section 9(a) provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

2. National Labor Relations Act § 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d) (1958).

3. National Labor Relations Act § 8(a)(1), (3), 61 Stat. 140 (1947), 29 U.S.C. § 158 (a)(1), (3) (1958): "(a) It shall be an unfair labor practice for an employer—(1) to inter-

not consider sections 8(d) or 8(a)(3) and (1),[4] but, although absolving the respondent of anti-union motivations and illegal intent, otherwise adopted the Trial Examiner's findings.[5] In the enforcement proceeding, the Court of Appeals for the Eighth Circuit modified the Board's holding and held that respondent's decision to change its distribution system when motivated by economic considerations alone was not a required subject of collective bargaining under section 8(a)(5).[6] The court, however, required respondent to bargain with the Association as to the treatment of the discharged employees. *NLRB v. Adams Dairy, Inc.*, 322 F.2d 553 (8th Cir. 1963).

In reaching its decision, the instant court relied heavily on the language and rationale of *NLRB v. Erie Resistor Corp.*[7] There the court, despite the absence of a finding of specific subjective intent to "encourage or discourage membership in any labor organization,"[8] held that a super-seniority plan for strike-breakers and employees who returned to work during a strike was an unfair labor practice.[9] It concluded that "specific evidence of such subjective [anti-union] intent" is not always required.[10] This intent, although necessary for a violation,[11] may be

> founded upon the inherently discriminatory or destructive nature of the conduct itself. . . . [T]he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends . . . . Nevertheless, his conduct *does* speak for itself . . . . [I]t carries with it unavoidable consequences which the employer not only foresaw but . . . must have intended.[12]

From this the instant court concluded that some evidence of illegal intent was a requisite for an unfair labor practice.[13] It reasoned that, since there was no evidence of illegal subjective intent by the respondent, and the distribution of its products through independent contractors was not inherently discriminatory, "the Board, by ignoring intent, motivation and natural conse-

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fere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

4. Adams Dairy, Inc., 137 N.L.R.B. 815, 816 (1962).

5. Ibid.

6. NLRB v. Adams Dairy, Inc., 322 F.2d 553, 562-63 (8th Cir. 1963).

7. 373 U.S. 221 (1963).

8. National Labor Relations Act § 8(a)(3), 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958).

9. 373 U.S. at 231-32.

10. Id. at 227.

11. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), and Associated Press v. NLRB, 301 U.S. 103 (1937) (discharge based on anti-union motivation was an unfair labor practice); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (refusal to rehire striking employees was an unfair labor practice because of anti-union animus); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) (encouragement of union membership an unfair labor practice because inherently discriminatory).

12. 373 U.S. at 228.

13. 322 F.2d at 558.

quences . . . [failed to apply] the proper standard in determining the 'unfairness' of the respondent's decision . . . ."[14] The court in the instant case concluded that "the Board . . . was not free to completely ignore the question of intent and declare an act as an unfair labor practice without first finding some illegal motivation or intent or discriminatory result . . . ."[15]

Perhaps the best illustrations of the conflict between the Board's and court's approaches to section 8(a)(5) violations involving an employer's decision to subcontract work may be found in *NLRB v. Brown-Dunkin Co.*[16] and *NLRB v. Houston Chronicle Publishing Co.*[17] In the former, which represents the rationale of the Board, the court found the employer guilty of a violation of section 8(a)(5), since it did not afford the union a reasonable effort to bargain concerning the decision to subcontract work.[18] The court stated:

[A] reasonable notice and a chance to bargain must be afforded before an employer enters into a contract affecting the hire or tenure of its Union workers' employment. This is so because "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."[19]

In the latter case, the court failed to find a violation, stating:

In our opinion, their [the employees] services were validly terminated when the respondent, in the exercise of its business judgment, instituted the independent contractor system of distribution.[20]

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14. Ibid.

15. Id. at 559.

16. 287 F.2d 17 (10th Cir. 1961). Three of Brown-Dunkin's employees, operating engineers, had joined a union. Subsequently, Brown-Dunkin contracted with an operating-management firm whereby that firm would take over the employment of the engineers and their duties. Discussions were also held concerning the operating-management firm's assuming the employment and duties of Brown-Dunkin's janitors and maids. However, nothing was decided. The janitors and maids then voted the Teamsters Union in as its bargaining representative, in accordance with an election order issued by the NLRB. Brown-Dunkin proceeded to subcontract the work of these employees to the operating-management firm without discussing the decision to do so with the Teamsters. The decision to subcontract resulted in increased costs for Brown-Dunkin.

17. 211 F.2d 848 (5th Cir. 1954). The Houston Chronicle had distributed its newspapers through its employees in its City Circulation Department. Before the employees of this department became associated with any union, the Chronicle had seriously considered changing to the independent contractor method of distribution. When the employees learned of the possible changeover, they immediately joined a union. Shortly afterward, the Chronicle did change to the independent contractor method. Fifty-nine employees were fired and forty-nine were retained as the independent contractors. The union demanded that the Chronicle bargain with it concerning the change. The Chronicle refused.

18. 287 F.2d at 20.

19. Ibid. The court cited May Dep't Stores Co. v. NLRB, 326 U.S. 376, 385 (1945).

20. 211 F.2d at 855.

It should be noted that the court found no violation of section 8(a)(5), even though the employer's decision was accelerated because of the anticipated increased costs resulting from the advent of the union.

