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Recent Decisions

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RECENT DECISIONS

Labor Arbitration—Clause Prohibiting Arbitrator from "Adding to" the Terms of Collective Bargaining Agreement Precludes Expansion of Agreement Beyond Express Provisions as Basis for Award. Appellee-employer announced that its twenty-year policy allowing employees time off with pay to vote on general election days would be discontinued. The policy had been unilaterally instituted by employer and was not expressly contained in the then-existing collective bargaining agreement. In later negotiations for a new agreement each party proposed that the old contract be reinstated with certain amendments, none of which referred to the time off with pay voting practice. When it became evident that employer did not intend to allow its employees time off to vote, appellant-union filed a grievance which was subsequently submitted to arbitration.[1] The arbitrator found that although the voting policy was not expressly contained in the bargaining agreement, it was an implied provision based on the parties' past practice, and the employer had the burden of changing the policy through negotiations with the union. Since in negotiations for the new contract the parties had not agreed to terminate the practice, the arbitrator ruled that the employer must pay an election benefit to those employees who worked on election day.[2] On motion to vacate, the district court[3] held that the arbitrator had exceeded his authority in ruling that the voting policy was an implied provision of the collective bargaining agreement. On appeal, *held,* affirmed. An arbitrator exceeds his authority if he bases his award on an implied provision of a collective bargaining agreement which forbids "adding to" its terms and which does not expressly confer power to make the award. *Torrington Co. v. Metal Prods. Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966).

An arbitrator's interpretation of the provisions of a collective bargaining agreement is not subject to judicial review when applied to the merits of a labor dispute,[4] even though the courts may disagree with his interpreta-

1 Relevant sections of Article V of the collective bargaining agreement provide:
Section 1.—. . . [A] grievance with respect to the interpretation or application of any provisions of this contract . . . may be submitted to arbitration . . . .
Section 3.—The arbitrator shall be bound by and must comply with all of the terms of this agreement and he shall have no power to add to, delete from, or modify, in any way, any of the provisions of this agreement . . . .
Section 4.—The decision of the arbitrator shall be binding on both parties during the life of this agreement unless the same is contrary, in any way, to law.

2 65-2 CCH Arbitration Awards 5990 (1965).

3 Jurisdiction for the federal courts is provided by The Labor Management Relations Act (Taft-Hartley Act) § 301(a), 29 U.S.C. § 185(a) (1964). This section reads, in relevant part: "Suits for violation of contracts . . . may be brought in any district court of the United States having jurisdiction of its parties . . . ." *Ibid.*

4 *E.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960);

tion.[5] However, the courts have the power[6] to determine whether a dispute is actually arbitrable,[7] and on a petition to enforce or vacate an award, to determine whether the arbitrator exceeded the authority granted him by the bargaining agreement.[8] In considering the arbitration of a dispute courts will declare an issue arbitrable unless the parties have clearly excluded it from arbitration.[9] Moreover, the courts will consider past practices and pre-contract negotiations to determine whether a dispute is arbitrable under a particular bargaining agreement.[10] However, in considering the issue of

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Minute Maid Co. v. Citrus Workers Local 444, 331 F.2d 280, 281 (5th Cir. 1964).

Courts will also refuse to consider the merits of a dispute in a suit to compel arbitration. *E.g.*, United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960); Nepco Unit of Local 95, Office Employees Union v. Nekoosa-Edwards Paper Co., 287 F.2d 452, 455 (7th Cir. 1961); IUEW v. Westinghouse Elec. Corp., 218 F. Supp. 82, 84 (S.D.N.Y. 1963), *aff'd per curiam*, 326 F.2d 758 (2d Cir. 1964).

[5] *E.g.*, Brotherhood of R. R. Trainmen v. St. Louis Sw. Ry., 220 F. Supp. 319, 325 (E.D. Tex. 1963); *accord*, Arnold v. United Air Lines, Inc., 296 F.2d 191, 195 (7th Cir. 1961) (dictum); *In re* States Marine Lines, Inc., and Crooks, 13 N.Y.2d 206, 195 N.E.2d 296, 299 (1963) (dictum).

[6] See note 3 *supra*.

