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Case Notes

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CASE NOTES

Constitutional Law—Full Faith and Credit Does Not Forbid Piecemeal Application of Foreign Workmen's Compensation Statute.—Petitioner, a resident of Alabama and there employed by a Georgia corporation, was injured in Alabama. He sued, in an Alabama court, under the Georgia Workmen's Compensation Act. The state court entered a default judgment, although the Georgia Act purported to grant an exclusive remedy which could be afforded only by the Georgia Compensation Board.¹ Petitioner then sought the aid of the federal court to enforce his judgment. The action was dismissed in the district court,² and the court of appeals affirmed³ on the ground that the Alabama court lacked subject matter jurisdiction. The Supreme Court reversed and remanded, finding that the dismissal had been based on the full faith and credit clause of the federal constitution, and that this clause did not require recognition of the administrative procedure. *Cridcr v. Zurich Ins. Co.*, 85 Sup. Ct. 769 (1965).

Under the early rule of *Bradford Elcc. Light Co. v. Clapper*,⁴ the state of injury was required by the full faith and credit clause⁵ to defer to the workmen's compensation act of the state of the employment contract when the latter state's act was exclusive in nature.⁶ The *Clapper* Court noted, first, that the forum state's interest was only casual⁷ and, second, that it was not shown to be against the public policy of the forum state to give full faith and credit to the exclusive foreign statute.⁸ Subsequent cases limited and distinguished the *Clapper* decision. Thus, *Alaska Packers Ass'n v. Industrial Acc. Comm'n*⁹ held that California could apply its own act though the plaintiff was injured in Alaska and the contract, made in California, contemplated that the Alaska act, which was exclusive, should apply. The Court noted that if California did not grant relief there was the distinct possibility that the plaintiff would become a charge of that state.¹⁰ This interest, coupled with the fact that the Court felt it was against California's public policy to deny recovery, was considered sufficient to allow California to apply its own law and still not contravene the Full Faith and Credit Clause.¹¹ *Pacific Employers Ins. Co. v. Industrial*

1. "The rights and remedies herein granted . . . shall exclude all other rights and remedies . . ." Ga. Code Ann. 114-103 (1956).

2. *Cridcr v. Zurich Ins. Co.*, 224 F. Supp. 87 (N.D. Ala. 1963).

3. *Cridcr v. Zurich Ins. Co.*, 324 F.2d 499 (5th Cir. 1963) (per curiam).

4. 286 U.S. 145 (1932).

5. U.S. Const. art. IV, § 1 states that "Full Faith and Credit shall be given in each State to the public Acts . . . of every other State."

6. 286 U.S. at 155-59.

7. *Id.* at 162.

8. *Id.* at 159-62.

9. 294 U.S. 532 (1935).

10. *Id.* at 542, 549.

11. *Id.* at 550.

*Acc. Comm'n*¹² applied the same reasoning¹³ in a case where the plaintiff, a Massachusetts resident, was injured in California while working for a Massachusetts corporation. *Carroll v. Lanza*¹⁴ completed the cycle. On reasoning, impossible to reconcile with *Bradford Elec. Light Co. v. Clapper*,¹⁵ the Court allowed Arkansas, where the plaintiff was injured, to apply its own common law remedy instead of the exclusive workmen's compensation statute of Missouri, the state in which plaintiff had entered into the employ of his employer. *Carroll v. Lanza* did not involve an indigent worker who might have become a charge of the state of Arkansas and Arkansas' only interest was found in the fact that it was the place of injury.¹⁶ Thus, the casual interest of *Clapper* became a sufficient "governmental interest" to the *Lanza* Court.

The instant court, reasoning that Alabama, the state of both injury and domicile, had an interest "at least commensurate" to that present in any of the earlier cases, ruled that the Alabama court did not violate the full faith and credit clause in granting the judgment in question.¹⁷ In so doing the majority failed to discuss the fact that the plaintiff was suing under a statute which provided that it could only be invoked before the Georgia Workmen's Compensation Board. This represents a factual distinction from the earlier cases which applied the law of the forum in preference to an exclusive statute of the foreign state. It was this distinction which caused Mr. Justice Goldberg to conclude in his dissent:¹⁸ "The federal issue raised by respondent is

12. 306 U.S. 493 (1938).

13. *Id.* at 502-03. The Court distinguished *Clapper* on the basis that in *Pacific* it would clearly be against California's policy not to grant relief; while in *Clapper* there was no such evidence. *Id.* at 504.

14. 349 U.S. 408 (1955).

15. 286 U.S. 145 (1932).

16. *Id.* at 413.

17. 85 Sup. Ct. at 770-71.

18. Mr. Justice Goldberg disagreed with the majority decision to remand the case to the circuit court on two grounds. First, he disagreed with the majority that the lower court decisions were based on a misconception of the full faith and credit clause but rather "believe[d] that the lower courts did rest their decisions upon independent state law . . ." 85 Sup. Ct. at 773. This view seems correct since *Green v. J. A. Jones Constr. Co.*, 161 F.2d 359 (5th Cir. 147) (per curiam), cited as controlling by the lower court does not mention full faith and credit. The authorities cited by the *Green* court are all cases decided on the basis of state law. *Id.* n.2.

Second, Mr. Justice Goldberg noted that even if his analysis of the lower court decisions was incorrect, this "would not justify the Court's ignoring the fact that the decision below is clearly supported by independent state law and, as a consequence, the constitutional issue should not be reached and decided." 85 Sup. Ct. at 774. See *Neese v. Southern Ry.*, 350 U.S. 77, 78 (1955). It seems clear that Alabama law would prohibit an Alabama court from entertaining an action under the Georgia statute, 85 Sup. Ct. at 774 (dissenting opinion). In *Singleton v. Hope Eng'r Co.*, 233 Ala. 538, 137 So. 441 (1931), the Alabama Supreme Court held that "the right sought to be enforced had its origin and existence in the Georgia Workmen's compensation statute. The remedies for its breach are recoverable

whether, consistent with the Full Faith and Credit Clause, a State may enforce in its courts the liability claims created by another State in violation of that other State's fixed policy to have those claims enforced only by an administrative board. There is no decision of this Court which settles this federal issue and, in my view, the question is not free from difficulty."¹⁹

While this question has not received a direct answer, the answer is necessarily implicit in the *Alaska Packers*, *Pacific Employers* and *Carroll v. Lanza* trio of cases. In each of those cases the question of full faith and credit was entwined with due process considerations. In *Alaska Packers* the same interest, i.e., the state's concern for the indigent worker, was advanced to satisfy both the due process and full faith and credit objections.²⁰ *Pacific Employers* cited with approval *Alaska Packers* as holding that "The full faith and credit exacted for the statute of one state does not necessarily preclude another state from enforcing in its own courts its own conflicting statute having no extra-territorial operation forbidden by the Fourteenth Amendment . . ." ²¹ The interrelationship of the two concepts was perhaps more clearly underscored in *Carroll v. Lanza* where the Court, to support its conclusion that the mere fact of injury in the state was sufficient governmental interest to satisfy the full faith and credit clause,²² cited a due process decision, *Watson v. Employers Liab. Assur. Corp.*²³ The inference seems clear "that, when it is acknowledged that each state has a legitimate, or substantial, interest—an interest sufficient to justify the application of its law so far as the Due Process Clause is concerned—then . . . each state is free to apply its own law, consistently with the Full Faith and Credit Clause."²⁴

If a state can acquire a sufficient interest to apply, consistently with due process, its own internal law in preference to the common law of another state, should it not then be permitted, given the same interest, to borrow piecemeal, consistently with full faith and credit, the statute of another state? From this point of view, is it not clear that Alabama, the place of injury and the domicile of plaintiff, had a sufficient interest to apply its own workmen's compensation statute or the statute of any other jurisdiction which

in the manner provided by proper pleadings and procedure before the Industrial Commission of our sister state." *Id.* at 540, 137 So. at 443.

19. 85 Sup. Ct. at 772 (dissenting opinion).

20. 294 U.S. at 542, 549.

21. 306 U.S. at 503.

22. 349 U.S. at 413.

23. 348 U.S. 66 (1954). This case involved a Louisiana direct action statute which permitted Louisiana residents to bring direct actions against insurance companies insuring the tortfeasor even when the state in which the contract was made forbade such actions. The Court recognized the close relationship of due process and full faith and credit when, after having shown that the Louisiana statute was consistent with due process, it stated: "What we have said . . . [about due process] goes far toward answering the Full Faith and Credit Clause contention." *Id.* at 73.

24. Currie, *The Constitution and The Choice of Law: Governmental Interests and The Judicial Function*, 26 U. Chi. L. Rev. 9, 22 (1958).

had a reasonable relationship to plaintiff's employment? In other words, neither the due process clause nor the full faith and credit clause should be permitted to require rigid choice of law rules nor to turn every choice of law decision into one of constitutional law. This may foster a lack of uniformity in conflict of laws rules but, as Judge Kaufman, in *Pearson v. Northeast Airlines, Inc.*,²⁵ sensibly noted: "The field of conflict of laws, the most underdeveloped in our jurisprudence from a practical standpoint, is just now breaking loose from the ritualistic thinking of the last century. . . . The development will be stillborn if we impose inflexible constitutional strictures in the name of national unity"²⁶

Coram Nobis—Indigent Defendant Entitled to Assigned Counsel at Coram Nobis Hearing.—Defendant was convicted of assault with a deadly weapon, and did not appeal. Several months thereafter he mailed a petition for writ of error coram nobis¹ to the trial court and requested appointment of counsel to represent him. The trial court granted a hearing on the writ, but refused to appoint counsel.² On appeal from a denial of the defendant's petition, the district court of appeals reversed and remanded with instruction to assign counsel to represent defendant at the coram nobis hearing. The state supreme court granted the attorney general's petition for a hearing to determine recurring coram nobis questions. The court, in reversing and remanding³ to the trial court, held that whenever facts are sufficient to warrant a hearing, the indigent party is entitled to appointed counsel. *People v. Shipman*, — Cal. 2d —, 397 P.2d 993 (1965).

The problem of adequate legal representation for indigent coram nobis petitioners arises at four stages: first, in drafting the petition; second, on appeal from denial of coram nobis without a hearing; third, on the coram nobis hearing itself; and fourth, on appeal from a hearing denying coram nobis. Although the court here held that an indigent petitioner is entitled, as of right, to assigned counsel at the hearing and on appeal from a hearing, it nevertheless dismissed any absolute right to assigned counsel in drafting the petition and on appeal from the denial of the petition without a hearing.⁴

25. 309 F.2d 553 (2d Cir. 1962).

26. 309 F.2d at 563.

1. Coram Nobis in California is equivalent to a motion to vacate judgment and is based on an error of fact unknown to the trial court. *People v. Tuthill*, 32 Cal. 2d 819, 820-21, 198 P.2d 505, 506-07 (1948). In most jurisdictions throughout the United States coram nobis is employed in the same fashion as it is in California. See Frank, *Coram Nobis* ¶ 1.01 (1953).

2. A public defender appeared on several occasions to assist in filing papers and obtaining continuances. *People v. Shipman*, — Cal. 2d —, —, 397 P.2d 993, 995 (1965).

3. The court affirmed the district court of appeal and reversed the trial court. *Ibid.*

4. *Id.* at —, 397 P.2d at 997.