Another illustration of the conflict is *NLRB v. Rapid Bindery, Inc.*,[21] which concerned an employer's decision to move his operations from one locale to another. The move had economic justifications, but it resulted in the discharge of employees. The court stated that "the decision to move was not a required subject of collective bargaining, as it was clearly within the realm of managerial discretion."[22] The court nonetheless upheld the Board's finding of a section 8(a)(5) violation. It stated that once the decision to move had been made, the employer should have informed the union in order to enable negotiation of an agreement regarding the treatment of employees "whose conditions of employment would be radically changed by the move."[23] The same rationale is found in *NLRB v. Servette, Inc.*,[24] and *Jays Foods, Inc. v. NLRB*,[25] where the Courts of Appeals for the Ninth and Seventh Circuits found that the employer's decision motivated by economic considerations was not a subject of collective bargaining.[26]

On the other hand, the Court of Appeals for the Fifth Circuit, in *Town & Country Mfg. Co. v. NLRB*,[27] found a violation where an employer terminated its trucking operation and utilized an independent contractor to perform that phase of its operations. The court found that the change was discriminatorily motivated. The court did say, however, that even if there had not been a finding of illegal intent,

> the company . . . must in good faith bargain with the union . . . upon the question whether the company should not return to its former method of doing its hauling with its own employees.[28]

Again, in *East Bay Union of Machinists v. NLRB* (the *Fibreboard Paper*

21. 293 F.2d 170 (2d Cir. 1961).

22. Id. at 176.

23. Ibid.

24. 313 F.2d 67 (9th Cir. 1962). See also Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).

25. 292 F.2d 317 (7th Cir. 1961).

26. In NLRB v. Servette, Inc., the court, in referring to alleged violations of section 8(a)(5), said: "There is no argument but what a company in the position of Respondent here may change its business methods so long as its change in operation is not motivated by the illegal intention to avoid its obligations under the Act." 313 F.2d at 70. In Jays Foods, Inc. v. NLRB, where the employer discontinued its automotive repair and maintenance shop, discharged the employees who worked in it, and subcontracted out the work, the court said: "[I]f . . . [an employer] makes a change in operation because of reasonably anticipated increased costs . . . his action does not constitute discrimination within the provisions of section 8(a)(1), (3) and (5) of the Act." 292 F.2d at 320.

27. 316 F.2d 846 (5th Cir. 1963).

28. Id. at 847 (dictum).

Prods. Corp. case),[29] the Court of Appeals for the District of Columbia stated a rule consistent with *Brown-Dunkin* and *Town & Country*, and directly contrary to the rationale of the instant case. There the employer, solely for economic reasons, farmed out its maintenance work thereby terminating the employment of its "former" employees who had performed that function. The court held that a decision to subcontract work was a required subject of collective bargaining since it pertained to the tenure of conditions of employment.[30] It stated:

> It is not necessary to find an anti-union animus as a predicate for a conclusion that the employer violated Section 8(a)(5) which commands good faith bargaining on wages, hours and terms and conditions of employment. . . . It is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly.[31]

It would appear from this line of cases that the decision to subcontract work, even if done for economic reasons, does affect the tenure of employment of the employees. The reasoning is that section 8(a)(5) requires an employer to bargain collectively with the union "in respect to rates of pay, wages, hours of employment, or other conditions of employment";[32] and that since the statutory language is sufficiently broad to include tenure of employment, the decision to subcontract is a required subject of collective bargaining.[33]

The court in the present case found this reasoning unpersuasive.[34] It concluded that the element of intent is still a required element of an unfair labor practice. This contention is based on *Erie Resistor*.[35]

The instant case arrives at the most desirable solution. An employer's obligations run not only to employees, but also to investors and other interested parties. In addition, it is the employer alone who shoulders the responsibility of conducting a profitable operation. It would appear inequitable, therefore, to require negotiation prior to a purely managerial decision free of illegal intent and fostered by economic considerations, simply because it would have an ultimate effect on employees. This reasoning would impose an undue burden on management, particularly since the instant holding would require negotiation covering the future status of affected employees after the decision. The employee is further protected, for the decision to subcontract is open to direct attack should the union suspect an illegal managerial intent.

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29. 322 F.2d 411 (D.C. Cir. 1963).

30. Id. at 415.

31. Id. at 414.

32. See statutes cited note 1 supra.

33. 322 F.2d at 414. In further support of such a conclusion, the NLRB has relied on the Supreme Court holding in Order of R.R. Telegraphers v. Chicago & North Western Ry. Co., 362 U.S. 330 (1960), that the railroad was required to bargain with the union about the decision to eliminate some completely unnecessary jobs under the Railway Labor Act.

34. 322 F.2d at 562, especially n.1.

35. Id. at 562.

Labor Law—Employer's Right To Permanently Close Manufacturing Plant Upheld.—Darlington Manufacturing Company, a South Carolina corporation engaged in the manufacture of cotton goods, was substantially owned by the Milliken family.[1] In 1956, the Textile Workers Union of America, AFL-CIO, began unionization activities, which culminated on September 6 with the election of that union as the collective bargaining representative of the employees. The company reacted adversely to the threatened election but continued to replace machinery and improve facilities. On September 7, the president called a board of directors meeting for September 12. At that meeting he recommended that the plant be closed, and the board decided to liquidate the corporation. Stockholder approval was given on October 17, production was discontinued on November 24, and the plant and machinery were sold on December 12 and 13. The corporation, during this time, did not comply with union demands for the production of wage information, and refused to meet with the union on September 12 on the grounds that the union was not certified and a protest of the election had not been decided. The National Labor Relations Board found that Darlington's actions were primarily motivated by the employees' union activities[2] and therefore violative of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act.[3] In a three-to-two decision the Court of Appeals for the Fourth Circuit reversed holding it to be the

1. "When Darlington was liquidated in 1956 . . . there were outstanding 150,000 shares of common stock owned as follows:

"Deering Milliken & Co., Inc.	41.4%
"Cotwool Manufacturing Corp.	18.3
"Rodger Milliken and members of his immediate family	6.4
"Directors and employees of Deering Milliken & Co.	2.9
"Outsiders or non-Milliken family or interests (about 100 stockholders living in South Carolina, 50 in New York, and more than 50 scattered over the United States)	31.0
	100.0%"

Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 683 (4th Cir. 1963). A majority of the stock of Deering Milliken & Co. was owned by the Milliken family. Rodger Milliken was president both of Deering Milliken and of Darlington, and the majority of both boards of directors were members of the Milliken family.