[7] *E.g.*, John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964); Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 241 (1962). See generally Annot., 24 A.L.R.2d 752 (1952).

[8] *E.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (dictum); H. K. Porter Co. v. United Saw Workers, 333 F.2d 596, 600-02 (3d Cir. 1964); International Ass'n of Machinists v. Hayes Corp., 296 F.2d 238, 243 (5th Cir. 1961).

Statutory provisions also allow vacation of an arbitrator's award if he has exceeded his powers. *E.g.*, United States Arbitration Act § 10(d), 9 U.S.C. § 10(d) (1964); N.Y. CIV. PRAC. LAW § 7511(b)(1)(iii) (1965).

[9] *E.g.*, United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 582-83 (1960); UMW Local 12298 v. Bridgeport Gas Co., 328 F.2d 381, 383 (2d Cir. 1964); UAW v. Cardwell Mfg. Co., 304 F.2d 801, 802 (10th Cir. 1962); A. S. Abell Co. v. Baltimore Typographical Union, 230 F. Supp. 962, 966-67 (D. Md.), *aff'd*, 338 F.2d 190 (4th Cir. 1964).

This reluctance of the courts to interfere with arbitration was given great weight by the Supreme Court in the famous *Steelworkers* trilogy: United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior Gulf & Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Judicial hesitancy has long been urged by textual authority which upholds the role of the arbitrator in labor disputes. *E.g.*, Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MT. L. REV. 247, 258-66 (1958); Gregory, *The Law of the Collective Agreement*, 57 MICH. L. REV. 635, 648-49 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955); Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 BUFFALO L. REV. 1 (1952). *But cf.*, Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955); Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960).

[10] See, *e.g.*, Pacific Northwest Bell Tel. Co. v. Communications Workers, 310 F.2d 244, 247 (9th Cir. 1962); International Chemical Workers Local 19 v. Jefferson Lake Sulphur Co., 197 F. Supp. 155 (S.D. Tex. 1961).

Some courts refuse to consider these issues, stating that the need for their consideration compels arbitration. *E.g.*, Silvercup Bakers, Inc. v. Strauss, 245 F. Supp. 199, 203 (E.D.N.Y.

whether an arbitrator had exceeded his authority under a clause prohibiting him from adding to the provisions of the agreement, the Eighth Circuit has said[11] that the authority to make a specific award must be found within the four corners of the written contract.[12] Some courts have indicated that a clause prohibiting the arbitrator from adding to the agreement does not affect his authority to hear a dispute, but applies only to his authority to make an award.[13] However, at least one court has said that on a motion to enforce an award, the only question open to the court was whether the arbitrator "ruled on a question of contract interpretation,"[14] and allowed an award based on an implied provision of the bargaining agreement even though the agreement forbade adding to its terms.[15]

1965); See Linton's Laundry v. Restaurant Employee's Local 138, 233 F. Supp. 112 (E.D. Pa. 1964).

Although courts will compel arbitration whenever possible, bargaining history will be considered by some courts in finding that a dispute is not subject to arbitration. See Independent Petroleum Workers v. Standard Oil Co., 275 F.2d 706, 709-10 (7th Cir. 1960); Local 201, IUEW v. General Elec. Co., 262 F.2d 265, 271 (1st Cir. 1959); Sunnyvale Westinghouse Salaried Employee's Ass'n v. Westinghouse Elec. Corp., 175 F. Supp. 685, 689 (W.D. Pa. 1959), *aff'd per curiam*, 276 F.2d 927 (3d Cir. 1960).

11 Truck Drivers Local 784 v. Ulry-Talbert Co., 330 F.2d 562 (8th Cir. 1964).

12 *Id.* at 563; see Local 2130, IBEW v. Bailey Case & Cooler, Inc., 232 F. Supp. 394 (E.D. Pa. 1964). *But see* Rubenstein, *Some Thoughts on Labor Arbitration*, 49 MARQ. L. REV. 695, 698-99 (1966).