In denying an indigent the right to counsel in the first two stages, the court stated that a contrary holding would require the appointment of counsel to "every prisoner who asserts that there may be some possible ground for challenging his conviction."⁵ The court took a practical approach to the problem of appointing counsel, recognizing that certain basic requirements must be met before a hearing will be granted and counsel appointed.⁶ Several states have attempted to assist the indigent petitioner in drafting for coram nobis by enacting post-conviction procedure statutes.⁷ One such statute⁸ makes it "the duty of the public defender to represent . . ." any indigent person imprisoned within the state who may assert the unlawfulness or illegality of his confinement. Generally, counsel will be appointed upon request, any necessary transcripts will be furnished free of charge, and an appeal may be taken from a final judgment on the hearing of the petition.⁹ As a result of these post-conviction statutes, an indigent has the opportunity to be

5. *Ibid.*

6. *Id.* at —, 397 P.2d at 995. For a discussion of the grounds for coram nobis relief in New York, see Kirkpatrick, *Law Notes for Judges and Lawyers* §§ 1, 3 (1963); Comment, 32 *Fordham L. Rev.* 803-13 (1964). See generally Frank, *op. cit. supra* note 1, ¶¶ 3.01-.02(e); Note, 61 *Colum. L. Rev.* 681, 695 (1961).

A hearing was granted in *People v. Silverman*, 3 N.Y.2d 200, 144 N.E.2d 10, 165 N.Y.S.2d 11 (1957) (trial forced upon defendant without adequate opportunity to prepare a defense—coram nobis lies). In *People v. Lain*, 309 N.Y. 291, 293, 130 N.E.2d 105, 106 (1955) the court stated: "in coram nobis a petitioner swearing to allegations such as those in this petition is entitled to a trial [hearing] thereof in open court unless his claims are 'conclusively refuted by unquestionable documentary proof.'" (Emphasis omitted.) See *People v. Guariglia*, 303 N.Y. 338, 343, 102 N.E.2d 580, 583 (1951); *People v. Hughes*, 3 App. Div. 2d 302, 187 N.Y.S.2d 828 (1st Dep't 1959) (per curiam) (upon defendant's unopposed papers, a hearing was granted). But see *People v. Picart*, 14 N.Y.2d 789, 199 N.E.2d 846, 250 N.Y.S.2d 815 (1964) (memorandum decision) (hearing denied).

7. Ill. Ann. Stat. ch. 38, §§ 122-1-122-7 (Smith-Hurd 1964); Ind. Ann. Stat. §§ 13-1401-13-1406 (1956); N.C. Gen. Stat. §§ 15-217-15-222 (Supp. 1963); Ore. Rev. Stat. §§ 138.500-138.680 (1963); Wis. Stat. Ann. §§ 958.01-958.14 (1958).

8. Ind. Ann. Stat. § 13-1402 (1956). The Indiana public defender's office initially investigates an indigent's assertion of unlawful or illegal confinement and thereafter drafts a petition for filing with the court. For a discussion of coram nobis and the post-conviction statute in Indiana, see Note, 26 *Ind. L.J.* 529 (1951).

9. Ill. Ann. Stat. ch. 38, §§ 122-4, 122-7 (Smith-Hurd 1964); Ind. Ann. Stat. §§ 13-1402, 13-1405 (1956); N.C. Gen. Stat. §§ 15-219, 15-222 (Supp. 1963); Ore. Rev. Stat. § 138.590 (1963); Wis. Stat. Ann. § 958.07 (1958). In federal habeas corpus, the indigent is furnished necessary transcripts. 28 U.S.C. § 2250; see also 28 U.S.C. § 2255 (federal coram nobis). Appointment of counsel in federal habeas corpus proceedings is not required in every case. *United States ex rel. Wissenfeld v. Wilkins*, 231 F.2d 707, 715 (2d Cir. 1960) (frivolous applications do not require assignment of counsel). The court may appoint counsel if satisfied the action is not frivolous or malicious. 28 U.S.C. § 1915(d). See *Ellis v. United States*, 356 U.S. 674 (1958) (per curiam) (counsel may withdraw if appeal is frivolous). There is no constitutional right to appointment of counsel in habeas corpus proceedings. *United States ex rel. Marshall v. Wilkins*, 338 F.2d 404, 406 (2d Cir. 1964); *Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir.), cert. denied, 325 U.S. 890 (1945).

assisted by counsel throughout the proceedings. Although the New York Legislature has been considering a statutory remedy in lieu of *coram nobis*, it has not yet provided for such a procedure.¹⁰ Further, New York, as well as California, has not required assignment of counsel to aid indigent in drafting his petition, even though it is a critical juncture, since it generally determines the fate of the petition.

The instant court was of the opinion that if the petition failed to state a *prima facie* case, "counsel need not be appointed . . . on appeal from a summary denial of relief in . . . [the trial] court."¹¹ Until recently, the New York courts took the same position.¹² However, in *People v. Hughes*,¹³ the New York Court of Appeals held that "an indigent defendant, who is by statute accorded an absolute right to appeal to the Appellate Division (or to some other appellate court), is entitled to assignment of counsel to represent him on such appeal if he so requests. This rule applies whether the appeal be from a judgment of conviction or an order denying an application for *coram nobis* . . . relief."¹⁴ In addition to requiring assignment of counsel on appeal from a denial of a hearing, *Hughes* also requires assignment on appeal from the hearing. This decision clarifies prior law and definitely establishes a new and more inclusive rule on the right to assigned counsel in New York.¹⁵

The New York Court of Appeals, unlike the high court of California, has never ruled on the question of whether counsel must be assigned at the hearing of the *coram nobis* petition. Perhaps such a consideration is no longer necessary. In *Gideon v. Wainwright*,¹⁶ the Supreme Court held that an indigent

10. N.Y. Leg. Doc. No. 65(L) (1959); N.Y. Leg. Doc. No. 65, p. 19 (1960); N.Y. Leg. Doc. No. 65, p. 18 (1961).

11. — Cal. 2d at —, 397 P.2d at 997. In New York "the denial of a [*coram nobis*] hearing was based upon the failure of the petition to raise any triable issue of fact requiring a hearing and the failure of the Court to assign counsel was based upon the denial of the hearing." *People v. Brandau*, 19 Misc. 2d 879, 880, 191 N.Y.S.2d 94, 95 (Oncida County Ct. 1959).

12. *Ibid*; *People v. St. John*, 281 App. Div. 1061, 1062, 121 N.Y.S.2d 441, 442 (3d Dep't 1953) (*per curiam*) (assigned counsel—triable issue of fact existed); *People v. Jester*, 4 App. Div. 2d 841, 842, 168 N.Y.S.2d 520, 521 (3d Dep't 1957) (*memorandum decision*).

13. 15 N.Y.2d 172 (1965) (*per curiam*), overruling *People v. Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 577 (1958) and *People v. Di Maggio*, 4 N.Y.2d 801, 149 N.E.2d 531, 173 N.Y.S.2d 33 (1958) by implication.

14. 15 N.Y.2d at 173. Section 517(3) of the New York Code of Criminal Procedure states: "An appeal may be taken as of right by the defendant from an order denying a motion to vacate a judgment of conviction, otherwise known as a motion or application for a writ of error *coram nobis*, to the court to which an appeal from the judgment of conviction would lie . . ." But cf. *United States ex rel. Boone v. Fay*, 231 F. Supp. 387, 392 (S.D.N.Y. 1964) (holding petitioner not entitled by Constitution to assigned counsel on appeal from denial of *coram nobis* petition).

15. Even before *Hughes*, it was the practice of some departments of the appellate division to assign counsel on appeal from a denial of *coram nobis* without a hearing.

16. 372 U.S. 335 (1963) overruling *Betts v. Brady*, 316 U.S. 455 (1942). The Court, concerned with the right to assigned counsel at the trial level in a state prosecution for a

defendant was entitled to the assistance of counsel at trial. During the same term, in *Douglas v. California*,¹⁷ the Court also decided that an indigent was entitled to assigned counsel on his first appeal, as of right. In comparing these two decisions with the court of appeals opinion in *People v. Hughes*, it would appear that an indigent petitioner is entitled to assistance of counsel at the coram nobis hearing. In most cases the hearing on the coram nobis application could be equated with the trial stage¹⁸ of the criminal proceedings, and an appeal from a denial of an application for coram nobis after a hearing could be equated with a first appeal, as of right, from the trial. Since assigned counsel is required at the trial, on direct appeal, and now as a result of *Hughes*, on appeal from a denial of an application for coram nobis, should it not follow that an indigent is entitled to assigned counsel at the coram nobis hearing?

There have been some lower court decisions in New York holding that counsel should be assigned at the hearing. In *People v. St. John*,¹⁹ the appellate division, third department, held that "since the proceeding in coram nobis is part of the original criminal action the court should have assigned counsel at appellant's request where a triable issue of fact existed."²⁰ The same court, in *People v. Jester*,²¹ directed the trial court to assign counsel if requested. It may be that the New York Court of Appeals has not yet decided the issue because it has been the practice of the supreme court in several New York counties outside the third department to assign counsel upon request of an indigent.²²

non-capital offense, held that an indigent has a constitutional right to be represented by counsel, if requested. Nowhere is there a greater need for counsel than at the trial. *Id.* at 339-40. See *People v. Witek*, No. 66, N.Y. Ct. of App., April 22, 1965, which reversed a conviction for failure of a justice of the peace to inform defendants of their right to assigned counsel.

17. 372 U.S. 353 (1963). The Court settled the question of assignment on appeal when it held that on the first appeal as of right from the trial, indigent petitioners were entitled to assigned counsel. The Court stated that appellate review cannot be denied on the basis of a defendant's poverty. Where a person with money can procure a full review, so should a poor person be able to get a similar review. *Id.* at 356-57. But see, *People v. Breslin*, 4 N.Y.2d 73, 149 N.E.2d 85, 172 N.Y.S.2d 577 (1958) (denying counsel on appeal from trial).

18. Everyone is entitled to their day in court and Gideon guarantees assigned counsel to the indigent at trial. At the coram nobis hearing, facts outside the record which the defendant had no opportunity to raise at the trial or by appeal and, therefore, never adjudicated, are reviewed in deciding whether the trial judgment should be vacated. Certain things appearing in the record are within the scope of coram nobis, such as, failure to appraise a defendant of his right to counsel at arraignment, denying counsel of defendant's choice and assertion of invalidity of prior convictions by a second or fourth felony offender. *Kirkpatrick*, op. cit. supra note 6, § 1, at 4. Fairness demands that the indigent be accorded the opportunity to have these facts presented adequately.

19. 281 App. Div. 1061, 121 N.Y.S.2d 441 (3d Dep't 1957) (per curiam).

20. *Id.* at 1061, 121 N.Y.S.2d at 442. (Emphasis omitted.)

21. 4 App. Div. 2d 841, 168 N.Y.S.2d 520 (3d Dep't 1957) (memorandum decision).

22. There appears to be little case law on the right to assigned counsel at the hearing stage in the other three departments, apparently because several counties appoint counsel whenever a hearing is granted. Bronx, Erie, Kings, New York and Queens counties appoint

Undoubtedly, the approach of many state courts with respect to assignment of counsel in coram nobis proceedings has been influenced by the increasing liberality of the Supreme Court decisions requiring equal protection for impoverished defendants. In its recent decisions, the Court has emphasized the necessity of affording indigent parties the same kind of review that is afforded those who have the means to retain counsel and to purchase transcripts.

