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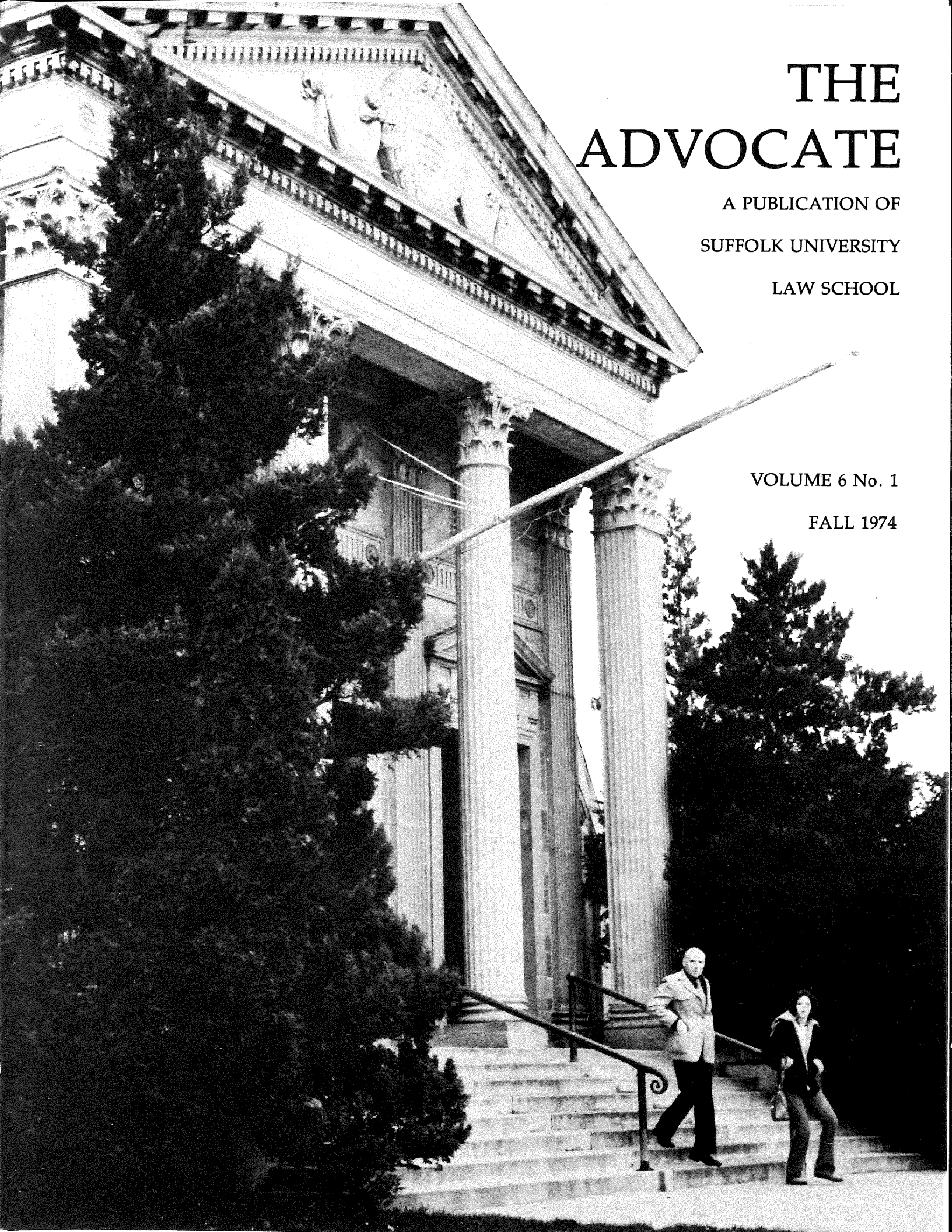

THE ADVOCATE

A PUBLICATION OF

SUFFOLK UNIVERSITY

LAW SCHOOL

VOLUME 6 No. 1

FALL 1974

Policy Statement

The objectives of **The Advocate** are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law.

All articles and editorials reflect the personal views of the authors and are not necessarily the views of the administration or faculty of Suffolk Law School.

Guest editorials by students and faculty are welcomed by **The Advocate** which recognizes its obligation to publish opposing points of view.

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In Memoriam: Judge John E. Fenton, Sr.

The late Judge John E. Fenton, Sr. will be remembered as one of the most influential jurists, educators and civic leaders in the history of Massachusetts. Throughout his life Judge Fenton was able to accomplish herculean feats with such proficiency that the impossible was expected from him as commonplace.

Judge Fenton's association with Suffolk University began in 1920, when he commenced his four years of night school which resulted in a degree from Suffolk University Law School in 1924. In September, 1965, Judge Fenton retired after twenty-eight years as judge of the Massachusetts Land Court to become president of Suffolk University. He served five years before retiring and assuming the chairmanship of the board of trustees of Suffolk for the second time in October, 1970.

During Judge Fenton's tenure as president, Suffolk enjoyed its period of greatest growth. The enrollment at Suffolk nearly doubled as did the number of faculty. Today, Suffolk's colleges and law school have a combined enrollment of more than 6,000 students. As the student body grew, the school's facilities expanded and improved. A new six-story building on Beacon Hill and two new libraries were built during Judge Fenton's presidency.

Judge Fenton was Suffolk's fifth president and one of its most popular. He possessed an unyielding dedication to the welfare of his students. At the time of assuming the presidency of Suffolk, he was 67 years-old and said, "Retire? I'm just beginning. The main reason I took this job was to do some good for future generations." When he stepped down in 1970, then board chairman George C. Seybolt cited Fenton's relationship with students as "a matter of pride for both himself and the trustees."

The late sixties were turbulent times full of discord and unrest; yet, Suffolk University was free of any strife. The major reason for this was Judge Fenton's open door policy of meeting, within one day, with any student. He took pride in the fact that he and students could discuss protests reasonably, and that Suffolk was free of student strikes. He was never too busy to listen to a student's problem.

It was this devotion to the student body which won him two citations from the students themselves. The Student Bar Association presented him with the Dean Frederick A. McDermott Award in 1966 for devoted service to the law school and students. The undergraduate students honored Fenton as the outstanding administrator at their senior banquet last May.

Judge Fenton will be remembered as Associate Dean Clifford E. Elias described him. "He was a very warm and energetic person with a marvelous capacity to get things done. He was restless, always wanting to accomplish more. But above all, he was a decent human being."

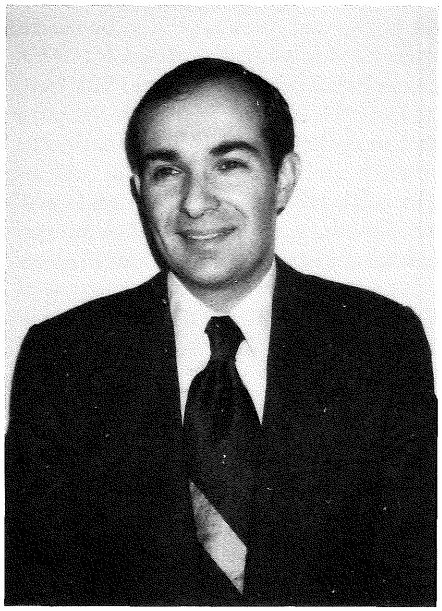
Outside Suffolk, Judge Fenton received a myriad of honors and awards for his civic and charitable work. Among his most outstanding achievements in these fields were his efforts in raising one million dollars for Bon Secours Hospital.

It is the sincere wish of everyone associated with Suffolk University that Judge Fenton's dedication, spirit and humanitarianism will live on at the University. Suffolk's new college of liberal arts building on Beacon Hill will be named after Judge Fenton, as President Thomas A. Fulham recently announced, to "recognize his immeasurable contributions to the colleges, the law school, and its students."

Francis A. DeLuca

Dealing with the Drunk Driver: A New Approach in Massachusetts

By
Joseph J. Senna, MSW, JD
Associate Professor College of Criminal Justice
Northeastern University



Biography

Joseph J. Senna is currently an Associate Professor in the College of Criminal Justice at Northeastern University, Boston, Massachusetts. He holds an undergraduate degree in Economics and Psychology from Brooklyn College, a Master of Social Work degree (M.S.W.) from the Fordham University Graduate School of Social Service, and a law degree (J.D.) from the Suffolk University Law School.

Prior to coming to Northeastern University in 1970, Professor Senna had extensive experience in the field of criminal justice. He has given lectures and seminars on related legal and social service issues, and has authored many articles in professional journals on criminal justice administration and education.

Professor Senna also serves as a Special Assistant District Attorney in Middlesex County and has prosecuted numerous cases of defendants charged with driving under the influence of intoxicating liquor.

Introduction

On July 29, 1974, Governor Sargent signed into law Chapter 647 of 1974 — "An Act Establishing an Alternative Procedure for the Disposition of Cases Involving Persons Convicted of Operating Motor Vehicles While Under the Influence of Intoxicating Liquor."[1] This Act, which will become effective on July 1, 1975, is a two-year experiment in rehabilitating the alcoholic driver. The major issue raised by the Act is whether positive treatment and driver education programs are a more effective approach in dealing with drunk driving than mandatory penalties which result in automatic license revocation. This article will discuss the problem of alcohol related traffic offenses, identify the more interesting approaches for implementing "driving under the influence" laws, and explore the provisions and scope of the new Massachusetts legislation.

The "Drunk Driver"

Statistics of alcohol related driving offenses indicate the extreme seriousness of "drunk driving" in Massachusetts and throughout the country. In Massachusetts, there are perhaps between 250,000 to 290,000 alcoholics and the majority of them are licensed drivers.[2] This fact demonstrates the seriousness and potential magnitude of the drunk driving problem. It has been estimated that drunk driving accounts for a minimum of 67% of all fatal crashes in the Commonwealth, of which there were over 800 such incidents in 1973.[3] Furthermore, throughout the entire state, over 8,000 persons were convicted of driving under the influence of intoxicating liquor in 1974.[4] This figure does not represent the extent of the problem because law enforcement officials have traditionally under-enforced "DUIL" laws and judges and juries have been reluctant to convict the arrested offender.[5]

Across the country, it has been estimated that alcohol is involved in 50% to 60% of all highway fatalities, causing as many as 30,000 deaths and 800,000 injuries every year.[6] Nationally, drivers who drink are responsible for the death of 500 men, women, and children every week of the year.[7] It is a fact that the drunken driver is a menace in our society, and potentially as dangerous as a criminal with a lethal weapon. As a result, DUIL offenses contribute substantially to the crime problem and need to be dealt with effectively by the criminal justice system and related agencies.

Present Law

In Massachusetts, individuals convicted of operating a motor vehicle under the influence of intoxicating liquor are punished by a one-year revocation of their driver's license for the first offense within a six-year period, with no right to petition for license re-instatement.[8] This type of de-licensing action is the most often used criminal sanction for DUIL offenders. There are at least 45 states, and the District of Columbia, which impose the legal penalty of suspension or revocation of license upon a first conviction for DUIL.[9] However, less than half of those jurisdictions suspend or revoke the licensing action for less than a year.[10] In Connecticut, for example, the legal sanction for being found guilty of DUIL is a mandatory suspension for one year, but a person may apply for a reversal of this action.[11] The state of Vermont imposes a mandatory suspension for 90 days provided a breathalyzer examination was not refused and a rehabilitation program was successfully completed by the defendant.[12] In Maine, there is a mandatory suspension of license for four months upon a first DUIL conviction.[13] Thus, most states, including Massachusetts, seek to deal with the drunk driver by

some form of punitive action involving the suspension or revocation of the driver's license. The Massachusetts Statute, however, appears unduly restrictive, because it mandates an automatic revocation of the license for one year, while also making no provisions for driver rehabilitation programs.

In the past year, however, efforts have been made to re-evaluate the present DUIL law in Massachusetts. This re-examination results from the apparent fact that alcohol is related to over half of all highway fatalities and that existing punitive statutes alone have not been able to handle the problem satisfactorily. Also, such recent federal decisions as *Easter* v. *District of Columbia* and *Driver* v. *Hinnant*[14] have served to emphasize the need to treat the alcoholic offender rather than apply rigid criminal penalties. These two cases, both in 1966, declared that chronic alcoholics could not be found guilty of the crime of public intoxication. The President's Crime Commission gave further support to this approach in 1967 by recommending alternative forms of treatment for alcoholics, including the elimination of public drunkenness as a criminal offense.[15] And although the United States Supreme Court case of *Powell* v. *Texas*,[16] in 1968, did not decide that alcoholism is a disease, it was clear that the criminal justice system lacked the capacity to deal with the problem drinker. Massachusetts realized this to be the case by the passage of its "Alcoholism Treatment and Rehabilitation Law" in 1971.[17] These factors have resulted in the decriminalization of drunkenness in many jurisdictions, as well as in efforts to provide rehabilitation services to the alcoholic driver still under the reach of the criminal law.

The current Massachusetts DUIL law, excluding the recent amendment, makes no attempt to rehabilitate the alcoholic offender. It handles the problem of the drunk driver simply through a fine or imprisonment and some action against the defendant's license. Critics of the law feel that it is extremely rigid because it mandates immediate loss of a driving license upon conviction for a DUIL offense. This automatic revocation gives the courts no discretion in the handling of such cases.

Another problem with the present statute has been the apparent reluctance on the part of law enforcement personnel to aggressively enforce the law. The police obviously realize the hardship that may be caused by revocation of license. If an offender is convicted, loss of driving privilege may interfere with maintaining a livelihood and eventually curtail employment. As a result, the police often make arrests for DUIL in severe cases only, or charge the offender with a lesser crime, such as operating to endanger life and safety. There is also the tendency at a trial for many judges and juries to be reluctant to enter convictions in drunk driving cases for similar reasons.[18]

This situation is further complicated by the feeling that many offenders who lose their license for a DUIL conviction continue to drive anyway. If this is true, the law has little or no deterrent effect on the drunken driver, and the underlying problem which resulted in the offense — alcoholism — remains untreated.

Thus, laxity of enforcement, loss of statutory deterrent value, and no chance for rehabilitation indicate that the present DUIL law requires some revision since it operates neither fairly nor effectively. Police officers who are not interested in enforcing the law, judges disinclined to convict the offender, and juries on appeal unwilling to sustain convictions, represent an area in need of law reform.

New Approaches

There are programs in Massachusetts which have attempted to deal with the drunken driver by other than punitive means. One such program is the Alcohol Safety Action Project of Boston (ASAP).[19] It is one of thirty-five such programs being conducted throughout the United States funded by the Federal Department of Transportation. The aim of this project is to reduce drunken driving by a variety of activities which include increased enforcement through police safety patrols, the availability of rehabilitation and re-education services for the alcoholic, expanded prosecution and probation supervision, legislative reform, and programs of public information and education. According to present information, it appears that Boston ASAP is having a substantial impact on the drunk driving problem in that jurisdiction.[20]

Similar type programs, with particular emphasis on judicial discretion of the DUIL statute and individual rehabilitation, have developed in other communities throughout the state. Both the cities of Lawrence and Brockton, for example, have created ASAP type programs and many other jurisdictions in the state and around the country are also following this direction.[21] These types of programs represent combined efforts by police, courts, social service agencies, and the public, to deal with the drunken driver in a more constructive manner. Such activities represent a more realistic effort to prevent, deter and treat the alcoholic driver.

Scope of New Legislation

There are several important policy issues which underlie the passage and eventual implementation of Chapter 647. The first is a change from a punitive to a rehabilitative approach to the drunken driving problem. This means that non-penal treatment is to be made available for problem drinkers who need rehabilitation programs. The emphasis of the amendment is on the prevention and treatment of the alcoholic driver.

Secondly, the new DUIL amendment will allow the courts to apply the concept of judicial discretion in the handling of such cases. Under the present law, the offender convicted of DUIL automatically has the driver's license revoked for a minimum of one year. Undoubtedly, some judges do exercise discretion in individual cases, by withholding a finding of guilt while referring the offender to a treatment service. The DUIL amendment formalizes this approach under legal sanction by allowing the judge to consider various alternative dispositions to the mandatory license revocation requirement.

Thirdly, it is apparent that lawyers, probation personnel, and others in the social services, will play a critical role in representing, investigating, supervising, and rehabilitating DUIL offenders for the courts. Lawyers will be required to assist their clients during trial, at disposition, and in subsequent hearings for license re-instatement. Probation officers will have the responsibility of insuring that offenders comply with the order of probation and with successful participation in driver alcohol education and treatment programs. Treatment specialists to whom the offender is referred will bear the burden of rehabilitating the alcoholic driver in the community. If these groups are not effective, it will not be possible to implement the new legislation.

Perhaps the last, and one of the most important, policy factors of the alternative procedure for handling DUIL cases is that it is based upon the need to ob-

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Jurisdiction to Annul in Massachusetts: A Blanket too Small for the Bed

by Wayne Soini

Milford v. Worcester[1], source of legal predictability for seven generations, inevitably cited in support of the proposition that common-law marriage is void in Massachusetts,[2] consistently followed for its rule that solemnization is required to validate a Massachusetts marriage,[3] is indisputably popular. Disputable nonetheless is its jurisdictional basis, and so this article.

The Massachusetts Constitution is succinct:

"All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision."[4]

This article, adopted in 1780 and retained ever since despite constitutional revising conventions and extensive amendments, establishes complete legislative power over marriage, divorce and alimony.[5] Chief Justice Gray summarized in an 1876 decision that, "(b)y the Constitution of the Commonwealth, in accordance with the practice under the Charter of the Province, the jurisdiction in cases of divorce and alimony was vested in the Governor and Council, until transferred by the Statutes of 1785, Chapter 69, to this court, where it has since remained; but it belongs to the Legislature to express by general laws the cases in which the court may decree a divorce . . ."[6] As to legislative power over annulment, the court has suggested no less complete constitutional investment. During the eighteenth century the term "divorce" subsumed annulment. The Statutes of 1785, for example, allowed "divorce" for marriages in violation of specified degrees of consanguinity or affinity, although by another section such marriages were to be "null and void."[7] Statutes using such terms as "libel for annulling" and "sentence of divorce, or nullity" date from 1836 in Massachusetts statutes with the Revised Laws codification of that year.[8] The Constitution of 1780 can hardly be construed to embody the narrower, modern meaning of "divorce." A Delaware court, citing Massachusetts and other jurisdictions' decisions in support of the proposition that courts have no inherent power to annul, held that jurisdiction arose "(o)nly if the asserted ground of invalidity of the marriage is one of the statutory grounds for annulment."[9]

If the Legislature retains complete authority to specify grounds for annulment under the Constitution, did the Legislature make any provision by law for annulment on grounds of lack of solemnization? Only if it had done so will *Milford* be valid; only if it had done so — or has since — will common-law marriage be void in Massachusetts.

The facts in *Milford* are derived from two depositions, one by Rhoda Temple, alleged wife, then widow of Stephen Temple, and the other by Joseph Dorr, Justice of the Peace.[10]

According to Mrs. Temple, she and Stephen "went to Mr. Lemuel Perham's, innholder in . . . Upton, where was then present Joseph Dorr, Esq., one of the Justices of the Peace for the County of Worcester . . . (W)e requested him to join us in marriage and presented to him the . . . certificate (of intentions) which he took and perused. But he declined taking an active part in the business. We then rose up before the said justice and he, the Stephen Temple, took me by the hand and declared before the said justice that he took me for his lawful wife in sickness and in health and that he would keep his body chaste for me until death did us part." Mrs. Temple recited her oath, "after which ceremony I believed that Stephen Temple and myself to be husband and wife."

The deposition concludes, "Mr. Lemuel Perham was present, and offered to pay Justice Dorr his fees, and requested him to make a record of the marriage and I verily thought the same to be on record till lately. And I further say that Justice Dorr did with an approving countenance, as it appeared to me, say, 'I believe it is strong enough.' "

Justice Dorr's deposition runs, "I called at the house of one Perham who then kept a tavern in the town of Upton.

"While I was at said Perham's house, one Stephen Temple and a woman, whose maiden name was Rhoda Galloway, but who had been married previously to the time, came into the room where I was, and application was made to me, as a magistrate of said county, to join them in marriage —

"Having in my own mind such objection as I thought ought to prevent me as a magistrate from joining the said Stephen and Rhoda in marriage I declined to do it — A proposition was made to me, I think by said Perham, that they might take each other as man and wife in the room where I was — I told him I should not marry them — After this they declared in my hearing that they took each other to be man and wife and I was desired by Lem Perham to make a record of it — I declined to do it and told them I should not take any active part respecting the business and should not make any record of it."

He concludes that he never did make record of the marriage, supposedly contracted in August or September, 1784. At least six children were born to Stephen and Rhoda Temple before Stephen died in February, 1809,[11] beginning with the birth of son Dolston on May 9, 1785.[12] This marriage, of over twenty years' standing, was annulled in *Milford* since Justice Dorr was found by a jury to have taken no active part in the ceremony.