2. Darlington Mfg. Co., 139 N.L.R.B. 241 (1962).

3. 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1958), as amended, 29 U.S.C. § 158(a)(3) (Supp. IV, 1963): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . . (5) to refuse to bargain collectively with the representatives of his employees . . . ." These sections will hereinafter be referred to collectively as section 8.

The applicable part of section 7 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 . . . ." 61 Stat. 140 (1947), 29 U.S.C. § 157 (1958).

absolute prerogative of an employer to cease business permanently or to discontinue it in part without incurring a penalty under the act. *Darlington Mfg. Co. v. NLRB*, 325 F.2d 682 (4th Cir. 1963).

The original section 8(3) of the act[4] was initially applied by the Board to compel an employer to reinstate a striking employee and to reimburse him for wages lost as a result of the employer's refusal to do so.[5] As early as 1937, the Supreme Court delineated the limits of the power conferred upon the Board by the statute: "[T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than . . . intimidation and coercion."[6]

In 1940 the Court of Appeals for the Third Circuit refused to enforce an order of the Board[7] which sought to compel the reemployment of a striker laid off as a result of a cutback in production. Reasoning that reinstatement may only be required where the discharge was for purely discriminatory reasons, the court held that an employer's "motive in ceasing production or decreasing it is not open to scrutiny and is impertinent to any issue into which the Labor Board is entitled to inquire."[8]

Subsequently, however, two court of appeals decisions[9] upheld rulings of the Board that an employer's closing of a department of his industry violated section 8 by discriminating with respect to tenure in order to discourage labor union membership, and by refusing to bargain. In enforcing the Board's order requiring resumption of the department and compelling reinstatement of employees, the courts refused to disturb the findings of the Board as supported by "substantial evidence,"[10] and enforced its remedies expressly provided for

4. 49 Stat. 452 (1935). This, the forerunner of section 8(a)(3), read as follows: "It shall be an unfair labor practice for an employer— . . . (3) by unfair discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor union . . . ."

5. Black Diamond S.S. Corp., 3 N.L.R.B. 84 (1937), aff'd, 94 F.2d 875 (2d Cir.), cert. denied, 304 U.S. 579 (1938); Alabama Mills Inc., 2 N.L.R.B. 20 (1936); Rollway Bearing Co., 1 N.L.R.B. 651 (1936); Mackay Radio & Tel. Co., 1 N.L.R.B. 201 (1936), aff'd, 304 U.S. 333 (1938).

6. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1937).

7. Union Drawn Steel Co., 10 N.L.R.B. 868 (1938).

8. Union Drawn Steel Co. v. NLRB, 109 F.2d 587, 593 (3d Cir. 1940).

9. In NLRB v. Cape County Milling Co., 140 F.2d 543 (8th Cir. 1944), the employer discontinued his trucking operations. The Board found that the shutdown was a temporary one for the purpose of discouraging unionization. In Williams Motor Co. v. NLRB, 128 F.2d 960 (8th Cir. 1942), the Board found that the employer had closed a department because of the union activities of his men.

10. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951). "The Board's findings . . . must . . . be set aside when the record . . . clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." Id. at 490. This involves an interpretation of the National Labor Relations Act § 10(e), added by 61 Stat. 148 (1947), 29 U.S.C. § 160(e) (1958): "The findings of the Board with respect

under Section 10(c) of the NLRA.[11]

In the cases that have followed, the "substantial evidence test," a criterion used in reviewing all Board orders, has been applied to judge the validity of orders requiring employers who closed plants or departments in violation of section 8 to reimburse employees for lost pay and to reinstate them to their former positions.[12] The courts have not hesitated, however, to refuse enforcement of orders when they felt that the evidence as a whole did not substantially justify a finding that the employer had decided to shut down primarily because of anti-union bias.[13] In *NLRB v. Houston Chronicle Publishing Co.*,[14] the court refused to give effect to a Board order requiring the reestablishment of a company's distribution system. In reaching its decision, the court considered the facts that the employer had been planning to eliminate the system prior to the election of the union bargaining representative and that organization of the employees was begun as a move to prevent the elimination. It was held, however, that "when the Board could as reasonably infer a proper motive as an unlawful one, substantial evidence has not proved the [employer] . . . to be guilty of an unfair labor practice."[15]

Subsequent cases have continued to assert the proposition that the impact of unionization is a valid consideration for an employer who decides to close part of his business.[16] Some courts have gone even further in support of the

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to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."

11. 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1958). "[The Board may] take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . ." There is a significant problem presented by the assessment of penalties under this statute. Query: Should reimbursement be coercive in nature, i.e., until the employer rehires or equivalent employment is found, or should it be compensatory, i.e., aimed at reimbursing the employee for his losses over a reasonable period of time during which he would be able to seek employment.

12. NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); NLRB v. Preston Feed Corp., 309 F.2d 346 (4th Cir. 1962); NLRB v. Winchester Electronics, Inc., 295 F.2d 288 (2d Cir. 1961); NLRB v. Missouri Transit Co., 250 F.2d 261 (8th Cir. 1957); NLRB v. Wallick, 198 F.2d 477 (3d Cir. 1952).

13. NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. United States Air Conditioning Corp., 302 F.2d 280 (1st Cir. 1962); NLRB v. Rapid Bindery, Inc., 293 F.2d 170 (2d Cir. 1961); Jays Foods, Inc. v. NLRB, 292 F.2d 317 (7th Cir. 1961); NLRB v. R. C. Mahon Co., 269 F.2d 44 (6th Cir. 1959); NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954); NLRB v. Houston Chronicle Publishing Co., 211 F.2d 848 (5th Cir. 1954).

14. 211 F.2d 848 (5th Cir. 1954).