It has been difficult to implement the equal protection clause at the many levels where assistance is necessary. In *Griffin v. Illinois*,²³ the Court held that due process and equal protection must be guaranteed at all stages and that poor persons must be protected from "invidious discrimination." The Court specifically required that defendants be permitted an appeal even though they could not afford to pay for a transcript of the trial record.²⁴

In *Lane v. Brown*,²⁵ petitioner was unable to obtain a free transcript due to the discretionary refusal²⁶ of the public defender to pursue his coram nobis appeal, mainly because he thought an appeal would be unsuccessful.²⁷ The Supreme Court took issue with the arbitrariness permitted by the state procedure which in effect handicapped the destitute person and denied him the protection afforded one with money.²⁸ It follows that equal protection should also be accorded indigents in all coram nobis proceedings. The instant court felt precluded by *Douglas* from "holding that appointment of counsel in coram nobis proceedings rests solely in the discretion of the court."²⁹ It also felt that absolute equality was not required. However, the denial of assistance at the drafting stage might be an act of "invidious discrimination" if an indigent with a bona fide case is unable to secure a hearing because he is ignorant of the legal prerequisites.

Perhaps a solution to the problem is the adoption of a post-conviction proceeding statute requiring that the incarcerated prisoner be assisted in drafting his coram nobis petition. Although it is highly impractical to assign individual

counsel as a matter of policy in all coram nobis hearings. Telephone Interviews With Several Clerks of New York Supreme Court, Criminal Part, in Bronx, Eric, Kings, New York and Queens Counties, March, 1965. In Richmond county, Rules 6 and 9 of the Rules of the Supreme Court authorize the court to appoint counsel to indigent coram nobis petitioners.

23. 351 U.S. 12 (1956).

24. The Illinois Supreme Court had interpreted the Post-Conviction Hearing Act to deny petitioners a free transcript. *Id.* at 19. See *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); *McCrary v. Indiana*, 364 U.S. 277 (1960) (*per curiam*). See also *People v. Pride*, 3 N.Y.2d 545, 147 N.E.2d 719, 170 N.Y.S.2d 321 (1958).

25. 372 U.S. 477 (1963).

26. *Id.* at 480-82.

27. *Id.* at 482, n.10.

28. *Id.* at 481. Both the district court and the court of appeals in *Lane* found that the procedure substantially denied "indigent defendants the benefits of an existing system of appellate review." *Id.* at 483. See *Draper v. Washington*, 372 U.S. 487 (1963) (request for transcript).

29. — Cal. 2d at —, 397 P.2d at 996.

counsel to every prospective coram nobis applicant, a procedure similar to that in Indiana,³⁰ whereby a public defender assists in the drafting and presentation of a petition is a practical solution.³¹

Criminal Law—Felony Murder—Killing of Co-Felon by an Intended Victim Held to be a Ground for Felony Murder.—In an attempted robbery of a service station, the station's proprietor shot and killed defendant's co-felon. Despite defendant's denials that he was not involved in the robbery, the trial court found him guilty of that crime and also of felony murder. The present case was an appeal from a denial of a new trial. The District Court of Appeal, one judge dissenting, held that the defendant could properly be convicted of murder even though he neither actively nor constructively instituted the death-dealing act. *People v. Washington*, 40 Cal. Rptr. 791 (2d Dist. 1964).

The law is well settled that under certain circumstances, a felon may be convicted of murder for a homicide which occurred during the commission of a felony.¹ It is generally conceded that when the homicidal act² is instituted by a felon while the felony is continuing, the charge of felony murder will lie.³

30. Ind. Ann. Stat. § 13-1402 (1956).

31. Assignment of counsel in coram nobis proceedings may very well save the state time and money by insuring a proper presentation of the indigent's case and thus preventing repetitious appeals. See Note, 40 N.Y.U.L. Rev. 154, 187 (1965) (a discussion of state post-conviction remedies).

1. "Various theories have been propounded to explain the legal rationale for the felony-murder doctrine. The most widely accepted view is that at common law nearly every felony was punishable by death, and, therefore, it made no difference whether a felon was executed for one felony or another. One English case [*Regina v. Horsey*, 3 Fost. & Fin. 237, 176 Eng. Rep. 129 (1862)] suggests a more rational basis for the doctrine. The annotator of the case points out that a man can resist the perpetration of a felony by force even to the extent of killing the felon, and, therefore, if a person is engaged in the commission of a felony for which he can be lawfully killed, the presumption is that the felon would kill if necessary and such implied intent is sufficient to make it murder. Note, *A Survey of Felony Murder*, 28 Temp. L.Q. 453, 454 (1955). (Footnotes omitted.)

2. The homicidal act of the felon can be his either directly or constructively. A lethal act is constructively attributable to a felon, when it is committed by one of his co-felons during the commission of the crime. There are numerous cases in which a defendant has been found guilty of murder when the killing was not done by him but rather by one of his accomplices. E.g., *United States ex rel. De Moss v. Pennsylvania*, 198 F. Supp. 570 (E.D. Pa. 1961), aff'd, 316 F.2d 841 (3d Cir. 1962); *State v. Turner*, 193 Kan. 189, 392 P.2d 863 (1964); *Commonwealth v. Dickerson*, 406 Pa. 102, 176 A.2d 421 (1962). It is said that the homicidal act is constructively his on the theory that co-felons are agents of each other. *Crum, Causal Relations and The Felony-Murder Rule*, 1952 Wash. U.L.Q. 191, 193.

3. Within United States jurisdictions, there is some disagreement as to the types of felonies that can act as a basis for a felony-murder conviction. California, for example, limits these felonies to six crimes which usually involve a substantial risk of violence, Cal. Pen. Code § 189 ("Arson, rape, robbery, burglary, mayhem, or any act punishable under

There are, however, two divergent views as to whether it will lie when the death inflicting act is not instituted by one of the defendants, but rather by some third party.

The majority view, which requires that the killing be done by one of the felons,⁴ appears to be rooted in the old common law doctrine⁵ that the defendant's malicious intent or *mens rea*⁶ in committing the original felony can be transferred to his or his accomplice's subsequent homicidal act.⁷ However, there is now a minority view⁸ which will not only transfer the required malicious intent, but will also impute to a defendant the lethal acts of someone other than himself or his confederates.⁹ The underlying theory is that when a person

Section 288 . . ."). On the other hand, New York presently would appear to allow "all felonies which are independent of the homicide, whether or not they are of the type that usually breed violence," to form the ground work of a felony-murder charge, *Byrn, Homicide Under the Proposed New York Penal Law*, 33 *Fordham L. Rev.* 173, 193 (1964). (Emphasis omitted.) Note, however, that the New York Proposed Penal Law § 125.25(3) limits the felony-murder doctrine to homicide arising out of the commission or attempted commission of the crimes of "robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first degree, or escape in the second degree"

4. For cases representing the view that a person cannot be responsible for the killing of another unless the lethal act was either actively or constructively his see *Butler v. People*, 125 Ill. 641, 18 N.E. 338 (1888); *Commonwealth v. Moore*, 121 Ky. 97, 88 S.W. 1085 (1905); *Commonwealth v. Campbell*, 89 Mass. 541 (1863); *People v. Wood*, 8 N.Y.2d 48, 167 N.E.2d 736, 201 N.Y.S.2d 328 (1960); *State v. Oxendine*, 187 N.C. 658, 122 S.E. 568 (1924).

5. See note 1 *supra*.

6. One author notes that "the mens rea or 'malice' necessary for the felony is in every instance different from the mens rea or 'malice aforethought' required for murder; but for certain killings the law will allow the latter to be conclusively proved from the former. This is not to identify them at all—it is merely to say that in certain cases proof of the particular state of mind required for murder will be established by the mens rea of certain felonies; it will be malice 'implied' rather than 'express.'" *Morris, The Felon's Responsibility for the Lethal Acts of Others*, 105 U. Pa. L. Rev. 50, 60 (1956). (Emphasis omitted.)

7. There are several cases, commonly known as the "shield" cases, in which a person who was being used by a felon as a breastwork was accidentally killed by the gunfire of pursuers. See *Wilson v. State*, 188 Ark. 846, 68 S.W.2d 100 (1934); *Keaton v. State*, 41 Tex. Crim. 621, 57 S.W. 1125 (1900); *Taylor v. State*, 41 Tex. Crim. 564, 55 S.W. 961 (1900). One author suggests that the convictions in these cases are exceptions to the majority rule in that the lethal acts were not committed by one of the felons. Note, 106 U. Pa. L. Rev. 1176, 1177 (1958). Closer analysis of the facts, however, appears to indicate that the cases are squarely within the majority reasoning, in that the very fact of "placing the victim in this situation is itself a directly lethal act." *Morris, supra* note 6, at 54.

8. See *People v. Washington*, 40 Cal. Rptr. 791 (2d Dist. 1964); *People v. Harrison*, 1 Cal. Rptr. 414 (2d Dist. 1959); *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955); *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, cert. denied, 344 U.S. 845 (1952); *Commonwealth v. Almeida*, 362 Pa. 596, 68 A.2d 595 (1949), cert. denied, 339 U.S. 924 (1950); *Commonwealth v. Moyer*, 357 Pa. 181, 53 A.2d 736 (1947).

9. Referring to Justice Bell's statement in *Commonwealth v. Thomas*, 382 Pa. 639, 646, 117 A.2d 204, 207 (1955) (concurring opinion), in which he said that a "person is from

engages in a felonious act, he "should be held responsible for *any* death which by direct and almost inevitable sequence results from the initial criminal act."¹⁰ Essentially, the proponents of this view, the instant court included, believe that the proximate cause doctrine¹¹ is as readily applicable to criminal cases as it is to tort cases.

Original formulation of the minority view is generally attributed to the courts of Pennsylvania. In *Commonwealth v. Moyer*,¹² the Pennsylvania Supreme Court declared that the defendant felons could be properly found guilty of murder in the death of a gas station attendant they were attempting to rob, even though the lethal gun shot was fired by the station's proprietor. Further support for this new extension of the felony-murder doctrine was given by the court in *Commonwealth v. Almeida*,¹³ where it was stated that "whether the fatal bullet was fired by one of the bandits or by one of the policemen who were performing their duty . . . is immaterial"¹⁴ as to whether the defendant is guilty of murder. Finally, the Supreme Court of Pennsylvania decided *Commonwealth v. Thomas*,¹⁵ a case which was a cornerstone of the minority view until it was expressly overruled by *Commonwealth v. Redline*¹⁶ in 1958. This apparent reversal of the minority trend by the *Redline* case met with general approval.¹⁷

The minority view again appeared, however, when in the following year the second District Court of Appeal of California in *Pcople v. Harrison*¹⁸ denied a new trial to a felon who had been convicted of murder in the death of a store owner even though the fatal shot was fired during a holdup by the owner's clerk.

time immemorial responsible for the natural and reasonably foreseeable results of the felony," Professor Morris unequivocally asserts that the "proposition . . . is false if it is meant to imply, as it would seem to, that a felon has from time immemorial, because of the 'malice' of his felony, been responsible for more than his own acts or those of his co-felon in pursuance of the felony. Not until Almeida, [supra note 8] is responsibility more widely cast than this." Morris, supra note 6, at 61. (Footnote omitted.)

10. *Commonwealth v. Moyer*, 357 Pa. 181, 190-91, 53 A.2d 736, 741 (1947). (Emphasis added.)

11. Although the cases do not explicitly mention tort proximate cause, this, in effect, is the standard they are applying. See notes 27-32 infra for a discussion of proximate cause as used by the minority view.

12. 357 Pa. 181, 53 A.2d 736 (1947).

13. 362 Pa. 596, 68 A.2d 595 (1949), cert. denied, 339 U.S. 924 (1950).

14. *Id.* at 610, 68 A.2d at 602-03.

15. 382 Pa. 639, 117 A.2d 204 (1955). While attempting to make good an escape after having robbed a storekeeper, the defendant's co-felon was mortally wounded by the robbery victim. The defendant was subsequently convicted for the death of his partner.

16. 391 Pa. 486, 137 A.2d 472 (1958). This case, like the Thomas decision, involved the death of a felon. However, here the lethal shot was fired by a pursuing policeman rather than the victim.