(Justice Dorr's mysterious objection is probably based on fear of solemnizing a

bigamous marriage. Rhoda Galloway married Richard Eseling — the *Milford* court spells it Essling — on October 26, 1779.[13] Interestingly, this marriage was flawed by lack of required certificate of intentions. In the absence of any record of Eseling's death between 1779 and 1784, this author has concluded an Enoch Arden situation during which Rhoda advanced in age from 20 to 25 years.)[14]

Did the court have power to annul this marriage? Before *Milford*, in *Mangue v. Mangue*,[15] the court was presented with a libellant who alleged adultery as grounds for divorce. The libel was dismissed not because the libellant had failed to prove adultery, but because she failed to prove that her marriage had been solemnized. The flaw? The justice of the peace again is pivotal, as he would be in *Milford*; when he signed with two other witnesses as having observed the Mangues exchange marriage oaths, he was not acting in his official character. So far *Mangue* sounds like a fine *Milford* precedent. But the *Mangue* court pointedly refused to avoid the marriage for lack of jurisdiction! By statute the court could decree a "divorce" (or annulment) for incest, bigamy, impotency or adultery "and for no other cause."[16]

The jurisdictional question *Mangue* noted as open was not a unique Massachusetts problem. What court has jurisdiction to annul? Professor Clark informs us that "(t)his was a question of some difficulty in earlier times, since only the ecclesiastical courts had this authority in England, and in this country we had no such courts."[17] Courts elsewhere, unlike *Mangue*, assumed jurisdiction though justifications varied. Chancellor Kent, in decisions such as *Wightman v. Wightman*[18] and *Burtis v. Burtis*,[19] held that equity courts could annul marriage contracts by analogy to their powers over other contracts. Courts of law in other states annulled marriages after finding that ecclesiastical principles came to them through the common law.[20] The difference was not academic; if equity had jurisdiction, grounds for annulment were restricted to reasons that would cause contracts generally to fail, such as fraud or duress,[21] while if jurisdiction to annul derived from canon law, grounds were canonical, such as consanguinity and impotence.[22] There was, of course, less difficulty when the Legislature answered the question of jurisdiction statutorily and specified grounds for annulment. Massachusetts completed this task in 1836 by enacting a directory[23] catch-all jurisdiction:

> The supreme judicial court may, in all cases, where the course of proceeding is not specially prescribed, hear and determine all matters, coming within the purview of (the "divorce") chapter, according to the course of proceeding in ecclesiastical courts, and in courts of chancery . . .[24]

But this was not enacted until 1836. Although in the *Mangue* case the court forbore to exercise any extra-statutory jurisdiction to annul, in *Milford* the court assumed jurisdiction over unsolemnized marriage by asserting such marriages were void *ab initio*,[25] void before and even without judicial process. This invention in nullity to mother a non-express jurisdiction hung by the thread of implied legislative intent — that the Legislature meant to avoid all unsolemnized marriage when it established solemnization as a requirement for "lawful" marriage.[26] The intention could be implied since to accept noncomplying marriages would render "fruitless"[27] and "nugatory"[28] the legislation passed.

Obviously, the "fruit" test will fix a result only if social conditions remain the same or if that test is conscientiously applied only once — the first time. Thereafter, social changes are not taken into account as *stare decisis* takes over: to change becomes "a matter for legislative, and not for judicial consideration."[29]

Was it not always a matter for legislative, and not for judicial consideration? *Milford* cites generality, not unanimity, of opinion holding that the marriage solemnization laws are mandatory.[30] If such was the opinion of the legal community, what might not the marrying public believe in good faith? Given a group of debatably valid marriages, the Quaker variant of which the Legislature has affirmatively embraced, both prospectively and retroactively affirming the same in 1786,[31] may the judicial branch then or years later avoid remaining variants?

If it may, from whence does jurisdiction flow? Laches may provide temptation and opportunity, but it will not provide any addition to constitutional power. On a case level, *Mangue* is no precedent for judicial intervention into these debatable unions. Statutorily, the same Legislature that protected Quaker marriage restricted divorce (annulment) to four causes "and no others",[32] and it avoided marriage without jurisdictional direction for a fifth cause — miscegenation.[33] The Legislature showed its ability to avoid marriages in terms "absolutely null and void", "null and void" and "absolutely void" when avoidance was its intent.[34] What nonetheless avowedly motivates the *Milford* court to avoid? A fear that legislation will otherwise fail of its purpose and bear no fruit! The Legislature, which delineated penalties and fines for official noncompliance, which expressly avoided miscegenatious marriage in a section of the very solemnization requirements,[35] committed an oversight by not avoiding all marriages not in conformity with the statutes!

Such is urged by *Milford*, that a mandatory interpretation might breathe fecundity into an otherwise barren statute. What language is appropriate to discuss the constitutionality of such a decision? The court's own, of course. When, in *Sparhawk v. Sparhawk*,[36] the Supreme Judicial Court overturned a statute as unconstitutional for making all decrees *nisi* absolute, it was incensed that the Legislature had "attribut(ed) to judicial decrees, rendered before its passage, a force and operation which they did not have when they were made." But the court attributed to the solemnization statutes an effect invalidating all unsolemnized marriage. Can one be constitutional and the other not?

Where *Mangue* left the jurisdictional question open, *Milford* supplied a ground from history, as if a thirty-year legislative default could be made up for by some long-standing inferences. In fact, the inference to be drawn from history is unclear.

In an 1854 decision Judge Metcalf complained, "A full history of our early law of divorce is nowhere to be found; nor are the materials for such a history readily accessible . . ."[37] Fifty years later a historian who tried wrote that "the relation of the statutes governing marriage to the common law can only be partially determined from the court records" of the colonial period.[38] *Milford* evades the tedium of research entirely by the expedient of restricting "history" to a collation of statutes making unsolemnized marriage unlawful.[39]

Restricting ourselves to logical inferences, from similar sounding successive statutes we will conclude that Mas-

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Notes and Quotes

John Kevin Henebery
Nancy Viano Brown
Thomas A. Hickey

Dressing your Defendant

Perhaps lost in the spate of publicity surrounding the commencement of the Watergate cover-up trial in Washington D.C. was an interesting news article published by the Knight News Service on October 9. In an interview with New York men's fashion consultant, John T. Molloy, the proper method of dressing a defendant (particularly the Watergate defendants) for trial was discussed.

Molloy noted that originally, it was only the large New York law firms who were interested in the results of tests made to determine people's reactions to various attire. Now, however, costuming plays a major role in nearly every modern courtroom drama. So much attention is given to the subtleties of dress that selecting the appropriate garb for court can prove harder than outfitting a Broadway play.

The object of dressing the defendant is not to offend, but rather to try to relate to the judge and jury.

When he was consulted by certain participants in the 1973 televised hearings before the Erwin committee, Molloy said he recognized that his problem would be making them look "credible". His answer then - pinstripe suits, traditionally the most "credible" attire a man could wear when trying to sell something important. However, Molloy went on to note that though he hadn't been asked for his opinion, he believes that pinstripes won't do the trick during the cover-up trial. His recommendations for appearances by Senate committee witnesses were directed towards appealing to the mass television audience in white, middle class America. The dress appropriate there would be all wrong for a Washington jury which could reasonably be expected to be predominantly black. (There are 8 black jurors on the Watergate jury.) "A dark blue suit turns off many blacks," Molloy stated. His suggestion in cases such as this normally would have been to dress the defendants in non-authoritarian, medium colored plaid and patterned suits, nonflashy shirts and equally moderate ties. However, Haldeman, Ehrlichman and Mitchell pose an additional problem: they are prominent national figures. People are already aware of their appearances and well-publicized images. Any alterations now might prove counter-productive. The question of dress is most important when the defendant is unknown to the jury.

One final suggestion from Mr. Molloy concerned what he described as the visual separation of peripheral defendants such as Robert Mardian and Kenneth Parkinson. He spoke of an earlier case in which he was involved where a group of executives were on trial. One of these defendant's, Molloy's client, was instructed along with his lawyer to dress differently and stay as far apart physically from the other defendants and attorneys as possible during the trial. The result: Molloy's client was acquitted, but his co-defendants were all found guilty.

Abortion: The Husband's Rights

The Supreme Judicial Court of Massachusetts has handed down a ruling which further affirms the right of a woman to control her body and in particular, her right to decide whether or not to terminate a pregnancy.

The decision that the husband had no fundamental right, guaranteed by the Constitution or by statute, to prevent his wife from procuring an abortion, at least while the fetus was not viable, was arrived at in a case between an estranged husband and his wife.

In *Doe v. Doe*, __Mass. __, 314 N.E.2d 128 (1974), the pregnancy was originally a wanted one, but shortly thereafter the husband and wife separated and the husband told his wife that he did not want to support the child. In light of these remarks, the wife decided that she wanted to terminate the pregnancy. The husband objected to this and brought suit, stating that he was willing to assume custody and to care for the child.

The wife's general health was good and medical testimony indicated that there was little risk of serious harm to her health in a saline abortion performed before 28 weeks of gestation elapsed. There also appeared to be little risk of serious harm in carrying the pregnancy the full period of time.

When the case was considered by the full court, the majority ordered entry of a decree which declared that an abortion might be performed without the husband's consent.

The court was unable to find that the Constitution guaranteed to the husband a fundamental right to prevent this abortion. Despite the fact that some marital rights have been found to be protected, they have been found to be protected from governmental intrusion and not from the acts of the married parties themselves.

The husband's allegation of a right was further weakened by the fact that other states' statutes, which required the husband's consent for abortions, have not withstood constitutional challenge in lower courts.

The 1973 abortion decisions of *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) offer no support to the husband's position, for they do not discuss the father's rights and none had been asserted. Interestingly, the Supreme Court indicates in its decisions that the anti-abortion statutes on their face take no cognizance of the father and the Court mentions that the father may not have any constitutional rights in this decision.

Finally, the court stated that since the

state could not generally interfere with the abortion decision before the fetus is viable, that it was doubtful that it could come to the husband's aid.

While the court felt that the husband had a legitimate interest in this decision, particularly where the parties were not estranged, it felt that this interest was not equal to a veto nor could it be enforced by the state.

Two justices filed strong dissents and felt that the husband has fundamental rights in this decision which deserve consideration. Some of the arguments put forth in these dissents were that a woman's right to an abortion is not absolute, but should be balanced against the father's rights; that the husband has a fundamental right based on the marriage; and that the common law rule in Massachusetts recognizes a father's interest in his children, for in the absence of a court decree or a statute, the custody of children is in the father.

A.B.A. Annual Meeting

The week of August 12 through 16 saw the American Bar Association hold its 97th Annual Meeting in Honolulu, Hawaii. Convention festivities, island paradise style, did not prevent the delegates from wading through the largest ever agenda of resolutions and proposals regarding the A.B.A.'s position on leading legal issues. For those who like to keep score, here's a brief tally sheet on some of the A.B.A.'s current stances.

The A.B.A. is officially in favor of (1) adoption of the Equal Rights Amendment to the Constitution; (2) legislation at all government levels which would prohibit sex discrimination in sales and rentals of housing and in providing related services or facilities; (3) joint congressional hearings on the vice-presidential nominations; (4) federal assistance to state and local governments in simplifying election procedures, thereby encouraging more people to vote; (5) improving tax and social security laws for retirement benefit programs; (6) improving the decision making process relative to the selection of industrial sites for environmental reasons; (7) modifications in the Federal Trade Commission's Annual Line of Business Reports so as to improve their meaningfulness and reliability; (8) additional funding for the Office of Economic Opportunity and its legal services programs; (9) higher judicial salaries; (10) creation of a National Institute for Justice to act as a clearinghouse for research in criminal justice; (11) preserving the secrecy of grand jury proceedings, and finally; (12) affording congressional witnesses the right not to be compelled to testify in hearings being broadcast on radio or T.V. unless they consent in writing beforehand. Also, the A.B.A. stated its support "in principle" for conditional amnesty to draft evaders.

Opposition was voiced by the delegates toward: (1) legalized prostitution [with one conventioneer citing "products liability" problems as a reason for his negative position]; (2) requiring anything less than a unanimous verdict in a federal criminal case; (3) adopting any changes in Rule 23 of the Federal Rules of Civil Procedure dealing with consumer class actions; (4) United States' support of the U.N.'s proposed Treaty on Economic Rights and Duties of the States, and; (5) abolishment of the provision in the Employment Discrimination Act that prohibits job discrimination on the basis of age only up to the age of 65 and replacing it with an anti-discrimination provision with no upper age limit. The delegates also, without naming names, expressed their displeasure with the Nixon pardon by adopting a proposal calling for the "just and impartial application of the law regardless of the position or status of any person accused of a violation of the law."

Finally, the delegates either tabled or refused to act on proposals dealing with (1) adoption by the A.B.A. of a rule that all law schools require a course in professional ethics as a pre-requisite to graduation; (2) pre-paid legal services and; (3) abolishing the House Committee on Internal Security, formerly the House Committee on Un-American Activities.

Pension Report Act of 1974

Numerous pieces of legislation were enacted by the 93rd Congress, but perhaps none will affect the general American populace more than the Pension Reform Act of 1974. Officially known as the "Employee Retirement Income Security Act of 1974", the impact of this particular statute will not be felt until 1975. Basically, this Act has revised the oft-abused private employee pension system and offered an expanded version of individual retirement accounts.

Harsh reality forced the recent legislative swing toward pension reform. Private employees were consistently discovering that as they approached retirement age their employer was floundering. As a result, the employer could not offer the faithful employee even a meager pension. Numerous other employees learned too late that they could not meet the stringent pension requirements imposed by several employers, e.g., a twenty-five year vesting period. Furthermore, doctors, lawyers, and other self-employed individuals were not encouraged to formulate long range retirement plans.

The new pension reform measure seeks to eliminate many of the aforementioned barnacles which have become encrusted on previous retirement laws. The Act is quite complicated

and, as it was just signed into law on September 2, 1974, there is a lack of adequate legal commentary. However, Commerce Clearing House, Inc. has prepared an excellent explanation of the Pension Reform Act in Vol. 61, No. 39 (Extra Edition), August 21, 1974.

Since this article is designed only to introduce the reader to the Act, we must defer to Commerce Clearing House for a complete discussion of all the provisions of the Act. Basically, this measure provides for joint administration by the Treasury and Labor Departments. It will permit a self-employed individual to establish his own retirement account in the event that he is not covered by a qualified private or government retirement plan. Contributions to these accounts will be tax deferable for almost twice the amount presently allowed by law. Furthermore, the new Act requires termination insurance to protect participants and beneficiaries against loss of benefits. Private employers fear the provision ordering mandatory participation as they feel that this may cut deeply into company profits.

All in all, the Pension Reform Act of 1974 is the most sweeping overhaul of pension and employee benefit rules in history. As its effect will first be felt in 1975, pension lawyers are currently in the midst of subjecting the Act to careful scrutiny. For all lawyers, however, this innovative enactment will demand numerous hours of study.

State Lotteries v. FCC

In view of the numerous states which now use lotteries for revenue purposes, attention has been drawn to the government's contest of the decision that the broadcast of a winning lottery number during a regularly scheduled newscast is legal and to the Supreme Court's grant of certiorari.

The issue arose when the New Jersey State Lottery Commission requested the assistance of a local radio station to broadcast the weekly winning number for three consecutive newscasts on the day of the drawing. This was aimed at solving the problem caused by the huge public demand for information concerning the winning number every Thursday morning. The Lottery's telephone service had been temporarily suspended at one point due to the overload of calls, despite attempts by the Commission to arrange for adequate handling of the requests.

The broadcast corporation requested a ruling from the FCC on whether such a broadcast would violate 18 U.S.C. § 1304, which prohibits a radio broadcast of "any advertisement of or information concerning any lottery" or "any list of the prizes drawn or awarded by means of any such lottery." The FCC ruled that the broadcast of these numbers, as proposed, would be a violation. Thereafter, the State Lottery Commission asked the FCC for a reconsideration of its ruling and it was denied. The State Lottery Commission then filed suit for a review of the FCC ruling. The states of New Hampshire and Pennsylvania also intervened as petitioners.

In *New Jersey State Lottery Commission* v. *U.S.*, 491 F.2d 219 (3rd Cir. 1974), the court held that the winning lottery number was news and protected by both the First Amendment and 47 U.S.C. § 326, which is designed to prevent censorship by the FCC over the radio communications of stations.

In order to reconcile the conflict between these two sections of the U.S.C., the court found that the application of 18 U.S.C. §1304 should be restricted to promotion of lotteries for which the licensee receives compensation. Thus it would not bar announcement, on regular news broadcasts, of the winning state lottery number.

It is this ruling that the government is contesting in *United States v. New Jersey State Lottery Commission,* 42 U.S. L.W. 3652 (U.S. May 28, 1974) (No. 73-1471). The government is asking whether 18 U.S.C. § 1304 applies to the announcement during newscasts of the winning number and also whether the statute is constitutional as so applied.

Utah Bar Pre-Paid Legal Services Plan

As legal costs have continued to rise at an alarming rate, there has been a parallel increase in interest and concern in the various forms of pre-paid legal services plans. It is now generally accepted that something akin to a legal insurance scheme is inevitable if we wish to prevent the statement "only the very rich and the very poor can afford a lawyer" from becoming a maxim.

Proposals abound as to the nature and character that such plans should assume. Essentially, these suggestions can be categorized as either open or closed panel plans, and as either insurance or trust fund plans. Open panel plans provide for the selection by the participant of his own attorney, while in closed panel proposals, a staff of attorneys is retained to handle the legal problems of plan members. An insurance plan contemplates the payment of a premium for which the insurer provides a fixed schedule of benefits, pays the administrative overhead and extracts a profit. The problem facing any such plan is the need to qualify under the state's insurance laws. The trust fund concept allows for the accumulation of monies from plan members for distribution to members to pay for legal services as incurred. Only administrative costs are deducted from the fund.

In the September, 1974 issue of the *American Bar Association Journal,* it was reported that the Utah Bar Association

had given its full cooperation to establishing an open panel, trust fund plan for that state. Under their arrangement, the annual cost for membership is $60.00 per year. Upon payment, there is a thirty day waiting period prior to eligibility. This is to discourage persons from joining in order to use the plan to resolve a pre-existing dispute. In fact, such prior matters are not covered by the plan at all.

Four types of legal services are covered by the plan:

(1) Advice and consultations — the fund will pay up to $25.00 per consultation four times a year where nothing more than a lawyer's advice is sought.

(2) Office work — any drafting of papers, legal research or writing, or negotiating with the adverse party by the attorney will be paid for up to the sum of $250.00 per year.

(3) Judicial proceedings — if it is necessary to file pleadings, or make appearances at either hearings or trials before a court or administrative agency, the plan will cover expenses for these and attendant services up to $400.00 per year. There is a $25.00 deductible provision if the member is the plaintiff so as to discourage frivolous filings.

(4) Major legal expenses — if the member is the defendant in any civil or criminal matter, he will be compensated up to 80% of the first $1000.00 of legal expenses beyond the judicial proceedings category.

The plan covers dependent wives and children under age 19. In a domestic relations case, the covered member may authorize use of the plan by either himself or his spouse, but not by both. If a person does not use any of the benefits in a particular coverage year, that member is entitled to a carry over of benefits into the following year, affording him, in effect, double coverage.

The Utah plan is still in its infancy, but a monitoring of the proposal has indicated that the results will be highly satisfactory. Even the greatest fear expressed about legal prepaid service plans — that they will result in an overwhelming surge of claims — has not been borne out to date.

Glimpses of the Judiciary and the General Court

Several of the major judicial acts signed into law in Massachusetts during 1974 are highlighted below:

(1) Acts of 1974, Chapter 508

"Section 1 of Chapter 276 of the General Laws, as appearing in section 1 of chapter 557 of the Acts of 1964, is amended by inserting after the first paragraph the following paragraph:

"A search conducted incident to an arrest may be made only for the purposes of seizing fruits, instrumentalities, contraband and other evidence for which the arrest has been made, in order to prevent its destruction or concealment; and removing any weapons that the arrestee might use to resist arrest or effect his escape. Property seized as a result of a search in violation of the provisions of this paragraph shall not be admissible in evidence in criminal proceedings."

(2) Acts of 1974, Chapter 830

This measure amends G.L., c.265, sec. 18A by imposing an additional penalty upon persons who use or posssess a firearm in the commission of a felony. If one commits a punishable offense using a firearm, rifle, shotgun or machine gun, then that person shall receive a two and one-half to five year sentence which cannot be suspended. If that person commits a second or subsequent offense, then the person shall receive a five year sentence which shall not be suspended.

(3) Acts of 1974, Chapter 525

Excerpts of this act, which relates to the sealing of criminal files, are provided below:

"Chapter 276 of the General Laws is hereby amended by striking out section 100A . . . and inserting the following . . . Any person having a record of criminal court appearances and dispositions in the commonwealth on file with the office of the commissioner of probation may, on a form furnished by the commissioner and signed under the penalties of perjury, request that the commissioner seal such file . . . The commissioner, in response to inquiries by authorized persons other than any law enforcement agency, any court, or any appointing authority, shall in the case of a sealed record report that no record exists."

(4) Acts of 1974, Chapter 845

Several sections of G.L.,c.201, which provides for the appointment of guardians and conservators for mentally retarded persons, have been altered and amended. For example, sec. 6A, "A parent of a mentally retarded person, two or more relatives or friends of a mentally retarded person, a nonprofit corporation organized under the laws of the commonwealth whose corporate charter authorizes the corporation to act as guardian of a mentally retarded person, or any agency within the executive offices of human services or educational affairs may file a petition in the probate court asking to have a guardian appointed for such mentally retarded person."

(5) Acts of 1974, Chapter 421

This act prohibits experimentation on human fetuses. It provides that G.L., c.112 will be amended by inserting after section 12I the following section (known as 12J): "No person shall use any live human fetus, whether before or after expulsion from its mother's womb, for scientific, laboratory, research or other kind of experimentation . . ."

