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Recent Decisions

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RECENT DECISIONS

LABOR LAW — FEDERAL PRE-EMPTION — ACTION IN STATE COURT DISMISSED BECAUSE NATIONAL LABOR RELATIONS BOARD REASONABLY HAS COGNIZANCE OF THE QUESTION AT ISSUE. — Elmer J. Day, employed as a bus driver for Western Greyhound Lines was a member of Northwest Division 1055 of the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America. The contract between the union and the employer, Greyhound, required Day to remain a member in good standing of the union. When Day objected to a "check-off" system established by the union for the collection of dues and undertook to pay the required monthly dues himself, the union determined that Day's subsequent payment was not proper and requested the company to terminate his employment. The collective bargaining agreement did provide that the union could request such termination if the subject employee was not a member in good standing. When the company complied, Day requested the Regional Director of the National Labor Relations Board to issue a complaint against the union and certain officials of the union alleging that the union conspired to have him removed from employment by fraudulently invoking the "member in good standing" clause of the contract. Day further alleged that the removal was in violation of § 8(b) (2) of the National Labor Relations Act. The Regional Director refused to issue a complaint and stated that there was insufficient evidence to warrant further proceedings. Day then brought suit in a Circuit Court of Oregon charging the union with tortiously interfering with his employment. The jury found that the union tortiously interfered with the employment of Day by having him fired not because of non-payment of dues but because they disliked his attitude. The Circuit Court entered judgment on the verdict and granted substantial damages. In a divided opinion the Supreme Court of Oregon reversed the Circuit Court and held: the conduct complained of was reasonably within the cognizance of the NLRB and the state court was pre-empted from hearing the suit. Day v. Northwest Division 1055, 389 P.2d 42 (Ore.), cert. denied, 85 Sup. Ct. 145 (1964).

The Day dissenters contended that the pre-emption doctrine was inapplicable since § 301 of the Taft-Hartley Act permitted Day to sue on the union contract

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1 It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. 49 Stat. 452 (1935), as amended, 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1958).

2 Day did not appeal the decision of the Regional Director to the General Counsel of the NLRB. Therefore, he did not completely exhaust his administrative remedy before resorting to the courts. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938), is the leading case in regard to the exhaustion of the NLRB administrative remedy. A petition to the NLRB for injunctive relief rather than a suit for damages was the subject of the Myers decision. The Supreme Court held that no action could be brought in court while the administrative remedy was not exhausted. There is no statement in any case which says that a suit for damages demands a different rationale than that of Myers. The statement in Myers is qualified by allowing suits in cases of undue hardship resulting from the pursual of the normal administrative course. The requisite hardship seems to be lacking in the instant case and a serious doubt arises as to whether or not the action could be had in state court even if the pre-emption issue had been resolved in Day's favor. The Supreme Court of Oregon did not concern itself with this problem and since the pre-emption question is the issue of interest, the failure of appeal will not be dealt with here. For a complete discussion of the problem of exhaustion of administrative remedies, see 3 Davis, Administrative Law §§ 20.01-.10 (1958).

3 Suits for violation of contract between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in
in a state court. To judge the merit of this position it is necessary to ascertain the present state of the pre-emption doctrine, the limitations imposed on § 301 suits by the courts and finally, the relationship between the two bodies of law.

The leading case on the question of exclusive federal jurisdiction of labor disputes is San Diego Building Trades Council v. Garmon in which the United States Supreme Court held: "when it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." The court further held that it was the primary responsibility of the NLRB to determine whether the activities regulated by the states were subject to the pertinent provisions of the act. Garmon severely limited the Supreme Court's ruling in International Association of Machinists v. Gonzales which allowed an action to be brought in a state court, despite possible conflict with the national labor policy, because the NLRB remedy of back pay was inadequate to compensate for the injuries received which included physical and mental suffering of a kind compensable at common law.

After Garmon, therefore, the jurisdiction of the state courts in any matter which is arguably within the jurisdiction of the NLRB is pre-empted with the single exception of violent torts requiring an exercise of the state's police power. Subsequently, stronger language in Local 100, United Ass'n of Journeymen and Apprentices v. Borden and Local 207, Int'l Ass'n of Bridge Workers v. Perko buttressed the Garmon doctrine. Thus the majority holding of pre-emption of state jurisdiction in Day appears to be correct for the union apparently violated § 8(b) (2) of the NLRA. The only ground for discharge of an employee from his union is for nonpayment of dues or initiation fees. If the allegations of Day are true, the union has both removed him from the union and secured the termination of his employment for a reason other than that permitted by the act.

The Regional Director of the NLRB, receiving the "charge" submitted by Day, undertook an investigation of the facts surrounding his dismissal and informed Day that "[A]s a result of the investigation, it appears that, because there is insufficient evidence of violations, further proceedings are not warranted at this time." The normal course of administrative review was open to him. As pointed out...
above, the facts alleged by Day, if true would constitute an unfair labor practice on the part of the union. Therefore, the Regional Director in refusing to issue the complaint after investigation of the facts, has made the finding, in effect, that the facts alleged by Day cannot be substantiated. Thus, since the NLRB has neither denied nor declined jurisdiction, the state court is still pre-empted from acting. The inability of the state courts to act at this point is consistent with the purposes of the national labor policy. If, after the NLRB has determined that the facts do not constitute an unfair labor practice, the state courts are allowed to "second-guess" the Board, the plaintiff has two opportunities of having his case heard and the exclusive jurisdiction of the Board becomes meaningless. The Board would be effectively displaced as the enforcing instrument of the national labor policy in direct contradiction of the logic behind the pre-emption decisions. However, the pre-emption decisions are not the only ones which could be considered applicable to the fact situation in Day.

In Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp., Mr. Justice Frankfurter, writing for the Court, indicated that § 301 of the Taft-Hartley Act did not authorize suits by unions to enforce uniquely personal rights of employees. However, Justice Frankfurter was in the minority in Textile Workers v. Lincoln Mills in which landmark case the Court, ignoring the Westinghouse case, broadly expanded the scope of § 301. The administration of union contracts was now to be pursuant to federal substantive law based on national labor policy. Subsequent cases before the Court indicated that federal and state courts were to have concurrent jurisdiction which could not be pre-empted merely because the conduct involved was arguably an unfair labor practice within the heretofore exclusive jurisdiction of the NLRB as construed by the Garmon case.

Smith v. Evening News Ass'n accomplished the final reversal of Justice Frankfurter's narrow construction of § 301. In that case Justice White overturned Westinghouse holding that the individual employees' uniquely personal contract rights could be enforced under § 301 both by the union and the employees. In rejecting the Garmon pre-emption doctrine Justice White pointedly acknowledged that the case was "not only arguably, but concededly, . . . an unfair labor practice." The doctrine of Smith was both buttressed and expanded by the Court in Humphrey v. Moore. For the first time the labor contract rights protected by § 301 were extended to rights of fair representation due employees by their union in negotiating the collective bargaining agreement. On the question of pre-emption the Humphrey court, citing Smith v. Evening News Ass'n, said that since a § 301 action was proper it was not necessary to decide whether a violation of the duty of fair representation was also an unfair labor practice.