17. See 71 Harv. L. Rev. 1565 (1958); 56 Mich. L. Rev. 1197 (1958); 106 U. Pa. L. Rev. 1176 (1958); 19 U. Pitt. L. Rev. 808 (1958). But see 32 Temp. L.Q. 117 (1958).

18. 1 Cal. Rptr. 414 (2d Dist. 1959). This case and the Thomas case, which was overruled by the Redline case, were the only cases cited by the instant court in support of its holding.

It should be noted that prior to the *Redline*¹⁹ decision, the courts of Florida²⁰ and Michigan²¹ followed Pennsylvania's lead by adopting the view that felons could be guilty of murder for lethal acts, which were neither actively nor constructively committed by them. Michigan, however, has since reappraised its position, and although not expressly overruling its previous stand, has seriously limited the application of the minority view. The court in *People v. Austin*,²² while refusing to hold a felon guilty of murder in the killing of one of his accomplices by the victim of the robbery, let stand a prior conviction²³ where there was the killing of an *innocent person* by a non-participant in the felony. Similarly, the majority in the *Redline* case, although overruling²⁴ *Commonwealth v. Thomas* (the killing of a co-felon), refused to disturb²⁵ the holding in *Commonwealth v. Almeida* where the defendant was held guilty of murder in the death of an innocent third party. Both the *Redline* and *Austin* cases defended this rather doubtful distinction on the grounds that the killing of a felon was justifiable, whereas it was only excusable in the case of an innocent third party.²⁶

The dissent in the present case, would also make a distinction between the killing of an accomplice and of an innocent party, but on grounds somewhat different from those put forth by either the *Redline* or *Austin* courts. In

19. The California felony murder doctrine is found in Section 189 of the Penal Code. "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilfull, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree . . ." Note that the statute does not explicitly state that the killing must be done by a felon as does, for example, the New York statute. "The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed . . . without a design to affect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise . . ." N.Y. Pen. Law § 1044(2).

20. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955).

21. *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, cert. denied, 344 U.S. 845 (1952).

22. 370 Mich. 12, 120 N.W.2d 766 (1963).

23. *People v. Podolski*, 332 Mich. 508, 52 N.W.2d 201, cert. denied, 344 U.S. 845 (1952).

24. 391 Pa. at 508, 137 A.2d at 482.

25. *Id.* at 510, 137 A.2d at 482-83.

26. Referring to the killing of one of the defendants' accomplices by a policeman, the court in the *Redline* case stated that "the homicide was justifiable and, obviously, could not be availed of, on any rational legal theory, to support a charge of murder. How can anyone, no matter how much of an outlaw he may be, have a criminal charge lodged against him for the consequences of the lawful conduct of another person?" 391 Pa. at —, 137 A.2d at 483. This distinction has been generally criticized. "The *Redline* case . . . expressly overruled the *Thomas* decision, and, in limiting the *Almeida* case to its facts, cast serious doubt as to its rationale." *People v. Wood*, 8 N.Y.2d 48, 53, 167 N.E.2d 736, 740, 201 N.Y.S.2d 328, 333 (1960). Another source notes that "the factual difference between victims . . . does not produce a legal distinction justifying an opposite result; yet the majority refuses to extend its holding possibly influenced by an emotional reluctance to let the killing of an innocent bystander, even though excusable, go unpunished." 19 U. Pitt. L. Rev. 808, 810 (1958) (Emphasis omitted.); see 24 Mo. L. Rev. 266, 269 (1959); 106 U. Pa. L. Rev. 1176, 1179 (1958).

distinguishing *People v. Harrison* (the killing of an innocent third person) from the situation in issue, the dissent pointed out:

The rule that a killing perpetrated in an attempt to commit a felony is murder is based upon the common-law principle that the intent to commit a felony supplies the criminal intent or malice. . . . There is no logical basis for saying that the attempt to commit a felony implies malice between the two felons who are working in concert with each other.²⁷

This distinction would lead to the conclusion that the accidental killing of one felon by another during the commission of a felony would not be felony murder.

In applying a proximate cause standard, the majority reasoned that since the defendant initiated the original felony, he should be responsible for any death stemming from the criminal conduct. *People v. Harrison*, cited as an authority for this holding, makes an elaborate attempt to justify the minority view by means of a proximate cause theory.²⁸ The authorities cited by the *Harrison* court, however, dealt with proximate cause in situations somewhat different from the facts of that case.²⁹ That is, the lethal act and not simply the act of entering into the original felony, was initiated by one of the felons, although other intervening causes contributed to the death. By way of simple illustration, if A is attempting to rob B, and a struggle for A's gun ensues in which B is killed, A will not be heard to say that B's attempt to seize the gun from him was such an intervening cause as to absolve him of liability.³⁰ In such a case, it is not unreasonable to say that A's act (pointing the gun at B) was the proximate cause of B's death, and is unaffected by B's natural reaction in attempting to defend himself. However, it is quite another proposition to maintain, as did the *Harrison* court,³¹ that once a person enters into a felony, he is the proximate cause for any death occurring during the *res gestae* of the felony.

Furthermore, the minority's position, in applying the tort standard of proximate cause, becomes even more doubtful when it is realized

that proximate cause in criminal and civil cases differ because the theories behind the limitation on liability in each are based upon a different premise, one upon a social concept, of public interest and safety, and the other upon compensatory relief in reference to whom should bear the loss as between two individuals. One is based upon the welfare and safety of the state and its citizens in general, and the other when to compensate an individual for some harm done or whether to leave the parties where they are found.³²

27. 40 Cal. Rptr. at 795 (dissenting opinion).

28. See note 11 *supra*.

29. One authority, in a criticism of the *Harrison* court states "that through a process of selection from a given area one may create and achieve that which is desired and by this process also develop the authority it seeks for its stated position." James, *The Felony Murder Doctrine*, 1 *Crim. L.Q.* No. 2, 33, 46 (1963).

30. See *People v. Manriquez*, 188 Cal. 602, 206 Pac. 63 (1922).

31. 1 Cal. Rptr. at 425.

32. James, *supra* note 29, at 46. (Footnotes omitted.)

Consequently, it would appear to be imprudent to apply strictly the same standards originally developed for cases dealing with money damages, to those criminal cases involving the charge of murder.

The minority view with respect to the liability of felons for the lethal acts of others, can neither be justified in light of the common law origins of the crime of felony³³ murder, nor on the grounds that such strict liability is necessary as a deterrent to crime. Clearly in its original form, felony murder involved nothing more than the transfer of a *mens rea* from the original crime to a death-dealing act of the felon. However, presently in California, as a result of the *Harrison* and *Washington* cases, not only the *mens rea* but the *homicidal act itself* will be imputed to a felon, thus making the "apparent scope of the . . . felony murder rule . . . to be one of almost absolute liability."³⁴ It is also somewhat questionable to argue that an imputation of the lethal acts of third persons to a felon is necessary to deter crime.³⁵ Rather, it appears that such a view is a return to an era when the punishment for a crime bore little relation to its seriousness.³⁶ In short, the minority position, both legally and socially, lacks sufficient justification.

Domestic Relations—New York Court Approves Use of Arbitration in Custody Disputes.—The plaintiff and his wife entered into a separation agreement in 1962. Paragraph three of the agreement provided that custody of the parties' two children be given to the wife, subject to specified visitation rights

33. See notes 1-3 *supra* and accompanying text.

34. James, *supra* note 29, at 46. (Footnotes omitted.)

35. Professor Morris, in referring to the Almeida and Thomas cases, succinctly summarized the weakness of the "deterrence argument" when he stated that "the whole theory of the deterrence of serious crimes by variations in the weight of the punishment imposed on the perpetrators is so much in doubt as to make rational judgment on the effect of this particular increased punishment doubly dubious. Furthermore, where it is sought to increase the deterrent force of a punishment, it is usually accepted as wiser to strike at the harm intended by the criminal rather than at the greater harm possibly flowing from his act which was neither intended nor desired by him; that is to say, for the situations before us, to increase penalties on felonies—particularly armed felonies—wherever retaliatory force can be foreseen, rather than on the relatively rarer occasions when the greater harm eventuates." Morris, *supra* note 6, at 67.

36. Although part of the purpose of society's punishment of convicted criminals is retributive, the fact remains that "all the striving of the law is to inflict a punishment commensurate with the crime For preventive purposes the penalties are increased with the degree of social harm threatened [while] for retributive purposes the penalties are increased with the viciousness of defendant's intent These purposes should not be forgotten when the punishability of a defendant charged with homicide happens to turn upon the outcome of a proximate cause inquiry. Assuming that his act has caused a death in fact, its punishability as a homicide should be determined, not so much by the more or less fortuitous course of events subsequent to the acting, as by the social menace of the act and the viciousness of the actor's intent." Comment, 31 Mich. L. Rev. 659, 662-63 (1933).

for the husband; that the parents should consult with each other on all matters of importance relating to the children's health, welfare, and education; that the husband be notified of the serious injury or illness of either child; and that each party encourage the children's love and respect for the other. Another clause in the agreement provided for arbitration of disputes arising within the scope of paragraph three. Seeking punitive damages for alleged violation of the provisions of paragraph three, the husband served a demand for arbitration on the wife. Her motion to stay arbitration was granted by the supreme court. The appellate division, first department, affirmed the order below noting that a demand for punitive damages was clearly outside the scope of the arbitration clause. In dictum, however, the court expressly approved the use of arbitration in custody and visitation disputes. *Sheets v. Sheets*, 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964).

Ultimate jurisdiction over custody questions has been a jealously guarded prerogative of the courts. At common law, custody was considered an incident of the guardianship of lands and in that light was closely tied to property rights.¹ With the development of the idea that infants, as such, should be protected by the courts, the Chancellor was deemed to have received from the Crown its power as *parens patriae* to hear petitions regarding them,² as an additional remedy to traditional habeas corpus proceedings at law.³ In both types of proceedings the courts gradually came to apply a rule based on the best interests of the child. In the words of Lord Esher in *Queen v. Gyngall*,⁴ "the Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children, and must exercise that jurisdiction in the manner in which a wise, affectionate, and careful parent would act for the welfare of the child."⁵

In the United States, equity courts have long exercised jurisdiction in custody matters.⁶ The rule, as stated by Judge Cardozo, is: "Except when adjudged as an incident to a suit for divorce or separation, the custody of children is to be regulated as it has always been in one or other of two ways: by writ of habeas corpus or by petition to the chancellor . . ." ⁷ It has been

1. See 25 Am. Jur. Guardian & Ward §§ 5, 6 (1940); Jacobs & Goebel, *Cases on Domestic Relations* 880-82 (4th ed. 1961); Foster & Freed, *Child Custody*, 39 N.Y.U.L. Rev. 423 (1964).

2. *Ibid.* The Common law view was that the father was the natural guardian of the child. It was not until 1839 that the Chancellor was empowered by statute to award custody of children under seven to their mother. This has now been extended in England to age 21. *Id.* at 424.

3. Since the ecclesiastical courts had jurisdiction over marriage, custody could not be decided as an incident of a matrimonial action.

4. [1893] 2 Q.B. 232.

5. *Id.* at 241.

6. See, e.g., *Wilcox v. Wilcox*, 14 N.Y. 575 (1856). See also Note, *Custody of Minor Children—Courts Power as Parens Patriae*, 23 Albany L. Rev. 424, 432 (1959).