Politics 1972: Avoiding the Gift Tax

In the wake of Watergate and the revelations relating to the 1972 presidential campaigns, there is yet another revelation, this one on the tax side. A Federal District Court for the District of Columbia has held that a ruling of the IRS regarding campaign contributions was an illegal action. *Tax Analysts and Advocates v. Shultz*, 376 F. Supp. 889 (D.D.C. 1974).

On June 21, 1972, the Internal Revenue Service issued Rev. Rul. 72-355, 1972-2 Cum. Bull. 532 in response to inquiries concerning gift tax treatment of contributions to political campaigns. Essentially, it stated that gifts of up to $3,000 to multiple finance committees organized to receive contributions for the campaign of the same political candidate were to be treated as gifts to the committees and not to the candidate. These gifts would each qualify for the $3,000 exclusion under the gift tax provision of the Internal Revenue Code of 1954, § 2503(b), if at least one-third of the officers of each committee were different.

The result of this was that millions of dollars, contributed in $3,000 increments to the various finance committees, escaped the gift tax which would have been imposed had the contributions been made directly to the central campaign committees.

Plaintiffs were a non-profit corporation organized to promote tax reform. They challenged the IRS ruling, which had defined the committees as "persons", as an improper application of the gift tax. They urged the court to rely on *Helvering v. Hutchings*, 312 U.S. 393 (1941), for the correct definition of "person" and the proper interpretation of the application of the gift tax.

Hutchings was analyzed and found to be applicable because it addressed the issue of who is the donee of a gift for gift tax purposes. In *Hutchings* the question was whether the trust itself or the beneficiary of the trust is the "person" to whom the gift was made and for whom the deduction is allowed. There the court felt that "person" referred to the beneficiary and in fact foresaw situations such as the one at hand whereby numerous trusts as "person" could be set up by a single donor for a single beneficiary without incurring any gift tax liability.

Combining the scope of *Hutchings* with the clear IRS position that political contributions are subject ot the gift tax brought the court to the ruling that it is the candidate and not the committee that is the "person" or donee for purposes of the $3,000 gift tax exclusion.

The court went on to state that in applying the gift tax to political contributions, the practical effect of the transaction is to be considered. Here the effect of the gifts to a campaign is that a benefit inures to the candidate and as such, he is the "person" within the meaning of the prior Supreme court ruling.

New Rules of Criminal Procedure in Massachusetts

Early in 1975, the Supreme Judicial Court of Massachusetts will have placed before it for adoption a new code of criminal procedure. The result of a request for revision emanating from the Massachusetts Judicial Conference, these rules will contain a number of new and innovative approaches to a traditionally troublesome area.

Prior to the fall of 1972, work had begun revising the Massachusetts Rules of Civil Procedure and promulgating a new criminal code. The Judicial Conference, as a logical extension of these two developments, directed that an advisory committee be established to study the rules of criminal procedure and to recommend to the S.J.C. a series of proposals designed to modernize and update the rules. This advisory committee in turn authorized the creation of an executive committee which was directly charged with the responsibility of researching and drafting the proposals. The executive committee is chaired by Judge Dwyer of the Superior Court and has as its other members Judges Travers and Abrams, also of the Superior Court, Judge Cullen of the District Court, Mr. Homans, a prominent Boston defense attorney, and Mr. Irwin, head of the Attorney General's Criminal Division. Serving as reporter for this committee, and in charge of organizing and directing the lion's share of the research, is Mr. Bellefontaine, Librarian of the Social Law Library. With the assistance of volunteer student research groups from law schools throughout the city of Boston (including Suffolk University Law School), the product of almost 2½ years worth of intensive effort is nearing its conclusion. Once work on the proposed code is finalized and the approval of the advisory committee is received, it will be submitted to the S.J.C. for adoption as Rules of Court. This event is expected to occur sometime during the course of this winter. Once the S.J.C. does adopt the rules, amendatory legislation will be filed in the State Legislature to eliminate any contradictions between these new rules and existing statutory law.

A number of jurisdictions across the country have recently enacted new rules of criminal procedure. The members of the Massachusetts project have sought to incorporate the most forward-looking and viable of these rules into their own proposals. In addition, this new code contains a number of untried procedures. As a result of the highly innovative nature of the committee's recommendations, their task will not be finished once the S.J.C. accepts the rules. The second phase will involve a

period of monitoring the success or failure of the procedures, and then modifying and amending the code as necessary. Thus it is recommended that people not only make themselves aware of the new rules as adopted by the S.J.C., but also be aware of the possibility of alterations thereto.

Massachusetts' Public Employee Retirement Law

What promises to be a subject of great concern in the future is the Commonwealth's public employee retirement law, G.L., c. 32. This law is presently directed toward approximately 260,000 public employees. Since this group will continue to multiply, the growth of problems connected with the implementation of Ch. 32 will show an alarming parallel increase. With a hope of unearthing different solutions, legislative research teams have started to probe this complex statute.

Essentially, the retirement law establishes a comfortable guaranteed income for the public worker. For many years, this benefit, or "pension", was construed as a gift from the sovereign. As a gratuity, the pension could be revoked at any time. See *Pennie v. Reis,* 132 U.S. 464 (1889). Massachusetts became one of the first states to change this antiquated concept with the alteration of G.L., c. 32, sec. 25 by Ch. 525 of the Acts of 1956. This provision espoused the principle that an implied contract exists between the employer and the public employee wherein the employer guarantees a retirement allowance to the employee. To determine a retiree's allowance, the state actuary considers several important factors such as the size of the member's contributions to his "annuity" fund, the length of his service and an average of the member's salary for three consecutive years.

Naturally, major problems have arisen in financing such a system. Currently, the Massachusetts General Court appropriates the funds which are necessary for each year. This format, known as "pay as you go", is unique to Massachusetts. All other states have various types of "funded" systems. Under the latter structure, the state retirement board anticipates how much will be required over a lengthy period of time. The state amortizes this amount to guarantee to the employee that when he retires, the necessary funds will exist. Problems have increased as the funded "pools", especially Connecticut's, have lost several million dollars as a result of poor investment practices. Therefore, research analysts have been carefully scrutinizing the funded systems.

Placing the monetary complexities aside, the public employee retirement law has also been the subject of recent judicial actions. First, the General Court asked the Massachusetts' Supreme Judicial Court to rule on the question of raising members' contributions. In an Advisory Opinion issued on October 30, 1973, the court noted that such action would violate the implied contract between the employee and the employer. See 1973 Mass. Adv. Sh. 1329. In a secondary controversy, Judge Bailey Aldrich questioned the mandatory retirement age of a state officer. Judge Aldrich pointed out that "mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy." See *Murgia v. Commonwealth of Massachusetts Board of Retirement* et al, 42 U.S.L.W. 2639 (G.L. June 18, 1974) (lst Cir. 1974). If changes are to be made in Ch. 32, sufficient guidelines for these and other pressing issues must be formulated.

Legislators are gradually becoming aware of problems within the public employee retirement law, and this is evidenced by the formation of research teams. There will always be concern about retirement laws, but the next few months will particularly bear watching.

"De Novo" Trials: Constitutional?

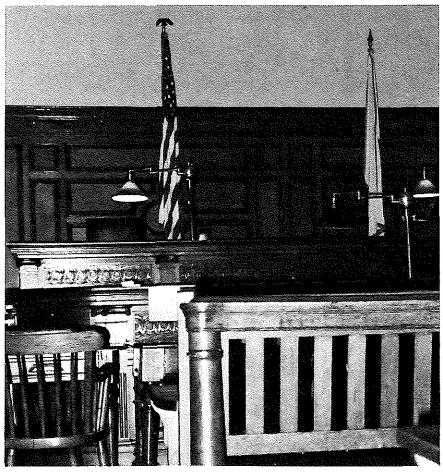
The U.S. Supreme Court has decided to rule on the constitutionality of the trial "de novo" system in Massachusetts by accepting for hearing in January or February *Costarelli* v. *Massachusetts,* 43 U.S.L.W. 3239 (U.S. Oct. 2, 1974) (No. 73-6739). This case was accepted on appeal directly from the Boston Municipal Court without any other appellate review. This is not the usual course of appeal and the Massachusetts Attorney General's office had filed a motion to dismiss on this ground. It was denied.

The same question was answered by the Supreme Judicial Court of Massachusetts on September 4, 1974 in *Whitmarsh* v. *Commonwealth,* __ Mass. __, 316 N.E. 2d 610 (1974). In that case the defendant had been charged with a misdemeanor. In the District Court he made a motion for a jury trial. It was denied and he was subsequently convicted. He then appealed to the Superior Court but prior to trial, he filed an Interlocutory Appeal with the Supreme Judicial Court asking that the State's two trial "de novo" procedures be declared unconstitutional on grounds of violating both the Fifth and Sixth Amendments as applied to the States through the Fourteenth Amendment. The court held that criminal "de novo" trials are constitutional on both Fifth and Sixth Amendment grounds.

In arriving at their decision, the court analyzed the defendant's claims in light of the related Supreme Court decisions. With regard to the Sixth Amendment right to a jury trial, the court found that the meaning of this provision, as set out by the Supreme Court, continued to be unsettled. Further, the court commented on the fact that the Supreme Court knows that ten states have two-tier court systems for the trial of less serious criminal offences. Based on the foregoing, the court concluded that at the present time the Supreme Court would not interpret the Sixth Amendment to require a jury trial in the first instance in all criminal offences and therefore the Commonwealth's provision for a jury trial was constitutional.

The contention that the two-tier system violates the Double Jeopardy Clause of the Fifth Amendment was dealt with briefly. Noting the argument that the possible imposition of a higher sentence by the Superior Court in a "de novo" trial was not new, the court used the case of *North Carolina* v. *Pearce,* 395 U.S. 711 (1969) as authority to rule that the Fifth Amendment does not prohibit the imposition of an enhanced penalty upon reconviction.

This decision bears watching in light of the upcoming Supreme Court review of this question.

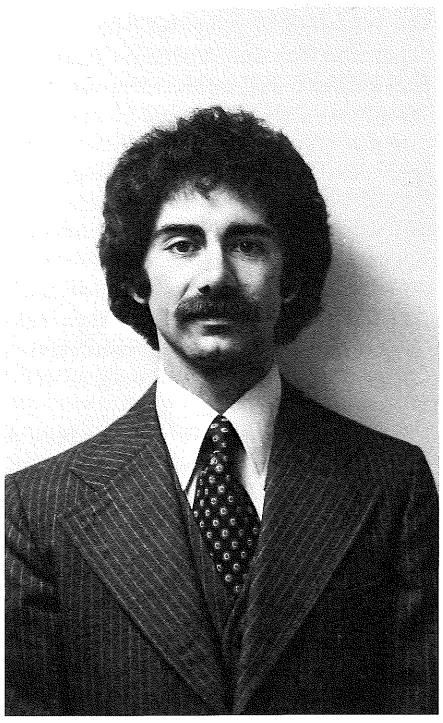


Kingwood Mining Co. and Management's Rights Revisited

Charles S. Mancuso

The most dramatic development in industrial relations in this century has been the inroads made by labor upon management's absolute right to direct its business as it pleases. At common law, entrepreneurs possessed an inherent freedom of action in directing their business establishments without regard to the welfare of their employees. Today management still contends that because it has a fiduciary duty to its investors to operate efficiently and to maximize profits, its decisions concerning the business should be free from participation by unions who are not answerable to corporate ownership. However these so-called management's rights or management's prerogatives are presently limited both by law and by collective bargaining agreements. This article will concentrate on the issue of whether the employer must bargain about his decision to subcontract various operations of his business, to sell part of his business, to terminate part of his business or to relocate his business. It will examine the evolvement of the Board's (the National Labor Relations Board) decisions on the above issue and it will analyze the sweep of the Board's most recent decision in *Kingwood Mining Co.*[1] The article suggests that the decision in *Kingwood* is wrong and that the Board may be ushering in a new era of management's rights.

For almost forty years the mainspring of the Act (the National Labor Relations Act) has been the encouragement of collective bargaining between management and labor. Section 8 (d) of the Act[2] establishes what is now commonly referred to as the mandatory subjects of collective bargaining i.e. "wages, hours, and other terms and conditions of employment." And section 8 (a) (5) of the Act[3] makes it an unfair labor practice if the employer refuses to bargain over these mandatory subjects. There are of course differences of opinion between labor and management as to exactly what is encompassed by the statutory phrase: "wages, hours, and terms and conditions of employment." In the case of *Inland Steel Co.*[4], the Board decided that pension and retirement policies as well as "tenure of employment" were within the meaning of the statutory phrase.[5] Moreover in *Richfield Oil Corp.*[6], the Board decided that stock purchase plans were also within the statutory phrase as well.[7] By these early cases the Board established a broad interpretation of section 8 (d) of the Act.[8] This article suggests that management's decision to subcontract an operation, to sell a portion of the business, to terminate a portion of the business, or to relocate the business which results in the elimination of unit jobs is within section 8 (d) of the Act since these matters obviously affect "tenure of employment."



In *Railroad Telegraphers v. C. and N.W.R. Co.*[9], the Supreme Court placed "job security"[10] within the definition of section 2 of the Norris-La Guardia Act[11] which required the railroads and airlines "to make and maintain agreements concerning rates of pay, rules and working conditions." Section 2 of the Norris-La Guardia Act is clearly analogous to section 8 (d) of the National Labor Relations Act, and it is suggested here that job security is properly included within section 8 (d). Management's contention that this broad interpretation of section 8 (d) is a further encroachment upon its common law management's rights is without merit. For the simple reason that although the parties are obligated to bargain, they are not obligated to agree.[12] It is not intimated that a union should become a partner with management in determining business policy, but it is advised the parties should be partners at the bargaining table in order to resolve the issues which affect employment. Furthermore it should be made clear that if labor fails to present any viable alternatives during a period of good faith bargaining[13] then the employer is free to unilaterally carry out his proposed action. However, it is submitted that unions may well come to the bargaining table with worthwhile concessions such as wage cuts, productivity increases, decreases in fringe benefits, etc. which may cause management to change its decision.

In *Kingwood Mining Co.*[14], the Board had an opportunity to deal with the issue of whether the employer's decision to subcontract an operation of the business was a mandatory subject of collective bargaining. The pertinent facts were briefly as follows: the employer operated a coal tipple where it processed and sold coal which was mined by both its own employees and by independent

mining companies. For economic reasons, the employer unilaterally shut down its own mining operations and subsequently gave an independent mining contractor permission to mine where the former unit employees had been mining. The employer's mining machinery was sold to one of the independent mining companies and to the parent company of the employer. The United Mine Workers of America represented all production and maintenance employees for the purposes of collective bargaining, however there was no contract in effect at the time. The Board found that the employer was under no duty to decision-bargain (bargain collectively over the decision) with the Union concerning the subcontracting of the mining operation. In support of its holding the Board argued that there was a total termination of a segment of the business[15] and that the decision to subcontract was one of a basic managerial nature involving the investment of capital.[16]

In order to intelligently evaluate the Board's decision in *Kingwood,* it will be necessary to examine the evolution of the prior cases determined by the Board in this area. A little over a decade ago, in 1960, the Board decided the case of *Rapid Bindery, Inc.*[17] that the employer was required to bargain with the union over the decision to relocate its bindery plant. In that case, the employer unilaterally decided to move the plant to another town; this resulted in the elimination of unit jobs. The Board's decision was denied enforcement on this issue by the Court of Appeals for the 2nd Circuit.[18] The Court declared that the decision to relocate was a management prerogative.[19] A short time later the Board handed down two similar decisions in *R.C. Can Co.*[20] and *Star Baby Co.*[21] In *R.C. Can Co.,* the employer moved a segment of its production process to another plant and then proceeded to lay-off some unit employees. The Board held that the decision to relocate the process which resulted in an elimination of unit jobs was a mandatory subject of collective bargaining.[22] In *Star Baby Co.,* the employer informed the union of its unilateral decision to sell all its assets and to dissolve its partnership. The Board held that the decision to terminate its operations was a mandatory subject of collective bargaining.[23] The Court of Appeals for 2nd Circuit in *Star Baby*[24] did not consider the issue of whether the decision to go out of business was a mandatory subject of collective bargaining since it had already found the employer violated section 8 (a) (5) of the Act by failing to bargain in good faith.[25]

During this same period of time the Board decided *Town and Country Mfg. Co.*[26] and *Fibreboard Paper Products, Corp.*[27] In *Town and Country Mfg. Co.* the employer not only manufactured mobile trailer homes but he also employed drivers to haul the trailers with company trucks. During a union campaign, the employer unilaterally sub-contracted out his trucking operations and he discharged his drivers. The Board held that the decision to subcontract work which resulted in the loss of unit jobs was a mandatory subject of collective bargaining,[28] however in doing so it also emphasized that the employer was required to bargain but not to agree.[29] The Court of Appeals for the 5th Circuit enforced the Board's decision.[30]

In *Fibreboard Paper Products Corp.*, the employer made a unilateral decision to sub-contract the maintenance work at its Emeryville, Calif. plant to an independent contractor because of economic considerations. The Board again held that the decision to sub-contract unit work which resulted in the loss of jobs was a mandatory subject of collective bargaining.[31] The Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement.[32] In 1964, the Supreme Court granted certiorari[33] in order to consider the issue of whether the decision to subcontract was a subject of mandatory bargaining.[34] For all intents and purposes, this was the last time that the Supreme Court spoke concerning this subject matter. In the majority opinion delivered by Mr. Chief Justice Warren, the Court held that:

> On the facts of this case, the contracting out' of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively.[35]

The majority opinion very carefully defined the scope of mandatory bargaining with regard to sub-contracting.[36] In its discussion the Court clearly pointed out that the advantages which the employer gained from the independent contractor with regards to reducing the work force, decreasing the fringe benefits and eliminating overtime payments could possibly have been worked out with the union.[37]

The Supreme Court's decision in *Fibreboard* also contains a concurring opinion by Mr. Justice Stewart which has been interpreted as narrowing the application of the majority opinion.[38] Justice for Mr. Stewart seemingly would exclude those managerial decisions from mandatory collective bargaining which concern either "the commitment of investment capital" or "the basic direction of the enterprise" or which "lie at the core of entrepreneurial control."[39] With all due respect to Mr. Justice Stewart, these criteria are but a disguise for the old management's rights theory which was mentioned earlier. While any entrepreneur would like to make his decisions unhampered by the consideration of the welfare of those in his employ, businesses do not operate in a vacuum. The needs of society as well as the needs of the business must be taken into account. And surely society has an interest in its members' continued employment.

> The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.[40]

Immediately after the Supreme Court handed down its decision in *Fibreboard,* the Circuit Courts applied the results to the cases which were then on appeal from the Board. In *American Mfg. Co. of Texas,*[41] the employer maintained an extensive transportation department in addition to manufacturing oilfield pumping equipment. During a union campaign, the employer unilaterally abolished his transportation department and he sub-contracted the work to an independent contractor. The Board found the decision to sub-contract the work which resulted in the loss of unit jobs was a subject of mandatory bargaining. As can be seen, the facts are almost identical to *Fibreboard* and the Court of Appeals for the 5th Circuit enforced the Board's decision on this issue.[42] However, this uniformity of reasoning by the Board and the Courts soon had a parting of ways when the factual situation deviated slightly from the *Fibreboard* case. In *Adams Dairy, Inc.*[43], the employer unilaterally decided to subcontract his trucking operation

and to sell his products dockside. All the trucks which were previously used by the company's driver-salesmen were sold to the independent distributors. The Board found that the employer was required to bargain with the union over the decision to sub-contract which resulted in the elimination of unit jobs.[44] The Court of Appeals for the 8th Circuit denied the Board enforcement on this issue.[45] In applying Stewart's concurring opinion in *Fibreboard,* the Court found that the employer's decision to sub-contract the operation was within the pale of managerial freedom.[46] In *Royal Plating and Polishing, Co., Inc.*[47], the employer unilaterally decided to close down one of its two plants and to sell it to the Housing Authority of the city. The Board found that the decision to partially terminate operations was a mandatory subject of collective bargaining. The The Court of Appeals for the 3rd Circuit in denying enforcement of the Board's decision[48] also applied Stewart's concurring opinion in *Fibreboard.* It determined that the employer's decision concerning the company's capital was exclusively managerial in nature.[49]

In *William J. Burns International Detective Agency*[50], the employer unilaterally decided to discontinue the employment of four unit guards in Omaha due to a cancellation of contracts in that area. The Board found that the decision to partially terminate operations resulting in the loss of unit jobs was a mandatory subject of collective bargaining. The Court of Appeals for the 8th Circuit again denied the Board enforcement on this issue[51] but this time it distinguished the *Fibreboard* case on its facts. The Court maintained that the complete withdrawal of operations from one area was significantly different from sub-contracting operations in the same area.[52] However, the Court did not give proper attention to the fact that in both situations the decision resulted in the elimination of unit jobs from an on-going business.

On the strength of these three post-*Fibreboard* decisions, one can plainly see that the Court of Appeals had adopted a very narrow interpretation of the Supreme Court case. It would not be inaccurate to say that as far as the Courts were concerned anything not rigidly within the confines of a *Fibreboard* fact-pattern was not a subject of mandatory bargaining. It is respectfully suggested that the authors of the majority opinion in *Fibreboard* never intended such a negative application of their decision.