The dissenters in the case at hand felt that a § 301 suit could be maintained
by the plaintiff against the union in the state court. For this position to be valid, Day must be brought within the teaching of Smith and Humphrey. Day, if he was discharged from employment by the unfair representation of his union, as he alleges, was discharged in violation of the collective bargaining agreement between defendant union and Western Greyhound Lines. Humphrey and Day are arguably distinguishable on their facts. There is little doubt that a § 301 suit could not be maintained by Day if the action were based solely on the narrow holding in Humphrey. However, Justice White in Smith uttered a caveat that "§ 301 is not to be narrowly construed." Since a contract right of Day was violated, and since the union through its unfair representation caused the violation, there is a distinct possibility that the Smith and Humphrey Courts would be willing to continue widening the concept of contract and contractual rights protected under § 301. This would involve holding that a § 301 action is now open to protect employees against union unfair representation in the administration of the collective bargaining agreement as well as unfair representation in the negotiation of the agreement as was the case in Humphrey. The crux of the problem raised with the widening of § 301 is how far the Supreme Court will go in allowing disputes to be heard under § 301 which were formerly considered to be under the exclusive jurisdiction of the NLRB.

Congress has not indicated to the Court how far § 301 should extend but did register its dissatisfaction with the strict pre-emption cases in the Labor Management Reporting and Disclosure Act of 1959. Here Congress confirmed the power of the Board to decline jurisdiction in some controversies and authorized the states to assume jurisdiction when the Board declines. This elimination of "no man's land" indicates a Congressional willingness to subordinate a logically consistent pre-emption doctrine to the realistic demands of aggrieved parties for adequate remedies.

The position of the NLRB is of interest when considering how far § 301 should be extended. The United States filed a brief amicus curiae in Smith urging the Court that, since the rationale of the pre-emption cases should not apply to judicial enforcement of collective bargaining agreements under § 301, the state courts should be free to hear such suits.

It is the government's position that the considerations which underlie the doctrine of pre-emption enunciated in Carman have no application to suits for enforcement of collective bargaining agreements, as this court has recognized ... and that to oust the State or Federal courts of jurisdiction over such suits would not only fail to promote, but would actively obstruct, the purposes of the National Labor Relations Act. ... Furthermore, the courts may often be in a better position than the Board to provide a full and meaningful solution to the complex of related issues which are frequently involved in a labor controversy. In many contract disputes, the unfair labor practices element, to which the Board's jurisdiction is confined, may only be a small segment of the total problem. In other cases, the unfair labor practices question, though perhaps dispositive of the whole controversy, may turn entirely upon subsidiary questions of contract interpretation which make no demands on the Board's expertise and which might better be decided by the courts into whose hands Congress put them. Also, courts and arbitrators have a wider and more flexible repertoire of remedies than does the Board.

The collective bargaining agreement provided that the union could request the company to discharge an employee who was not a member in good standing of the union. Brief for Respondent, Petition for Rehearing, pp. 5-6.


32 Brief for the United States as Amicus Curiae, pp. 4-5, Smith v. Evening News Ass'n,
In addition to stressing the necessity of the § 301 suits, the government in its reply brief *amicus curiae* could see no reason for distinguishing between the union bringing an action for its employees and the employees bringing the action for themselves. 33 The government recognized the fact that the NLRB has neither the weapons nor the time to carry effectively the burden which the full force of the strict pre-emption cases throw upon it. A reasonable use of the § 301 suits both relieves the case burden on the NLRB and allows full compensation of plaintiffs by the courts in cases where the NLRB remedy is inadequate.

It is the responsibility of the United States Supreme Court to ultimately decide what is a reasonable use of the § 301 suit. 34 If *Day* is held to allow suits for unfair representation by the union in the administration of the contract, there would seem to be no obvious limits on § 301. The basis of the relationship between unions and companies is the collective bargaining agreement. The union is effectively the agent for its individual members in the administration of the agreement. Many practices, which today are considered unfair labor practices subject to the exclusive jurisdiction of the NLRB, arguably arise out of the contractual relationship between the union and the company. For example, in the instant case, the action taken by the union against Day, if substantiated, is both an unfair labor practice and a violation of the "member in good standing" clause of the agreement between the union and the company.

Assuming that the broad extension of the contract rights held to be protected under § 301 is realized, the following situation could result. The plaintiff, in a case normally referred to the NLRB, seeking relief beyond the power of the Board to grant, goes first to the state courts under the most tenuous claim of "contract violation." If the court is willing to hear the case under § 301 the suit remains in the state court. It is conceivable, therefore, that a large number of cases normally adjudicated by the Board would not reach that body. This substantial reduction in the Board's case load suggests that the jury, as fact finder, would be increasingly substituted for the Board whose supposed "expertise" would be disregarded. Interpretation of contracts has historically been a jury function and the Board has no special claim to expertise in pure contract cases. However, many state courts, in suits arising from the contract, will allow the jury to assess substantial damages. Herein lies the real difficulty. The jury is not equipped, as the Board would be, to view the particular actions complained of in light of the national labor policy. If the extent of the award varies in the different jurisdictions or even with different juries in the same jurisdiction, we can question whether a national labor policy is possible without uniformity of sanctions or a coherent program of deterrence.

Objections that § 301, widely used, will result in a varying application of the law can be expected. However, the fact that fifty state courts would be interpreting actions under § 301 does not necessarily mean that there will be less uniformity of opinion than when only the Board is interpreting labor problems. The Supreme Court of the United States is the final appeal from the state courts in the § 301 suits. Through this process of appeal the Court will be able to develop consistency as between the state court cases and the developing federal law. Decisions of the NLRB are appealed to the federal appellate courts who often differ, as greatly as do the state courts, in their review of NLRB decisions.

On appeal to the Supreme Court after a state determination of a § 301 suit,

371 U.S. 195 (1962). The General Counsel, Associate General Counsel and Assistant General Counsel of the NLRB were on the brief.

33 "It borders on the absurd, we believe, to suggest that the same cause of action involving the same facts and the same legal issues should be decided in accordance with different substantive-law rules, depending upon whether it is brought by an employee or his representative, i.e., the union." Reply Brief for the United States as Amicus Curiae, pp. 5-6, Smith v. Evening News Ass'n, 371 U.S. 195 (1962).

34 For a lucid presentation of possible guidelines for the Court, see Sovern, *Section 301 and the Primary Jurisdiction of the NLRB*, 76 Harv. L. Rev. 529 (1963).
the Court could hold that an action was not proper under § 301 either because the facts as pleaded do not constitute a cause of action under § 301 or because the facts, while constituting a cause of action, were not properly substantiated. The question then arises as to whether or not the aggrieved party could institute a charge with the NLRB. If the Court denied the § 301 remedy because the facts did not constitute a cause of action, it would seem that the plaintiff could approach the NLRB freely; for the facts, while not being proper for a § 301 suit, might very well involve an unfair labor practice. However in the latter case of denial by the Court a determination has been made as to the substantiality of the facts alleged. The Board, in deciding on the existence of the unfair labor practice, must make a second determination of the facts. There is a substantial question here as to whether or not the Board is bound, by principles of collateral estoppel, to accept some of the facts as determined by the state court. If so, the Board would be "pre-empted" from applying its acknowledged expertise. If the solution to the contract question in the state court only partially disposes of the issue at hand and the Board is asked to complete the settlement of the dispute, the same problem would arise. Suppose the NLRB procedure is pursued only after the attempt at a § 301 suit fails, should the award of back pay include the time spent in the fruitless pursuit of the contract remedy? A rule denying pay for this period could discourage frivolous attempts at § 301 suits.