7. *Finlay v. Finlay*, 240 N.Y. 429, 432, 148 N.E. 624, 626 (1925). Judge Cardozo also noted: "The chancellor in exercising his jurisdiction upon petition does not proceed upon

held that a court's jurisdiction over custody matters survives the incorporation of a separation agreement providing for custody in a valid foreign divorce decree,⁸ and that a state court has jurisdiction over a child physically present therein even though his residence or domicile or that of his parents is not in that state.⁹ Once made, a custody decree will not be modified without a clear showing of a substantial change of circumstances and an equally strong indication that the best interests of the child require it.¹⁰

The underlying principle, that "a child is not a chattel which may be used as a consideration for an agreement of compromise,"¹¹ pervades the reasoning of the courts in consistent holdings that they are not bound by the agreement of the parties as to custody. Thus, in *Hicks v. Bridges*,¹² a New York court entertained jurisdiction to fix the children's residence in New York even though their mother had agreed to keep them in San Francisco and a California divorce decree had directed her to do just that.¹³ In *Kunker v. Kunker*,¹⁴ the court declared that parties to a matrimonial action can never finally contract with respect to custody and their proper support and education.¹⁵

Virtually no one disputes the *ultimate* jurisdiction of the courts with regard to custody. Recently, however, a question has been raised as to the proper

the theory that the petitioner, whether father or mother, has a cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. . . . He 'interferes for the protection of infants, *qua* infants' Id. at 433-34, 148 N.E. at 626. (Italics omitted.)

8. *People ex rel. Herzog v. Morgan*, 287 N.Y. 317, 39 N.E.2d 255 (1942); *Spitz v. Spitz*, 39 Misc. 2d 934, 242 N.Y.S.2d 111 (Sup. Ct. 1963); *Bastian v. Bastian*, 130 Ohio Op. 2d 267, 160 N.E.2d 133 (Ct. App. 1959). The statement in *Bachman v. Mejias*, 1 N.Y.2d 575, 580, 136 N.E.2d 866, 868, 154 N.Y.S.2d 903, 907 (1956), that "the full faith and credit clause does not apply to custody decrees" has been criticized as going too far in its statement of the rule. See Grad, *Conflict of Laws*, 32 N.Y.U.L. Rev. 1327, 1331 (1957). For a general discussion of the conflicts of laws problems involved in custody decrees see Ratner, *Child Custody in a Federal System*, 62 Mich. L. Rev. 795 (1964).

9. The general rule as to the basis of jurisdiction in custody matters is that "a custody contest is in the nature of an *in rem* proceeding; that the *res* is the custodial status of the child . . ." Lindey, *Separation Agreements and Ante-Nuptial Contracts* § 14-84 (1964). (Italics omitted.) See *Paul v. Paul*, 78 Idaho 370, 304 P.2d 641 (1956); *Hicks v. Bridges*, 2 App. Div. 2d 335, 155 N.Y.S.2d 746 (1st Dep't 1956).

10. See N.Y. Dom. Rel. Law § 70; *Harwell v. Harwell*, 253 Iowa 413, 112 N.W.2d 868 (1962).

11. *Bachman v. Mejias*, 1 N.Y.2d 575, 582, 136 N.E.2d 866, 869, 154 N.Y.S.2d 903, 908 (1956). See also *Pratt v. Pratt*, 363 S.W.2d 54 (Mo. Ct. App. 1962); *Commonwealth ex rel. Children's Aid Soc'y v. Gard*, 362 Pa. 85, 66 A.2d 300 (1949).

12. 2 App. Div. 2d 335, 155 N.Y.S.2d 746 (1st Dep't 1956).

13. See also *Kiger v. Kiger*, 258 N.C. 126, 128 S.E.2d 235 (1962); *Taylor v. Taylor*, 389 P.2d 648 (Okla. 1963).

14. 230 App. Div. 641 246 N.Y. Supp. 118 (3d Dep't 1930).

15. "Over these [support and education] the court has jurisdiction regardless of the agreement of the parties, for as to them the directions must be such 'as justice requires,' subject to later modification." Id. at 645, 246 N.Y. Supp. at 123.

forum for the initial hearing of a custody dispute. It has been suggested that many parents are reluctant to "invoke the machinery of the law" in a custody dispute because it is slow and expensive as well as subject to publicity.¹⁶ One alternate approach would use a committee, containing one member called a child-ally (whose sole concern would be the needs and desires of the child) to hear and decide the question.¹⁷ Translating this idea into practical terms, it has further been suggested that the committee approach might well be realized by means of arbitration of custody disputes.¹⁸

It was recognized prior to the present case that in New York, at least, judicial precedent clearly militated against such an approach, since both custody and visitation questions were unequivocally held to be nonarbitrable.¹⁹ In the leading case on arbitration of custody questions, *Hill v. Hill*,²⁰ the separation agreement provided that if one party moved out of New York City and no agreement could be reached as to resettlement of custody or visitation rights, arbitration would be held. When the wife notified her former husband of her intention to move to Florida and take the children with her, and the husband did not reply to her request for resettlement discussions, she served a demand for arbitration upon him. Ruling on her motion to compel arbitration, the Supreme Court said: "Lacking any compelling authority to support the enforcement of an agreement to arbitrate custody and in the face of what appears to be clear and authoritative condemnation of such method of determining custody, the petitioner's application is denied."²¹ A few years later, in *In the Matter of Michelman*,²² the supreme court refused to allow arbitration of a dispute over visitation rights, declaring that a hearing *by the court* was the only way for the best interests of the child to be determined.²³

In the thirteen years since *Hill* the climate for arbitration of matrimonial matters has undoubtedly grown warmer. Though it was settled even before

16. Kuble, Provisions for the Care of Children of Divorced Parents: A New Legal Instrument, 73 Yale L.J. 1197, 1198 (1964).

17. *Ibid.*

18. Note, Committee Decision of Child Custody Disputes and the Judicial Test of "Best Interests," 73 Yale L.J. 1201 (1964). This note was cited with approval in the instant case. 22 App. Div. 2d at 177, 254 N.Y.S.2d at 323.

19. *Id.* at 1207. The arbitrability of custody disputes has apparently not been before the courts in other states, but it is a question that could easily arise, especially in the twenty states whose arbitration statutes specifically provide for the arbitration of future disputes. They are: Arizona, California, Connecticut, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and Wyoming. Maryland will become the twenty-first State with a modern arbitration law when its statute becomes effective on June 1, 1965. See American Arbitration Ass'n, Arbitration News, No. 5, p. 1, 1965.

20. 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

21. *Id.* at 1039; 104 N.Y.S.2d at 759.

22. 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. 1954).

23. *Id.* at 570, 135 N.Y.S.2d at 608.

Hill that questions of wife support were arbitrable,²⁴ child support and corollary questions were generally considered nonarbitrable.²⁵ Then, in 1960, the court in *Freidberg v. Freidberg*²⁶ held the education of the couple's son and the payment of his tuition fees to be arbitrable issues. The court expressly distinguished *Michelman* apparently on the theory that the education of the child did not go to the heart of the custody question. Under the typical court reasoning, as illustrated by *Kunker v. Kunker*,²⁷ this distinction would not have been tenable unless the courts were already beginning to look for a less rigid rule regarding arbitration of custody questions.²⁸

The decision in the instant case signals a new attitude regarding custody problems. It does not mean, however, that the courts intend to abdicate their common-law *ultimate* jurisdiction over infants.²⁹ Thus, though one of the chief advantages of the arbitration process is its finality,³⁰ the court pointed out that an arbitration award involving custody would always be subject to review by the courts on the question of the child's best interests.³¹ It noted that any provision of the award could be challenged in court by a parent, interested relative, or the child himself through a friend. On such application

24. Wife support was arbitrable whether it involved the fixing of the amount to be paid or the enforcement of an existing provision. See *In the Matter of Robinson*, 296 N.Y. 778, 71 N.E.2d 214 (1947) (memorandum decision); *In the Matter of Luttinger*, 294 N.Y. 855, 62 N.E.2d 487 (1945) (memorandum decision); *Zuckerman v. Zuckerman*, 96 N.Y.S.2d 190 (Sup. Ct. 1950).

25. See Lindey, *op. cit. supra* note 9, § 29-15: "[I]t would seem that child-support is not arbitrable. But the point is by no means settled. For one thing, the law is evolving; the trend is toward enlarging the scope of arbitrable issues, so as to relieve the over-burdened courts. For another, there are conflicting unreported decisions in the lower courts." See American Arbitration Ass'n, Lawyers' Arbitration Letter, Nov. 15, 1961, in which it is noted that contrary decisions were reached in two cases involving child support. In *Dowell v. Berger* (Sup. Ct.) in N.Y.L.J., June 6, 1952, p. 16, col. 3, the question of support payments for children was considered arbitrable. In another case, *Dianda v. Volkman*, (Suffolk County Ct.) in N.Y.L.J., Feb. 1, 1952, p. 16, col. 1, a motion to compel arbitration of a dispute involving child support was denied. The *Dianda* case has been distinguished on the ground that the Children's Court had already ordered the defendant to pay a certain sum for support. Lindey notes that in the only high court case involving arbitration of child support it was denied on very narrow grounds and the court did not specifically rule out arbitration of the question. See Lindey, *op. cit. supra* note 9, citing *In the Matter of Matsner*, 301 N.Y. 699, 95 N.E.2d 53 (1950) (memorandum decision).

26. 23 Misc. 2d 196, 201 N.Y.S.2d 606 (Sup. Ct. 1960).

27. 230 App. Div. 641, 246 N.Y. Supp. 118 (3d Dep't 1930); see notes 14 & 15 *supra* and accompanying text.

28. See Lindey, *op. cit. supra* note 9, § 29-4.

29. See notes 6 & 7 *supra* and accompanying text.

30. The courts will not review an arbitration award on the law or on the facts. Only if the arbitrator has been guilty of fraud, misconduct, or partiality can the award be vacated. See N.Y. Civ. Prac. Law & R. 7511; see also *Domke, Commercial Arbitration 96-99* (1965).

31. 22 App. Div. 2d at 178, 254 N.Y.S.2d at 324.

the court would examine the matter de novo and decide what action was "necessary for the best interests of the child."³²

This approach to custody disputes does not have the unanimous approval of the bar.³³ It has been suggested that "no one individual other than a court should have the last word to determine the basic questions of who shall have custody of a child or how the health and general welfare of a child can best be protected."³⁴ There is no doubt that if the dictum in *Sheets* is followed in New York, arbitration clauses covering custody, heretofore inserted by attorneys in separation agreements for their "psychological effect,"³⁵ will now be invokable and the resultant awards largely enforceable without further hearing. Whether this method of resolving custody problems involves a greater danger to the child than a hearing in a judge's chamber cannot, at this juncture, be fully known. Certainly the attorney who draws a separation agreement which includes an arbitration clause should pay particular attention to that clause. For example, to utilize the committee approach, he may want to write an arbitration clause providing that each party name one arbitrator and that a specified agency³⁶ name the third. If he does this, the clause should specify

32. *Id.* at 179, 254 N.Y.S.2d at 324. The court noted that of a typical list of items that might be arbitrated, including visitation rights of the father on one day of the week rather than another, the place where a child's clothes should be purchased, whether the child should be accompanied to school by a parent or nurse, whether he should have a particular, or no, religious training, or whether he should go to a camp at sea level or in the mountains, only those which could affect his interests adversely would be subject to review. The court pointed out that of all the items in the above mentioned list only those involving religious training and, in some instances, a summer camp would so qualify. *Ibid.*

33. See Perles, *The Effect of the Sheets Case on Agreements to Arbitrate Problems Involving Children*, N.Y.L.J., Jan. 25, 1965, p. 1, col. 4.