In order to fully understand some of the more recent cases in this area, mention of the Supreme Court's decision in *Darlington Mfg. Co.*[53] is essential. The first and most important single consideration to keep in mind is that in *Darlington* the Supreme Court was considering whether or not the employer had discriminated against the union in closing its plant. It would have been an unfair labor practice under the Act and a violation of section 8 (a) (3).[54] In the case, the employer unilaterally decided to close one of its plants because of union activity. The Supreme Court in reversing the Court below found that the partial closing was motivated by anti-union animus, and thus it was an 8 (a) (3) violation of the Act.[55] Dicta from the opinion also states, however, that an employer who goes completely out of business even if for anti-union reasons commits no unfair labor practices.[56] The Court of Appeals in *Burns* cited *Darlington* for this proposition in its opinion,[57] however the facts in *Burns* do not demonstrate that the employer went completely out of business.

In 1966, the Court of Appeals for the 9th Circuit enforced the Board's decision in *Carmichael Floor Covering Co.*[58] In that case the employer was engaged in the sale and installation of floor covering. Shortly after the employer's association executed a collective bargaining agreement with the union the employer unilaterally decided to terminate the floor covering installers and to sub-contract the work to an independent contractor. Once again where the facts were within the limited range defined by *Fibreboard,* the Courts were willing to find a duty for the employer to bargain over the decision with the union.

During this time the Board itself began to distinguish a number of cases from *Fibreboard* because of special circumstances. For example in *New York Mirror*[59], the employer unilaterally executed a sale of the newspaper's name, goodwill and assets. The sale of the N.Y. Mirror which resulted in the loss of unit jobs was actually only a partial sale since the newspaper company was a division of the Hearst Corp. The Board found that technically there was a duty for the employer to bargain over the decision which resulted in the elimination of unit jobs.[60] However, upon the facts of the case it determined that there was no violation of section 8 (a) (5) of the Act since the union sought no restoration or reinstatement and the employer had cooperated completely after the shutdown. In *Westinghouse Electric Corp.*[61], the Board considered whether the decisions to sub-contract approximately 7,700 separate operations should be the subjects of mandatory collective bargaining. In deciding that they were not, the Board distinguished *Fibreboard* and determined that here there were other factors such as waiver by the union and the non-adverse affect upon the unit employees.[62] It should be noted here that the most fundamental criterion for requiring mandatory decision-bargaining was lacking, i.e. the elimination of unit jobs. While the Board may have been distinguishing cases which did not fall within the ambit of its theory of mandatory decision-bargaining, it was still deciding cases which exemplified its basic position. For example, in *Spun-Jee Corp.*[63], the employer unilaterally decided to sub-contract his production work and to move his business elsewhere. The Board held that the employer was required to bargain collectively with the union over these decisions.[64]

The case which is by far the most significant statement of the Board's logical reasoning on the issue under consideration is *Ozark Trailers, Inc.*[65] In that case, the employer unilaterally decided to shut down one of its plants which resulted in the termination of unit employees.[66] The Board in keeping with its prior holdings found that the employer's decision to partially terminate its business was a mandatory subject of collective bargaining. It stressed not only the balancing of the employer's investment interest with that of the employee's livelihood,[67] but it also stressed the interest of the public in collective bargaining.[68] Although effects-bargaining (bargaining after the decision to relocate, etc. has already been made by the company, with regards to pensions, accrued vacation pay, etc.) is not within the scope of this article, the Board pointed out very clearly that in many cases effects-bargaining alone would be meaningless without the opportunity to decision-bargain.[69]

After *Ozark,* the Courts had occasion to rule on three cases decided by the Board in this area. In *Transmarine Navigation Corp.*[70], the employer unilaterally decided to terminate its guards and to move its operations elsewhere. The Court of Appeals for the 9th Circuit in remanding the Board's decision found that there was no duty for the employer

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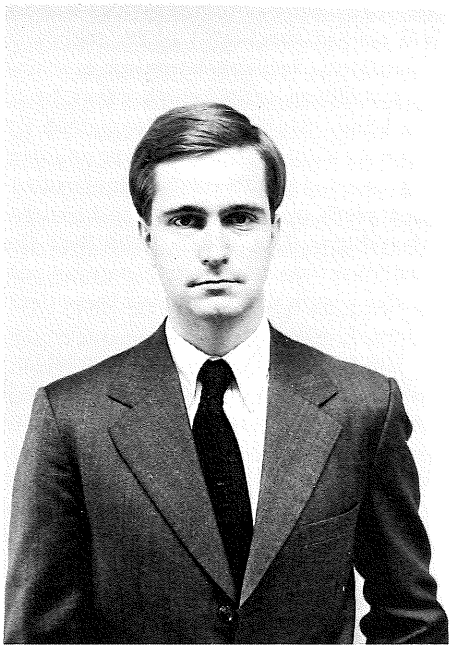
Charitable Donation-Redemption with Closely Held Stock

Walter L. Jacobsen



Recently, the Court of Appeals for the Second Circuit decided a case which is of great significance to charitable fund raisers and estate planners who may have as clients shareholders or beneficial owners of a closely held corporation. The Second Circuit sided with a snowballing trend that may soon find its way to the First Circuit for a decision. *Grove* v. *Commissioner of Internal Revenue*[1] added to a growing body of authority holding that where there has been a *bona fide* gift of stock of a closely held corporation to a charity, followed by a redemption of that stock by the corporation, the taxpayer is not taxed on the redemption and is able to deduct the gift.[2] Although the Tax Reform Act of 1969 has modified the form of such gifts involving a partial interest,[3] *Grove* and allied cases have opened up new possibilities in the area of gifts to charities.

The taxpayer in *Grove* was a successful engineer and majority stockholder of a construction firm. He was approached by his alma mater, Rensselaer Polytechnic Institute (RPI), to make a donation. Mr. Grove agreed and chose the form of a future interest in securities from his corporation.[4] However, he reserved a life estate in the stock or in any proceeds from its sale. On the taxpayer's death, full title to the stock or any invested proceeds from its sale would vest entirely in RPI. The final agreement called for the taxpayer to donate personally owned, non-dividend paying shares in his own corporation. These would be redeemed as RPI saw fit. The proceeds would then be invested. The life income would go to the taxpayer and his wife, the remainder to RPI. The only restrictions placed on the gift were that the taxpayer's construction corporation would have the right of first refusal at book value and that the investment of the proceeds would be done by a reputable brokerage firm. It was specifically stipulated that due to the cash fluctuations of the taxpayer's business, no guarantee of redemption by the corporation was assured.

The donor made ten annual gifts of stock which were subsequently redeemed at odd intervals over an eight year period; no redemption of which was less than one year from the date of transfer to RPI. The taxpayer paid income tax on all taxable interest and dividends received as a result of the invested proceeds of the redemption. However, he deducted the value of the future interest and did not pay taxes on any portion of the redemption by the corporation. The Commissioner sought to tax the redemption as being a direct dividend payment to the taxpayer.[5] The Commissioner's theory alleged a prearranged scheme that was designed to redeem the shares of the closely held corporation for the benefit of the taxpayer, using RPI as a tax-free conduit.

The Court of Appeals for the Second Circuit, in a holding affirming a United States Tax Court decision for the taxpayer, found no evidence that the gifts and redemptions were merely multistep single transactions. It found no pre-arranged plan of redemption between the corporation and RPI, but instead found that the gifts were complete and irrevocable, and as such, the gift and subsequent redemptions were unrelated to the preceding gifts for tax purposes.

The Commissioner of Internal Revenue, in the present case, predicated his stance on the premise that the deductible gift of a partial interest, followed by a redemption, were merely steps in an overall singular taxable transaction of redemption. In a dissenting opinion, Judge Oakes concurred with this view and proposed a legal theory to define its parameters.

The "step-transaction doctrine", the

"economic realities test" and the "substance-form test" all have as their object one purpose: to determine whether certain transactions, which may at first glance appear to be unrelated, are, in fact, closely related and whether they have any substantial basis or objective in themselves except to avoid some tax. This does not mean that a taxpayer may not plan his affairs to pay the least amount of tax, for as the majority pointed out, legal avoidance is a perfectly proper objective as long as the entire undertaking from start to finish has some other legitimate objective in addition to the legal avoidance scheme. The "step-transaction doctrine" was relied upon by the government, which attempted to show that in *Grove*, the taxpayer's sole objective was to better his own situation without any substantial additional objective. Both the Commissioner and Judge Oakes, in his dissenting opinion, tried to demonstrate that the entire transaction was merely an attempt to wash the taxpayer's stock through the tax-free conduit of a tax exempt charity. However, the Commissioner relied on cases dealing not with donation-redemption problems, but with corporate reorganization and corporate sales. The classic fact pattern of *Commissioner of Internal Revenue* v. *Court Holding Company*[7] illustrates the usual application of the "step-transaction doctrine".

Court Holding involved the sale of a corporation owned building. To avoid the corporation's paying taxes on the gain, a scheme was concocted whereby the corporation was liquidated and the assets of the building divided among the shareholders. The shareholders then sold their shares in the corporation to the buyer, received their share of the money, but without any deductions for the Federal Income Tax the corporation would have had to pay on the proceeds of the sale. The Commissioner ignored this triangular scheme, maintaining that the intent all along had been to sell to the buyer. Since the only reason for the liquidation and shareholder sale had been to avoid the tax, the incidence of the tax depended on the substance of the transaction, not the form. The liquidation and shareholder sale had been steps in an overall transaction and could not be ignored for tax purposes. The Supreme Court upheld the Commissioner's position and the rule has remained firm in subsequent decisions.

In *Grove*, the Commissioner tried to draw the analogy between the donations and redemptions and the liquidation and sale situation in *Court Holding*. If this was the case, then the redemptions would be attributed directly to the taxpayer and not to RPI. Due to the taxpayer's corporate situation, this would mean that the redemptions would be treated as dividends and taxed as ordinary income. The closest authority to which the government could point was a series of cases dealing with sharecrop landlords who donated warehouse receipts to churches. The receipts represented crops in payment of rent. Thus the facts are easily distinguishable. The churches which received the receipts sold (by analogy "redeemed") them and kept the money. The sharecrop landlords deducted the sale value of the crops as a charitable contribution and paid no tax on the value of the receipts. The Courts of Appeals for the Fifth and Tenth Circuits, where the cases arose, held that on the authority of *Helvering* v. *Horst*[8] the landlords had realized income and so should pay a tax on the value of the receipts although they were allowed to keep the deductions. In *Grove*, however, the taxpayer did not realize income directly from the sale or redemption of the stock shares by RPI. The taxpayer realized income only on his life interest alone, on which he did pay taxes. The crop shares were income to the landlords as rent, as soon as they were harvested.

The Commissioner's assertions, which might have succeeded had he been able to broadly use the "step-transaction doctrine" of the corporate sale and reorganization cases, were to no avail. This was mainly due to a growing trend in the other direction. United States Courts of Appeals in a number of circuits have held in gift and redemption cases similar to the one in *Grove*, that where the gift to the charity is complete and irrevocable, and the redemption is not part of a pre-arranged mandatory plan of recovery, the gift and redemption are distinct and separate. In those cases, the taxpayer has been allowed the deduction and has avoided completely any redemption-dividend tax.

The first signs of this trend appeared in 1964 with a tax court decision in *The Humacid Company*.[9] In *Humacid*, the taxpayer controlled a holding company that had a subsidiary which issued five promissory notes. The notes were subsequently purchased by the taxpayer. He sold two of them to a friend. The friend redeemed them by a pre-arranged agreement. The other three notes were donated to a tax exempt charity which also redeemed the notes with the subsidiary. The tax court found that the sale to and redemption by the friend was really part of a single transaction of redemption by the taxpayer himself and he was so taxed. The gift to and redemption by the charity were separate and distinct events and the deduction was allowed for the contribution and the redemption was not taxed to the taxpayer.

The next case in the gift-redemption area which runs counter to the Commissioner's theory in *Grove* was *Sheppard* v. *United States*.[10] In *Sheppard*, the taxpayer had a controlling interest in an unincorporated farm which owned most of the interest in a prize race horse. The taxpayer himself owned the remaining interest. The taxpayer wished the farm to have the entire interest in the horse. He split his personal interest and gave a sub-part to each of two charities. The gifts were found to be total and irrevocable. The taxpayer then caused the farm to solicit the shares of the horse from the charities. Both charities accepted, although neither was under any obligation to do so. The farm then had total interest in the horse, the taxpayer took his charitable deduction for the gift and the redemption of the shares in the horse went untaxed. The United States Court of Claims held that an unencumbered integrated plan must exist if the government telescopes the transactions into one. The situation did not exist here since someone could have possibly outbid the taxpayer and obtained a share in the horse.

Finally, two Circuit Courts of Appeals' decisions prior to *Grove* served to further buttress the taxpayer's argument. In *Behrend* v. *United States*[11], the Court of Appeals for the Fourth Circuit held that even where the taxpayer admitted the existence of a planned redemption scheme, the redemptions were not taxable as dividends as long as the gifts to the charity were found to be complete and distinct. The Court allowed a deduction for the charitable gift and charged no dividend tax for the redemption even where the charity itself was subject to control by the taxpayer.[12] Here, as in *Grove*, there was no obligation on the closely held corporation to redeem, only an understanding it might do so if capable. In *Carrington* v. *Commissioner of Internal Revenue*[13] the Court of Appeals for the Fifth Circuit held that as long as the taxpayer has parted with all dominion and control of his donated

property, there is a completed transaction. In *Carrington* there was the now familiar triangle of taxpayer, charity and taxpayer controlled corporation. Shares of stock were given to a church with no obligation or agreement for redemption. The shares were later redeemed by the corporation in exchange for a residence to be used as a rectory. The case turned on the divisibility of the perfected gift and the redemption, and again, the taxpayer prevailed.

Admittedly, in the last two cases there was no donation of a partial interest involved. However, this is not a significant point for two reasons: (1) it is a moot point in view of the Tax Reform Act of 1969;[14] and (2) the cases turn on the completed donation of the interest.[15] In *Grove* the majority accepted that the gift to RPI was conclusive and irrevocable and found no compelling evidence to upset the Tax Court's finding, in spite of the Commissioner's attack based on the frequency of the donations to RPI. Once the *Grove* majority accepted this finding of fact, the separate identities of the donations and the redemptions became fixed and the allegations of a "step-transaction" scheme were dissipated. The majority also acknowledged the special cash flow problems of the taxpayer's business as proof that no scheme to redeem existed and, additionally, cited the needs of institutions like RPI for alumni donations in order to survive.

The case for the Internal Revenue Service, notwithstanding the weight of authority elsewhere, attempted to show additional special circumstances in order to establish that the taxpayer was using RPI to recycle high risk shares of his own closely held corporation into quality stocks and bonds on the public market.[16] This argument also postulated that the redemption of the stock and the investment of the proceeds for the life benefit of the taxpayer were merely a scheme to use RPI to convert the closely held shares into shares of public investment securities. These new and supposedly higher quality investments were viewed as part of the taxpayer's retirement provisions. The Commissioner pointed to the pattern of donation and redemption with the obvious resemblance of the life interest in dividends to an annuity. The *Grove* majority was not persuaded. The argument failed to acknowledge two determinative factors.

First, the very real benefit accruing to RPI by the donation of the future interests in the proceeds from the redemption that also benefited the taxpayer. There is no question as to the benefit to RPI on the death of the taxpayer. This is ignored by the Revenue Service. As the Tax Court found, there had been a genuine desire to help RPI and a genuine gift had been made. The fact, that the taxpayer received a benefit, ignores the holding of *Helvering* v. *Gregory* that incidental tax benefits to the taxpayer are not improper as long as that is not the sole motivation for the tax consequences.[17] The benefits to RPI, even if postponed, coupled with the overall good faith of the taxpayer meet that standard.

Secondly, the Commissioner's attack failed to recognize that the closely held stock, while not a publicly regulated security, was not worthless paper. Even if the taxpayer in *Grove* did eventually acquire public stock, his private stock was worth a substantial sum of cash. Hence his dealing was not a lopsided benefit to him at the expense of RPI. Also, the taxpayer did pay tax on the eventual income from the public shares. While the taxpayer did not part with the entire interest in the stock, the interests he gave away were given absolutely.

Ultimately, the significance of *Grove* lies in its legitimation of a variety of possible schemes which will permit qualifying taxpayers to aid their favorite charities by using closely held shares, and yet preserve a relatively constant degree of control in their companies as well as create the analog of a low risk pension fund for themselves and their dependents. Furthermore, when a prudent taxpayer has a donative interest in a corporation which the taxpayer controls with a charity, he can make a donation, receive a deduction, and use the first option clause to subsequently regain control over the donated interest through the controlled corporation. The only strict requirement is that the taxpayer truly give up his interest in the donation.[18] The Treasury Department must have been especially concerned about relinquishment of control by the taxpayer because of the changes made in the Tax Reform Act of 1969.[19] Now the donor, at least of a partial interest in property, as in the *Grove* case, must give up all controls to a trust. The specific facts of *Grove* will probably never be exactly repeated, but the donation-redemption principles in the case can be applied elsewhere.

In *Grove* it was the charity, RPI, that approached the taxpayer. With the ever rising cost of education there is no reason to suppose this donation-redemption activity could not increase. Notwithstanding the current necessity of a trust device, the benefits to donors of closely held stock and to charitable organizations are very desirable.[20]

Although the basilisk eye of the Commissioner constantly seeks to destroy any so-called "loophole" it discovers, there is a public interest to be protected and encouraged in this type of initiative. It may not be desirable to allow wealth to remain in the hands of a few, but why should the omniscient federal government take, only to eventually give away? Why not use a creative tax policy to prod taxpayers into being generous on their own? Through the "life-income funds" plan of RPI and other similar programs, taxpayers are encouraged, not only by the deduction but also by the retained life interest, to give to educational and other worthy institutions. This saves the taxpayers in general from doing the same thing, pro rata. Creative tax policy has many benefits. Instead of trying to restrict such activity, the Internal Revenue Service and the Secretary of the Treasury should, in cooperation with Congress, encourage it. America has, traditionally pursued a tax policy which favors charitable organizations. The donation-redemption plans should be fostered or at least preserved as a legitimate part of that policy. There are over 1,323,000 corporations in the United States, and most of these are private ones. With this number of possible donors and the well publicized need of American educational and charitable institutions, this area should see much future growth as the trend of the donation-redemption cases continues.

As far as the Commissioner of Internal Revenue is concerned, indications are that he has not acquiesced and will continue to contest this type of case for a long time. However, one favorable sign to prospective donors and charities is that apparently no new legislation has been requested by either the Commissioner or Congress itself. This means that for now the action will be in the courts. Here the ground under *Grove* and its allies seems to be solidifying. On April 17, 1974, the United States Court of Claims once again decided for the taxpayer in a gift and repurchase situation.[21] Again, the critical factor was the finality of the donation by the taxpayer. Although a partial interest was not involved, the fact that the donor com-

pletely relinquished control of the stock donated to a school, meant that the subsequent redemption by his closely held corporation was not taxable to him. The area of gift-redemptions is only recently being tested in the courts and is infrequently mentioned in tax literature, but the recent cases indicate that it is an area that deserves the close attention of estate planners and tax specialists serving not only the taxpayer but charitable organizations as well. The area is just beginning to realize its potential.[22]

Footnotes

[1]490 F2d 241 (2nd Cir. 1973). Appealed by the government from an unfavorable United States Tax Court decision, 31 CCH Tax Ct. Mem 387 (1972).

[2]Carrington v. Commissioner, 476 F2d 704 (5th Cir. 1973); Behrend v. United States, __F2d__(4th Cir. 1972), 73-1 CCH 1973 Stand. Fed. Tax Rep. §9123; DeWitt v. United States, __F2d__(Ct.Cl. 1974), 74-1 CCH 1974 Stand. Fed. Tax. Rep. §9369; Sheppard v. United States, 361 F2d 972 (Ct.Cl. 1966); The Humacid Company 42 T.C. 894 (1964); *Contra,* Russel E. Phelon §66,199 P-H Tax Ct.Mem. (1966).

[3]When the transactions in the leading case took place it was possible, as a general proposition, to deduct charitable contributions of partial interests, income or remainder in property. Subsequently, the Tax Reform Act of 1969, Stat.Pub.L. 91-172, was passed, effective December, 1969 for all taxable years following. Now it is possible to deduct gifts of partial interests in one of three manners: First, by the creation of a trust which can be done in one of three ways — (a) by an annuity trust where specific monetary sums from a trust are paid at least annually to the beneficiary (b) by creating a unitrust whereby specific yearly payments are made based on a percentage of the value of the trust's assets as assessed each year or (c) by using the pooled income funds method which is a trust of funds, residual interest being left to the charity, the income to the donor. *See* Int.Rev.Code of 1954 §170(e)(1)(A), 642 (c)(5);, Treas. Reg. §1.664-1 to 1.664-4 (1973).

Second, the gift of a partial interest may be deducted if the remainder interest given is in a personal residence or farm. *See* Int.Rev.Code of 1954 § 170(f)(3). Third, a donated partial interest is deductable if the contribution is in an undivided interest in property. *See* Int.Rev.Code of 1954 §170(f)(3).

The reason for the new requirement of a trust vehicle for donation of partial interests seems to be to ensure the complete revocability of the donation and to better value the deduction. The age-old problem is how much of an interest constitutes the full benefits of ownership and how much has to be given away to ensure that the taxpayer is really giving something away. By requiring, in most cases, that the irrevocable trust be created with the partial interest as the res the government makes certain that the taxpayer is parting with his partial interest and can't reacquire the benefits of the donated interest at some later date. This change is explained in Senate Report No. 91-552 §201 dated 11-21-69 and House (conference) Report No. 91-782. By conforming to these rules, the requirements of complete divestment should be amply satisfied in cases of partial interest donations since complete title now rests in the trust.