Essentially, there are two conflicting interpretations of collective bargaining agreements. One, known as the "reserved rights" view, espouses the intrinsic supremacy of management over the later forming unions—a supremacy which is relinquished only to the extent stipulated by the labor contract. The other interpretation, known as the "implied obligation" view, maintains that all the issues confronting labor and management cannot possibly be transcribed on paper. Consequently, all those customs and practices that have become accepted by the employer and employees are considered part of the agreement, as long as they are not challenged by either side during negotiations for a new agreement. Obviously, the "reserved rights" concept is favored by management, the "implied obligations" view by labor. McLaughlin, *Custom and Past Practice in Labor Arbitration*, 18 ARB. J. (n.s.) 205, 222 (1963).

13 *E.g.*, Carey v. General Elec. Co., 315 F.2d 499, 507-08 (2d Cir. 1963); IBEW v. Westinghouse Elec. Corp., 228 F. Supp. 922, 924 (S.D.N.Y. 1964); IUEW v. Westinghouse Elec. Corp., 218 F. Supp. 82, 86-87 (S.D.N.Y. 1963), *aff'd*, 326 F.2d 758 (2d Cir. 1964).

State courts have reached a different conclusion saying that submitting the issue to arbitration would be "an idle gesture, as no valid award could be made." Carey v. Westinghouse Elec. Corp., 11 N.Y.2d 452, 184 N.E.2d 298 (1962) (dictum), *rev'd on other grounds*, 375 U.S. 261 (1964).

A few courts say that a party cannot voluntarily submit a claim to arbitration, await the outcome, and challenge the authority of the arbitrators to act if the decision is unfavorable. Ficek v. Southern Pac. Co., 338 F.2d 655, 657 (9th Cir. 1964); *accord*, Henderson v. Eastern Gas & Fuel Associates, 290 F.2d 677, 680 (4th Cir. 1961); *cf.*, United Steelworkers v. Northwest Steel Rolling Mills, Inc., 324 F.2d 479, 482 (9th Cir. 1963). Compare Woolley v. Eastern Air Lines, Inc., 250 F.2d 86, 90 (5th Cir. 1957).

14 American Brake Shoe Co. v. Local 149, UAW, 285 F.2d 869 (4th Cir. 1961).

15 *Ibid.*

In dealing with questions of arbitrability and arbitrator's awards arising under section 301(a) of the Labor Management Relations Act, the judiciary has employed a somewhat divergent approach. Courts rule an issue arbitrable whenever possible; but when considering awards, the courts usually limit the arbitrator's authority to the express language of the bargaining agreement. The courts' flexible approach toward arbitrability is understandable: national labor policy favors arbitration as a method of maintaining industrial peace,[16] and the process of arbitration is thought to have a cathartic value.[17] Thus, the courts are hesitant to rule a dispute non-arbitrable. On the other hand, the tendency of the courts to limit the arbitrator's award-making authority to the express provisions of the bargaining contract is less comprehensible, and perhaps unrealistic. For example, in the instant case it seems evident that the court felt that if the arbitrator had been allowed to interpret the prior voting practice as an implied provision of the bargaining agreement, the arbitrator would have expanded the scope of his authority beyond the intent of the bargaining agreement. This rationale, while perhaps valid, does not offset the threat of excessive judicial encroachment upon the arbitrator's authority to arbitrate—a result which the instant court's decision did bring about. In *Torrington* the arbitrator had the power to interpret the bargaining agreement, which necessarily includes the authority to determine what is contained in the contract. Consequently, the arbitrator's interpretation of the pre-contract negotiations led to the inclusion of the voting policy as an implied provision of the bargaining agreement. By deciding that the voting policy was part of the agreement the arbitrator did not add to the agreement, but instead specified what the agreement was. The Second Circuit, in rejecting the arbitrator's interpretation of the pre-contract negotiations, indicated that the courts, not the arbitrator, shall determine what is contained in a bargaining agreement. Clearly, this usurps the function of the arbitrator and tampers with the merits of the dispute.

Thus the issue becomes one of greater arbitrator freedom or increased judicial participation in arbitration. It is submitted that the courts should apply the same standard in determining an arbitrator's authority to make an award as they employ in deciding whether a dispute is arbitrable. That is, the courts should allow an award to stand unless the bargaining contract clearly relieves the arbtirator of the power to make the award in dispute. If this standard had been applied in *Torrington,* the court should have declined to vacate the arbitrator's award since the arbitrator had not been precluded from making an award by the terms of abritration contained in the new collective bargaining agreement.