The plaintiff may wish to do some forum-shopping or to try his luck in both the state court and Board simultaneously. The expense involved in such a course of action could deter him. However there is neither case nor statutory bar to such an attempt. The attempt would raise a problem as to which forum should defer to the other, if they should defer at all, on the immediate determination of the factual situation. The traditional notion of pre-emption favors the primacy of the Board but such a position comes into direct conflict with Mr. Justice White's assertion in Smith that pre-emption considerations are not to affect the § 301 cause of action. The term primary jurisdiction has been substituted for exclusive jurisdiction in an attempt to solve this problem but this substitution merely begs the question of deference which was left open in Smith.

The emergence of § 301 in an activist form under the Smith doctrine is still quite recent. Guidelines are yet to be set in regard to the character and extent of rights protected under the doctrine. It is for the Court to decide what range of cases will be considered actionable in the state and federal courts as affecting the contract rights of parties to the collective bargaining agreement. The basic determination in the setting of any guideline is whether the use of the action will promote industrial peace. Carey v. Westinghouse Elec. Corp. suggests that the NLRB should give great weight to the findings of the arbitrator upheld by the court in a § 301 suit. While this does not face up to the full problem of collateral estoppel, it does tend to strengthen the position of those willing to arbitrate. Perhaps, since arbitration is the main consideration in regard to the advisability of § 301 suits, deference should be accorded the NLRB when arbitration is not present. Deference to the NLRB would be proper in areas where its admitted expertise

35 The leading case on the subject of collateral estoppel and administrative agencies is United States v. Radio Corp. of America, 358 U.S. 334 (1959) (Government not collaterally estopped by FCC licensing unless the government's interests had been properly represented in previous adjudication). For a comprehensive treatment of the problems of res judicata and administrative agencies, see 2 Davis, Administrative Law §§ 18.01-12 (1958).

36 371 U.S. 195, 197 (1962). Professor Sovern considers various actions which may arise and attempts to analyze the proper role of the Board and the § 301 suit in each instance. Supra note 34 at 551-69.

37 Sovern, supra note 34 at 551.

38 One wonders whether the NLRB would like to reword it amicus curiae briefs in Smith. Their content is a bit startling for one would not expect the Board to retire from the field so modestly. Perhaps, in the not too distant future, the Board will be forced to take a different position in regard to the character and extent of suits under § 301.

could be useful in the solving of labor disputes. Proper use of § 301 should be recognized, in situations like the instant case, when the remedy available from the NLRB does not serve to compensate the plaintiff for his injuries.

Until these guidelines are clearly formed, plaintiffs in the position of Day have at least a possible claim to jurisdiction in the state courts under § 301. The nature and extent of the contract rights in the particular case must be considered. It is submitted that the Supreme Court of Oregon erred in reversing the Circuit Court without giving explicit consideration to the possibility of a § 301 suit.

Justice White felt, in Smith, that § 301 was not to conflict with the power of the NLRB but to strengthen such power. For this purpose to be achieved further litigation and clearer guidelines are necessary.

Francis M. Gregory, Jr.

Bankruptcy — Federal Income Tax — Loss Carryback Refund Passes to Trustee in Bankruptcy.— Gerald and Sam Segal, partners in Segal Cotton Products, suffered losses during the first part of 1961, and filed voluntary petitions in bankruptcy on September 27 of that year, as partners and as individuals. Early in 1962 the trustee filed claims on their behalf for loss-carryback adjustments, since the Segals had paid income taxes on profits earned in 1959 and 1960. After payment of the loss-carryback refunds to the trustee, the Segals filed claims with the referee to recover them. The claims were denied. On appeal from the decision of the District Court affirming the findings of the referee, the Court of Appeals held: the claim to a net operating loss-carryback refund is transferable property within the meaning of Section 70(a) (5) of the Bankruptcy Act, and passes to the trustee on the date of filing. Segal v. Rochelle, 336 F.2d 298 (5th Cir. 1964).

The question raised here was first decided in 1961. In re Sussman held that a loss-carryback claim did not pass to the trustee. The Sussman court's conclusion was based on alternative theories. The court reasoned that the statutory scheme under which a taxpayer may claim a carryback refund precluded any right of action from vesting before the end of the taxable year: "This is clear because the net operating loss upon which any claim for a carryback must be based is the excess of allowable deductions over the taxpayer's gross income as computed in a tax return for a taxable year." On the date of filing bankruptcy Sussman could claim no right to any legal or equitable interest in an existing fund or cause of action; thus, he had no ownership interest which could pass to the trustee. Alternatively, the Third Circuit suggested that even if the expectation

3 Bankruptcy Act § 70(a) (5), ch. 575, 52 Stat. 879-80 (1938), as amended, 11 U.S.C. 110(a) (5) (1958). This section provides:
(a) The trustee of the estate of a bankrupt ... shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition ... to all ... (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered ... .

Section 1(30) provides:
"Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise ... . 11 U.S.C. § 1(30) (1958).
4 289 F.2d 76 (3d Cir. 1961).
5 Id. at 77.
of a refund could be classed as a contingent claim against the United States, the Assignment of Claims Act would have prohibited its transfer, even as between Sussman and any assignee. Hence, whatever interest Sussman may have had, it could not have met the transferability requirement of Section 70(a) (5). Noting the inequity of the result, the court nevertheless felt constrained to find for the bankrupt and suggested legislative correction.

The Sussman decision evoked much criticism from legal periodicals. But two years later, the First Circuit "regretfully" followed suit in Fournier v. Rosenblum. Its holding rested solely upon the first ground advanced in Sussman, that the carryback claim was not "property" at the date of filing.

In Segal, the Fifth Circuit rejected Sussman and Fournier, grounding its reasoning in Congressional intent:

We begin with the proposition that it was the intent of Congress to secure to creditors all property of a bankrupt. The refunds here in question will pass to the bankrupts freed from claims of their creditors if such a right is outside the scope of the definition of property as used in the Act. This will be the result in spite of the fact that the refunds arose as a result of losses in the partnership business which in the first place caused the claims of the creditors to come into existence. Reasoning that judicial construction of the statute could not be limited by the kinds of property rights existent at the time of its enactment in 1898, the court considered analogous cases holding various types of contingencies to be "property" for the purposes of Section 70(a) (5). Perhaps most persuasive was Williams v. Heard, which the court selected from a line of cases developing the theory that a "possibility coupled with an interest" was property and passed to the trustee. In order to meet the test of a "possibility coupled with an interest," the Segal court said:


All transfers and assignments made of any claim upon the United States . . . shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

7 In re Sussman, 289 F.2d 76, 78 (3d Cir. 1961).


9 In re Sussman, 289 F.2d 76, 78 (3rd Cir. 1961).


11 318 F.2d 525 (1st Cir. 1963). Woodbury, C. J., said, "We regret this result as much as did the court in Sussman. But, as in Sussman, we think the remedy lies with Congress." Fournier v. Rosenblum, supra at 527.

12 In defense of the Sussman position, the First Circuit noted that the carryback claim could have been defeated by unexpected income such as "winning a large bet or holding a winning sweepstakes ticket" which would offset the loss in the year of bankruptcy. Id. at 527.

13 Segal v. Rochelle, 336 F.2d 298, 300 (5th Cir. 1964).

14 Williams v. Heard, 140 U.S. 529 (1891) (claim against government contingent upon passage of bill by Congress); Kleinschmidt v. Schroeter, 94 F.2d 707 (9th Cir. 1938) (conditional right under partnership agreement); In re Dorgan's Estate, 237 Fed. 507 (S.D. Iowa 1916) (remedial subject to divestment).

15 140 U.S. 529 (1891). The plaintiffs had paid enhanced insurance premiums for shipping during the Civil War. After their bankruptcy, their trustees received compensation for the claim under an act of Congress and a subsequent award. The Supreme Court held the claims to be "property" which passed to the trustees. Williams v. Heard, supra at 540.