15. Id. at 854.

16. See NLRB v. Rapid Bindery, Inc., 293 F.2d 170, 175 (2d Cir. 1961): "The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operations"; and Jays Foods, Inc., v. NLRB, 292 F.2d 317, 320 (7th Cir. 1961): "[I]f [an employer] . . . makes a change in operation because of reasonably anticipated increased costs, regardless of whether they

contention that an employer may, under similar circumstances, cease plant operations *in toto* without violating section 8, despite the fact that unionization was a contributing motivation.[17] A concise statement of this position can be found in dictum as early as 1948:

> Of course, if [the employer] . . . has, in good faith, and not only pretendedly gone out of business, this court will not hold it in contempt for not reinstating [its former employees]. . . . The law does not, the Board can not . . . require that an employer stay in business merely in order to give employment.[18]

This proposition was applied in *NLRB v. New Madrid Mfg. Co.*,[19] where an employer closed a branch plant and sold his machinery to the manager, who subsequently opened the same type of business in the same plant. The court, refusing to enforce the Board's order compelling reinstatement of the former employees, concluded that the sale was a valid discontinuance of business and stated:

> [N]one of this can be taken to mean that an employer does not have the absolute right, at all times, to permanently close and go out of business . . . for whatever reason he may choose, whether union animosity or anything else, and without his being thereby left subject to remedial liability under the Labor Management Relations Act for such unfair labor practices as he may have committed [by chance]. . . .[20]

The same principle was again applied in *NLRB v. New England Web, Inc.*,[21] when an employer closed his plant after the advent of a union. He had been in financial difficulty because of the poor quality of his product and had attempted to correct this by converting from piece work to an hourly wage. Disagreement over the change itself and over the wage scale proposed under the system prompted his employees to organize and seek the assistance of a labor union. At the first negotiation meeting between the corporation and the newly constituted bargaining agent, an officer of the corporation informed the employees that the corporation had lost several of its customers and was therefore going into liquidation. The court took into consideration the facts that there had been no prior union hostility and that there was economic justification for the cessation of the business, and held that a consideration of the impact of the union was not violative of the National Labor Relations Act. The court had no doubt, however, that

> a businessman still retains the untrammeled prerogative to close his enterprise when

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are caused by or contributed to by the advent of a union or by some other factor, his action does not constitute discrimination within the provisions of Section 8(a)(1), (3) and (5) . . . ."

17. NLRB v. New England Web, Inc., 309 F.2d 696 (1st Cir. 1962); NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954); NLRB v. Caroline Mills, Inc., 167 F.2d 212 (5th Cir. 1948); NLRB v. Tupelo Garment Co., 122 F.2d 603 (5th Cir. 1941).

18. NLRB v. Caroline Mills, 167 F.2d at 214 (dictum).

19. 215 F.2d 908 (8th Cir. 1954).

20. Id. at 914

21. 309 F.2d 696 (1st Cir. 1962).

in the exercise of a legitimate and justified business judgment he concludes that such a step is either economically desirable or . . . necessary. This prerogative exists quite apart from whether or not there is a union on the scene.[22]

Adherence by the fourth circuit to the same principle was made clear in *NLRB v. Preston Feed Corp.*[23] Although the court upheld a Board finding that the premature closing of a trucking department constituted an unfair labor practice under section 8, it went on to qualify its decision:

[W]e wish to make it clear that . . . the order of the Board shall not be taken to deny the company the right to abandon the trucking operations at any time in the future if it deems best for business reasons to do so and is not impelled by the intent to deny to its employees the rights conferred by the statute.[24]

One year later the instant case afforded the same court an opportunity to clarify its position. Darlington Manufacturing Company closed its plant and liquidated its assets following the election of the Textile Workers as bargaining agent for its employees. Although "the Board acknowledged, as the Trial Examiner had found, that there were economic considerations sufficient in themselves to support the decision . . . ,"[25] the Board concluded that the decision to liquidate was based upon the union's election victory. The court chose not to pursue the question of economic justification but declared, "To go out of business in toto, or to discontinue it in part, permanently at any time, we think was Darlington's absolute prerogative."[26]

This conclusion of the court is well supported by past decisions.[27] The fact that there existed economic justification as found by the Board and the trial examiner supports the court's decision that although Darlington's action was partially motivated by the advent of the union, it was a reasonable exercise of business discretion and therefore not a violation of section 8.[28]

Assuming, *arguendo*, that Darlington's conduct did violate section 8 as both the Board and the dissenters found, the question remains whether Darlington and Deering Milliken, its parent corporation,[29] should be held jointly liable as a single employer. The single-employer theory was originally advanced in *NLRB v. Pennsylvania Greyhound Lines, Inc.*,[30] where the Supreme Court found a corporation guilty of an unfair labor practice by virtue of its financial support of the union of its "affiliate" corporation. Subsequent cases have used the theory to bring related corporations under the purview of the statute[31] and

22. Id. at 700.
23. 309 F.2d 346 (4th Cir. 1962).
24. Id. at 352.
25. Darlington Mfg. Co. v. NLRB, 325 F.2d 682, 684-85 (4th Cir. 1963).
26. Id. at 685.
27. See notes 16 & 17 supra.
28. See 325 F.2d at 684-85.
29. See note 1 supra.
30. 303 U.S. 261 (1938).
31. NLRB v. Stowe Spinning Co., 336 U.S. 226 (1949); NLRB v. National Shoes, Inc., 208 F.2d 688 (2d Cir. 1953).

to make them equally responsible for carrying out the Board's order.[32]

The criterion used in determining whether the single-employer status exists is whether there are "present unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations . . . ."[33] This test has been satisfied in cases similar to the instant controversy.[34] In all such cases, however, the boards of directors and the officers of both corporations were the same, and were closely related to the principle stockholders. In two cases,[35] the stockholders of both corporations were identical. In the third,[36] the stock of one corporation was entirely owned by another corporation and the stock of the latter was held exclusively by one man.