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16 LMRA § 701, 29 U.S.C. § 171 (1964).

17 Gregory, *Arbitration of Grievances Under Collective Bargaining Agreements,* 1 GA. L. REV. 20, 26 (1966).

Labor Law—FAIR LABOR STANDARDS ACT—MAINTENANCE EMPLOYEES OF BANK WORKING IN RENTAL OFFICE PORTION OF BANK BUILDING ARE PART OF BANKING ENTERPRISE AND COVERED BY 1961 AMENDMENT.—Savannah Bank & Trust Co. occupies twenty-two percent of its fifteen story building and rents the remaining space to various tenants. The bank paid its employees engaged in banking operations the minimum wage required by the Fair Labor Standards Act,[1] but refused to pay the minimum wage to its elevator starter and maids whose duties were limited to services rendered exclusively in the rental office portion of the building. Therefore, the Secretary of Labor brought an action under section 17 of the Fair Labor Standards Act to enjoin the bank from violating provisions of the FLSA.[2] The district court[3] held that the 1961 amendment to the FLSA, which extended minimum wage coverage to those employees covered by an enterprise engaged in interstate commerce or in the production of goods for commerce, did not extend coverage to the bank's maintenance employees who worked on the leased floors of the building. On appeal, *held*, reversed. Maintenance workers, employed by a bank, who work in part of building owned by the bank which is not involved in banking operations, are part of the "banking enterprise" and thus are covered by the 1961 amendment to the FLSA. *Wirtz v. Savannah Bank & Trust Co.*, 362 F.2d 857 (5th Cir. 1966).

Prior to the 1961 amendments to the FLSA,[4] coverage of an employee

1 29 U.S.C. §§ 201-19 (1964). The general purpose of the FLSA is found in § 202(a), which reads:

> (a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. . .

29 U.S.C. § 202(a) (1964). For a thorough insight into the legislative history of the Act see Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 464 (1939).

In United States v. Darby, 312 U.S. 100 (1941), the Supreme Court held that the FLSA was a valid exercise of Congressional regulatory authority over commerce. The Fair Fair Labor Standards Act is hereinafter abbreviated as FLSA.

2 29 U.S.C. §§ 206, 207 (1964). The FLSA provides that employees coming within its coverage must be paid ceratin minimum wages (§ 206) and overtime pay (§ 207).

3 Wirtz v. Savannah Bank & Trust Co., 51 CCH LAB. CAS. 42,324 (S.D. Ga. 1964).

4 29 U.S.C. 203(r)-(s) (1964).

> The purpose of the bill, as amended, is to strengthen and extend the scope of the Fair Labor Standards Act of 1938, thus implementing the declared policy of the act to correct and as rapidly as practicable to eliminate, in industries engaged in

by the FLSA depended upon the nature of his work as it related to commerce, not upon the nature of the employer's[5] business.[6] However, in 1961 Congress extended[7] the coverage[8] of the act to include all employees whose

commerce or in the production of goods for commerce, labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.

S. REP. No. 145, 87th Cong., 1st Sess. 1 (1961) (hereinafter cited as S. REP. 145).

5 29 U.S.C. § 203(d) (1964).

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

Ibid.

6 Under the 1938 act, which was in effect prior to the 1961 amendments, the test was "to determine whether an employee is engaged in commerce . . . not whether the employee's activities affect or indirectly relate to interstate commerce, but whether they are actually in or so closely related to the movement of the commerce as to be part of it." Rosenberg v. Semeria, 137 F.2d 742, 744 (9th Cir.), *cert. denied*, 320 U.S. 770 (1943). See, *e.g.*, A. B. Kirschbaum Co. v. Wailing, 316 U.S. 517, 522 (1942) (dictum). However, the 1961 amendments extended the coverage of the 1938 act through the use of the "enterprise" concept. A.B.A. REP., SECTION OF LABOR RELATIONS LAW 116 (1961).

7 One of the major purposes of the 1961 amendment was to extend protection of minimum wage laws to "4,100,000 additional employees mainly in large retail and service enterprises which are engaged in commerce or in the production of goods for commerce." S. REP. 145 at 1-2.