16 E.g., Phelps v. McDonald, 99 U.S. 298 (1878) (resident British subject's claim for burning of cotton by military forces contingent upon treaty); Erwin v. United States, 97 U.S. 392 (1878) (claim for seizure of cotton by military forces contingent upon passage of remedial statute by Congress); Comegys v. Vasse, 26 U.S. (1 Pet.) 193 (1828) (right to indemnity for capture contingent upon treaty with Spain). But see Harlan v. Archer, 79 F.2d 673 (4th Cir. 1935) (claim for consequential property damage caused by condemnation not an existent right at time of bankruptcy, notwithstanding later statute allowing such claims).
This right of action [the right to claim carryback refunds] springs from and rests on the fact that the income taxes theretofore paid were paid subject to adjustment in the event of future losses and are available for that purpose to the end of providing the refund. The right to adjustment is definite; the time for filing the claim is definite; only the amount of the refund is contingent....

The conceptual validity of this argument is perhaps open to question. For example, one could hardly assert the “vesting” of this right in order to challenge the constitutional validity of an amendment eliminating the carryback adjustment from the tax code. However, within the pragmatic structure of tax and bankruptcy law, conceptual niceties cannot be expected to triumph over sound results.

It is significant that the Fifth Circuit adopted the reasoning of the Williams case, decided under the previous bankruptcy statute, which did not utilize the concept of transferability to determine what should be available to creditors. Relying on Williams, the Segal court first concluded that the carryback claim was property and only then did it consider the transferability of the claim. On the other hand, modern courts and writers have regarded transferability as the test which must be met before the subject can be considered property under Section 70(a)(5). This approach is coupled with the doctrine that local law controls the alienability of property for purposes of the Bankruptcy Act. This combination renders difficult if not impossible the task of coping with a new type of property right, such as the carryback claim. For at the outset, a court becomes tangled in a conceptual briar-patch of local real and personal property rules, from which even the legendary Br'er Rabbit could not escape. The Segal rationale, embracing common-sense implementation of statutory policy together with analogical reasoning, fits comfortably within the doctrine that a bankruptcy court is a court of Equity.

Having concluded that the carryback claim was property within the meaning of the statute, the court was confronted with a dual problem in respect to transferability — (1) the claim was contingent and (2) was against the United States. The first problem was disposed of rather summarily, with the statement, “Contingent property interests are, of course, assignable at common law. . . .” While as a general proposition this is not true, in context it is clear that the reference is to vested interests subject to defeat.

Rejecting the Sussman argument as to transferability under the Assignment of Claims Act, the Fifth Circuit relied on cases holding that the statute does not render the assignment of a claim against the United States unenforceable as be-

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17 Segal v. Rochelle, 336 F.2d 298, 302 (5th Cir. 1964).
18 140 U.S. 529 (1891).
19 Bankruptcy Act of 1867, ch. 176 § 14, 14 Stat. 523 (1867). For discussion of the legislative history of the present bankruptcy statute, see 4 COLLIER, BANKRUPTCY § 70.02 (14th ed. 1964).
20 E.g., Horton v. Moore, 110 F.2d 189 (6th Cir. 1940), cert. denied, 311 U.S. 692 (1940); In re Wright, 157 Fed. 544 (2d Cir. 1907); 4 COLLIER, op. cit. supra note 19, § 70.15; 3 REMINGTON, BANKRUPTCY LAW § 1178 (rev. ed. 1957).
21 Spindle v. Shreve, 111 U.S. 542 (1884). Federal courts do have the authority to determine whether the degree of alienability under local law falls within the concept of transferability. See 4 COLLIER, op. cit. supra note 19, §§ 70.15 at 1034-36, 70.37.
22 Discussion of local law governing the alienability of real and personal property is beyond the scope of this article. See generally, 1 AMERICAN LAW OF PROPERTY §§ 4.64-4.81 (Casner ed. 1952); 2 POWELL, REAL PROPERTY §§ 280-88 (1950).
24 Segal v. Rochelle, 336 F.2d 298, 302 (5th Cir. 1964).
25 See 4 COLLIER, op. cit. supra note 19, § 70.37 at 1292-97.
26 The Fifth Circuit cited two cases in support of the proposition. In re Landis, 41 F.2d 700 (7th Cir. 1930), cert. denied, 282 U.S. 872 (1930), held that a contingent remainder was assignable in equity and therefore passed to the trustee in bankruptcy (see text accompanying note 32 infra). In re Wright, 157 Fed. 544 (2d Cir. 1907), held that a conditional right under an existing contract was assignable.
tween the parties. 27 Under these holdings, the court said the Segals possessed the right to make an enforceable contract to convey the tax claims to a third party upon their receipt from the government. 28 The court concluded: "Thus, at the date of bankruptcy, the Segals were possessed of a valuable property right, capable of being converted into money value. We feel that this was sufficient transferability to meet the requirement of § 70, sub. a(5)." 29 The Fifth Circuit undeniably reaches a good result, but its rationale with regard to this issue is neither convincing nor supported by the authorities. The assignment of a contingent remainder or expectancy was invalid at common law. A court of Equity, however, would enforce such an assignment as a contract to convey the interest. 30 Most courts rejected the argument that an "equitable assignment" met the requirement of Section 70(a) (5). 31 Those courts that accepted it 32 were criticized by legal writers on the grounds that (1) the rule was of little benefit to creditors compared to the possible future loss to the bankrupt, since the value of such an interest was largely speculative, 33 and (2) no present transfer took place until the interest vested in the assignor. 34

In the context of Segal v. Rochelle, it is apparent that the policy arguments of the writers are inapplicable. The value of the tax claim is not speculative in the same sense as an expectancy or contingent remainder for it is contingent only upon profits or losses after the date of filing in the year of bankruptcy. Nor are creditors allowed to reach deep into the future assets of the bankrupt in this case, so as to deny him a fresh start.

The Segal rationale that an equitable assignment constitutes a transfer under the Act does present a problem, both conceptual and practical. The conceptual problem is relating Segal v. Rochelle to those cases which hold that the assignment of a claim against the government becomes enforceable only when the claim has been ascertained and a warrant issued for its payment. 35 These cases support the second argument of the writers, i.e., that an equitable assignment does not affect a present transfer, since no assignment by the Segals could have become enforceable against the trustee until the end of the taxable year.