Gifts of partial interests in tangible personal property, such as paintings are not deductible until all the donor's right, title and interest in the property ceases. *See* Int.Rev.Code of 1954 §170(a)(3).

[4]It is important to understand the nature of the corporation and controlling interests. The corporation was a construction and engineering firm building heavy construction projects around the world. Because of the nature of the construction industry, payment by the firm's customers is made only after certain levels of completion have been reached. Therefore, to meet its own current expenses and payroll, large amounts of liquid cash are necessary depending on the nature of the job. In addition, the contract price negotiated by such a firm is estimated in advance and often there are errors in judgement costing the firm unexpected losses. The point is that cash on hand in such a corporation is highly variable. The inference the Court of Appeals for the Second Circuit drew is that no pre-arranged plan of redemption could have existed since the corporation's cash picture varied too much to ensure redemption at pre-arranged periods.

[5]The Commissioner was trying to show that the redemption was essentially equivalent to a dividend and therefore taxable under Int.Rev.Code of 1954 §302. *See also* Rev.Rul. 178, 1967-1 Cum. Bull. 64 (a gentlman's agreement to reacquire donated shares is the same as a gift of the proceeds, not the shares); and Treas.Reg. §1.302 (1973) (requirements for not having a redemption be construed as a taxable dividend). There was no liquidation issue in *Grove.*

[6]Helvering v. Gregory, 293 U.S. 465, 468-9 (1935) (as long as the *sole* purpose of an event isn't to avoid taxes, the taxpayer can decrease or avoid taxes as the law permits).

[7]324 U.S. 331 (1945).

[8]311 U.S. 112 (1940).

[9]42 T.C. 894, 913, (1964).

[10]361 F2d 972 (Ct.Cl. 1966).

[11]__F2d__(4th Cir. 1972), 73-1 CCH 1973 Stand.Fed. Tax Rep. ¶ 9123.

[12]The majority in *Grove* also noted that during part of the redemption period the taxpayer was a trustee of RPI but no significance was attached to this. 490 F.2d at 244 n.5.

[13]476 F2d 704 (5th Cir. 1973).

[14]This is not to say partial donations can't be made today. All it means is that now one has to go to the extra trouble of first setting up a trust. *See* note 3 *supra.*

[15]The government and the dissent attached significance to the fact that in *Grove* only the future interest was given away. They cited Corliss v. Bowers, 281 U.S. 376 (1930) (Holmes, J.) for the proposition that taxation considers actual not formal title. The government and dissent then sought to use this proposition to conclude that because partial title was retained by the taxpayer in *Grove,* the gift was inconsequential. 490 F.2d 250. Nothing could be further off base. The dissent missed the point that there is not one interest and two formal owners but two interests and two owners. Grove controlled the life income from the donated stocks or their proceeds only. He no longer had anything to say about the interest that RPI now forever owns. The taxpayer paid income tax on the income he received from his interest but he is no longer responsible or liable for RPI's interest. *Corliss, supra,* supports the proposition that income subject to a person's unfettered command is subject to taxation as his, whether or not he enjoys it. The problem is that the *Grove* dissent failed to realize that the interest of RPI was no longer subject to Grove's command at all and that even the life estate was not subject to the taxpayer's command until RPI acted to produce some income from the stocks. Therefore, until RPI started redeeming, no benefit accrued to the owner that was taxable. This power of RPI should be enough to indicate the separateness and legitimacy of the transactions. Clearly the fact that there were created two interests had no bearing on the central question of the donor's gift. That gift was final and to tax the donor on anything but his income received from the life estate would be contrary to the Internal Revenue Code.

[16]Grove's ultimate objective may have been to create a stable pension fund or life annuity for his wife and himself and indeed this was one of the features of the "life income funds" plan. 490 F.2d at 243. But once again, as long as this was not the sole intent of the transactions, the *Gregory* test, (must be some valid reason other than tax avoidance), is satisfied and the transaction is not tainted by the incidental benefit to the taxpayer.

[17]490 F.2d at 246-47, *citing* Helvering v. Gregory 293 U.S. 465 (1935).

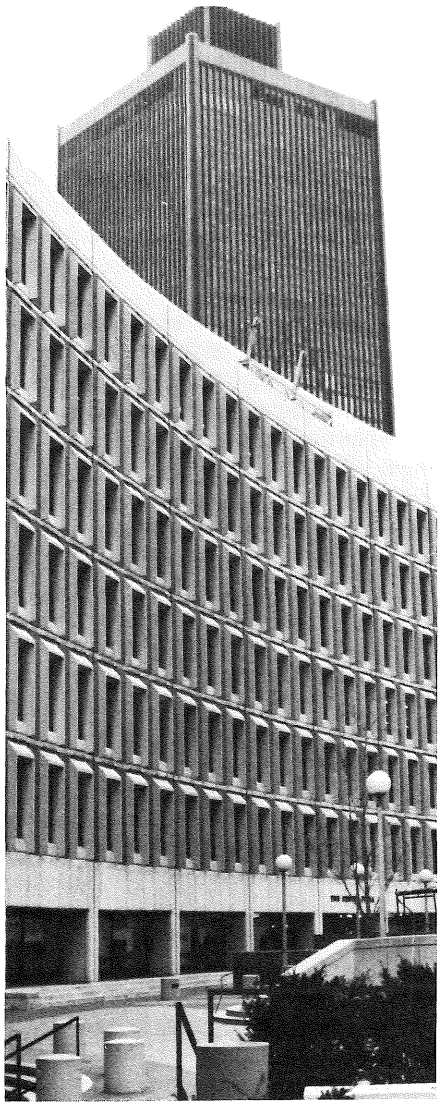
[18]An element common to all the discussed donation-redemption cases is that full dominion and control of the donated items was given up to the donee. *See* note 2 *supra.*

[19]*See* note 3 *supra.*

[20]The donation-redemption fact pattern has already been discussed as a planning opportunity. *See* Galant, *Planning Opportunity: the Gift of Closely Held Stock to Charitable Organizations,* 51 Taxes 645 (November, 1973) (analyzes transactions similar to a *Grove* situation but was written before *Grove* was decided). *See also* Abbin and Gormanous, *Creative Charitable Giving,* 51 Taxes 813 (December, 1973)(part of a report from a tax symposium — the article seeks to sort out new patterns emerging from the Tax Reform Act of 1969 and give practical guidelines to help the tax adviser in considering creative planning under the new law) (briefly discusses the *Grove* factpattern).

[21]DeWitt v. United States __F.2d__(Ct.Cl. 1974), 74-1 CCH 1974 Stand.Fed.Tax Rep. ¶ 9369.

[22]I would like to recognize the assistance rendered in preparing this article of Peter Agnes of the Suffolk Law Review and of Richard Bacon of the Senate Joint Committee on Taxation.



Suffolk University Law School Notes

Dean's Message

During the past twenty years there have been a number of developments at the Law School, and it might be worthwhile to review some of them before they are lost in what has been described as the "twilight of antiquity".

In 1954 the faculty consisted of a Dean and two full-time faculty members and about twenty-five part-time members. The latter, all of whom were active practitioners, taught most of the required courses. Today, in contrast, we have, including various administrators, forty full-time teachers and about forty part-time instructors. As an incidental item of interest the budget for the part-time faculty alone for the academic year 1974-1975 far exceeds the budget for the entire faculty and staff of 1954.

The curriculum in 1954 consisted mainly of required courses. In the third year day class then were two hours of electives each semester; in the fourth year evening there were also two hours of electives each semester. Today, there are some electives in the second year day and third year evening curriculum and the third year day is entirely elective as will be the fourth year evening next year. This academic year there is one required course in the first semester of the fourth year evening.

In 1954, the total student population, day and evening division, did not exceed five hundred students. The day division was outnumbered by the evening division by a ratio of at least three to one. As we all know this has drastically changed in that today each division has about one thousand students.

Further in 1954, ninety-eight per cent of the students were residents of Massachusetts. The change that has taken place here is that many of our students now come from the other New England States, New York, New Jersey and

Pennsylvania in particular. While we have no aspirations to become a national law school we have slowly developed into a regional law school, and our alumni are very active in the Northeast region.

The facilities for the Law School in 1954 consisted of a few rooms in what is now called Archer Building. Today, we occupy part of the Archer Building and part of the recently built Donahue Building. Hopefully, in September 1975, the Law School will have the entire Donahue Building with the exception of the first floor. Further in 1954 there was no separate Law Library or Law Librarian. The changes that have occurred in these areas are well known to all, and plans are now being considered for a separate Law Library facility.

The aforegoing are some of the major developments that have taken place in the Law School in the past twenty years. The progress that has occurred has been the result of the joint cooperation of the Trustees of the University, the President of the University and the Deans, faculty, students and alumni of the Law School. This spirit of cooperation will continue and further achievements will be realized over the coming years.

Moot Court Round-Up

Suffolk's National Moot Court Team, consisting of Steve Callahan, Mike Greely, Paul Kelly and Bob Schwartz (alt.), has won the distinction of having the "Best Brief" in the Regionals of the National Moot Court Competition held at the new Cambridge Courthouse on November 6, 1974. The team was defeated in the oral argument session by State University of New York at Buffalo Law School. This year's winner of the Regional Competition was Boston University Law School.

The Client Counseling Competition which is a Regional and National Competition testing a student's ability to perceive clients' problems and advise clients as to their legal alternatives, will be sponsored this year by the Moot Court Board. Professor Cella, Jim Sahakian, and Robert Rufo are in the process of selecting a Client Counseling Team to represent Suffolk in the Regional Competition.

The International Moot Court Team, consisting of Jim Connolly, Walter Jacobsen and Bruce Pritzker, will be participating in the Phillip C. Jessup International Moot Court Competition this February. The team is now preparing a comprehensive brief in support of their legal arguments and readying themselves for the upcoming oral arguments.

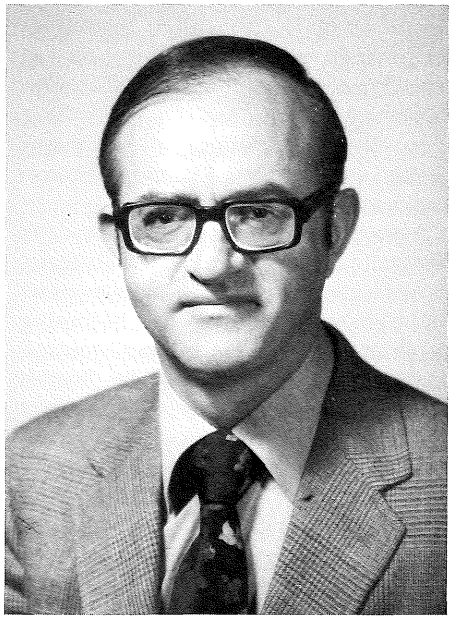
The Co-chairmen of the Tom C. Clark Annual Moot Court Competition have announced the panel of Judges for the final argument. They will be, the Honorable G. Joseph Tauro, Chief Justice of the Supreme Judicial Court of Massachusetts; the Honorable Levin H. Campbell, United States Court of Appeals for the First Circuit; and the Honorable Charles S. House, Chief Justice of the Supreme Judicial Court of Connecticut.

The record is available for any second and third year day and second, third, and fourth year evening students who are interested in expanding upon their brief writing and oral advocacy talents. The Clark Competition affords students the rare opportunity to argue and develop a point of law before a distinguished panel of judges; should a student reach the final stages of the Competition, scholarship prizes are also awarded.

Each team consists of two people who will write a brief in support of their legal contention and eventually will argue orally for their side during the last two weeks in February. This year, team briefs will be due Monday, February 3, 1975.

Suffolk Discusses Critical Sea Issues

by Basil Yanakakis



To solve the monumental problems facing the world today, a whole new concept of the world's oceans is one of the changes necessary. New ideas on the control of the sea and its treasures can be employed to combat the problems of hunger, pollution and shortages of resources. Recognizing these facts, the United Nations has sponsored several international conferences in an attempt to join the nations of the world in a harmonious effort to solve the problems relating to the oceans. The most recent of these was held in Caracas, Venezuela last summer. Among the issues considered were: the rights of nations over natural resources on the ocean floor; fishing rights; the width of national coastlines; and the nature of a nation's possessive authority over its territorial waters and environmental problems. Another conference will be held in Geneva in 1975 to attempt to promulgate some concrete solutions to these problems.

In this same spirit, Suffolk University Law School and the American Society of International Law will co-sponsor a conference entitled "New Concepts of the International Law of the Sea." The conference will be held on February 1st and 2nd at the Sheraton-Boston Hotel. The purpose of the conference is to bring to Boston many of the participants in the Caracas Conference to explain the ideas being considered to solve the problems of the sea.

Among the topics to be discussed at the Boston Conference are: the rights of nations to fish and mine in the oceans; the limits on national sovereignty over the sea; the rights of landlocked nations and of archipelagic states; the establishment of an international authority to supervise exploration and to regulate exploitation; the problems of pollution; and the control of international navigation in narrow waters. The participants in the February conference will include:

Mr. Constantin Stavropoulos, Undersecretary General of the United Nations;

His Excellency, Dr. P.H. Kooijmans, State Secretary for Foreign Affairs, Netherlands;

Ambassador John Stevenson, Special Representative of the President of the United States and Chief Delegate of the U.S. to the International Law of the Sea Conference in Caracas;

Ambassador Francis Njenga, Kenya, leader of the 200 mile Economic Zone Concept;

Ambassador T.T.B. Koh, former Dean of the Law School at the University of Singapore and now Ambassador to the U.N.;

Ambassador Haji Hussein, Representative of Somalia to the United Nations;

Ambassador Reynaldo Galindo-Pohl, Representative of El Salvador to the United Nations;

Richard A. Frank, Esq., of the Center for Law and Social Policy in Washington;

Professor Caflisch, Director of the Institute of International Studies, Geneva, Switzerland;

Ambassador Sani, Representative of Indonesia to the U.N.;

Dr. Hussein Hassouna of the Permanent Mission of the United Arab Republic to the United Nations;

Ambassador Burella of Venezuela, Ambassador of Venezuela to the United States;

Professors Richard Baxter, Louis Sohn and Dean Rusk; and others.

The Conference promises to be a truly outstanding event whether one is interested in the sea from a legal, scientific, political, environmental or economic standpoint. Members of the Suffolk community are urged to attend. There will be a special reduced rate for Suffolk students and alumni. Anyone with any questions concerning the conference or desiring further information should contact Professor Basil Yanakakis at the Law School or phone the Sea Conference Committee at 617-742-4300,x359.

Faculty-Alumni Committee

On October 22, Professor Richard G. Pizzano, Chairman of the Faculty-Alumni Committee, Associate Dean Malcolm M. Donahue, Judge John E. Fenton, Jr., and Captain Anthony J. DeVico met with about 30 Suffolk Law School alumni practicing members of the Connecticut Bar at a luncheon hosted by the law school in New Haven. The luncheon held in conjunction with the 99th annual meeting of the Connecticut Bar Association was sponsored by the Alumni Committee and coordinated by Associate Dean Clifford E. Elias and New Haven attorney Donald S. Baillie (J.D. 1973).

The Honorable John E. Fenton, Jr., the featured speaker, and a consultant to the Alumni Committee brought the Connecticut alumni up to date on recent happenings at the law school, commenting on enrollments, an increase in the teacher-student ratio, the present administration, and plans for expansion of the law school facilities.

Associate Dean Donahue spoke on the matter of admissions at the school and Captain DeVico spoke concerning law placement.

Professor Pizzano then commented on the new Alumni Committee, noting particularly that one of its most important areas of concern was to provide the means and opportunities for Suffolk alumni to "come together", get to know

one another, and form local alumni chapters in their respective states. He related the plans of the committee to sponsor future alumni gatherings in several different states, including all of the New England states, California and Washington D.C., assuring the alumni that this was just the beginning of a "new, exciting and productive era in faculty-alumni relations."

A question and answer period followed.

When questioned by *The Advocate* concerning future alumni gatherings, Professor Pizzano indicated that the committee welcomes, encourages and urges alumni of the law school, wherever located, to communicate directly with him at the law school if they are interested in assisting in the holding of similar affairs in their respective states.

All those interested should contact

Professor Richard G. Pizzano
Suffolk University Law School
Beacon Hill
Boston, Mass. 02114
(617) 723-4700

Elias Appointed Associate Dean

In order to function effectively as an academic executive, one must retain the feel of the classroom. As Professor Clifford E. Elias, newly-appointed Associate Dean of the Law School, recently observed, an administrator serves to translate student needs and concerns into administrative action.

Dean Elias, 43, has been a member of the Suffolk Law School faculty since 1961, specializing in criminal law and procedure. He is a graduate of Phillips Academy, Yale University, and Boston University Law School. During the Korean War, Dean Elias served as an intelligence officer with the United States Army. Among his numerous activities at Suffolk, he has sat on the Curriculum Committee, the Law School Development Committee, and the Joint Faculty Student Committee.

There are several areas which Dean Elias regards as requiring immediate attention. Of the highest priority is the continual search for qualified full-time faculty members. As Chairman of the Faculty Appointments Committee, the Dean is primarily responsible for all appointments to the law faculty. He views the recruitment program as an obligation not only to the students, but also to the Bar, the courts and the general public.

In another role, the Dean, as Chairman of the Building and Space Committee, is acutely aware of the oft-expressed complaint that there is not enough space available to the law school community. In response, he has approved the acquisition of the Fenton Building (nee Wright and Potter Publishers) and has instituted several studies, including a feasibility plan for a proposed separate law library.

Another sector of the law school community, the alumni, has also come under the Dean's scrutiny. The role of the alumni, their purposes and position are being re-examined with a look towards the future. Certain vital alumni offices are presently vacant and Dean Elias is coordinating a search for prospective appointees. This is an important endeavor especially because of the feedback alumni give on the quality of the preparation of attorneys at the law school.

Dean Elias recognizes his responsibility to the community and Suffolk's role beyond the campus. He senses the need to develop a spirit of community interest and involvement that will embrace students, faculty, administrators, and alumni. It is evident that Dean Elias, whether in the classroom or in his offices, is doing his utmost to instill this peculiar sense of belonging within the Law School.

New Trustees Elected

President Thomas A. Fulham has announced that Judge C. Edward Rowe of Athol has been elected to succeed the late Judge John E. Fenton as chairman of the Board of Trustees of Suffolk University. Judge Rowe, who holds two honorary degrees from Suffolk, graduated from Suffolk Law School in 1926 and began his judicial career as a special justice in the District Court of Eastern Franklin (Orange, Ma.) in 1933. Three years later he was appointed presiding justice of that court. During his long tenure on the bench, he had occasion to sit on the Superior Court.

Judge Rowe is also a trustee of St. Anselm's College. That college conferred an honorary degree of doctor of laws upon him in 1962. Suffolk awarded him an honorary doctor of juridical science degree in 1969. A member of the law school committee, the nominating committee and the honorary degree committee at Suffolk, he is also chairman of the board of The First National Bank of Athol and director of The Athol-Clinton Cooperative Bank. During World War II he served as a director of the Small War Plants Corporation and was also director and vice-chairman of the Reconstruction Finance Corporation from 1950-51.

Also elected at the Board's October meeting were two new trustees. Elected to five-year terms were John S. Howe, president of The Provident Institution for Savings, and Mrs. Dorothy A. Antonelli, a commissioner for the State Industrial Accident Board.

Howe and Antonelli fill vacancies created by the deaths of Judge Fenton and trustee George H. Spillane.

A graduate of Harvard College and the Graduate School of Banking at Rutgers, Howe served as treasurer and vice president of the Provident before becoming president in 1958. He is a director and past president of the Greater Boston Chamber of Commerce; past president and campaign chairman of the United Way of Massachusetts Bay; and an incorporator and director of the Robert B. Brigham Hospital. He is also a trustee of the Bank Officers Association and the Massachusetts Eye and Ear Infirmary; a director of the State Street Bank and Trust Co.; treasurer of The Cathedral Church of St. Paul, Boston; past president and director of the Massachusetts Society for Prevention of Cruelty to Children; and a member of the Greater Boston Advisory Board to the Salvation Army.

Mrs. Antonelli was graduated from Mary Cliff Academy and Simmons College and received her law degree from Suffolk University Law School in 1959. She has a law office in Somerville and is vice president of the Massachusetts Association of Women Lawyers. She is also a member of the Committee of Family Law for the Massachusetts Bar Associa-

tion and the Committee of Trial Practice. She has lectured at both Harvard Law School and Suffolk Law School. In August of 1973, Governor Sargent appointed her to serve the remaining ten years of an unexpired twelve year term as commissioner of the Industrial Accident Board.

Faculty Notes

Professor R. Lisle Baker presented a lecture entitled "Environmental Law: New Concepts in Land Use and Management" at the Second National Symposium on Corporate Social Policy. The symposium was held at the University of Chicago Center for Continuing Education and was sponsored by the National Affiliation of Concerned Business Students. Professor Baker also arranged a weekend course in environmental science and ecology for a small group of Suffolk Law students at Williams College. Besides their environmental studies, the law students spoke to Williams College students concerning legal education.