34. *Ibid.* An alternate plan suggested by this attorney would be for separation agreements to be drafted making submission of the disputed questions to qualified mediators a condition precedent to litigation. The mediators' opinion would be advisory, and binding on neither the court nor the parents. The benefit of such a plan would be that the parents would have the advice of disinterested parties without any waiver of legal rights. In reply to this suggestion, it has been proposed that an arbitration agency such as the American Arbitration Association might be able to provide facilities for a combined arbitration-mediation approach. See Letter from Robert Coulson, Executive Vice-President of the American Arbitration Association, to Warren Moscow, Editor of the *New York Law Journal*, Feb. 2, 1965, p. 4, col. 3. Conciliation procedures have also been advocated as an ideal way of settling custody problems, even where it has been agreed by all that divorce is the best solution. See McIntyre, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. Fam. Law 117, 129 (1964). It is noted there that although the New York Legislature passed the Family Court Act in 1962, the courts have yet to set up the facilities or procedures for a full-fledged conciliation program. *Id.* at 119 n.6.

35. Perles, *op. cit. supra* note 33.

36. E.g., the American Arbitration Association. Under the Commercial Arbitration Rules of that Association, parties to an arbitration proceeding may provide for a single arbitrator or for a three-man panel. If they choose the latter, they may require that each party nomi-

exactly what type of person is felt by the parents to be most desirable—his occupation, religious affiliation, and even his age, should the parties have strong feelings on any of these matters. A clearly written and specific clause will make easier the resolution of future disputes.

It is submitted that the *Sheets* dictum provides no ground for apprehension. A well-drafted arbitration agreement will insure a qualified, mutually-acceptable panel of arbitrators. In the background the court stands ready to exercise its paternal jurisdiction. And the flexibility of procedure which is possible is bound to result in more imaginative treatment of the human problems that make up a custody dispute.

Evidence—Defendant in a Malpractice Action Compelled to Give Expert Testimony.—Pursuant to the advice of defendant doctors, plaintiff underwent three operations to correct a corneal condition. The operations worsened plaintiff's condition to the point where plaintiff became blind in one eye.¹ In her action against the doctors and the hospital for malpractice, plaintiff sought to elicit the expert testimony of defendant doctors. The trial court sustained objections to all such questions and nonsuited plaintiff for failure of proof. The appellate division affirmed.² The court of appeals granted a new trial, holding that plaintiff in a malpractice action is entitled to elicit and rely on the expert testimony of the defendant. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

At common law a party could not compel his adversary to testify.³ In an early New York case, *Mauran v. Lamb*,⁴ the court stated that a party would not be compelled to make himself civilly liable.⁵ However, this rule has long since been abandoned and expressly superseded by legislative enactments which provide that a party to a civil action shall not be excluded *or excused* from being a witness because of his interest,⁶ nor will he be excused from answering

nate his own arbitrator and that the two nominees name the third, or that the Association name the third. Or, if they prefer, they may provide for a completely neutral panel of three arbitrators to be chosen from the panels of the Association. See §§ 12-14 of the Commercial Arbitration Rules (1964).

1. Plaintiff claimed in her malpractice action that Doctors Schachat and Kleinhandler had misrepresented the possible outcome of the operation and that the decision of Doctors Doctor, Paton and Kleinhandler to operate was contrary to professionally acceptable practice in light of her condition.

2. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 16 App. Div. 2d 374, 228 N.Y.S.2d 143 (1st Dep't 1962).

3. 8 Wigmore, Evidence §§ 2217, 2218 (McNaughton ed. 1961).

4. 7 Cow. 174 (N.Y. Sup. Ct. 1827).

5. *Id.* at 177-78.

6. N.Y. Civ. Prac. Law & R. 4512: "Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party . . ."

a relevant question solely on the ground that "the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit."⁷ The purpose of these legislative enactments is to promote the presentation to the jury of all relevant facts.⁸ The function of the courts in deciding controversies should not be thwarted or delayed simply because the pertinent information in the possession of a party happens to be prejudicial to his case.

An independent expert may be required to testify in his lay capacity just as any other lay witness. Although he may voluntarily voice his professional opinion, *i.e.*, give expert testimony,⁹ he will not be compelled to do so. In formulating this rule, the New York Court of Appeals in *People ex rel. Kraushaar Bros. v. Thorpe*,¹⁰ reasoned that if the independent expert could be compelled to give his expert opinion in every similar controversy he might be subjected to the considerable hardship of having to appear in every such controversy—in effect, penalizing him for his skill or knowledge.¹¹ In a case such as the present one, where the adverse party is himself an expert, the rule permitting a party to compel his adversary to testify and the rule prohibiting compulsory expert testimony must be juxtaposed. The discord among the decisions in jurisdictions outside New York¹² seems to arise from this juxtaposition. Many of these decisions are based on the incorrect assumption that the rule compelling an adverse party to testify, if called as a witness, to all relevant facts, conflicts with the rule which prevents a witness from being compelled to testify as an expert, notwithstanding the relevancy of his testimony.

In most states the rules permitting and governing the examination of an adverse party are statutory in nature. Some statutes provide that the examination of an adverse party will be governed by the rules applicable to other witnesses.¹³ This has led to much disparity in decisions within and among the various

7. N.Y. Civ. Prac. Law & R. 4501.

8. 15 N.Y.2d at 27, 203 N.E.2d at 473, 255 N.Y.S.2d at 71.

9. Expert testimony will be necessary in "cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence." *Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900). See also *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 396, 34 N.E.2d 367, 371 (1941) (malpractice); see generally *Rosenthal, The Development of the Use of Expert Testimony*, 2 *Law & Contemp. Prob.* 403 (1935).

10. 296 N.Y. 223, 72 N.E.2d 165 (1947) (tax certiorari; independent expert, who had made an appraisal for previous owners of the property not compelled to testify).

11. *Ibid.*; *Buchman v. State*, 59 Ind. 1 (1877) (criminal trial for rape in which appellant doctor was called as an expert witness). As an additional reason for its holding the court, in *Buchman*, noted that "it is evident that the skill and professional experience of a man are so far his individual capital and property, that he cannot be compelled to bestow it gratuitously upon any party." *Id.* at 9 (citation omitted).

12. See cases cited in 15 N.Y.2d at 26-27, 203 N.E.2d at 473, 255 N.Y.S.2d at 71.

13. E.g., *Idaho Code Ann.* § 9-1206 (Supp. 1963); *Minn. Stat. Ann.* § 595.03 (Supp. 1964); *N.J. Rev. Stat.* § 2A:81-11 (1951): "Except as otherwise provided by law, when any party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses."

jurisdictions.¹⁴ Since one of the rules applicable to "other witnesses" invariably prohibits compulsory expert testimony, some courts have concluded that this right of an expert to remain silent on certain matters is of paramount importance. The scope of testimony capable of being elicited from the adverse party is, therefore, limited accordingly.¹⁵ Under such an interpretation the testimony of the doctors in the instant case would have been limited to a mere description of the actual treatment rendered. Consequently, the doctors would not have been compelled to answer hypothetical questions as to what the usual medical procedure might be in such instances. In other states, however, the courts have held that since the purpose of the adverse witness statute is to bring *all* relevant information before the court, the rule respecting compulsory expert testimony should have no application to the adverse party.¹⁶ It is to be noted that this will not subject an expert to involuntary appearances in court since the exception is in favor of the adverse party.

The instant case is one of first impression in New York. Unlike other state statutes which attempt to set down guidelines governing the examination of an adverse party, the New York statute merely permits such examinations.¹⁷ The court, therefore, in seeking a determination, correctly turned to the rules as evincing solutions to problems of evidentiary procedure. The foreign state decisions which have reached a result contrary to the one here, have been based solely on the language appearing in their adverse witness statutes.¹⁸ These courts have merely superimposed the rules applicable to independent experts upon the adverse party statutes without seeking to understand the concept behind these rules. A proper discussion of the issue need not consider the adverse party statute at all since the adverse party expert is, irrespective of his being

14. Compare *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956) (compelling the adverse party to testify as an expert on cross-examination in a childbirth malpractice action), with *Osborn v. Carey*, 24 Idaho 158, 132 Pac. 967 (1913) (malpractice case; adverse party not compelled to testify as an expert on cross-examination); compare *Lashley v. Koerber*, 26 Cal. 2d 83, 156 P.2d 441 (1945), and *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944), and *Harnden v. Mischel*, 63 N.D. 122, 246 N.W. 646 (1933), with *Ericksen v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963), and *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931), and *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

15. Such was the rule set down by the New Jersey court in *Hull v. Plume*, 131 N.J.L. 511, 37 A.2d 53 (Ct. Err. & App. 1944). In this action for wrongful death due to negligence, the court, sustaining objections to questions relating to hypothetical methods of treatment, concluded that "there is no authority for excluding the defendant . . . from the protection of the statute [respecting compulsory expert testimony] because he is a party to the litigation . . ." *Id.* at 517, 37 A.2d at 56. In a recent Minnesota malpractice action, *Ericksen v. Wilson*, *supra* note 14, a similar decision was reached.

16. *Lawless v. Calaway*, 24 Cal. 2d 81, 147 P.2d 604 (1944); *State v. Brainin*, 224 Md. 156, 167 A.2d 117 (1961) (wrongful death due to malpractice).

17. See N.Y. Civ. Prac. Law & R. 4512, quoted in note 6 *supra*.

18. E.g., *Ericksen v. Wilson*, 266 Minn. 401, 123 N.W.2d 687 (1963); *Hunder v. Rindlaub*, 61 N.D. 389, 237 N.W. 915 (1931); *Forthofer v. Arnold*, 60 Ohio App. 436, 21 N.E.2d 869 (1938).

made an adverse party witness, an interested party who will be present during the proceedings. Furthermore, the testimony given by the adverse party expert will not entail an expenditure of research time to acquaint him with the facts of the case, one of the grounds asserted for refusing to compel an independent expert to testify.¹⁹

Another factor asserted by the court in reaching its conclusion was that a plaintiff will not, in most cases, elect to rely on the testimony of the defendant doctor, but will rather do so out of necessity,²⁰ for, as was noted in one opinion:

Anyone familiar with cases of this character [malpractice] knows the so-called ethical practitioner will not testify on behalf of a plaintiff regardless of the merits of his case. This is largely due to the pressure exerted by medical societies and public liability insurance companies which issue policies of liability insurance to physicians covering malpractice claims. . . . [P]hysicians . . . flock to the defense of their fellow member charged with malpractice and the plaintiff is relegated, for his expert testimony, to the occasional lone wolf or heroic soul, who for the sake of truth and justice has the courage to run the risk of ostracism by his fellow practitioners and the cancellation of his public liability insurance policy.²¹

However, there are two notable shortcomings inherent in this argument. Firstly, plaintiffs have succeeded in acquiring independent medical experts to testify in malpractice actions.²² Secondly, this reasoning may tend to limit the instant holding to malpractice cases. This would be an unjustified limitation for, in light of the interpretation given to the expert witness and adverse party witness rules, the holding should apply equally in *any* case requiring expert testimony²³ and not be limited to malpractice cases.

While it is true that as a result of the instant decision a plaintiff might tend to rely solely on the defendant for expert testimony, thus saving the time and expense involved in procuring his own expert, there is nothing "unsporting" in this technique since it is presumed that the defendant will testify most favorably to himself.²⁴ It is also assumed that in naming a doctor as a defendant the plaintiff will do so in good faith. However, if this were not the case, and plaintiff merely sued a doctor as co-defendant because his testimony would be favorable, the doctor could move for summary judgment and get the action dismissed as against him.²⁵ Therefore, the possibilities of abusing the court's ruling

19. *People ex rel. Kraushaar Bros. v. Thorpe*, 296 N.Y. 223, 72 N.E.2d 165 (1947).