In a hypothetical case subsequent to Segal, assume that the bankrupt had made an assignment for the fair value of the claim at the time of the assignment, but the trustee continued to operate the business and incurred losses after the date of the bankruptcy. The trustee would be hard put to claim the assignment of a claim against the government becomes enforceable only when the claim has been ascertained and a warrant issued for its payment. 36 Previous disputes between a trustee and an assignee

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29 Segal v. Rochelle, 336 F.2d 298, 303 (5th Cir. 1964).
30 See, e.g., In re Landis, 41 F.2d 700 (7th Cir. 1930), cert. denied, 282 U.S. 872 (1930).
31 In re Baker, 13 F.2d 707 (6th Cir. 1926); Kahn v. Rockhill, 132 N.J.Eq. 188, 28 A.2d 34 (Ch. 1942), aff'd mem., 135 N.J.Eq. 300, 31 A.2d 819 (Ct.Err. & App. 1945).
32 In re Landis, 41 F.2d 700 (7th Cir. 1930), cert. denied, 282 U.S. 872 (1930); In re Kefiteck, 71 F. Supp. 157 (E.D. Ill. 1947); Martin & Earle v. Maxwell, 86 S.C. 1, 67 S.E. 962 (1910).
33 2 Powell, op. cit. supra note 22, § 287 at 519-22. Powell also notes that these cases "put a premium on resort to bankruptcy" because such interests cannot otherwise be reached by creditors. 2 Powell, op. cit. supra note 22, § 287 at 520. See also Halbach, Creditors' Rights in Future Interests, 43 Minn. L. Rev. 217, 240-42 (1958); 43 Ill. L. Rev. 121 (1948). But see 4 Collier, op. cit. supra note 19, § 70.37 at 1293-95 n.6; 3 Remington, op. cit. supra note 20, §§ 1217, 1218-1219.04.
34 Sims, Future Interests § 1927 (2d ed. 1956).
35 The general question whether an equitable assignment is good as against the trustee is both complex and perplexing. See generally, 3 Collier, op. cit. supra note 19, §§ 60.37, 60.50, 70.62, 70.82. But apparently no court has approved the specific proposition that an unallowed and unascertained claim against the government can be assigned as against the trustee. See 4 Collier, op. cit. supra note 19 § 70.28 at 1250-53 & cases cited nn.30, 32b, 32d.
(concerning claims against the government) have involved property passing to the trustee under Section 70(a)(6), which does not require transferability. Thus, the question presented by Segal is sui generis. It is evident that an equitable solution demands a unique approach which would treat the carryback claim as transferable property for the sole purpose of Section 70(a)(5), while not contradicting existing law concerning recovery by the trustee from an assignee. Such an approach would involve statutory construction based on the policies of both statutes. It is settled law that the Assignment of Claims Act exists solely for the protection of the government and is not intended to affect transfers by operation of law. If the statute cannot directly affect the implementation of the Bankruptcy Act, it would seem that it should not affect it indirectly either, simply because Congress has chosen transferability as the criterion for determining what property of a bankrupt should go to his creditors. The result obtained via this rationale would be supported by and consistent with the judicially defined policies of both statutes. At the same time the decision would have no effect upon the meaning of transferability in other areas of Bankruptcy law.

Joseph P. Della Maria, Jr.

LABOR LAW—INFORMATIONAL PICKETING—SUBSTANTIAL EFFECT TEST ADOPTED TO DETERMINE WHEN INFORMATIONAL PICKETING BECOMES AN UNFAIR LABOR PRACTICE.—Following an unsuccessful year of negotiations over new contracts, Locals 770 and 324 of the Retail Clerks’ Union, former collective bargaining representatives for Barker Brothers retail furniture stores employees, commenced picketing of the stores. The two unions took active measures to insure that everyone fully understood the picketing was intended to be purely informational so that no work stoppages or delays would result. To this end, they informed the Teamsters’ Council that the picketing was to be informational and placed advertisements in local papers informing the public of their intentions. Furthermore, the picketing was generally confined to consumer entrances and was conducted only during those hours the stores were open to the public. Despite these precautions, at least three truck drivers refused to cross the picket lines and several deliveries were delayed. On a petition for review, the Ninth Circuit Court of Appeals, affirming the decision of the National Labor Relations Board, held: the stoppages and delays did not have a sufficient impact on the business of Barker Brothers to constitute an unfair labor practice under Section 8(b)(7)(C) of the National Labor Relations Act.

Section 8(b)(7)(C) of the National Labor Relations Act, as amended by the Landrum-Griffin Act of 1959, prohibits picketing by a union which is not the

39 Erwin v. United States, 97 U.S. 392 (1878); M. M. Landy, Inc. v. Nicholas, 221 F.2d 923 (5th Cir. 1955); In re Webber Motor Co., 52 F. Supp. 742 (D.N.J. 1943).
3 Hereinafter referred to as Barker Bros. It might also be noted that a minor issue in Barker Bros. was whether the dual-purpose picketing, considered separately from its effect, was itself unlawful. To settle this issue, the court merely cited its decision in Smitley v. NLRB, 327 F.2d 351 (9th Cir. 1964), which holds that informational picketing is lawful even when it is also for recognitional purposes so long as the picket signs conform with the language of the proviso and are for the purpose of truthfully advising the public.
RECENT DECISIONS

certified representative, where an object thereof is recognition or organization:

Under Paragraph (A), if another union has been lawfully recognized and an existing contract with that union bars an election; under Paragraph (B), if a valid election has been held among the employees by the Board during the preceding twelve months; and under Paragraph (C), if conducted for more than a reasonable period, not to exceed thirty days, without the filing of a petition for an election under Section 9(C) of the Act.

A second proviso to Paragraph (C) carves out a significant exception to the general ban on recognitional and organizational picketing:

Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Thus, the proviso excludes from the interdiction of Section 8(b)(7) informational picketing which, while it embraces the proscribed object of recognition or organization, meets the two specified conditions. It is this “effect clause,” the second proviso of Paragraph (C), which was interpreted by the Barker Bros. decision.

This proviso is susceptible to and has been given three interpretations. First, the proviso can be literally interpreted. This would mean that the refusal of a single truck driver making a delivery to cross a picket line, despite contrary instructions from his union and precautions taken by the picketing union, would automatically convert an informational picket line into an unfair labor practice. Most commentators favor rejecting such an interpretation. The Congressional debates over Section 8(b)(7)(C) are inconclusive. The most unambiguous statement made concerning the danger of a literal interpretation was that of Congressman Roosevelt:

All he [a primary employer] would have to do is to get a fellow employer, not kindly disposed to trade unions, to instruct his secretary—say—to refuse to deliver a message to the primary employer on the pretext that her service would violate her conviction aroused by the picket line. . . . The picket line would be declared unlawful.

Also, it can be argued that such an interpretation would raise constitutional questions concerning a union’s right to peaceful informational picketing. Despite a

4 This strict prohibition on recognitional and organizational picketing has been somewhat modified. In Crown Cafeteria, 130 N.L.R.B. 570 (1961), the National Labor Relations Board held that the “publicity proviso” of Sec. 8(b)(7)(C) only allows picketing by an uncertified union where the sole purpose is to truthfully advise the public. Thus, picketing found to be for a recognitional object was prohibited. However, one year later in a reconsideration of the case, Crown Cafeteria, 135 N.L.R.B. 1183 (1962), the Board reversed itself and held that notwithstanding the fact that the informational picketing is also for an object of recognition or organization, it nevertheless is lawful so long as the picket signs conform with the language of the proviso, are for the purpose of truthfully advising the public, and do not result in the stoppage of deliveries or services.


6 See statute cited note 2 supra.


8 Despite attempts to prove the contrary, statements made in the Congressional debates over Section 8(b)(7) do not contemplate the factual situation found in Barker Bros. and cannot be taken as conclusive on what interpretation Congress intended the Section to be given. For most frequently cited statements, see Senator Kennedy’s statement at 105 Cong. Rec. 15900 (daily ed. Aug. 28, 1959), 2 Legis. Hist. 1577(3), and Senator Goldwater’s statement at 105 Cong. Rec. A68524-A68525 (1959), 2 Legis. Hist. 1858(3) to 1859(1).

9 105 Cong. Rec. 18142 (1959), 2 Legis. Hist. 1728(3) to 1729(1).

vehement dissent by two members of the NLRB, a literal interpretation of the proviso was rejected by the majority of the Board in Barker Bros. They stated that such a reading would produce "bizarre results," and concluded,

To read the effect clause literally would, for all practical purposes, render illusory the very protection which the Congress expressly conferred upon labor's right to disseminate information to the public by engaging in publicity picketing. It thereby not only bring into play a serious constitutional question, but also do a disservice to the Congress itself.