The exemptions to coverage under the 1938 act which included retail and service establishments were, for the most part, removed by the 1961 Amendments, 29 U.S.C. § 213(a)(2) (1964). For example, the amended act now includes a transit system with a gross volume of sales not less than one million dollars. See 29 U.S.C. § 203(s) (1964) for this and other enterprises now covered by the FLSA. The Senate Committee on Labor and Public Welfare stated:

It is plainly appropriate, therefore, to extend to the employees of the retail selling enterprise the same minimm wage protection that the act now affords to the production and transportation employees, who participate to no greater extent in the interstate commerce carried on in the same goods.

S. REP. 145 at 43.

It should be noted that many exemptions are still retained under the amended act. For example, many cleaners and small newspapers are not covered by the Fair Labor Standards Act. See, 29 U.S.C. §§ 213(a)(1)-213(a) 22 (1964); S. REP. 145 at 27; 12 LAB. L.J. 733-38 (1961).

8 H. REP. 75 (87th Cong., 1st Sess. 4 (1961).

Coverage is extended, subject to specific exemptions, to the employees in the following categories of enterprises engaged in commerce or in the production of goods for commerce:

(1) Any enterprise which has one or more retail or service establishments if the annual volume of sales of the enterprise is not less than $1 million (exclusive of excise taxes) (included here is coverage for gasoline service stations);

(2) Any enterprises which has one or more establishments engaged in laundering, cleaning, or clothes repairing if the annual volume of sales of the enterprise is not less than $1 million (exclusive of excise taxes);

employer qualified as an "enterprise" as stipulated by the amendment.[9] The stipulations[10] are first, that the bank and its related activities constitute establishments of the same enterprise,[11] and second, that this enter-

(3) Any enterprise engaged in local transit business if an annual gross is not less than $1 million (exclusive of excise taxes);

(4) Any enterprise engaged in a local transit in commerce or production of goods for commerce, excluding categories in 1, 2, 3, or 5, if the annual volume of sales of the establishment is not less than $1 million;

(5) Any enterprise engaged in the business of construction or reconstruction, if annual gross is not less than $250,000."

The power of Congress to regulate interstate commerce was the basis of the new coverage provided under the 1961 amendment. S. REP. 145 at 96. But the Supreme Court has extended the commerce clause to include any place, area, or industry which merely affects interstate commerce. Thus, the Supreme Court has recognized that the commerce clause gives Congress the power to regulate interstate commerce. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 17 (1824); see The Minnesota Rate Cases, 230 U.S. 352, 367 (1913). In the *Community Power & Light* case the court stated:

> Congress may . . . enact legislation "to foster, protect, and control [interstate] commerce with appropriate regard to the welfare of those who are immediately concerned as well as the public at large, and to promote its growth and insure its safety."

In re Community Power & Light Co., 33 F. Supp. 901, 913 (S.D.N.Y. 1940).

Thus the establishment of minimum wages by Congress is a valid regulation of interstate commerce. *E.g.*, Morgan v. Atlantic Coast Line R.R., 32 F. Supp. 617, 619 (S.D. Ga. 1940) (dictum); Andrews v. Montgomery Ward & Co., 30 F. Supp. 380, 384 (N.D. Ill., 1939) (dictum), *aff'd sub nom.*, Fleming v. Montgomery Ward & Co., 114 F.2d 384 (7th Cir.), *cert. denied*, 311 U.S. 690 (1940).

9 29 U.S.C. § 203(s)(3) (1964).

10 29 U.S.C. § 203(r)-(s) (1964). The pertinent provisions concerning an enterprise are as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor. . . .

29 U.S.C. § 203(r) (1964).

> "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person. . . .

29 U.S.C. § 203(s) (1964).

> (3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000. . . .