Circuit courts, on the other hand, have refused to attach the single-employer status to a lessor-independent contractor relationship, although substantial control was exercised by the lessor,[37] or to the situation where a new corporation was organized with the same president and vice-president and some but not all of the old stockholders and board of directors.[38] In the latter case, the court reversed the Board's finding of a single-employer status even though the new corporation manufactured the same products in the same place. It would appear, therefore, that all the elements enumerated in the test above must be present.

In the instant case, thirty-one per cent of the stockholders were termed "outsiders."[39] The trial examiner found that Deering Milliken & Co. did not control the labor relations and operations at Darlington, and concluded that there was no single-employer relationship between the two corporations.[40] In

32. NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); NLRB v. Gibraltar Indus., Inc., 307 F.2d 428 (4th Cir. 1962), cert. denied, 372 U.S. 911 (1963); NLRB v. United States Air Conditioning Corp., 302 F.2d 280 (1st Cir. 1962); A. M. Andrews Co. v. NLRB, 236 F.2d 44 (9th Cir. 1956); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir. 1952).

33. NLRB v. Gibraltar Indus., Inc., supra note 32, at 431. See also NLRB v. Williams, 195 F.2d 669 (4th Cir.), cert. denied, 344 U.S. 834 (1952).

34. NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960); A. M. Andrews Co. v. NLRB, 236 F.2d 44 (9th Cir. 1956); NLRB v. Somerset Classics, Inc., 193 F.2d 613 (2d Cir. 1952).

35. A. M. Andrews Co. v. NLRB, supra note 34; NLRB v. Somerset Classics, Inc., supra note 34.

36. NLRB v. Deena Artware, Inc., 361 U.S. 398 (1960).

37. NLRB v. Norma Mining Corp., 206 F.2d 38 (4th Cir. 1953).

38. NLRB v. Tupelo Garment Co., 122 F.2d 603 (5th Cir. 1941). See also NLRB v. New Madrid Mfg. Co., 215 F.2d 908 (8th Cir. 1954). But see NLRB v. U.S. Air Conditioning Corp., 302 F.2d 280 (1st Cir. 1962).

39. See note 1 supra.

40. "1. Deering Milliken & Co., Inc., does not control the operations or labor relations of Darlington Manufacturing Company.

"2. Darlington Manufacturing Company does not occupy a single-employer status with 'related' or other corporations.

"3. Deering Milliken & Co., Inc., has not engaged in unfair labor practices within the meaning of Section 8(a)(5), (3) or (1) of the Act."

Darlington Mfg. Co., 139 N.L.R.B. 241, 331 (1962).

these conclusions the dissenting members of the Board concurred.[41] Insofar as the facts do not appear to satisfy all requisites of the prescribed standard,[42] the Board's finding of a single-employer status seems unsupported by "substantial evidence."[43] Accordingly the court of appeals acted properly in absolving Deering Milliken from liability.

While the instant case would be questionable if unqualified, the decision appears sound as understood in the context of the underlying factual situation. A threat to close a business, where this would deprive many of employment, is a powerful weapon against unionization. Such a threat has properly been made an unfair labor practice.[44] However, it does not follow that an exercise of sound business discretion, affected by but not based upon union activities and resulting in a bona fide shutdown of a plant, is also an unfair labor practice. To allow the Board to so hold would be to prevent an employer from retiring from commerce without punishment for so doing. To deny a corporation the right to use its discretion in determining whether or not to remain in business would be contrary to our system of free enterprise. To penalize a corporation for the exercise of that discretion, and to exact that penalty upon a related but not functionally identical corporation, would be to enforce a penalty more oppressive than Shylock's pound of flesh.

Wills—Rule That There Is No Residue of a Residue Not Applied Because of Expressed Intent.—Testatrix executed a will directing that the residue of her estate be divided into eight equal parts among named relatives, without a gift over. A paragraph, immediately following, stated:

> I am not unmindful of the fact that I have other relatives than those hereinbefore referred to, and I have heretofore made a rather complete list of all or most of them, and have them in mind, and I have advised my executor and my attorney who has prepared this will for me that it is my desire that those hereinbefore mentioned shall inherit my estate, and that no part of my estate shall go to any except those hereinbefore mentioned.

The New York Surrogate's Court decreed that the portion of the residue bequeathed to a predeceased second cousin lapsed and passed as intestate property to a first cousin, named on the list of the testatrix as one whom she wished to exclude.[1] The appellate division affirmed,[2] but the court of appeals reversed.

41. Id. at 262-63.

42. "[E]vidence supporting a conclusion [of the Board] may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's . . . ." Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951).

43. See notes 10 & 11 supra and accompanying text.

44. Atlas Underwear Co. v. NLRB, 116 F.2d 1020 (6th Cir. 1941).

1. 220 N.Y.S.2d 358 (Surr. Ct. 1961).

2. 16 App. Div. 2d 953, 230 N.Y.S.2d 674 (2d Dep't 1962) (memorandum decision).

Reasoning that "whenever possible the testament is to be construed in accord with the actual intent of the testator,"[3] the court held that the words of disinheritance created a right of survivorship in the seven remaining residuary legatees. *In the Matter of Estate of Dammann*, 12 N.Y.2d 500, 191 N.E.2d 452, 240 N.Y.S.2d 968 (1963).