A second interpretation of the effect clause of Section 8(b)(7)(C) would hold that the effect must have been intended or at least reasonably foreseeable. Such a reading of the proviso would mean that a union would not be held responsible for unintentional delays or stoppages caused by its picket lines. By considering motive or intent rather than number of stoppages or delays, this interpretation would not only avoid the aforementioned problems inherent in a literal reading of the proviso, but would also satisfy the possible constitutional problem involved when freedom of speech is restricted by looking only at its effect.

In McLeod v. Chefs Local 89 (the Stork Club case), the initial case dealing with Section 8(b)(7)(C), such an interpretation was suggested in a concurring opinion:

... by emphasizing the word 'induce' instead of the word 'effect,' it is possible to reach a different interpretation, for then it is arguable that Congress intended something more than a simple cause-and-effect relationship, and intended that the effect be one proposed by the picketing union.

Subsequently, in Local 239, Teamsters Union, Stan-Jay Auto Parts Corp. (the Stan-Jay case), the NLRB rejected the contention that the "unless" proviso would take effect only if the work stoppages were the intended effect of the picket line, asserting that "there is no legislative history to justify qualifying the word effect in the manner urged by the respondent." Arguably, the function of the "effect clause" would seem to prohibit picketing where, even though the union only intends an appeal to the public, it nonetheless is stopping deliveries to a substantial degree by the mere fact that the picket lines are present.

In Barker Bros. a third interpretation of the proviso was adopted as the rule to be applied hereafter: that informational picketing does not become an unfair labor practice unless it interferes with the picketed employer's business to a substantial degree. This view that the "effect clause" should be interpreted as a "substantial effect" would find support among most authorities in the labor-management field. Such a reading of the proviso had been foreshadowed in earlier decisions, but was not formulated until the Barker Bros. decision when the

11 NLRB members, Rogers and Leedom, stated in their dissent:
This language is clear and unequivocal. It speaks in terms of "an effect," "any individual," "any other person," "any goods," and "any services." There is not one word in the statutory language about "disruption" of business, "curtailment" of business, "impact" of stoppages, or "actual impact on the picketed employer's business," which is the way our colleagues are interpreting the clear and unequivocal statutory language.

12 Id. at 489.
13 Id. at 490.
15 280 F.2d 760 (2d Cir. 1960). The "effect clause" was not the main issue in this case although a good discussion of it is given in the concurring opinion.
16 Id. at 765.
18 Id. at 961.
19 Brief for Respondent, p. 31.
20 Dunau, supra note 7 at 378. See generally Aaron, supra note 7; Cox, supra note 7; Olender, Standards Picketing under Sec. 8(b)(7)(C), 12 LAB. L.J. 739 (1961).
Board stated:
Thus, it is readily apparent that a quantitative test concerning itself solely with the number of deliveries not made and/or services not performed is an inadequate yardstick for determining whether to remove informational picketing from the proviso's protective ambit. Rather, with respect to employer operating retail establishments, we believe that where delivery and/or work stoppages occur, it would be more reasonable to frame the test in terms of the actual impact on the picketed employer's business. That is, the presence or absence of a violation will depend upon whether the picketing has disrupted, interfered with, or curtailed the employer's business.22

The Barker Bros. rule has provoked the strongest condemnation from Congressman Griffin, one of the co-sponsors of the Landrum-Griffin measure. He commented:
Accordingly, under the Board's ruling, a picketed employer must prove not only that delivery stoppages occurred but also the extent to which such stoppages disrupt his business. That this is not the language of the Statute appears to be conceded by the new Board majority. The law speaks clearly in terms of proscribing picketing with an effect of stopping any deliveries or any services. Notwithstanding that fact, the Board has blatantly legislated a new statute which it apparently considers more reasonable.23

In addition, it has evoked a cautious skepticism in the labor field since it is difficult, indeed in some cases impossible, to tell in advance when an effect of a picket line will be held to be a substantial effect by the Board.24 Nevertheless, in a series of subsequent cases, the NLRB has continued to apply the "substantial effect rule." In Joe Hunt's Restaurant,25 the Board held that a sufficient impact on the employer's business resulted where, for two and one-half months, all truck drivers supplying the picketed employer refused to make deliveries. In IBEW, Local 429, Sam Melson,26 a sufficient impact was found when two subcontractors refused to cross a construction site picket line for three weeks. On the other hand, in Retail Clerks and Hested Stores Co.,27 where there were two minor service stoppages, and Retail Clerks Union and Jay Jacobs Downtowner,28 where there were three insignificant delivery delays, the Board found that the stoppages and delays did not have a sufficient impact on the employer's business to make the picketing unlawful.

It must be admitted that the NLRB, in establishing the "substantial effect rule," has disregarded the ostensible meaning of Section 8(b) (7) (C) as Congressman Griffin charges. Nevertheless, it is submitted that the Board has rejected interpretations which would inevitably lead to unjust results and has substituted a sound and workable standard. By casting aside the intent requirement, the Board preserves the distinction drawn between the "effect" and "for the purpose" clauses. At the same time, by considering the extent and significance of the impact on the picketed employer's business, this interpretation rejects a strict literal reading of the "effect" clause and goes behind the wording of the proviso to set up a sensible standard.

Of course, difficulties still remain. At what point does picketing have a sufficient impact on the conduct of an employer's business to make it unlawful? When is an employer's business disrupted, curtailed, or interfered with to the extent of making the informational picketing unlawful? The NLRB will have to make these determinations in the light of the factual situations of each case brought before it.

Robert S. Krause

HEALTH—Compulsion of Adult of Sound Judgment to Submit to Blood Transfusions in Spite of Religious Objections.—Past her thirty-second week of pregnancy and quick with child, Willimina Anderson was admitted to the Raleigh Fitkin-Paul Morgan Memorial Hospital, Neptune, New Jersey, after two physicians had diagnosed that she was suffering from placenta praevia.1 Doctors had certified that the accepted treatment of such condition entailed the giving of blood transfusions to protect the lives of the mother and the unborn child. When informed of the remedy to be administered, Mrs. Anderson objected on religious grounds—she was a member of the Jehovah’s Witnesses and was forbidden by scripture to “drink blood.”2 The hospital sought to override her objections by securing permission from her husband for the transfusions, but here too physicians met with the same scriptural proscription.

Faced with the situation of an adult, not in extremis, refusing to consent to a blood transfusion deemed necessary for the preservation of two lives, plaintiff hospital sought court authority to administer the blood transfusion. The trial court held that the judiciary had no power to intervene in the case of an adult or with respect to an unborn child. On appeal, this decision was reversed by the Supreme Court of New Jersey. Held: blood transfusions may be administered to save the life of the mother or the child as the physician in attendance may determine. Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), cert. denied, 377 U.S. 989 (1964).

Though the case was widely publicized in the daily press, nowhere was it noticed that the actual transfusion was administered after the baby had been safely delivered. Attending physicians determined that such post-delivery treatment was authorized by the court and was necessary to preserve the life of the mother alone.3

The Anderson decision is the first instance of a judicial mandate compelling a person of sound mind and reasonable judgment to submit to a blood transfusion, even though such transfusion violates his fundamental religious tenets. The case forces a re-examination of the perplexing church-state problem of freedom of religious exercise in the area of public health and welfare.