20. 15 N.Y.2d at 27-28, 203 N.E.2d at 474, 255 N.Y.S.2d at 71-72.

21. *Huffman v. Lindquist*, 37 Cal. 2d 465, 484, 234 P.2d 34, 46 (1951) (Carter, J., dissenting). See *Christie v. Callahan*, 124 F.2d 825, 828 (D.C. Cir. 1941).

22. *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 34 N.E.2d 367 (1941); *Moss v. Winkler*, 4 App. Div. 2d 852, 166 N.Y.S.2d 485 (4th Dep't 1957) (memorandum decision).

23. *State v. Kurtz*, 143 So. 2d 761 (La. Ct. App. 1962) (independent appraiser employed by the adverse party compelled to give expert testimony as to the value of real estate); *Harnden v. Mischel*, 63 N.D. 122, 246 N.W. 646 (1933) (expert opinion as to value of automobile).

24. 15 N.Y.2d at 28, 203 N.E.2d at 474, 255 N.Y.S.2d at 72.

25. N.Y. Civ. Prac. Law & R. 3212.

will be greatly minimized. In the present case one of the defendants had written a book which contained information favorable to plaintiff.²⁶ By calling him, plaintiff could expect either to get him to repeat this information or, if he tried to assert a contrary opinion, to impeach him with these prior contradictory statements in the book. Thus, as a practical matter, plaintiffs will avail themselves of the instant holding only when the potentially detrimental testimony of the defendant can be impeached either by his prior contradictory statement or by another expert.

The appellate division,²⁷ holding that the defendant would not be compelled to testify as an expert, found an incongruity in that the net result of such an action would be that "the plaintiff invites the jury to be guided by a standard furnished by a source condemned by her."²⁸ This, however, fails to take into account two basic facts: that some expert testimony is necessary in a malpractice action, and that by impeaching and interrogating his adversary, a party can establish some standard against which the jury can measure the defendant's performance.²⁹ The importance of the holding, therefore, lies not in the wider latitude it affords a party in examining his adversary, but rather in the recognition it gives to the fact that there is no reason to limit the scope of such examination so as to exclude expert testimony.

Labor Law—National Labor Relations Board Affords Administrative Relief for Union Racial Discrimination.—In 1961, the National Labor Relations Board certified Locals 1 and 2, Independent Metal Workers Union, as the joint bargaining representative of the employees at Hughes Tool Co. Petitioner was a member of Local 2, which represented the Negro employees of the company; Local 1 represented the white employees. After the expiration of a collective bargaining agreement,¹ in which all the parties had participated, Local 1 and the employer agreed to extend and amend the agreement, and established new apprenticeships. All the parties were aware that these positions were to be available only to white employees.

Petitioner submitted a bid for one of the apprenticeships, but his name was omitted from the list of applicants. He then asked Local 1 to intercede on his behalf, but his request went unanswered. Petitioner then filed a charge that Local 1's failure to act on his grievance violated Section 8(b)(1)(A)² of the

26. 15 N.Y.2d at 24, 203 N.E.2d at 472, 255 N.Y.S.2d at 69.

27. 16 App. Div. 2d 374, 228 N.Y.S.2d 143 (1st Dep't 1962).

28. *Id.* at 379, 228 N.Y.S.2d at 149.

29. *Kelley v. Wasserman*, 5 N.Y.2d 425, 428-29, 158 N.E.2d 241, 243, 185 N.Y.S.2d 538, 541 (1959).

1. Clear lines delineating the scope of each local's responsibility were established by contract with the employer, and jobs were divided into two categories, one group of jobs being open only to white employees, the other only to Negroes.

2. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958): "It shall be an unfair labor

National Labor Relations Act.³ After the General Counsel issued a complaint on this charge, Local 2 filed a motion for the rescission of the certification issued to Locals 1 and 2 on the ground that Local 1 had discriminated against the Negro members of the bargaining unit because of their race. The Board consolidated the two proceedings. The trial examiner held that Local 1's action in failing to process petitioner's grievance violated sections 8(b)(1)(A), 8(b)(2),⁴ and 8(b)(3)⁵ of the NLRA. On appeal, the NLRB upheld the trial examiner's decision and withdrew certification of both locals on the ground that Locals 1 and 2 practiced racial discrimination when determining membership.⁶ *Metal Workers Union (Hughes Tool Co.)*, 56 L.R.R.M. 1289 (1964).

Although both the majority and the minority of the NLRB agreed that Local 1 had violated section 8(b)(1)(A), their conclusions were based on different theories. The majority adopted the trial examiner's holding that the union's failure to process an employee's grievance constituted a refusal to represent him, and therefore, "restrained or coerced him in his exercise of his right to be represented."⁷ It strongly condemned a failure to process a grievance on the basis of racial considerations, and stated that by Local 1's "failure to entertain in any fashion or to consider the grievance filed by an employee in the bargaining unit, Ivory Davis, and by its outright rejection of Davis' grievance for reasons of race, [Local 1] violated section 8(b)(1)(A)"⁸

In essence, this was a reiteration of the doctrine recently announced by the NLRB in *Miranda Fuel Co.*⁹ In *Miranda*, the Board held that the failure of a

practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein" (Italics omitted.)

3. 49 Stat. 449 (1935), as amended, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. V, 1964).

4. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (1958): "It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership"

5. 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(3) (1958): "It shall be an unfair labor practice for a labor organization or its agents . . . to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)"

6. Any violations occurring as a result of the fact that there may have been a discriminatory contract present are not in issue, because, as the trial examiner pointed out, "General Counsel expressly disclaimed any allegation that Local 1 violated the Act by executing the contract" *Metal Workers Union*, 56 L.R.R.M. 1289, 1291 (1964).

7. *Id.* at 1291.

8. *Id.* at 1292. (Emphasis added.)

9. 140 N.L.R.B. 181 (1962), enforcement denied, 326 F.2d 172 (2d Cir. 1963). A union truck driver asked his employer for a leave of absence which was to be effective several days

statutory bargaining representative to fairly represent all members of the bargaining unit constituted an unfair labor practice. The Board reached this result by first finding that section 9(a)¹⁰ of the act imposed upon the bargaining agent an obligation to represent fairly all employees in the unit.¹¹ It then read this obligation into the section 7¹² right of employees "to bargain collectively through representatives of their own choosing"¹³ and reached the conclusion that the employees are given, under section 7, "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment."¹⁴ The Board concluded that it had jurisdiction over a charge involving such treatment since a union violation of section 7 is an unfair labor practice under section 8(b)(1)(A).¹⁵

The court of appeals, however, denied enforcement of the Board's order in *Miranda*, Judge Medina taking specific exception with the Board's theory of "fair representation."¹⁶ *Miranda* represents the only judicial test of the Board's

prior to a date specified in a union-employer contract allowing employees to go on leave and still maintain their seniority rights. The employer granted the request, but the union demanded that the driver's seniority be reduced, and the employer acquiesced in the demand.

10. 49 Stat. 453 (1935), as amended, 29 U.S.C. § 159 (1958).

11. The doctrine of fair representation has been applied in the federal courts. E.g., *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1955) (per curiam); *Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768 (1952); *Graham v. Brotherhood of Locomotive Firemen*, 338 U.S. 232 (1949); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

12. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 157 (1958): "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

13. *Ibid.*

14. *Miranda Fuel Co.*, 140 N.L.R.B. at 185.

15. On the general question of the right of an employee to be represented fairly, there seems little doubt. However, there is a difference of opinion as to whether this right should be enforced by the federal courts, the state courts, state labor agencies, or the NLRB under the NLRA. See generally, Blumrosen, *The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship*, 61 Mich. L. Rev. 1435 (1963); Wellington, *Union Democracy and Fair Representation: Federal Responsibility in a Federal System*, 67 Yale L.J. 1327 (1958). Even those who feel that the problem of fair representation belongs before the Board, differ as to what theory, if any, would properly sustain the Board's jurisdiction. Compare, *Sovern, Race Discrimination and the National Labor Relations Act: The Brave New World of Miranda*, N.Y.U. 16th Annual Conference on Labor 3 (Christensen ed. 1963), and *Sovern, The NLRA and Racial Discrimination*, 62 Colum. L. Rev. 563 (1962), with *Cox, The Duty of Fair Representation*, 2 Vill. L. Rev. 151 (1957).

16. *NLRB v. Miranda Fuel Co.*, 326 F.2d 172, 176-77 (2d Cir. 1963). For the reasons why the other Judges did not rule on the theory, see the concurring opinion of Judge Lumbard (*id.* at 180), and the dissenting opinion of Judge Friendly. *Ibid.*

fair representation theory. However, the Supreme Court, in rejecting a Board decision that found a hiring hall provision in a union-employer collective bargaining contract *per se* illegal, stated that where "Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go further and establish a broader, more pervasive regulatory scheme."¹⁷ Section 7 makes no specific mention of any right to fair representation. Therefore, the Supreme Court's statement, in reference to the finding of a hiring hall provision *per se* illegal, would seem equally applicable in the instant case.

Further, the NLRA, as originally enacted, contained no prohibitions against union activities. The Taft-Hartley Act¹⁸ which added union unfair labor practices to the NLRA, supplemented section 7 only insofar as giving the employees the right to refrain from union activity. This would not have the effect of imposing a duty of fair representation on a union. The mere fact that an aggrieved employee who claims that he has not been represented fairly may be financially¹⁹ or procedurally²⁰ better off before the NLRB than if he had gone to the courts for relief would seem an insufficient reason for off-setting plain statutory language.²¹

The Board, however, has continued to apply the fair representation theory, and has taken specific exception with the circuit court's decision. "With due deference to the Circuit Court's opinion, we adhere to our previous decision until such time as the Supreme Court of the United States rules otherwise." Local 1367, Int'l Longshoremen's Ass'n, 57 L.R.R.M. 1083, 1085 n.7 (1964). See also Local 12, United Rubber Workers, 57 L.R.R.M. 1535 (1964).

17. Local 357, Teamsters Union v. NLRB, 365 U.S. 667, 676 (1961).

18. 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 151-68 (1958), as amended, 29 U.S.C. §§ 153-60 (Supp. V, 1964).

19. Since the NLRB, after a charge has been filed, handles the prosecution of an unfair labor practice, an aggrieved employee need not bear the expense of trial or counsel.

20. The principal difficulty that arises in suing a union is that which is found in suing any unincorporated association: The problem of obtaining a binding judgment against the association's treasury in the face of the common law requirement of showing that all the association's members concurred in the alleged wrongful act. See Millis & Katz, A Decade of State Labor Legislation 1937-1947, 15 U. Chi. L. Rev. 282, 305 (1947). Hiller v. Liqueur Salesmen's Union, 338 F.2d 778 (2d Cir. 1964), would seem to obviate this problem. It held that an employee may sue the union in respect to a violation of fair representation and obtain a binding judgment on the union treasury under § 301 of the NLRA, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958). See also Smith v. Evening News Ass'n, 371 U.S. 195, 200 (1962).

Further, it has been held that § 301 is substantive rather than procedural, Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), and that when dealing with a contract under § 301, federal law supersedes state law, Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962). However the problem would still seem to exist where the suit was not within the purview of § 301.