The instant case involves two rules of will construction, both of early common-law origin. The first is that a lapsed residuary bequest passes as in intestacy unless there is a gift over or a gift to a class; the second, that words of disinheritance, per se, will not prevent a party from taking a lapsed residuary legacy by intestacy.[4]

Begrudged adherence to the rule of stare decisis accounts for the present status of the principle of "no residue of a residue." New York and the majority of American jurisdictions have placed great weight on the authority of *Skrymsher v. Northcote*,[5] decided in 1818. There, the testator provided that upon the happening of a certain contingency, a daughter was to receive £500 as part of his residuary estate. He specifically disposed of the remainder of the residuary. Later the bequest to the daughter was revoked and when the contingency occurred, the £500 was in issue. The Master of the Rolls held that since there was "no disposition" as to the £500, "the testator is as to that intestate,"[6] and cited *Bagwell v. Dry*[7] and *Page v. Page*[8] in support of the rule that:

> A specific or pecuniary legacy being revoked, or, from whatever cause, failing, becomes part of the residue for the benefit of the residuary legatee; but if a gift of some portion of the residue itself fails, the residue being given as in this instance, in distinct shares, the shares so failing will not accrue to the remaining shares, but belongs as undisposed of to the next of kin.[9]

3. In the Matter of Estate of Dammann, 12 N.Y.2d 500, 504, 191 N.E.2d 452, 453, 240 N.Y.S.2d 968, 970 (1963).

4. "'It was not sufficient to deprive an heir at law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate.'" In the Matter of Trumble, 199 N.Y. 454, 465-66, 92 N.E. 1073, 1076 (1910) (quoting Pomroy v. Hincks, 180 N.Y. 73, 75, 72 N.E. 628, 629 (1904)).

5. 1 Swans. 565, 36 Eng. Rep. 507 (Ch. 1818).

6. Id. at 571, 36 Eng. Rep. at 509.

7. 1 P. Wms. 700, 24 Eng. Rep. 577 (Ch. 1721). Testator left his residuary estate to four persons equally to be divided among them, "share and share alike." One of the four predeceased the testator. The Lord Chancellor held that "the residuum being devised in common, it was the same as if a fourth part had been devised to each of the four, which could not be increased by the death of any of them." Id. at 701, 24 Eng. Rep. at 578.

8. 2 P. Wms. 489, 24 Eng. Rep. 828 (Ch. 1728). Testator devised the residue of his personal estate to six persons, "to each of them a sixth part." With only five surviving at the testator's death, the Lord Chancellor, citing Bagwell v. Dry, supra note 7, and others, declared: "This is a lapsed legacy as to one-sixth, and undisposed of by the will, the residuary legatees being tenants in common and not jointenants; and therefore the legacy shall not survive, but go to the testator's next of kin, according to the statute of distribution." Ibid.

9. 1 Swans. at 569, 36 Eng. Rep. at 508.

The dissatisfaction of the English courts with the rationale of *Skrymsher* was reflected in numerous subsequent decisions.[10] Occasionally a court, straining to avoid the application of the rule of "no residue of a residue," held that the testator had created a gift over or a gift to a class. In *In re Parker*,[11] the testator divided his residuary estate into thirds. As to one of those thirds, half was to be held in trust for two grandchildren, Norman and Arnold, and half in trust for any of all four of testator's grandchildren who reached their majority. When Norman died before reaching the age of twenty-one, a dispute arose as to whether his share should go to the testator's next of kin or be held in trust for the surviving grandchildren who reached their majority. The court excepted the case from the rule of *Skrymsher* by holding that there was a gift over.[12] In a later case, *In re Dunster*,[13] the testator directed that his residuary estate be divided into as many equal shares as he had daughters, or their issue, surviving him. Subsequently, he revoked the bequest to one of his six daughters, all of whom survived him. The court, in expressly refusing to follow an early precedent,[14] held that this was a gift to a class, and that the entire residuary estate should be divided among the five remaining daughters. In an attempt to limit the application of the *Skrymsher* doctrine, the court further stated that the case applies only where the gift is to named persons and not where the gift is to a class.[15]

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10. E.g., In re Dunster, [1909] 1 Ch. 103 (1908). "[T]he effect of it is to defeat the testator's intention in almost any case in which it is applied; but it is a rule by which I am undoubtedly bound." Id. at 106. In re Judkin's Trusts, 25 Ch. D. 743 (1884): "I confess that I should myself have been inclined to decide the case the other way." Id. at 750.

11. [1901] 1 Ch. 408.

12. Id. at 411. The court indicated that by its decision the holding in Skrymsher v. Northcote was doubted. The opinion stated: "I do not think it necessary to say whether Skrymsher v. Northcote can stand . . . because I consider myself bound to apply to this will the principle applied by the Court of Appeal in the analogous cases in which the word 'survivors' has been read 'others.' It is true that this principle was not, as it might have been, applied in Skrymsher v. Northcote; but that may be explained by the fact that the principle under which such particular weight is attached to a gift over is comparatively modern in origin. . . . Assuming that Skrymsher v. Northcote was well decided as the law then stood, I am nevertheless bound by the modern course of authority to attach great weight to the gift over, which shows that the testator intended that no part of the principal gift should fail unless all the children died wihout attaining vested interests." Id. at 410-11.

13. [1909] 1 Ch. 103 (1908).

14. Ramsay v. Shelmerdine, L.R. 1 Eq. 129 (1865).

15. ". . . I think the reason is obvious, because the difficulty which led to the application of the rule in the case of a gift to designated persons does not apply where the gift is to a class. In that case the death of one of the presumptive members of the class simply leads to the contraction of the class, and therefore what that individual would have taken is automatically absorbed and goes into the general fund, which becomes divisible amongst the reduced number. I think there is no doubt that a revocation in the case of one person who is a presumptive member of the class to which the gift is made has the effect

As early as 1829, New York paid allegiance to the rule in *Floyd v. Barker.*[16] There, one of the two residuary legatees predeceased the testator, and the court directed that the undisposed share had lapsed and should be distributed in accord with the law of intestacy. In 1861 the court of appeals, in *Beekman v. Bonsor,*[17] adhered to the common-law rule and by 1919 that same court in *Wright v. Wright,*[18] while stating that the reason for following the rule was not very "apparent, satisfactory or convincing," nevertheless considered it to be "too firmly established to be disregarded."[19] Although consistently applied by New York courts until the instant case, the axiom "no residue of a residue" has often been unfavorably referred to as: "a technical rule, reluctantly enforced by courts";[20] "a technical rule of construction";[21] which "yields to any sound indication of a positive contrary intent";[22] "not one of a strongly predominating type";[23] "not inflexible";[24] "often deplored";[25] and "much assaulted, long lamented and reluctantly enforced."[26] Widespread dissatisfaction with the rule has also been expressed in states other than New York.[27] So intense and

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of excluding that member from the class, but not that of preventing the gift from being what it was in the inception, a gift to a class." [1909] 1 Ch. at 106 (1908).