The remote roots of the “blood transfusion doctrine” that today plagues practicing “Witnesses” may be traced back a half-century to the decision in Jacobson v. Massachusetts.4 There the Supreme Court upheld a state statute compelling any adult, sick or well, to submit to inoculations for the prevention of contagious diseases dangerous to the community. Later cases emphasized that the courts will not grant exemptions to orders for such medical care, even though they are violative of individual religious teachings.5

These holdings indicate a change in contemporary judicial attitude—a desire to enumerate specific limitations on the doctrine of freedom of religious practice

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1 Maloy, Medical Dictionary for Lawyers (2d ed. 1951). Placenta praevia: a placenta which is attached to the inside of the uterus in such a manner that it spreads out over the opening (mouth) through which the child may emerge. It may lead to serious complications and fatal hemorrhage because the part covering the opening must be freed from its attachment to the uterus before the child can be delivered.

2 Acts of the Apostles 15:28-29: For it seemed good to the Holy Ghost, and to us, to lay upon you no greater burden than these necessary things; that ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves, ye shall do well.

Leviticus 17:10: As for any man of the house of Israel or some alien resident who is residing as an alien in your midst who eats any sort of blood, I shall certainly set my face against the soul that is eating the blood, and I shall indeed cut him off from among his people.

3 Facts are certified by a letter from Mr. Eugene Landy, counsel for plaintiff, on file in the Notre Dame Law Library.

4 197 U.S. 11 (1905).

emphasized in early decisions; they add substance to the general limitations mentioned in the early case of Watson v. Jones.\footnote{80 U.S. 679 (1871).} In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.\footnote{Id. at 728.}

Such a shift in emphasis appears to be in perfect accord with the more general judicial transition from the individualism of the Nineteenth Century to the increased social concern of this century.

The courts have further circumscribed with limitations the area of free religious practice by prohibiting parents from preventing, on religious grounds, their children from receiving needed medical treatment.\footnote{State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962), cert. denied, 371 U.S. 890 (1962); People ex rel. Labrenz, supra note 5.} Such judicial intervention has been grounded on the traditional parens patriae doctrine of the common law.\footnote{For a concise discussion of this doctrine, see State v. Perricone, supra note 8, at 758.} The tenor of these decisions, including appropriate emphasis, has been well expressed in Prince v. Massachusetts:\footnote{321 U.S. 158 (1944).}

Acting to guard the general interest in [a] youth's well being, the state as parens patriae may restrict the parents' control . . . Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.\footnote{Id. at 166-67.} [Citations omitted].

From 1872 to 1963, then, the law pertaining to medical treatment of religious objectors has developed along two lines, namely, contagious diseases endangering the community and the care of minors. From these established grounds, however, two recent cases have taken the doctrine of judicial intervention much further, and have raised serious questions as to the limits of such judicial activity.

Application of the President and Directors of Georgetown College, Inc.\footnote{331 F.2d 1000 (1964), cert. denied, 377 U.S. 978 (1964).} concerned the admission of a female member of the Jehovah's Witnesses to a District of Columbia Hospital. After examination, attending physicians determined that the woman had lost two-thirds of her body's blood supply from a ruptured ulcer; it was further determined that she was non compos mentis. Standard treatment of such cases involved the giving of blood transfusions, a remedy prohibited by the patient and her husband on scriptural grounds.

The Hospital sought advice of counsel, and he in turn sought an appropriate writ from Judge Tamm of the District Court. When such application was denied, the hospital attorney proceeded directly to the chambers of Judge Skelly Wright of the United States Court of Appeals. After conferring with the patient and her husband, Judge Wright signed the writ and the blood was administered.

This case provided an issue of novel impression in the United States, namely, whether an adult, in extremis, and not suffering from a disease which might endanger the community, could be given a blood transfusion in spite of her and her husband's religious objections. In answering in the affirmative, Judge Wright leaned heavily on analogy from the earlier child cases.

He initially emphasized that Mrs. Jones was in extremis and hardly compos mentis, that "she was as little able competently to decide for herself as any child would be."\footnote{Id. at 1008.} As a result, he concluded:
It may well be the duty of a court of general jurisdiction . . . to assume the responsibility of guardianship for her, as for a child, at least to the extent of authorizing treatment to save her life. And if . . . a parent has no power to forbid the saving of his child's life, a fortiori the husband of the patient here had no right to order the doctors to treat his wife in a way so that she would die.14

Again relying strongly on the "child cases," Judge Wright further reasoned that since Mrs. Jones was the mother of a small boy, her death could constitute abandonment of that child. The equation here was that voluntary death amounts to voluntary abandonment.

A third justification for the administration of the transfusions was that a refusal of necessary medical aid is akin to the voluntary taking of one's own life or constructive suicide. In dismissing objections based on strict common law construction of suicide, Judge Wright stated that "only quibbles about the distinction between nonfeasance and misfeasance, or the specific intent necessary to be guilty of attempted suicide, could be raised against this latter conclusion."15

Fear of hospital liability for the death of Mrs. Anderson was perhaps the most understandable motivation for the issuance of the writ. Although the Joneses offered to release the hospital from responsibility for the possible death, there still remained the strong chance that the hospital would be liable under criminal law for failing to provide a patient with the necessary medical care which it was equipped to provide. As Judge Wright indicated, "it is not clear just where a patient would derive her authority to command her doctor to treat her under limitations which would produce death."16 Furthermore, Mrs. Jones never actively sought an early demise; instead, she simply sought to abide by her religious principles, to whatever end they might lead. Thus,

[If] the law undertook the responsibility of authorizing the transfusion without her consent, no problem would be raised with respect to her religious practice. Thus, the effect of the order was to preserve for Mrs. Jones the life she wanted without sacrifice of her religious beliefs.17

As a final reason, and one which is grounded firmly in the common law respect for the value of human life, Wright noted that:

[A] life hung in the balance. There was no time for research and reflection. Death could have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.18

Though a cursory inspection of the opinion in the Georgetown case would prompt one to conclude that it is in accord with the popular conscience, a closer inspection reveals many problems that need be resolved before this new path of equity courts can be safely followed. Judge Wright gave as one of his reasons for granting the writ the fact that Mrs. Jones was non compos mentis and as unable to care for herself as would be a child. This is arguably a limitation upon the scope of the writ of mandamus compelling an adult to submit to medical treatment. If so, this doctrine is not as radical as it appears, for equity has traditionally had jurisdiction over incompetents. If not, and there apparently was no such limitation in the Anderson case, this analogy of an adult in extremis to a child is really irrelevant to a defense of the doctrine.

Judge Wright also stated that the writ will issue to prevent the mother from abandoning, by her voluntary death, her small child. If this were the real basis of the decision, further applications of the doctrine would turn upon a necessarily arbitrary classification. If the defendant happened to be the parent of a minor child, then blood will be administered, but if the patient is childless, he will be allowed by the courts to die as he chooses.

14 Ibid.
15 Id. at 1009.
16 Ibid.
17 Ibid.
18 Id. at 1009-10.
Furthermore, it seems unlikely that Judge Wright's constructive suicide argument, as enunciated in *Georgetown*, would commend itself to other courts. What Judge Wright apparently intends to preserve is the common law denial of the right to take one's life—a policy which has no room for artificial distinctions between "active" and "passive" suicide. The difficulty lies in the suggestion that these distinctions between misfeasance and nonfeasance are without merit. It is submitted that the requirement of misfeasance and specific intent are not "quibbles," but, in fact, go to the central question. This is a policy question about the power of the state over the individual—his body, his soul, and his very existence—which power cannot be assumed under a theory which pretends to do no more than build upon the orthodox law of suicide.