Professor Alexander J. Cella is the author of "The Doctrine of Legislative Privilege: The New Interpretation as a Threat to Legislative Co-Equality," published in 8 *Suffolk University Law Review* 1019 (1974). The article contends that the Supreme Court's interpretation of Article I section 6 of the Constitution in recent cases endangers the ability of Congress to function as a co-equal branch. Professor Cella received this year's Outstanding Service Award from the Suffolk University Law Review. The award is voted annually by the Board of Editors of the Law Review for outstanding contributions made to the Law Review during the past academic year.

Professor Cella was recently elected Chairman of the twenty-five member Massachusetts Citizens' Committee on the State Legislature which will undertake a two year study of procedures and reform of the Massachusetts legislature.

Professor Gerald J. Clark has published an article in 23 *Catholic University Law Review* 444 (1974), entitled "The Creation of the Newark Plan." The article describes the affirmative action plan in the skilled craft construction trade in Newark, New Jersey under Executive Order 11,246.

Law Placement Director, Captain Anthony J. DeVico is presently serving as Treasurer of the American Justinian Society of Jurists, a nationwide association of jurists. Captain DeVico also participated in a recent ceremony in the Court of Appeals Chamber of the Federal District Court in Boston offering the motion by which thirty-four Suffolk Law School alumni were admitted to practice before the U.S. Court of Military Appeals. Captain DeVico was also recently appointed a member of the Corporation of Roger Williams College in Bristol, R.I.

Associate Dean Malcolm M. Donahue was recently re-elected as Chairman of the Board of Appeals of the town of Westwood, Mass.

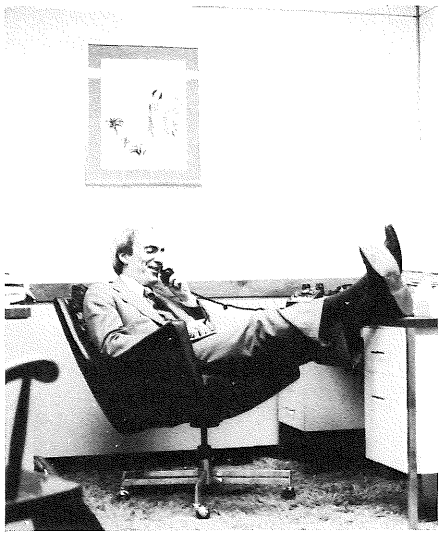
Professor Charles Garabedian served as moderator of the Tenth Annual National Law Enforcement Seminar. The seminar was held at Northeastern University and was entitled "Justice under Scrutiny."

Professor Garabedian has been elected to the Board of Advisors of the Court Practice Institute, Chicago, Illinois. He has also been appointed to the Liaison Committee of the Scribers (Society of American Legal Writers).

Professor Charles P. Kindregan has been named to the Boston Bicentennial Commission.

He was also appointed to the standing list of guardians by the Supreme Judicial Court of Massachusetts to advise the court on bone-marrow transplants and other legal-medical questions.

Professor Kindregan will also serve on a joint committee on continuing legal education of the Massachusetts Bar Association and the Boston Bar Association.



Professor Richard G. Pizzano has been elected local chairman of the 1974-1975 Heart Fund Drive. Professor Pizzano has also been appointed to the Board of Trustees of the Robert F. Kennedy Action Corps.

Dean David Sargent has been named chairman of the Massachusetts Bar Association's Committee on Trial Practice.

Professor Richard Vacco has been named to the Board of Editors of the *New Hampshire Bar Journal.* The appointment was made by the New Hampshire Bar Association. Professor Vacco has also been elected President of the Unitarian-Universalist Church of Nashua, New Hampshire.

Professor Hugh Wade has been selected by Chief Justice Warren Berger as the alternate judicial fellow of the U.S. Supreme Court this year. Each year, two fellows and two alternates are selected for the high honor.

Professor Louise Weinberg has been invited to do an article on copyright and photocopying for *The Public Interest.* The piece will likely appear in the spring issue.

Admission Office

Suffolk University Law School received over 4,500 applications from undergraduate institutions across the United States for the 590 seats available for the Class of 1977. This figure represents an increase of nine percent over the total number of applications received for the Class of 1976. However, seven fewer students were accepted in compliance with the school's new policy to decrease the size of its classes. With the increase in applications, the Law School Admissions Office was able to exercise a greater degree of selectivity over the incoming students which resulted in both a higher mean LSAT score (618) and grade point average (3.15).

Under Director John Deliso, the percentage of minority students recruited and enrolled increased significantly. A new emphasis has also been placed on recruiting at institutions outside the New England area.

According to figures furnished by the Office of the Registrar, there are 2,070 students studying law at Suffolk University, 948 in the Day Division and 1,122 in the Evening Division. This total represents 1,708 men and 362 women. Twenty-five percent of the applicants for the Class of 1977 were women which resulted in 80 of 320 Day Division students and 70 of 270 Evening Division students being women.

Alumni News

Alumni:
Inform us of what you're doing now. Send news to the:
ADVOCATE
Suffolk Univ. Law School
Beacon Hill
Boston, Ma. 02114

1933

George A. Lenzi has announced his retirement from the Commonwealth of Massachusetts Department of Corporations and Taxation.

1941

Edward P. Johnson has been appointed Director of the Franklin Housing Authority.

1949

Nicholas J. Vergados was sworn in as Commissioner on the Massachusetts Industrial Accident Board.

1950

Captain Savas Hantzes, Judge Advocate General's Corps, U.S. Navy, has retired after thirty years of service.

1954

Francis J. Tobin has been reappointed Co-Chairman of the Massachusetts Bar Association Committee on Legal Services to the Poor.

1956

Sidney J. Rosenthal has been elected president of the Builders Association of Greater Boston.

1960

Arthur P. Rogers has been appointed director of the Corporate Employee Relations Department of Combustion Engineering, Inc.

1964

Philip D. O'Connell, Jr. is district court prosecutor in the office of District Attorney William T. Buckley.

1965

Charles H. Robson has recently accepted the position of legal counsel to the Lynn Police Department.

1967

Sal Ciccarelli was honored by the Brookline Police Department at a recent testimonial dinner.

1968

Stephen R. Ross has entered into a partnership for the practice of law in West Yarmouth, Massachusetts.

1969

Joan I. Farcus has been named director of the legal assistance program at Sacred Heart University in Connecticut. **Imelda C. LaMountain** has been named the first woman assistant district attorney for Massachusetts' Western District. **William H. Walsh** is a partner in the law firm of Ferraro and Walsh. **Byron E. Woodman, Jr.** has joined the law firm of Sherburne, Powers and Needham.

1970

Alan J. Powers was named superintendent of the Operations Division of Harvard Medical School, Boston.

1971

Warren M. Gould is an associate with LaPenna and Tuckman, P.C. in New York. **John J.L. Matson** has been appointed Director of Employer Services for Associated Industries of Massachusetts. **Sheila Cabral Sousa** has been elected Chairwoman of the state Advisory Commission on Women in Rhode Island. **Virginia B. Watson** has been promoted to Assistant Tax Officer at the National Shawmut Bank in Boston.

1972

Richard Chandler has announced the opening of law offices in Marblehead. **Dennis J. Conry** is an attorney in the Edward M. Kiernan law firm in Wareham, Massachusetts. **Richard A. Cutter,** Assistant District Attorney, was assigned to Superior Court by Middlesex D.A. John J. Droney. **Robert M. Elliott** has announced the opening of law offices in East Hampton. **Francis T. Reynolds** has joined the law firm of Keshiah and St. Amour in Arlington, Massachusetts.

1973

Donald L. Carpenter has been appointed an assistant by District Attorney Philip Rollins in Hyannis, Massachusetts. **Barbara M. (Putzel) Delcore** is a member of the firm of Horovitz and Horovitz in Boston. **Walter P. Faria** has opened a law office in New Bedford, Mass. **James L. Henry** has joined the law firm of Attorney Clair F. Carpenter. **Lloyd N. Henderson** is an associate with the law firm of Hatfield and Howard in Hillsborough, N.H. and is an instructor in Business Law at Nathaniel Hawthorne College. **Timothy S. Hillman** has joined the law firm of Murphy and Pusateri in Fitchburg, Massachusetts. **Michael J. Noferi** has joined the law firm of Rosen, Noferi & Holland in Milford, Massachusetts. **Lawrence J. Sullivan** is practicing law with the Sullivan-Duly Law Offices, Inc. in Andover, Massachusetts.

1974

Robert C. Anderson is presently a Judge Advocate General in the United States Army. **Alan S. Kaplan** is serving a clerkship in the Delaware Superior Court. **George W. Shinney, Jr.** is currently the City Clerk for the city of Malden, Massachusetts. **Daniel L. Viveiros** has joined the law firm of Attorney George T. Bolger, Inc. **Thomas Ford** is associated with the law firm of Stacey, Smith, Gibson and Holmes located in Wellington, New Zealand.

New Faculty

Suffolk University Law School is proud to announce the addition of the following distinguished individuals to its faculty.

John Stewart Geer, an assistant professor of law, holds an A.B. from Union College and a J.D. from Boston University Law School where he was Editor of the Law Review and a cum laude graduate in 1970. He served with the West German law firm of Bellen, Belli and Bailey. More recently, he served with the Boston firm of Snyder, Tepper and Berlin.

G. Rosalyn Johnson, an assistant professor of law, received her undergraduate degree from Suffolk University. She was awarded her J.D. by Suffolk University Law School where she was a Dean's List student, ranking eleventh in a class of one hundred and fifty three.

Bernard M. Ortwein II, assistant professor of law, is a graduate of the University of Richmond. In 1972, he graduated cum laude from Suffolk University Law School, where he was editor-in-chief of the Law Review. He later clerked for Justice Wilkens of the Supreme Judicial Court, and subsequently received his Master of Laws from Harvard University. Prior to his appointment, he had been serving as a teaching fellow in Suffolk's Legal Practice Skill Program.

Thomas J. O'Toole, visiting professor of law, holds A.B., LL.B. and M.A. degrees from Harvard University. He is a former dean and professor of law at Northeastern University Law School, where he is presently a Hadley Professor

of Law. He has previously served as a professor at Antioch School of Law, professor and vice-dean at Villanova Law School and professor at the Georgetown University Law Center.

Thomas J. McMahon, associate professor of law, holds an A.B. from Holy Cross, where he graduated magna cum laude, and a J.D. degree from Georgetown University Law Center, where he graduated eighth in a class of ninety-five. He has served as a trademark attorney with the American Cyanamid Company of Stamford, Connecticut and the Gulf Oil Corporation. He has also served as an executive officer of the Naval Reserve Law Company and as a commander with the Judge Advocate General Corps, U.S. Naval Reserve.

John R. Sherman, associate professor of law, holds a B.S. from Georgetown University, a J.D. degree from Harvard University and a LL.M. degree from Boston University Law School. He has served as general council for the Boston Anti-Poverty Program and was a member of the Boston law firm of Mahoney, Atwood and Goldings, specializing in federal taxation, real estate and corporate law. Prior to his appointment, he served as assistant dean at Northeastern University Law School, where he administered the cooperative legal education program.

Hugh M. Wade, assistant professor of law, is a graduate of Northwestern University and the DePaul University College of Law in Chicago. While attending law school, he worked full-time as a housing management specialist for the United States Department of Housing and Urban Development. He has recently received his LL.M. from Columbia Law School.

Louise Weinberg, associate professor of law, holds a B.A. degree from Cornell University, where she graduated summa cum laude in 1954, and is a Phi Beta Kappa. She received her J.D. from Harvard Law School in 1969 and her LL.M. from Harvard in 1974. She has served as an associate in the firm of Bingham, Dana and Gould and as senior law clerk for Federal Judge Charles Wyzanski. Prior to her appointment, she served as a teaching fellow at Harvard Law School.

Necrology

We at THE ADVOCATE are saddened to report the deaths of the following alumni:

Class of 1923

Walter F. Costello, former supervisor of the Massachusetts Industrial Accident Board, died October 13, 1974. A retired professional basketball player, he was the editor of *"Costello's Red Book for Lawyers"* which annually interpreted new Massachusetts laws. He was president of the Cathedral Old Timers, a member of the Massachusetts Bar Association and the Massachusetts Trial Lawyers Association.

Class of 1925

John Tierney, father of Boston School Committeeman Paul R. Tierney, died October 5, 1974. He was a retired attorney with the City of Boston Law Department, serving as Assistant Corporation Counsel for thirty-five years.

Class of 1929

Hector Cicchetti, a former assistant attorney general and once head of the City of Boston's tax title division, died September 13, 1974. Mr. Cicchetti was a columnist for the Boston Post Gazette, writing "Bet You Knew It All the Time" under his pen name, "Chisk Eddy". Cicchetti was a member of the American Bar Association, Boston Bar Association, and numerous fraternal organizations.

Class of 1930

William J. McCluskey died September 14, 1974. In 1937 and 1938 he was an assistant district attorney in Middlesex County. He was a member of the American and Boston Bar Associations and was a past president of the Somerville Bar Association. At the time of his death he was a member of the Boston law firm of Hennessy, McCluskey, Earle and Kilburn.

Class of 1930

Myer J. Wolf died October 2, 1974. He was a well-known leader in the automobile industry in New England and had been President of Charles Pontiac of Watertown and Capitol Motors of Cambridge. He was also a member of the Massachusetts Bar Association and the Massachusetts Automobile Association.

Class of 1934

George Belli, Jr. died October 5, 1974 after a lengthy illness. He was claims manager of the Loyalty Group Insurance Co., which later became the Continental Insurance Co. After retiring from the insurance business he went into private practice and sat as a court-appointed auditor in Massachusetts Superior Court. During World War II and for many years following, Belli served on the Revere Draft Board and later on the Reading Draft Board.

Class of 1935

Dr. Chester W. Smith died recently at 78. He was an engineer and inventor and received five patents in the gas turbine field. He passed the Massachusetts Bar Examination thirteen years ago after retiring from the General Electric Corporation.

Class of 1955

William H. Goldsmith, Jr., president of Malmart Mortgage Co., Inc., of Brookline, died September 2, 1974 following a brief illness. He was president and trustee of the Urban Community Development Fund, chairman of the Real Estate License Law Committee, treasurer of the Community Assistance Corporation and a director of the United Community Services of Greater Boston, the American Red Cross and the Episcopal City Mission. In addition, he was a trustee of the Faulkner Hospital and the Charlestown Savings Bank, a member of the Junior Chamber of Commerce, the National, State and local Real Estate Boards, the American Society of Notaries, and a vestryman of the Church of Our Savior, Brookline.

continued from page 4

tain cooperation from different governmental agencies and private groups. The Courts, Probation Departments, Registry of Motor Vehicles, Division of Alcoholism, Department of Public Safety and the various rehabilitation programs all play a principal role under the amendment. This would appear to be an effective method of handling behavior for which numerous agencies are basically responsible. In this way, the amendment conforms to the inherent interests, concerns and capabilities of all participating groups.

Section 24 D and 24 E of Chapter 90 is a statute which parallels the approach taken by the Boston Alcohol Safety Action Project (ASAP) in dealing with drunken drivers. The thrust of the statute is that it creates an exception to the present one year license revocation for the DUIL first offender and seeks to provide treatment for such persons.

Section 24 D states that any person convicted of DUIL may, if he consents, be placed on probation for one year and shall, as a condition of probation, be assigned to a driver alcohol education or rehabilitation program or both.[22] Under the terms of this section, the person desiring to qualify for the program must agree to cooperate, upon conviction, in a pre-sentence investigation to be conducted by a probation officer. Although the statute deals with the voluntary participation of the offender, it is clearly a form of constructive coercion.[23] This means that the offender is subject to the more punitive sanctions of Section 24 (C) such as the automatic license revocation, if unwilling to participate in a program. After a conviction for DUIL, the statute provides a fourteen day continuance period for completion of the pre-sentence investigation and disposition. The statute is vague on what the specific contents of the pre-sentence report should include, but does indicate it shall be uniform in format throughout the State and shall include, but not be limited to, a copy of the offender's driving record. Hopefully, the kind of information obtained for the report will be psycho-social and diagnostic, so that appropriate recommendations can be made to the court about whether or not a DUIL offender requires a rehabilitation program. Following a disposition, the supervising probation officer will be required to maintain reports on the offender's participation in any programs to which he or she has been assigned.

Section 24 D goes on to require that the Division of Alcoholism establish and administer driver alcohol education programs and publish annually a list of all treatment and rehabilitation agencies to which DUIL offenders may be referred. The crux of the statute rests on these provisions, because the success of this approach depends primarily on the availability of effective rehabilitation programs.

The statute further mandates that a fee of $200.00 must be paid by any individual to qualify for participation in the program, except for those who are indigent. This sum is intended to pay for the costs of the services provided to the offender. Whether it will or not is difficult to determine at this time. It is more likely though, that the rehabilitation approach will require more resources, in terms of manpower and finances, than presently exist, and could eventually develop into a costly and complicated service program. There is also the possibility that many DUIL offenders will not be able to afford both the fee to qualify for the treatment program and the costs of legal services for their initial defense in the District Court.

The last part of Section 24 D requires the Commissioner of Probation to report to the Director of the Division of Alcoholism on the total number of DUIL offenders who receive disposition under the statute and the number of those determined by the court to require treatment. Further reports are to be made regarding the availability of existing resources and such reports are to be considered in the preparation of the budget of the Division of Alcoholism. These features are extremely important because they insure that at least a minimal evaluation will be done of the program on a yearly basis.

Section 24 E of Chapter 90 is that provision in the amendment which allows the alternative disposition for DUIL to apply only to first offenders. This section further provides for the possible return of the offender's revoked driver's license within three months after conviction. The court is required to hold a hearing at any time after 60 days but not later than 90 days from the date of the revocation to review the offender's participation in the disposition program and to determine if early reinstatement of the person's license to drive is warranted.[24]

At this hearing, the probation officer is required to submit a written report to the court about the offender's adjustment during the period of probation. This report shall include a written statement from the supervisor of any program to which the offender has been assigned, and a report by the Registry of Motor Vehicles regarding the offender's driving record following conviction. Also, any recommendations made by the supervising probation officer will be extremely important evidence considered by the court before a decision is made regarding license reinstatement. If the court finds sufficient facts to conclude that the offender is satisfactorily complying with the conditions of probation, the license can be restored after the 90th day following the date of revocation by the Registrar. The probation officer, under these conditions, would continue supervising the offender's participation in alcohol education and treatment programs. On the other hand, lack of compliance with the terms of the one year probation order would continue the license revocation until the end of the year. The statute also provides that the offender may petition the court for another hearing 60 days after the finding against reinstatement in the original hearing and such second hearing shall be granted within 30 days.

Where the probation officer feels that a DUIL offender is not complying with court ordered programs, this is to be reported to the court in the form of a written report by the officer. This can be done at any time during the period of probation and may result in license revocation for the remainder of the one year period after a hearing on the violation of probation.

One of the problems with Section 24 E is that it fails to specify the procedural due process guidelines needed to safeguard the rights of offenders during the hearing on early reinstatement of the license and on any subsequent violations of probation. It fails to mention the right to timely notice, requirements for proper conduct of the hearing, and whether or not counsel is to be present at such hearings. It would appear that the procedural mechanisms presently in operation for the review of other probation cases and violations of probation are applicable for DUIL offenders as well. The United States Supreme Court has declared that an offender on probation has a right to a fair hearing on a violation of probation, and that counsel, although not absolutely required, may be available at the court's discretion.[25]

A final procedural point is whether the evidence presented in the form of rehabilitation reports will be properly evaluated and reviewed by all parties as to its authenticity and credibility. Due recognition must be afforded the offender and defense counsel to refute any damaging information presented to the court by the probation officer at any early reinstatement or violation of probation hearing. Questionable practices could easily develop without adequate due process steps in these areas.

Conclusion

Section 24 D and 24 E of Chapter 90 of the M.G.L. experimentally establishes in Massachusetts a two-year reform program for the criminal offense of driving under the influence of intoxicating liquor (DUIL). The legislation provides an alternative procedure of education and rehabilitation to go along with the existing punitive measure of license revocation for drunken drivers. Under the provisions of the amendment, a DUIL first offender may obtain license reinstatement within 90 days if the person agrees to a pre-sentence report and is willing to participate in an alcohol treatment program. The amendment is based upon already established programs like Boston ASAP, and is consistent with statutory changes occurring in other jurisdictions.

It is expected that the new legislation will have an important impact on removing the drunken driver from the road. This it intends to achieve by stricter law enforcement resulting in more arrests for DUIL, by providing meaningful education and treatment programs, and by reducing the number of cases requesting appeal to a jury trial, particularly in the 6 man jury sessions of the district courts. This might result in an expansion of the limited appellate jurisdiction which exists over misdemeanors in the district courts to include the trial of more felony cases as well. There is also the possibility that the law will help in the early identification of problem drinkers who drive, and result in greater long-range efforts to divert the alcoholic offender from the criminal justice system. For the present, however, DUIL remains a criminal offense.

Section 24 D and E is basically a legislative remedy which emphasizes re-education and rehabilitation of the drunken driver. Its goals are worthwhile, but the future financial costs are unclear, and certain procedures such as the hearings for license reinstatement appear unduly cumbersome and bureaucratic. Also, efforts must be made to insure that those in need of alcohol rehabilitation receive such treatment, instead of those interested only in early license reinstatement.

Chapter 647 of 1974 is an example of how the legislature can grant greater statutory sentencing discretion to the judiciary. This approach appears urgently needed in the case of the DUIL offender where dispositional flexibility is lacking. The success of the statute depends on the coordinated efforts of the judicial and executive agencies of government, as well as on those in the private sector concerned about the drunken driver. Immediate planning for its implementation by all those involved would be a wise next step.