16. 1 Pai. Ch. 480 (N.Y. Ch. 1829).

17. 23 N.Y. 298 (1861). Accord, In the Matter of Glover, 278 App. Div. 602, 102 N.Y.S.2d 48 (3d Dep't 1951) (memorandum decision); In the Matter of Estate of Watkins, 7 Misc. 2d 871, 166 N.Y.S.2d 855 (Surr. Ct. 1957); In the Matter of Estate of Weir, 7 Misc. 2d 405, 160 N.Y.S.2d 76 (Surr. Ct. 1957); In the Matter of Hicks, 7 Misc. 2d 344, 160 N.Y.S.2d 451 (Surr. Ct. 1957); In the Matter of Bogardus, 5 Misc. 2d 607, 164 N.Y.S.2d 485 (Surr. Ct. 1957); In the Matter of Pepper, 208 Misc. 513, 146 N.Y.S.2d 281 (Surr. Ct. 1955).

18. 225 N.Y. 329, 122 N.E. 213 (1919).

19. Id. at 340-41, 122 N.E. at 17.

20. Oliver v. Wells, 254 N.Y. 451, 457, 173 N.E. 676, 678 (1930).

21. In the Matter of Will of Clonney, 189 Misc. 542, 545, 71 N.Y.S.2d 587, 590 (Surr. Ct. 1947).

22. Ibid.

23. In re Baumann's Will, 97 N.Y.S.2d 478, 485 (Surr. Ct. 1950).

24. In re Blood's Estate, 115 N.Y.S.2d 220, 227 (Surr. Ct. 1952), aff'd mem., 281 App. Div. 1045, 122 N.Y.S.2d 625 (2d Dep't 1953).

25. Waterman v. N.Y. Life Ins. & Trusts Co., 237 N.Y. 293, 300, 142 N.E. 668, 669 (1923).

26. In the Matter of Bogardus, 5 Misc. 2d 607, 608, 164 N.Y.S.2d 485, 487 (Surr. Ct. 1957).

27. E.g., Bronson v. Pinney, 130 Conn. 262, 271, 33 A.2d 322, 326 (1943); Corbett v. Skaggs, 111 Kan. 380, 384, 207 Pac. 819, 821 (1922); In re Estate of Zimmerman, 122 Neb. 813, 815, 241 N.W. 553, 554 (1932); In the Matter of Estate of Moloney, 15 N.J. Super. 583, 584, 83 A.2d 837, 838 (1951); Aitken v. Sharp, 93 N.J. Eq. 336, 342, 115 Atl. 912, 915 (1922), 31 Yale L.J. 782; Commerce Nat'l Bank v. Browning, 158 Ohio St. 54, 62, 107 N.E.2d 120, 124 (1952); Gray's Estate, 147 Pa. 67, 74-75, 23 Atl. 205, 206 (1892). See also Waln's Estate, 156 Pa. 194, 27 Atl. 59 (1893); Prison Ass'n v. Russell's Adm'r, 103 Va. 563, 49 S.E. 966 (1905); 2 Jarman, Wills 1056-58 (6th ed. 1893).

frequent has the criticism been that in at least Ohio,[28] Kansas,[29] Wisconsin,[30] Michigan[31] and Indiana[32] it has been rejected by the courts, and in Pennsylvania,[33] Rhode Island[34] and New Jersey[35] it has been repudiated by statute.

The court in the instant case placed very little emphasis on the common-law rule,[36] and stressed the necessity of giving effect to "the manifest and clearly expressed intent of the testatrix that the whole of her residuary estate go to the named eight or the survivors of them."[37] Finding ample authority,[38] the court took the position that the case demanded application of a cardinal rule of will construction that "whenever possible the testament is to be construed in accord with the actual intent of the testator including his presumed intent to dispose of his whole estate by the will . . . ."[39] Accordingly, it concluded that "common sense and customary English usage"[40] suggested that the residuary clause and the disinheritance clause following be read as one. Since the sole distributee by intestacy was not one previously mentioned (although testatrix was aware of

28. Commerce Nat'l Bank v. Browning, supra note 27.

29. Corbett v. Skaggs, 111 Kan. 380, 207 Pac. 819 (1922), where the court stated: "We prefer to rest our decision upon the general principle rather than upon exceptional features of the particular case.

"We regard the rule that lapsed shares of deceased residuary legatees shall be treated as intestate property as in direct conflict with the one to which this court is definitely committed—that the actual purpose of the testator, so far as it can be ascertained, must be given effect." Id. at 386, 207 Pac. at 822. Accord, In re Estate of Sowder, 185 Kan. 74, 80, 340 P.2d 907, 913 (1959).

30. Will of Nielson, 256 Wis. 521, 41 N.W.2d 369 (1950). The court ignored the rule by holding in favor of the residuary legatees "irrespective of whether or not they constitute a class." Id. at 528, 41 N.W.2d at 372. Accord, Will of Waterbury, 163 Wis. 510, 158 N.W. 340 (1916); Will of Reynolds, 151 Wis. 375, 138 N.W. 1019 (1912).

31. In re Ives' Estate, 182 Mich. 699, 148 N.W. 727 (1914), wherein one of the three residuary legatees had died; the court, in holding for the survivors, stated: "An examination of the will and codicil satisfies us that it was the intention of the testatrix to give to her adopted daughter [sole distributee] only the sum of $10,000 upon the terms stated, and to give to her brothers and sister the residue of her property." Id. at 705, 148 N.W. at 729.