21. If the Board does have jurisdiction over a breach of the duty to represent fairly, it may be argued that both the state and federal courts are excluded from dealing with this issue. "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). The

Legislative intent offers no additional support for the majority's theory.²² As late as 1959, when Congress passed the Labor-Management Disclosure Act (Landrum-Griffin Act),²³ some twenty-four years after the NLRA and twelve years after the Taft-Hartley Act, Congress had the opportunity to include a section making a breach of the duty to represent fairly an unfair labor practice. They did not do so. At the time that Congress considered the Landrum-Griffin Act, the Supreme Court had already established the judicial duty of fair representation. It would seem that had Congress desired the Board to have jurisdiction over fair representation matters they would have included some indication of that in the Landrum-Griffin Act. In addition, if Congress had intended the NLRB to protect workers' rights to fair representation, and to have jurisdiction over matters arising as a result of racial discrimination in union membership, why did they find it necessary to include a section barring racial discrimination in union membership, and create a new Board to enforce said section, in the 1964 Civil Rights Act?²⁴

Chairman McCulloch and Member Fanning, composing the minority, based their finding of a violation of section 8(b)(1)(A) on Local 1's refusal to process petitioner's grievance because he was not a member of the local. Clearly, a refusal to prosecute a grievance of a member of the bargaining unit on the ground that he is not a member of the union constitutes coercion on the part of the union with respect to the employee's right to refrain from union activities.²⁵

The minority also indicated that the new doctrine adopted by the majority would expand the Board's jurisdiction into new areas, and it doubted whether the Board has either the requisite experience or knowledge to deal with such matters.²⁶ One observer, in discussing the Board's theory of fair representation, has stated that there will be many "practical difficulties facing both unions and government should the latter attempt to determine and outlaw *any action* by a union which is 'unfair.'"²⁷

Court, however, has held that where the breach of the duty of fair representation arises from an employer-union contract, it may be treated as having arisen under § 301 of the NLRA, and the state and federal courts have jurisdiction. *Humphrey v. Moore*, 375 U.S. 335 (1964).

22. "The 1947 Congress intentionally rejected an amendment to the NLRA that would have directly enforced workers' rights to fair representation by a section 8 unfair labor practice proceeding." Note, *Administrative Enforcement of the Right to Fair Representation: The Miranda Case*, 112 U. Pa. L. Rev. 711, 721 (1964).

23. 73 Stat. 541 (1959), 29 U.S.C. § 158 (Supp. V, 1963).

24. Civil Rights Act of 1964, §§ 703, 705-06, 78 Stat. 255, 258-59, 42 U.S.C.A. §§ 2000e-2, -4, -5 (1964).

25. *Confectionary Union v. NLRB*, 312 F.2d 108 (2d Cir. 1963); *NLRB v. Die & Tool Makers Lodge*, 231 F.2d 298 (7th Cir. 1956).

26. 56 L.R.R.M. at 1299 (separate opinion). The Board minority, however, did not indicate who they thought would be more qualified than themselves to handle the fair representation problem, since the subject to be considered encompasses labor problems, an area in which they are considered expert.

27. Christensen, *Labor Relations Law*, 1963 Ann. Survey Am. L. 103, 126. (Emphasis added.)

The Board was also divided as to violations of sections 8(b)(2) and 8(b)(3). The majority rested its positive finding of a violation of section 8(b)(3) on the ground that when Local 1 failed to process the employee's grievance it, in effect, refused to bargain collectively.²⁸ The majority adopted the trial examiner's reasoning that since an employer owes a duty to bargain not only to the employees' statutory bargaining representatives, but to the individual employees as well, and since the statutory representative owes a duty to bargain with the employer, it must follow that the statutory representative also owes the duty to bargain with the employer to the individual employees.

The only case that the Board cited to support the proposition that the employer's duty to bargain with the union extends to the employees was *NLRB v. Louisville Refining Co.*²⁹ This case fails to evidence any support for the contention that this duty is owed to the employees.³⁰ The mere fact that the employer owes the duty to bargain to the union, and the union owes the employer a corresponding duty, would not, without some further indicia, give rise to the proposition that the union owes this duty to the employees as well.

Section 8(d)³¹ defines the term bargaining collectively for the purposes of section 8, and contains no wording which would indicate that the failure to process the grievance of a member of the bargaining unit may constitute a failure to bargain in violation of the statute.

The legislative history of the section indicates that a different result should have been reached. Congress merely intended, in passing section 8(b)(3), to make the union's duty to bargain reciprocal with that of the employer's duty to bargain with the union.³² Further, the Supreme Court has adopted this interpretation of legislative intent.³³ There was no mention in said history of the fact that a union's failure to process an employee's grievance should be considered a violation of the union's duty to bargain.

With respect to the section 8(b)(2) violation, the majority adopted the trial examiner's holding that because Local 1 did not process Davis' grievance

28. "A refusal to process a grievance is . . . a refusal to bargain." 56 L.R.R.M. at 1291.

29. 102 F.2d 678 (6th Cir. 1939).

30. In this case the employer refused to bargain with representatives of a national union, even though they were the designated representatives of his employees. The employer offered two defenses for his actions. First he claimed that he had not been officially notified in writing that the union was the choice of his employees. Second, he claimed that he was willing to bargain with a "local" union rather than the national. The court held these defenses insufficient. The obligation here can be recognized as the normal duty that the employer owes to the bargaining agent of his employees to bargain with such agent.

31. "[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . ." 61 Stat. 142 (1947), as amended, 29 U.S.C. § 158(d) (1958).

32. See 93 Cong. Rec. 3838 (1947) (remarks of Senator Taft); 93 Cong. Rec. 4133 (1947) (remarks of Senator Ellender).

33. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960).

it caused, or attempted to cause, the employer to violate section 8(a)(3).³⁴ The Board relied on *Radio Officers' Union v. NLRB*,³⁵ where the union had negotiated a contract with the employer that called for the payment of additional benefits to union members. The employer defended his distribution of these benefits on the theory that union membership was closed³⁶ and, therefore, he could not possibly encourage or discourage membership in the union by his distribution of additional benefits to the present union members. The Court rejected this defense on the ground that union membership requirements were subject to change and the employer could not take action that tended³⁷ to encourage union membership. The instant case, however, can be distinguished from *Radio Officers'*. In *Radio Officers'* the union asked the employer to distribute additional benefits to union members and not to other members of the bargaining unit, and the employer complied with its request. Here, with respect to the union's failure to process petitioner's grievance, the Board claimed that the union had caused, or attempted to cause the employer to violate section 8(a)(3) without asking the employer to do, or refrain from doing, anything.

The Board's determination rescinding the certification of both locals seems well founded. Union-employer contracts involving racial discrimination have long been judicially condemned.³⁸ These rulings have been made applicable to unions operating within the sphere of the NLRA.³⁹ In *Pioneer Bus Co.*,⁴⁰ the Board rescinded certification of a union which had drawn contracts with the employer on a racially discriminatory basis. In the present case, the majority went further⁴¹ and specifically overturned prior Board decisions⁴²

34. 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(3) (Supp. V, 1964): "It shall be an unfair labor practice for an employer . . . 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 . . ."

35. 347 U.S. 17 (1954).

36. Membership in the union was open only to the sons of persons who were already existing members.

37. The proposition that an employer's actions are illegal if they even tend to encourage membership in unions, rather than the act being done in order to encourage union membership was contested by Justices Black and Douglas. See 347 U.S. at 57-58 (Black, J., dissenting).

38. See cases cited note 11 supra.

39. *Syres v. Oil Workers Int'l Union*, 350 U.S. 892 (1955) (per curiam).

40. 140 N.L.R.B. 54 (1962).

41. The majority also set forth the proposition that racial discrimination in union membership may constitute a violation of § 8(b). "[R]acial segregation in membership, when engaged in by . . . a representative, cannot be countenanced by a Federal Agency and may violate Section 8(b)." 56 L.R.R.M. at 1293.

This poses an interesting problem because a close look at § 8(b) fails to reveal justification for the Board's statement. There are two subsections that deal directly with qualifications for union membership, one clearly inapplicable in this instance, § 8(b)(5), 61 Stat. 142 (1947), 29 U.S.C. § 158(b)(5) (1958), which prohibits the union from charging excessive initiation fees of employees covered by an agreement, and the other seemingly in direct opposition to the Board's contention, § 8(b)(1)(A), 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(1)(A) (1958),

which had allowed the certification of unions which were established along racially discriminatory lines. The Board stated that it could no longer render aid to a bargaining agent that discriminates on the basis of race.⁴³ The decision has adequate support in Supreme Court cases.⁴⁴ Although Congress had no intention to regulate racial requirements for union membership at the time the Taft-Hartley Law was proposed,⁴⁵ it is clear enough that the Court's decisions prohibiting enforcement of racial discrimination by the state or federal governments⁴⁶ would be equally applicable to a federal administrative agency.

With respect to the Board's handling of racial discrimination under the general area of fair representation, a different conclusion must be reached. This is not to say that all questions dealing with racial discrimination should be placed outside the Board's jurisdiction. However, in light of the dubious status of the Board's fair representation theory, and the prospect of increasing the Board's work load so that it might take as long as three years to get a decision on an NLRB action,⁴⁷ would it not be better to adopt the thinking

which says: "It shall be an unfair labor practice for a labor organization or its agents to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the rights of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . ." One observer has stated that this section means that "a union can probably refuse to admit an applicant . . . for any or no reason whatsoever . . ." (Italics omitted.) See Manoff, *Labor Relations Law* 122 (1955); see also note 45 infra.

42. *Atlanta Oak Flooring Co.*, 62 N.L.R.B. 973 (1945); *Larus & Brother Co.*, 62 N.L.R.B. 1075 (1945).

43. "We hold too, in agreement with the Trial Examiner, that the certification should be rescinded because Locals Nos. 1 and 2 discriminated on the basis of race in determining eligibility for full and equal membership, and segregated their members on the basis of race." 56 L.R.R.M. at 1294.

44. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (prohibiting state courts from enforcing private racially discriminatory contracts); *Hurd v. Hodge*, 334 U.S. 24 (1948) (prohibition extended to federal courts).

45. Senator Taft, during Congressional discussion of the bill, stated: "Let us take the case of unions which prohibit the admission of Negroes to membership. If they prohibit the admission of Negroes to membership, they may continue to do so . . ." 93 Cong. Rec. 4193 (1947). That membership requirements, in general, were not planned to be regulated is also evident. Referring to § 8(b)(1) of the then proposed Taft-Hartley Act, the Senate Committee considering the bill stated that: "It is to be observed that unions are free to adopt whatever membership provisions they desire . . ." S. Rep. No. 105, 80th Cong., 1st Sess. 21 (1947). The Committee clearly indicated legislative intent when they stated: "The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom." *Id.* at 20.

46. See, e.g., *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam), reversing 223 F.2d 93 (5 Cir. 1955) (public golf course); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (state public schools); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (federal public schools); *Dawson v. Mayor & City Council of Baltimore*, 220 F.2d 386 (4th Cir.) (per curiam), aff'd per curiam, 350 U.S. 877 (1955) (public beaches); *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), aff'd per curiam, 352 U.S. 903 (1956) (public transportation).

47. One commentator, discussing the Board's work load prior to its adoption of the

“that although Congress never intended the National Labor Relations Act to encompass union-caused racial discrimination as an unfair labor practice, the Board could take cases where the discrimination was based upon union membership considerations.”⁴⁸ An example of such cases would be where the union causes the employer to discriminate against a member of the bargaining unit who is not a member of the union, and such discrimination encourages union membership; or, the union in its bargaining with the employer, discriminates against a member of the bargaining unit because he is not a union member. Such discrimination, though it happened to be based on racial considerations, would be within the purview of the NLRB.

fair representation theory, indicated that “it commonly requires eighteen to twenty-five months from the time charges are filed until an enforcement order is issued in the circuit court of appeals.” Keeney, Comments, in Symposium on Labor Relations Law 684, 685 (Slovenko ed. 1961).

48. NLRB Press Release No. 981, at 4, Sept. 14, 1964.