Footnotes

[1]Mass. Gen. Laws Ann. ch. 90, §24 D-E (Supp. 1974).

[2]This figure is attributable to the Mass. State Department of Public Health, Division of Alcoholism, Boston, Mass. (October, 1974).

[3]Boston Sunday Globe, April 21, 1974, at 41, col. 1.

[4]Id.

[5]The term "DUIL" is a common acronym for driving under the influence of intoxicating liquor.

[6]From a brochure entitled "This is ASAP - Boston Alcohol Safety Action Project," Boston, Mass. 1973.

[7]Id.

[8]*See* Mass. Gen. Laws Ann. ch. 90 §24, 1 (a) (c) (Supp. 1974).

[9]*See* Highway Users Federation for Safety and Mobility, Suspension and Revocation of Drivers' Licenses, (Washington, D.C. 1970).

[10]Id.

[11]Conn. Gen. Stat. Ann. Title 14 §227a.

[12]Vermont Stat. Ann. Title 23, §1206.

[13]Maine Rev. Stat. Ann. Title 29 §1312.

[14]Easter v. District of Columbia, 361 F. 2d 50 (D. C. Cir. 1966); Driver v. Hinnant, 356 F. 2d 761 (4th Cir. 1966).

[15]President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness (1967).

[16]Powell v. Texas, 392 U.S. 514 (1968).

[17]Mass. Acts and Resolves of 1971, ch. 1076, created Mass. Gen. Laws Ann. ch. 111 B entitled "Alcoholism Treatment and Rehabilitation Law". For a review of the history and operation of the law, *see* Landsman, Massachusetts Comprehensive Alcoholism Law — Its History and Future, 58 Mass. Law Quarterly, 273 (1973).

[18]*See* Boston Alcohol Safety Action Project, 1 Boston Action Project 1 (1973); *Panel Arguments on Mass. Drunk Driving Laws*, Boston Sunday Globe, April 21, 1974, at 41, col. 1-5; Commonwealth of Mass. Special Commission Report Relative to Penalty for DUIL, *see* House Bill 6163, 2nd Annual Session of 168th General Court, (May, 1974).

[19]Alcohol Safety Action Project, 211 Congress Street, Boston, Mass. 02110.

[20]*See* J. Coules, The Effectiveness of the ASAP Program, Total Project Impact, (Analytic Study No. 1, Boston, ASAP, May, 1974).

[21]In the Brockton District Court, there is a program entitled, DART - Driving and Alcohol Re-education Training. Other communities planning or who have already adopted alternative treatment procedures for DUIL cases include Cambridge, Framingham, Concord and Somerville.

[22]*See* Mass. Acts and Resolves of 1974, ch. 647; §24D.

[23]*See* M. Blinder and G. Kornblum, The Alcoholic Driver, A Proposal For Treatment as an Alternative to Punishment, 56 Judicature 28 (June-July, 1972).

[24]*See* Mass. Acts and Resolves of 1974, ch. 647, §24E.

[25]*See* Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon V. Scarpelli, 411 U.S. 778 (1973).

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sachusetts never recognized unsolemnized marriages as valid. In the absence of court records or other materials indicative of enforcement of our inference, we have proved nothing. By widening our research, ambiguity creeps in to spoil the consistency our logic imposes on history. In the Massachusetts Archives of the State House, for example, dated October 14, 1697, there is preserved an order by the Governor and Council for Benjamin Allen and Hopestill Leonard of Rehoboth to be retried for having become parents sooner than six months from the publishment of banns. They alleged a New Hampshire marriage, clearly outside the requirements of statute that parties be married by their local justice or minister, a violation on which the jury was instructed in terms that "no Justice of the Peace of New Hampshire might officiate" at a marriage between Massachusetts residents.[40] The following dialogue is from a 1765 trial reported by Quincy:

> Mr. Gridley: . . . Cohabitation and universal Report have always been deemed sufficient Evidence (of marriage), and I never in the Course of my Practice heard it denied before.
>
> Chief Justice: Have you no Authorities, Gentlemen?
>
> Mr. Gridley: There is no Authority that the Sun shines.
>
> Mr. Auchmuty: But there is Evidence.
>
> Chief Justice: How do Quakers ever prove Marriage except by report.?
>
> Mr. Auchmuty answered, Favour was shown them.
>
> Mr. Gridley: There shall be no bastardizing Issue after Death, is a Maxim of the Law . . .
>
> Justice Lynde: I can't think a Certificate alone is Evidence, or the best — that is greater which Mr. Gridley mentioned. Persons present at the Marriage can only prove the identical

Persons. Universal Report is, in my Opinion, sufficient Evidence, corroborated with other Circumstances, of the Marriage.

Chief Justice: From Thomas and Frances Banister living in Old and New England as Man and Wife, I think it may well be inferred they were so. I am sorry for Want of Authorities, and that this Point was not left to the Court as well as the Rest; for it is not properly a Matter of Fact.[41]

In preambles to legislation such as, "Whereas the order for the recording of deaths, births and marriages is very useful and necessary and yet it has been in many places very neglected . . ."[42] or, "An Act for the Better Preventing of Clandestine Marriages"[43] as amplified by express fines and criminal penalties[44] one hears notes dissonant with consistent conformity to statutory requirements.

The inference that Massachusetts tolerated legally imperfect marriages is probably more in tune with history, just as the inference flawed marriages were void is marching to the beat of inexorable logic. "No doubt, a statute may take away a common-law right," the 1877 Supreme Court said, "but there is always a presumption that the legislature has no such intention, unless it be plainly expressed. A statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses . . ."[45]

The Supreme Court suggested (literally, in dictum) that *Milford* was no longer law in Massachusetts in 1877,[46] and we who still follow its rule must question, if history before 1810 does not affirm *Milford*, has case-law or legislative action (or inaction) since had any affirmative effect so as to ratify the rule?

The Revised Statutes of 1836 beam light. The Commissioners placed reference cases in the margin beside statutes "(w)henever the Revised Statutes . . . adopted, modified or controlled the adjudications of the Supreme Judicial Court . . ."[47] *Milford* is cited only once, in the "Marriage" chapter, under a margin comment, "Certain marriages valid though irregularly solemnized,"[48] and beside a statute which reads

No marriage solemnized before any person professing to be a justice of the peace, or a minister of the gospel, shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of jurisdiction or authority of such supposed justice or minister . . .[49]

The "Divorce" chapter does not marginate *Milford*, and only two grounds for annulment are specified — for incestuous marriages and marriage of minors who "separate during such nonage."[50] These "may be declared void by sentence of nullity" while "the validity of any marriage" may be affirmed under another section.[51] This codification, four years in the making, leads to a logical conclusion that the Legislature chose not to avoid unsolemnized marriage or adopt the *Milford* rule.

Leaving the Revised Statutes and marginalia the court in *Commonwealth v. Munson* turned to the Report of the Commissioners who codified the statutes. One must admire the dexterity of a court when, in the midst of a lengthy legislative history, it skirts 1836 law entirely and goes to the report for a statement that vows "formally and solemnly given in the presence of one who is acting as a justice or minister, and who is honestly believed to be such,. . . (furnish) all the security against fraud and surprise, which the law was designed to provide for."[52]

Even if adopted as part of the Revised Statutes (which it was not), this Report is as silent as the statutes on avoiding unsolemnized marriage. Rather, the judiciary stood required to recognize yet another variant of unsolemnized marriage.

May our missing jurisdiction come into being by reliance of the judiciary combined with legislative acquiescence? Though a poor substitute for the political process, this jerky assumption-and-acquiescence means of making law has contributed to Massachusetts divorce law before. According to *Reddington v. Reddington*[53] "(a)fter the statutes of this Commonwealth provided for judicial divorces, this court assumed, and the Legislature has long acquiesced in the assumption, that the doctrine of recrimination, though not mentioned in the statutes, had been adopted by implication. . ." (citations omitted)

There are, of course, implications and there are implications. The state interest in preserving marriage and doctrines like recrimination, long applied by ecclesiastical courts, especially taken in combination with the directory jurisdiction incorporating ecclesiastical procedure where proceedings are not "specially prescribed", form an overpowering implication of adoption. A new ground for annulment fails of these characteristics and is a subsequently weaker implication.

If one wishes to cast about for inferences, what inference is to be drawn from:

Marriage may be proved by evidence of an admission thereof by an adverse party, by evidence of general repute or of cohabitation of the parties as married persons, or of any other fact from which it may be inferred.[54]

This statute, which drew a blank in *Munson*,[55] was almost identically enacted in Ohio with an inference drawn from this by the Ohio Supreme Court that the Legislature had validated common-law marriage.[56]

Ultimately, neither history, nor legislation, has given the courts an unambiguous reason to annul *de facto* marriages for want of their solemnization. Although in *Thayer v. Thayer*, a divorce case, the court stated, "The rules which govern human conduct, and which are known to common observation and experience, are to be applied in these cases, as in all other investigations of fact,"[57] Massachusetts courts limit investigation into the fact of marriage once the lack of solemnization is alleged and proved. The *Milford* rule of avoidance for want of solemnization is today, by common observation and experience, the escape clause from marriage for irresponsible persons. First applied to avoid a marriage of some twenty years' standing, bastardizing at least six children at a stroke, the *Milford* rule was ironically promulgated to prevent "fraud" and "surprise."[58] No fraud, however, was alleged in *Milford*, and the surprise was the court's own. In common with most articles of faith, the *Milford* decision aged into dogma and did not start that way. The very justice who sat as trial judge in *Milford*, as if by way of repentance, but certainly also demonstrating for us *Milford's* significance in its own time, allowed the vital marriage involved in another action for settlement of a pauper to be proved by cohabitation and general reputation[59] — this before statute making such evidence competent. The Commissioners of the Revised Statutes of 1836 adopted only the liberalizing dictum of *Milford*. The lawyer's reverence for what is old

and his professional need for the predictable wedded him to *Milford* without legislative benediction. But while they are sleeping one cannot help but notice that the jurisdiction is a blanket too small for the bed. And on that titillating scene our camera does a slow fade.

Footnotes

[1]The Inhabitants of the Town of Milford v. The Inhabitants of the Town of Worcester, 7 Mass. 48 (1810).

[2]1 Lombard, MASSACHUSETTS PRACTICE 755 (1967).

[3]Commonwealth v. Munson, 127 Mass. 459, 467 (1879).

[4]Massachusetts Constitution, Part Two, Ch. III, Art. V.

[5]4 CONSTITUTIONAL CONVENTION 1917-19 DEBATES, at 75-80 (Boston, 1920).

[6]Bigelow v. Bigelow, 120 Mass. 320, 321 (1876).

[7]Statutes of 1785, c. 69, §3 and 1, respectively (now MGL c. 207, §3 and 1).

[8]Revised Statutes, c. 76, §3 (1836) (hereinafter cited as RS).

[9]Dupont v. Dupont, 8 Ter. 231, 90 A2d 468 (1952), *cert. denied* 344 U.S. 836, 97 L.Ed. 651, 73 S.Ct. 46 (1952). The Massachusetts case cited is Levy V. Downing, 213 Mass. 334, 100 N.E. 638 (1913) (annulment denied for want of jurisdiction over marriage contracted by minors in New Hampshire — marriage evasion statute inapplicable).

[10]These depositions have not been published but are still on file at Worcester County Courthouse with the Clerk of Court.

[11]T.W. Baldwin, VITAL RECORDS OF MILFORD, MASSACHUSETTS, 370 (Boston, 1917).

[12]F.R. Price, VITAL RECORDS OF UPTON, MASSACHUSETTS, 56 (Worcester, 1904).

[13]T.W. Baldwin, VITAL RECORDS OF MENDON, MASSACHUSETTS, 293 (Boston, 1920).

[14]Rhoda Gallaway, daughter of John and Sarah, is recorded born August, 1759. T.W. Baldwin, *supra* note 13. at 81.

[15]Mangue v. Mangue, 1 Mass. 240 (1804) (allegations of adultery — suit failed because marriage not solemnized). Whether consummation or cohabitation followed the ceremony is not clear from the record. Since one of the justices, Thacher, appears to view the case as involving a future promise to marry from which the parties may release themselves, the marriage may have been on paper only. (In ecclesiastical courts future promises to marry were not enforced, although these could be perfected by consummation into valid marriage.)

[16]Statutes of 1785, c. 69, §3.

[17]H. Clark, CASES AND MATERIALS ON DOMESTIC RELATIONS 147 (1965).

[18]Wightman v. Wightman, 4 Jones Ch. 343 (N.Y. 1819).

[19]Burtis v. Burtis, 1 Hopk. Ch. 557 (N.Y. 1825).

[20]LeBarron v. LeBarron, 35 Vt. 365 (1862).

[21]But see Dolan v. Dolan, 259 A2d 32 (1969) (incurable impotence held to be ground for annulment). Marden, J. and Williamson, C.J. dissenting.

[22]English ecclesiastical courts did not follow the mandatory solemnization requirements decreed by the Council of Trent (1545-1563). When Lord Hardwicke's Act mandated the same, without jurisdictional directions, the ecclesiastical court, with some doubts, assumed jurisdiction over suits of nullity for non-compliance with statute. See Miles v. Chilton, 163 Eng. Rep. 1178, 1183, 1 Rob. Ecc. 684, 698 (1849).

[23]Briggs v. Briggs, 319 Mass. 149, 65 NE2d 9 (1946).

[24]RS c. 76, §38 (1836) (now MGL c. 208, §33).

[25]*Milford* purports to "dissolve" the marriage at issue. However, since only marriages void *ab initio* may be questioned in collateral proceedings, and the invalidity of the initial exchange of oaths is dispositive, the marriage is plainly void *ab initio* rather than voidable.

[26]Since the *Milford* marriage was allegedly contracted in August or September, 1784, the governing statutes were colonial, including 7 Will. 3, c. 6, which prohibited marriage outside its requirements.

[27]*Milford*, 7 Mass. at 55.

[28]*Id.*

[29]*Munson*, 127 Mass. at 470.

[30]*Milford*, 7 Mass. at 56.

[31]St. of 1786, c. 3.

[32]St. of 1785, c. 69 §3.

[33]St. of 1786, c. 3, §7.

[34]St. of 1786, c. 3, §7; St. of 1785, c. 69, §1 and 2, respectively.

[35]St. of 1785, c. 3, §7.

[36]Sparhawk v. Sparhawk, 116 Mass. 315 (1874).

[37]Shannon v. Shannon, 68 Mass. 285, 286, 2 Gray 285, 286 (1854).

[38]3 Howard, A HISTORY OF MATRIMONIAL INSTITUTIONS 171 (1904). History's proof of the validity of invalidity of common-law marriage is notoriously controversial. Regina v. Millis, 8 E.R. 844, 10 Clark & Finnelly 534 (1843); 2 Pollock and Maitland, HISTORY OF ENGLISH LAW 372 (Second ed., 1923). See also Semonche, *Common-Law Marriage in North Carolina: A Study in Legal History*, 9 Am. J. Leg. Hist. 320 (1965) (Professor Semonche criticizes the *Milford* decision in passing).

[39]*Munson*, 127 Mass., at 460 to 468.

[40]40 Massachusetts Archives 476 (1697).

[41]Banister v. Henderson, Quincy 119, 122-3 (1765).

[42]9 Massachusetts Archives 29a; cited in *Munson* as 2 Mass. Col. Rec. 15. 127 Mass. at 461.

[43]*Munson*, 127 Mass. at 462.

[44]9 Massachusetts Archives 29a (1644).

[45]Meister v. Moore, 96 U.S. 76, 24 L.Ed. 826, (1877).

[46]*supra*, 96 US 76, 79, 24 L.Ed. 826, 829.

[47]RS, vi ("Advertisement" prefacing the body of the statutes).

[48]RS, c. 75, §24.

[49]*Id.*

[50]RS, c. 76, §1-3.

[51]RS, c. 76, §4.

[52]*Munson*, 127 Mass. at 466. *Munson* edits the Report, the original of which reads in part, "It has been decided that a marriage would be lawful, if solemnized before a justice or minister, although without publication of the banns, and without the consent of parents or guardians." The case cited for this "decision" is *Milford*, raising a question as to how the *Milford* case, and/or the term "decision", was employed by the Commonwealth's top legal draftsmen. The Report goes on: "(T)he solemnization prescribed to guard against fraud and surprise should be duly enforced; but this should be effected by adequate punishment, to be inflicted on all who wilfully offend against the law. It is cruel and unjust to extend the penalty, and that so severe a one as dissolution of the marriage, to parties who are innocent, and even ignorant of any violation of the law. . ." A copy of this rare Report was located for the author by Ms. Susan Tierney, State House Library.

[53]Reddington v. Reddington, 317 Mass. 760, 59 NE2d 775, 159 ALR 1448 (1945).

[54]Acts and Resolves of 1840, c. 84 (now MGL c. c. 207, §47).

[55]*Munson*, 127 Mass. at 466.

[56]Umberhower v. Labus, 85 Ohio St. 238, 97 NE 832 (1912). See also Black, *Common Law Marriage*, 2 U. Cin. L.R. 113, 119 (1928).

[57]Thayer v. Thayer, 101 Mass. 111 (1869).

[58]*Milford*, 7 Mass. at 52.

[59]The Inhabitants of the Town of Newburyport v. The Inhabitants of the Town of Boothbay, 9 Mass. 414 (1812).

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to bargain over the decision. Stewart's concurring opinion in *Fibreboard* was once again applied in support of the Court's argument that the decision to move was entirely a managerial concern.[71] The same approach was taken by the Court of Appeals for the 8th Circuit in denying enforcement of the Board's decision on the mandatory bargaining issue in *Drapery Mfg. Co.*[72] The Court found that the employer's unilateral decision to terminate a portion of its operations which involved a major capital investment was totally a managerial matter.[73] In *Weltronic Co.*[74], the employer had unilaterally decided to move the central wiring and electronic assembly work from one plant to another. The move affected unit employees who had already been laid off in the original plant. Surprisingly this time the Court of Appeals for the 6th Circuit enforced the Board's order, and it found the decision to be a subject of mandatory collective bargaining.[75]

In 1971, the Board in a devastating retreat from its prior cases handed down a decision in *General Motors Corp.*[76] which in effect removed partial sale decisions from the area of mandatory collective bargaining. In that case the employer unilaterally decided to sell all its personal property at one location and to sub-lease the premises to the buyer and to grant the buyer a franchise as well. The sale at the location resulted in a loss of unit jobs. The Board in adopting a strong managerial position relied on Stewart's concurring opinion in *Fibreboard*[77] which it had not accepted up until that time. Moreover, the Board misplaced the emphasis of its prior decisions which stressed the elimination of unit jobs, and it distinguished this case because it was a sale as opposed to other transactions such as sub-contracting. It is strongly suggested that the whole thrust of the Board's argument for decision-bargaining up until the *General Motors* case was upon unit job elimination itself and not upon the manner in which the jobs were eliminated. Prior cases decided by the Board

indicate that partial sales should in fact come under the rule of mandatory decision-bargaining. In *Ilfield Hardware and Furniture Co.*[78], the employer unilaterally decided to sell a portion of its operations resulting in the loss of unit jobs. Although the union had knowledge of the employer's intentions beforehand, the Board stated that there was a technical violation of mandatory collective bargaining.[79] In *Fruehauf Trailer Co.*[80], the employer decided to sell one of its plants, but before the sale was finalized the union was contacted.[81] Because the union had waived its rights in the case, the Board held that the employer had fulfilled his statutory duty to bargain concerning the sale. The Court of Appeals for the District of Columbia Circuit in the *General Motors* case, denied the union's petition for review.[82] The Court once again based its judgement on Stewart's concurring opinion in *Fibreboard.* It reiterated that a decision which is fundamental to the direction of the enterprise is completely a managerial affair.[83]

The last significant case decided by the Board before the one under consideration in this article was *Summit Tooling Co.*[84] The employer in that case unilaterally decided to partially terminate its operations which resulted in the loss of unit jobs. The Board in continuing its new misguided line of reasoning found that the employer's decision to partially terminate its operations was not a subject of mandatory collective bargaining. In addition to applying Stewart's concurring opinion in *Fibreboard* it also departed from its prior decisions by contending that there was a total termination of a segment of the business[85], i.e. the company was no longer in the manufacturing of tools business and therefore there was no duty to decision bargain upon complete termination under *Darlington.*[86] Unfortunately, the Board again retreated from its own well-reasoned cases without even passing mention of the fact. For example, in *American Mfg. Co.*[87], the employer had taken himself completely out of the trucking business and in *Carmichael Floor Covering Co.*[88], the employer had taken himself completely out of the floor installation business. In both these cases, the Board had found that the employer was required to decision bargain with the union.

It is suggested that although the Board has obviously shifted its direction towards a more favorable management position on the issue under consideration, it has not up until *Kingwood Mining* been so completely contrary to the Supreme Court's decision in *Fibreboard. Kingwood Mining* fits almost exactly into the *Fibreboard* template, i.e. "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment."[89] The employees of the Kingwood Mining Company were replaced by the employees of an independent contractor who performed the same mining operation in the same area under similar conditions.