32. Hedges v. Payne, 85 Ind. App. 394, 154 N.E. 293 (1926).

33. Pa. Stat. Ann. tit. 20, § 180.14 (1950).

34. R.I. Gen. Laws Ann. § 33-6-20 (1956).

35. N.J. Stat. Ann. § 3A: 3-13, -14 (1953).

36. "We see no reason why this testamentary intent cannot be carried out without doing violence to any rules of law." 12 N.Y.2d at 505, 191 N.E.2d at 453, 240 N.Y.S.2d at 970.

37. Id. at 504, 191 N.E.2d at 453, 240 N.Y.S.2d at 970.

38. Hadcox v. Cody, 213 N.Y. 570, 573-74, 108 N.E. 84, 86 (1915); Cammann v. Bailey, 210 N.Y. 19, 30, 103 N.E. 824, 827 (1913); Meeks v. Meeks, 161 N.Y. 66, 70-71, 55 N.E. 278, 279 (1899); Schult v. Moll, 132 N.Y. 122, 125-27, 30 N.E. 377, 378 (1892).

39. 12 N.Y.2d at 504, 191 N.E.2d at 453, 240 N.Y.S.2d at 970.

40. Id. at 506, 191 N.E.2d at 454, 240 N.Y.S.2d at 971.

his existence),[41] he was one of those whom she did not want to receive any part of her estate.

While acknowledging that expressed negatives are usually insufficient to prevent intestacy,[42] the court felt that such a proposition should not be carried to its ultimate extreme, and held:

> [W]e reach a point where a clearly and unmistakably expressed negative is as complete and unavoidable a statement of intent as if cast in the affirmative. We cannot read paragraphs Eighteen and Nineteen other than as a direction that the survivors of the named eight persons take the whole residue.[43]

To bolster its conclusion, the court pointed out that the rule of "no residue of a residue" was "technical" and only " 'reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention . . . .' "[44]

Judge Scileppi, the sole dissenter, argued that the majority had not left undisturbed, as they purported to do, the common-law rule that a lapsed residuary legacy passes to the statutory distributees when there is no provision for a gift over. He was not convinced that the words "hereinbefore mentioned" in the disinheritance clause could "with any degree of certainty" be interpreted as referring solely to the residuary legatees but must likewise encompass specific legatees set forth in previous paragraphs of the will. Finding no basis for the interpretation of the majority, Judge Scileppi noted that the usual purpose of a disinheritance clause is merely to forestall a charge of undue influence.[45]

The decision in the instant case indicates support by New York of the modern trend to break away from common-law principles that prove harsh and obsolete. As early as 1912 the New York legislature enacted Section 29 of the Decedent Estate Law[46] to provide that where the predeceased residuary legatee was the child, descendent, brother or sister of the testator, his share vested in his child or descendent surviving. In 1963, a companion bill, section 29-a[47]—providing

41. His name appeared on a list of decedent's relatives that had been written out in connection with the making of the will. This was filed in the Surrogate's Court with other papers constituting proof as to her family tree. 12 N.Y.2d at 506, 191 N.E.2d at 454, 240 N.Y.S.2d at 971.

42. In the Matter of Trumble, 199 N.Y. 454, 465, 92 N.E. 1073, 1076 (1910); Pomroy v. Hincks, 180 N.Y. 73, 75, 72 N.E. 628 (1904).

43. 12 N.Y.2d at 507, 191 N.E.2d at 454, 240 N.Y.S.2d at 972.

44. Id. at 506, 191 N.E.2d at 454, 240 N.Y.S.2d at 971-72.

45. Id. at 507, 191 N.E.2d at 454-55, 240 N.Y.S.2d at 972 (dissenting opinion).

46. "Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, or to a brother or sister of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendant of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate." N.Y. Deced. Est. Law § 29.

47. "Disposition of ineffective residuary devises or bequests to two or more legatees or devisees. Whenever a residue of an estate, real or personal, shall be devised or bequeathed to two or more legatees or devisees and a portion thereof shall become ineffective and its

that where a residuary bequest becomes ineffective and its disposition is not otherwise provided for, it shall vest in the remaining residuary nominees—passed the State Assembly but remained unacted upon by the Senate at the time of its adjournment. In its report, the Commission on Estates made it clear that the bill was intended to abolish the old common-law rule of "no residue of a residue."[48]

While the Senate, in its next session, may well enact section 29-a, it is regrettable that the court here chose to formulate an exception to the common-law rule, rather than to abolish it altogether. By refusing to rid New York, once and for all, of this admittedly undesirable decision-made rule, the court might fairly be criticized for abdicating a function peculiarly its own.[49] Inasmuch as the rule is one of construction on which no reliance is placed in drafting a will except by a more careful disposition of the residue, and since it fixes no property rights except against the will of the testator, an argument that its abolition should await legislative determination, for reasons of notice or to preserve fixed property rights, is not valid. The fact that the rule has survived in the courts for so many years gives cause for amazement, rather than proof of its wisdom.

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disposition shall not otherwise be expressly provided for by will or by the provisions of section twenty-nine of this chapter, said ineffective portion shall vest in the remaining residuary legatees or devisees, if any, in proportion to their respective shares in said residue. The provisions of this section shall apply to the estate of decedents who die on and after the effective date thereof." Sen. Introd. No. 2574, Pr. No. 2692, Ass. Introd. No. 3898, Pr. No. 4013, N.Y. State Leg. 186th Sess. (1963).

48. Commission on Estates, Second Report, N.Y. Leg. Doc. No. 19 (1963). The Commission pointed out that the arguments in favor of the rule were far outweighed by two canons of construction: "First, that the intent of the testator must be given effect whenever possible. Second, that there is a presumption against intestacy. It is common knowledge that a person, when making a will, usually intends to alter the distribution of his property as provided for in the laws of intestacy." Id. at 328.

49. See Woods v. Lancet, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951); Stone, The Common Law in The United States, 50 Harv. L. Rev. 4, 4-8 (1926).