Such problems as these, if discussed abstractly, would militate strongly against future applications of the *Georgetown* doctrine. This, however, is not the case—they cannot be separated from the quasi-emotional aura of the situation, *i.e.*, the context of "a life hanging in the balance." Human beings all desire the preservation of life, and few judges seem truly able to divorce themselves from this basic demand of the human condition.

The same day that a request for *certiorari* had been denied in *Georgetown*,9 the New Jersey Supreme Court began to hear oral argument in the *Anderson* case. Instead of a mere confrontation with the unresolved problems in *Georgetown*, the New Jersey Court found itself with even a more formidable question for decision, for now the patient was *compos mentis* and was not in *extremis*. Time, too, was another problem for the court, for it had to render judgment before the impending birth caused the patient and/or the child to die from loss of blood.

In brief and in oral argument, counsel for the hospital first sought to convince the court that it had the power to preserve the life of the unborn child by ordering the mother to submit to a blood transfusion.20 Obviously, this required a departure from established precedent, for these dealt only with children that had been born. Counsel argued that New Jersey has recognized the right of an unborn child to life and health, and that such rights are legally protected.21 Further, he demonstrated that the only feasible means of protecting these rights would be to order the mother to submit to a transfusion. If she refused, this could constitute parental neglect, and the court has traditionally assumed the task of caring for such neglected children.22 To this line of reasoning, opposing counsel countered that a child can be placed under the protection of the court only after the natural process of birth and separation.23

Counsel for Mrs. Anderson further sought to demonstrate that the relationship between physician and patient and hospital is purely contractual, and that there is no justification for judicial interference.24 With this, further contentions were made that the issuance of a writ of mandamus would not only interfere with contractual rights, but also with the time-honored right of a person to practice his religion in any manner he chooses if such practice does not present a danger to the community as a whole.25 Against this line of reasoning could be marshalled only the unpersuasive holding in *Georgetown*.

Finally, open conflict was reached on the issue of constructive suicide. Here the weight of argument seems balanced in favor of the Hospital. Instead of merely pointing out that refusal of blood transfusions is "akin" to the voluntary taking of human life—the argument pursued in *Georgetown*—counsel for the plaintiff

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20 Brief for Plaintiff, pp. 4-5
21 *Id.* at pp. 6-8.
23 Brief for Defendant, p. 18
24 *Id.* at pp. 4-10.
delved deeply into the common law policy of the suicide doctrine, *i.e.*, that the concern of the state for one human life is so great that it does not allow a citizen to take that life, but instead punishes him even for the attempt.26

On the basis of these arguments, then, the New Jersey Court reversed the lower opinion and ordered Mrs. Anderson to submit to transfusions. Unfortunately, its opinion did little to settle the already muddy waters of *Georgetown*.

The problem of the unborn child was more easily handled than that of the mother. The court held that it is well established that a child may be given blood when needed and that a court of equity has the power to order such treatment even if it involves submitting the mother to that care. The underlying rationale here seems to be a "conduit" theory, *i.e.*, the mother is the vehicle or means by which the unborn child can be reached.

The court avoided the more perplexing issue of whether an adult may be forced to accept such treatment to save his own life. Instead of facing this issue squarely the court said:

[I]t is unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop. The blood transfusions (including the transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine.27

The tragedy of this ambiguous language was made manifest when the physician in charge of the delivery had to determine for himself if the court order authorized him to administer blood to save Mrs. Anderson, even after the child had been delivered and separated from the mother in every medical sense. If such authorization was intended by the court, then it should have been clearly enunciated, for the fact situation was readily foreseeable to all involved. If this was not the intention of the New Jersey Supreme Court, then Mrs. Anderson was subjected to a serious infringement of her religious freedom, and the responsibility for this infringement must lie with the court for its refusal to treat the issue head-on.

After an examination of *Georgetown* and *Anderson*, one becomes hard-pressed to offer any conclusions as to the state of the law in this area. As emphasized, both cases are radical departures from established doctrine. Furthermore, these decisions raise many problems which remain in need of resolution. Because of the gravity of these problems, they must be resolved in the near future and, when they are, the better reasoned cases and, indeed, the weight of authority suggest a reversal of this recent judicial trend.

Nevertheless, certain elements in the reasoning of both opinions suggest a possible justification for future applications of the new doctrine. It would appear that the common law abhorrence of self-destruction could be developed into the defense for the doctrine that the State cannot allow an individual to bring about his own death, regardless of whether such demise was the result of misfeasance or nonfeasance. If this fails, perhaps we may soon see legislation in the various states giving the judiciary the power that the *Georgetown* and *Anderson* courts have already exercised.

Unresolved, too, in these recent cases is the disconcerting problem of where the limits to the new doctrine shall finally be grounded. In addition to the Jehovah's Witness proscription against blood transfusions, we also have the Christian Scientist prohibition against medical treatment in general, and the Roman Catholic pronouncement forbidding the abortion of a foetus to save the life of the mother. Unless certain limits are soon drawn, these religionists may increasingly find themselves defending their teachings in courts of equity.

26 Brief for Plaintiff, pp. 11-13.
Perhaps one indication of a future answer can be found in the opinion of Judge Skelly Wright.

Before proceeding with this inquiry, it may be useful to state what this case does not involve. This case does not involve a person who, for religious or other reasons, has refused to seek medical attention. It does not involve a disputed medical judgment or a dangerous or crippling operation. Nor does it involve the delicate question of saving the newborn in preference to the mother. Mrs. Jones sought medical attention and placed on the hospital the legal responsibility for her proper care. In its dilemma, not of its own making, the hospital sought judicial direction.\[28\] [Emphasis mine]

The Georgetown limits, though they do solve the immediate problem, nevertheless fail to establish an objective criterion by which all applications of the doctrine can be measured. Since an extension of the Georgetown and Anderson holdings into these areas seems probable, future courts must either formulate a standard or dismiss such cases for want of authority.

A workable solution may be devised by a consideration of the religious interests affected by a judicial mandate. Most, if not all religions hold that "sin" must be a voluntary act—a product of the will—and that no harm to the soul or danger to salvation is produced by an involuntary act. However, in a few instances—such as the Catholic teaching that a denial of baptism to an infant relegates him to limbo—certain moral deprivations are incurred even from an involuntary act. Therefore, it is suggested that before deciding the merits of such cases, the court hear testimony from an authority on the particular religion involved in the litigation, and issue the writ only if the court is reasonably convinced that involuntary submission to medical treatment will not "violate a cardinal religious tenet which endangers the soul’s salvation."\[29\]

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28 Application of President and Directors of Georgetown College, Inc. v. Jones, 331 F.2d 1000, 1007 (1964). It should also be noted that in the last sentence of this quotation, Judge Wright indicates the inappropriateness of an argument that Mrs. Jones had a "right to be left alone." Obviously this line of reasoning is refuted by the fact that she actively sought medical aid, thereby surrendering that right. Of course, argument can be made that the right applies to any treatment to which the patient does not consent, but this is refuted by the possible tort liability of the hospital if it does not provide necessary and proper care. Counsel for defendant in the Anderson case also made use of the so-called "right to be left alone." Brief for Defendant, pp. 2-4, but to no avail.

29 Church-State—Religion Institutions and Values: a Legal Survey—1963-64, 39 Notre Dame Lawyer 427, 483 (1964). It is recognized that this solution still constitutes an infringement upon religious freedom, but, under the circumstances, one that is unavoidable and not unreasonable.