Despite the elimination of unit jobs, the Board today would find no duty on the part of the employer to decision-bargain with respect to the partial sale of a business, the partial termination of a business, the relocation of a business or the sub-contracting of part of a business. It appears as though the Board has restored vigor to the employer's traditional defense for unilateral decision-making in the areas under discussion, i.e. management's rights. In an age of greater participatory democracy one might well look for extensions of this antiquated doctrine of management's rights to determine whether the Board has fallen prey to that creeping phenomenon known as the industry-oriented agency, where the regulators are dominated by the industries they are supposed to regulate.

Footnotes

[1]Kingwood Mining Co., 210 N.L.R.B. No. 139, 86 L.R.R.M. 1203 (1974).

[2]"For the purposes of this section, to 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. . . ." 29 U.S.C.§158 (d) (1970).

[3]"It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. . . ." 29 U.S.C. § 158 (a) (5) (1970).

[4]Inland Steel Co., 77 N.L.R.B. 1, 21 L.R.R.M. 1310 (1948), *review den'd,* Inland Steel Co. v. N.L.R.B., 170 F. 2d 247, 22 L.R.R.M. 2506 (7th Cir. 1948).

[5]"[W]e find, that matters affecting tenure of employment like the respondent's retirement rule, lie within the statutory scope of collective bargaining." 21 L.R.R.M. at 1311.

[6]Richfield Oil Corp., 110 N.L.R.B. 356, 34 L.R.R.M. 1658 (1954), *enf'd,* Richfield Oil Corp. v. N.L.R.B., 231 F. 2d 717, 37 L.R.R.M. 2327 (D.C. Cir. 1956).

[7]"We find nothing in the Act, including its 'Declaration of Policy' or in the legislative history of the Act which indicates Congress did not intend to subject a stock purchase plan of the character involved here to the bargaining process." 34 L.R.R.M. at 1661.

[8]"There is involved here no threat to Richfield's maintaining the integrity of its own business ownership, the control of its own management and its own representatives free from union interference. Nor is there substance to the claim that the situation necessarily and inevitably involves bargaining about the conditions and prerogatives of ownership." 37 L.R.R.M. at 2330. *See also* Lehigh Portland Cement, 101 N.L.R.B. 529, (1952) *enf'd,* N.L.R.B. v. Lehigh Portland Cement, 205 F.2d 821 (4th Cir. 1953); W.W. Cross and Co., 77 N.L.R.B. 1162 (1948), *enf'd,* W.W. Cross and Co. v. N.L.R.B., 174 F. 2d. 875 (1st Cir. 1949).

[9]Railroad Telegraphers v. C. and N.W.R. Co., 362 U.S. 330, 45 L.R.R.M. 3104 (1960).

[10]"We cannot agree . . . that the Union's efforts to negotiate about the job security of its members represents an attempt to usurp legitimate managerial prerogatives in the exercise of business judgement with respect to the most economical and efficient conduct of its operation." 45 L.R.R.M. at 3106.

[11]Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1932).

[12]"The Act does not compel any agreement whatsoever between employees and employers." N.L.R.B. v. American Insurance Co., 343 U.S. 395, 30 L.R.R.M. 2147, 2149 (1952). *See also* N.L.R.B. v. Katz, 369 U.S. 736 (1962).

[13]"[P]erformance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." 30 L.R.R.M. at 2149.

[14]210 N.L.R.B. No. 139, 86 L.R.R.M. 1203 (1974).

[15]"In our view, the practical effect of Respondent's shutdown and subcontracting, and its sale of equipment and machinery was to take Respondent out of the business of mining coal." 86 L.R.R.M. at 1204.

[16]"The decision of Respondent to close out its mining operations was manifestly a major one and entailed a substantial withdrawal of capital investment. To require Respondent to bargain about such a basic management decision would significantly abridge its freedom to manage its own affairs and is not contemplated by the Act." 86 L.R.R.M. at 1204.

[17]Rapid Bindery, Inc., 127 N.L.R.B. No. 33, 45 L.R.R.M. 1524 (1960).

[18]N.L.R.B. v. Rapid Bindery, Inc., 293 F.2d 170, 48 L.R.R.M. 2658 (2d Cir. 1961).

[19]"The decision to move was not a required subject of collective bargaining as it was clearly within the realm of managerial discretion." 48 L.R.R.M. at 2663.

[20]R.C. Can Co., 144 N.L.R.B. No. 26, 54 L.R.R.M. 1026 (1963).

[21]Star Baby Co., 140 N.L.R.B. No. 67, 52 L.R.R.M. 1094 (1963).

[22]"[T]he employer violated section 8 (a) (5) when he failed to bargain with the Union over the decision to move the two and one-quarter inch cinnamon line from Arlington to Dennison, Texas. These members find that the removal of a segment of the production process involves a matter pertaining to 'terms and conditions of employment' and is a mandatory subject of collective bargaining concerning which the employer could not, with impunity act unilaterally." 54 L.R.R.M. at 1028.

[23]"We accordingly find that by unilaterally terminating their business operations without consulting with the Union, the Respondent further violated 8 (a)(5)." 52 L.R.R.M. at 1096.

[24]N.L.R.B. v. Neiderman (Star Baby Co.), 334 F. 2d 601, 56 L.R.R.M. 2801 (2d Cir. 1964).

[25]"Nor need we consider whether the decision to go out of business was a mandatory subject of bargaining and whether the respondents violated 8(a)(5) of the Act by terminating their operations without discussing it with the union inasmuch as a bargaining violation has already been found under 8(a)(5) and any determination of this issue would not alter the appropriate scope of the Board's order." 334 F.2d at 604.

[26]Town and Country Mfg. Co., 136 N.L.R.B. 1022, 49 L.R.R.M. 1918 (1962).

[27]Fibreboard Paper Products Corp., 138 N.L.R.B. 550, 51 L.R.R.M. 1101 (1962).

[28]"[T]he elimination of unit jobs albeit for economic reasons is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of section 8 (a)(5)." 49 L.R.R.M. at 1920.

[29]"This obligation to bargain in no wise restrains an employer from formulating or effectuating an economic decision to terminate a phase of his business operations. Nor does it obligate him to yield to a union's demand that a sub-contracting not be let or that it be let on terms inconsistent with management's business judgement." 49 L.R.R.M. at 1920.

[30]Town and Country Mfg. Co. v. N.L.R.B., 316 F.2d 846, 53 L.R.R.M. 2054 (5th Cir. 1963).

[31]"[W]e find that Respondent's failure to negotiate with the charging Unions concerning its decision to sub-contract its maintenance work constituted a violation of section 8(a)(5) of the Act." 51 L.R.R.M. at 1101.

[32]Fibreboard Paper Products Corp. v. N.L.R.B., 322 F.2d 411, 53 L.R.R.M. 2666 (D.C. Cir. 1963).

[33]379 U.S. 203, 57 L.R.R.M. 2609 (1964).

[34]"Was Petitioner [employer] required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?" 57 L.R.R.M. at 2611.

[35]57 L.R.R.M. at 2611.

[36]"[T]he type of 'contracting out' involved in this case — the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment — is a statutory subject of collective bargaining under section 8 (d)." 57 L.R.R.M. at 2613.

[37]"[A]lthough it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective bargaining." 57 L.R.R.M. at 2613.

[38]"While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining." 57 L.R.R.M. at 2617.

[39]"Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment." 57 L.R.R.M. at 2617.

[40]John Wiley and Sons v. Livingston, 376 U.S. 543, 549, 55 L.R.R.M. 2769, 2772 (1964).

[41]American Mfg. Co. of Texas, 139 N.L.R.B. No. 57, 51 L.R.R.M. 1392 (1962).

[42]"Quite apart from anti-union conduct, or here the claim of economic justification, the decision to subcontract work is a subject for mandatory bargaining." N.L.R.B. v. American Mfg. of Texas, 351 F. 2d 74, 60 L.R.R.M. 2122, 2126 (5th Cir. 1965).

[43]Adams Dairy, Inc., 147 N.L.R.B. No. 133, 56 L.R.R.M. 1321 (1964).

[44]"We find that Respondent by taking the 'Consumer Market' accounts from five driver-salesmen. . . and giving them to an independent contractor, and otherwise changing working conditions without first giving an opportunity of bargaining to the Union violated 8(a)(5)." 56 L.R.R.M. at 1324.

[45]N.L.R.B. v. Adams Dairy, Inc., 350 F.2d 108, 60 L.R.R.M. 2084 (8th Cir. 1965).

[46]"There is a change in basic operating procedure in that the dairy liquidated that part of its business handling distribution of milk products. Unlike the situation in Fibreboard, there was a change in the capital structure of Adams Dairy which resulted in a partial liquidation and a recoup of capital investment. To require Adams to bargain about its decision to close out the distribution end of its business would significantly abridge its freedom to manage its own affairs." 350 F. 2d at 111.

[47]Royal Plating and Polishing Co., Inc., 148 N.L.R.B. No. 59, 57 L.R.R.M. 1006 (1964).

[48]N.L.R.B. v. Royal Plating and Polishing Co., Inc., 350 F.2d 191, 60 L.R.R.M. 2033 (3rd Cir. 1965).

[49]"The decision to close the Bleeker St. plant rather than move the operations to another location involved a management decision to recommit and reinvest funds in the business. . . The decision involved a major change in the economic direction of the Company." 350 F.2d at 196.

[50]William J. Burns International Detective Agency, 148 N.L.R.B. No. 113, 57 L.R.R.M. 1163 (1964).

[51]N.L.R.B. v. William J. Burns International Detective Agency, 346 F.2d 897, 59 L.R.R.M. 2523 (8th Cir. 1965).

[52]"Unlike the Fibreboard situation, Burns is not continuing the same work at the same plant under similar conditions of employment. No form of contracting out or subcontracting is here involved. Burns for valid economic reasons has withdrawn completely from providing any services in the Omaha area." 59 L.R.R.M. at 2525.

[53]Darlington Mfg. Co, 380 U.S. 263, 58 L.R.R.M. 2657 (1965).

[54]"It shall be an unfair labor practice for any 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. . . ." 29 U.S.C. § 158(a)(3) (1970).

[55]"By analogy to those cases involving a continuing enterprise we are constrained to hold. . . that a partial closing is an unfair labor practice under 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have forseen such closing will likely have that effect." 58 L.R.R.M. at 2661.

[56]"We hold here only that when an employer closes his entire business even if liquidation is motivated by vindictiveness towards the union such action is not an unfair labor practice." 58 L.R.R.M. at 2661.

[57]"Under Darlington, the finding of lack of anti-union motivation in closing the Omaha division for economic reasons precludes a finding of unfair labor practice in refusing to bargain with the Union on the cancellation of the Creighton contract and closing of the Omaha division." 59 L.R.R.M. at 2526.

[58]Carmichael Floor Covering Co., 155 N.L.R.B. No. 65, 60 L.R.R.M. 1364 (1965), *enf'd*, N.L.R.B. v. Johnson, 368 F.2d 549, 63 L.R.R.M. 2331 (9th Cir. 1966).

[59]New York Mirror, 151 N.L.R.B. No. 110, 58 L.R.R.M. 1465 (1965).

[60]"The elimination of unit work is no less within that statutory phrase [8(d) of the Act] when it is to result from a management decision affecting an entire operation. And this is so even though the likelihood is slim that prior consultation with the union will alter the employer's contemplated decision. For the Act, at least demands that the issue be submitted to the mediatory influence of collective negotiations." 58 L.R.R.M. at 1466.

[61]Westinghouse Electric Corp., 150 N.L.R.B. 1574, 58 L.R.R.M. 1257 (1965).

[62]"[The subcontracting] comported with the traditional methods by which the Respondent conducted its business operations; that it did not during the period here in question vary significantly in kind or degree from what had been customary under past established practice; that it had no demonstrable adverse impact on employees in the unit; and that the Union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings — for all these reasons cumulatively, we conclude Respondent did not violate its statutory bargaining obligation by failing to invite union participation in individual subcontracting decisions." 58 L.R.R.M. at 1259.

[63]Spun-Jee Corp., 152 N.L.R.B. 96, 59 L.R.R.M. 1206 (1965).

[64]"We also find that the Respondent, by failing to notify the Union and to bargain with it concerning the shutdown of their N.Y. plant, the subcontracting of operations formerly performed by their production employees and the removal of their operations to a new location have further violated section 8(a)(5) and 8(a)(1)." 59 L.R.R.M. at 1208.

[65]Ozark Trailers, Inc., 161 N.L.R.B. No. 48, 63 L.R.R.M. 1264 (1966).

[66]"So here, a termination of employment was the necessary result of Respondent's decision to close the Ozark plant. Thus here, just as in Fibreboard Respondents have failed to bargain concerning a term or condition of employment." 63 L.R.R.M. at 1267.

[67]"[A]n employer's decision to make a 'major' change in the nature of his business such as the termination of a portion thereof, is also of significance for those employees whose jobs will be lost by the termination. For, just as the employer has invested capital in the business, so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so too is the employee's interest in the protection of his livelihood." 63 L.R.R.M. at 1267.

[68]"[D]espite management's interest in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought to be consulted in matters affecting them, and that the public interest, which includes the interests of both employers and employees, is best served by subjecting problems between labor and management to the mediating influence of collective bargaining." 63 L.R.R.M. at 1268.

[69]"Finally, while meaningful bargaining over the effects of a decision to close one plant may in the circumstances of a particular case be all that the employees' representative can actually achieve especially where economic factors guiding the management decision to close or to move or to subcontract are so compelling that employee concessions cannot possibly alter the cost situation, nevertheless in other cases the effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a decision which cannot be revised. An interpretation of the law which carries the obligation to 'effects' therefore, cannot well stop short of the decision itself which directly affects 'terms and conditions of employment'." 63 L.R.R.M. at 1269.

[70]Transmarine Navigation Corp., 152 N.L.R.B. No. 107, 59 L.R.R.M. 1232 (1965), *reman'd*, N.L.R.B. v. Transmarine Navigation Corp., 380 F. 2d 933, 65 L.R.R.M. 2861 (9th Cir. 1967).

[71]"[T]he decision here brought about a major commitment of capital and a fundamental alteration of the corporate enterprise; unlike Fibreboard, it was not merely a decision to achieve economics by reducing the work force and fringe benefits of the Union." 65 L.R.R.M. at 2864.

[72]Drapery Mfg. Co., 170 N.L.R.B. No. 199, 68 L.R.R.M. 1027 (1968), *enf'd in part*, N.L.R.B. v. Drapery Mfg. Co., 425 F. 2d 1026, 74 L.R.R.M. 2055 (8th Cir. 1970).

[73]"In Fibreboard the work continued with no major capital decision taking place. Here, as in Adams Dairy a major shift in capital investment did

occur. The machinery of Drapery was dismantled and removed from the premises and the drapery work was no longer controlled in any way by the company." 77 L.R.R.M. at 2056.

[74]Weltronic Co., 173 N.L.R.B. No. 40, 69 L.R.R.M. 1282 (1968), *enf'd*, Weltronic Co. v. N.L.R.B., 419 F. 2d 1120, 73 L.R.R.M. 2014 (6th Cir. 1969).

[75]"The preservation of unit work has a significant impact on wages, hours and other terms of employment referred to in section 8(a)(5) of the Act. . . ." 73 L.R.R.M. at 2016.

[76]General Motors Corp., 191 N.L.R.B. No. 149, 77 L.R.R.M. 1537 (1971).

[77]"[D]ecisions such as this, in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of an enterprise are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control, and are not the types of subjects which Congress intended to encompass within 'rates of pay, wages, hours of employment, or other conditions of employment . . .'." 77 L.R.R.M. at 1539.

[78]Ilfield Hardware and Furniture Co., 157 N.L.R.B. No. 115, 61 L.R.R.M. 1540 (1966).

[79]"[U]nder all the circumstances above set forth, that a remedial order based upon the Respondent's failure to notify the Union of specific negotiations regarding the sale of Taos Gas as described above, is not required to effectuate the policies of the Act even though a technical violation might be found." 61 L.R.R.M. at 1541.

[80]Fruehauf Trailer Co., 162 N.L.R.B. No. 3, 64 L.R.R.M. 1037 (1966).

[81]"Notification came immediately when the negotiations had reached a point where the ultimate consummation of the sale was a likelihood. The sale had not been finalized then, and the U.A.W. was so apprised. Respondent placed no obstacles or limitations on bargaining at this point and it appears to have been U.A.W.'s own choice not to press for repudiation or some compromise." 64 L.R.R.M. at 1040.

[82]Auto Workers V. N.L.R.B., 81 L.R.R.M. 2439 (1972).

[83]"Such a decision is 'fundamental to the basic direction of a corporate enterprise.' It is at the core of entrepreneurial control. . . We therefore find that G.M. was under no obligation to bargain before entering into this particular transaction." 81 L.R.R.M. at 2442.

[84]Summit Tooling Co., 195 N.L.R.B. No. 91, 79 L.R.R.M. 1396 (1972).

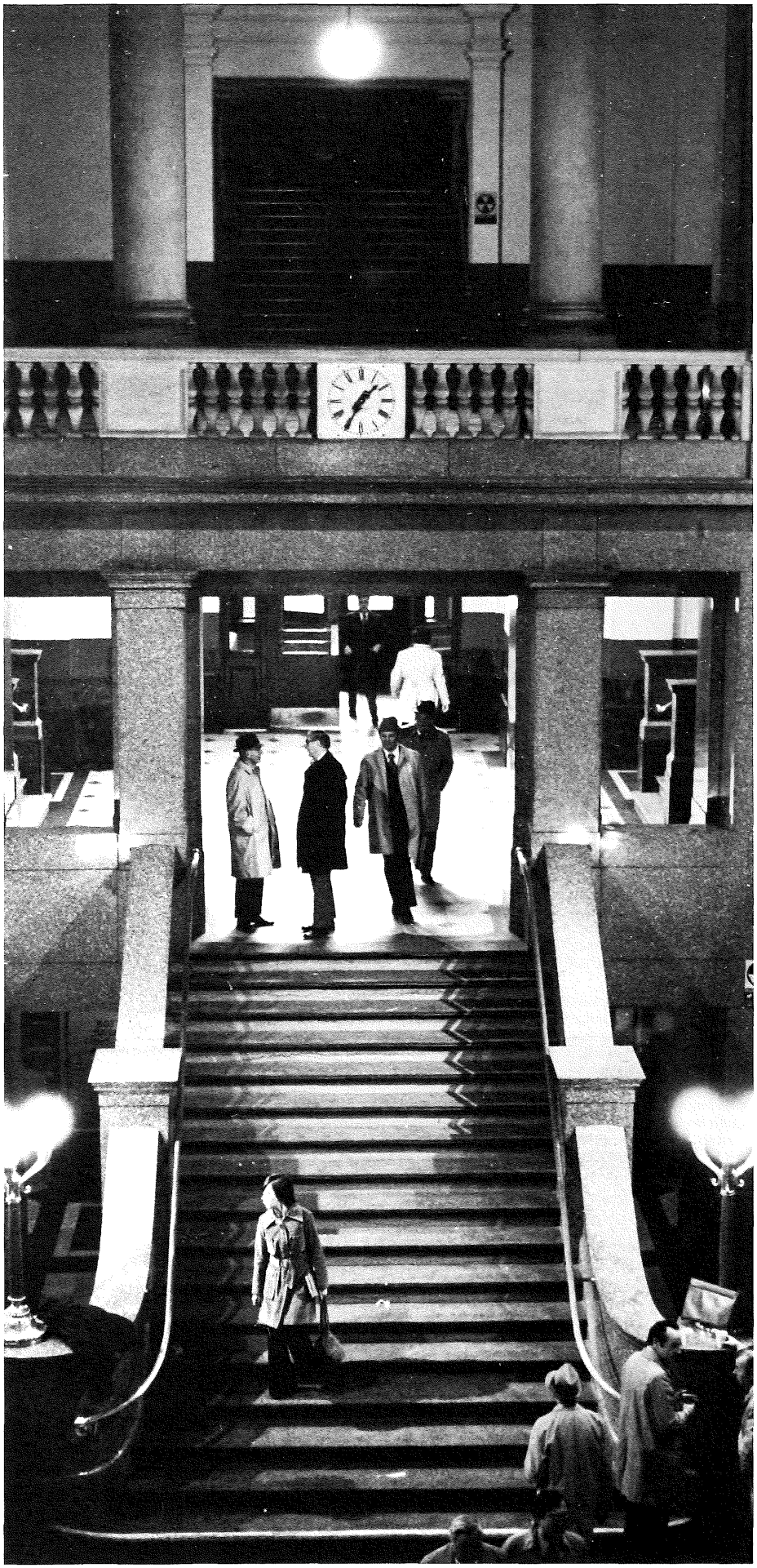
[85]"[S]uch decision involved a major change in the nature of the Respondent's business, and although the closing of the Summit operation could be characterized as a partial plant closing, its practical effect was to take the Respondent out of the business of manufacturing tool and tooling products." 79 L.R.R.M. at 1400.

[86]"In these circumstances, to require Respondent to bargain about its decision to close out its manufacturing operation would significantly abridge Respondent's freedom to manage its own affairs. We do not believe that the Act contemplated eliminating the prerogative of an employer, as here, to eliminate itself as an employer." 79 L.R.R.M. at 1400.

[87]139 N.L.R.B. No. 57, 51 L.R.R.M. 1392 (1962).

[88]155 N.L.R.B. No. 65, 60 L.R.R.M. 1364 (1965).

[89]Fibreboard Paper Products Corp. v. N.L.R.B., 379 U.S. 203, 57 L.R.R.M. 2609, 2613 (1964).



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