29 U.S.C. § 203(s) (1964).

11 See 29 U.S.C. § 203(r) (1964). The significance which the "enterprise" requirement has to the expanded coverage allowed by the 1961 amendment to the FLSA is delineated in S. REP. 145 at 40-41:

> The "enterprise" concept as a key to new coverage is by no means a novel one. This approach was adopted in proposed amendments to the act which were consid-

prise, which is engaged in commerce, have an annual gross volume of sales of not less than one million dollars.[12] In determining whether separate activities of a bank are part of the same enterprise the following are relevant criteria: (1) whether the activities are related, (2) whether they are under common control, and (3) whether they have a common business purpose.[13] While these requirements seem clear, their actual application in FLSA litigation involving the scope of the 1961 amendment has been inconsistent.[14] Thus, one Federal District Court has held that employees of a management company, owned by a bank for the purpose of operating the bank's building, were not covered by the 1961 amendment since the activities of the management corporation were separate from the banking "enterprise."[15] However, another Federal District Court, in a more recent decision, has held that the operation of a building owned by an insurance company and the interstate commerce activities of the insurance company's home office were part of the same enterprise; thus, all the building's employees were covered under the 1961 amendment.[16]

> ered in 1949 and, was followed by the bill passed by the Senate in 1960 . . . . In the present committee bill the term "enterprise" has been carefully defined and delimited and some revision has been made in last year's definition to clarify and express more accurately its intended scope.

Ibid.

12 29 U.S.C. § 203(s)(3) (1964). Congress defined "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k) (1964). While the congressional definition of sale is restrictive, the term "sale" is wide in scope and capable of being liberally interpreted. The need for a liberal interpretation becomes apparent upon an examination of the legislative history. For example, the "million dollar test" made coverage dependent on the size of a business. It was a way of saying that "anyone who is operating a business of that size in commerce can afford to pay his employees the minimum wage under the law." S. REP. 145 at 5. Furthermore, Congress intended that the method of calculating the dollar volume of sales would include receipts from all types of services and sales. See 29 C.F.R. § 779.248 (1965); S. REP. 145 at 23. Moreover, Congress did not intend to limit "sale" to those definitions quoted in § 203(k). Congress intended for rents, interests, investments, and dividends to be covered by the act. The Senate Committee on Labor and Public Welfare said,

> This section [203(s)(3)] would provide minimum wage and overtime protection under the act for approximately 100,000 additional employees in such enterprises as wholesale trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services.

S. REP. 145 at 31. The act often uses "gross sales" in reference to retail or service establishments. See, *e.g.*, 29 U.S.C. § 203(s), (1), (2), (5) (1964). This would indicate that "sale" should be liberally, not literally, interpreted in order to promote the congressional purpose.

13 See 29 U.S.C. § 203(r) (1964).

14 See notes 15, 16 *infra*.

15 Wirtz v. First National Bank and Trust Co., 239 F. Supp. 613, 615-17 (W.D. Okla. 1965).

16 Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198, 200-06 (W.D. Tenn. 1965).

The legislative history of the 1961 amendment is useful in determining whether banks and office leasing activities are related. The report of the Committee on labor and Public Welfare stated,[17]

> The bill's approach is to treat as separate enterprises those businesses which are unrelated to each other. For example, if a single company owns several retail apparel stores and is also engaged in the lumbering business, the sales of the lumbering business would not be included in the annual dollar volume in determining whether the $1 million test under section 3(s)(1) has been met. The employees of the lumbering business would not be included in the enterprise even if the $1 million test were met since they are not engaged in the related activities of the retail stores.
>
> Within the meaning of this term activities are "related" when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. They are also related when they are *auxiliary and service* activities such as central office and warehousing activities and bookkeeping, auditing, purchasing, advertising, and other services. Likewise, activities are related when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose.

It could be argued that operating a bank and leasing offices in the bank building are two separate and distinct activities. For example, the court, in *Wirtz v. First Nat'l Bank and Trust Co.*,[18] held that the activities of an office leasing firm and a banking business were unrelated since the bank was concerned with general banking business while the leasing firm was concerned with rent and maintenance of offices. But here, the court either erroneously or deliberately failed to consider the close connections between the operation of the building and the bank within that building. Indeed, the activities of the bank and management of the office building appear inextricably related. For example, the office building provides the bank premises for its banking activities, as well as future space for possible expansion. On the other hand, the bank controls the office building activities and provides the building with a substantial income. In light of this mutual dependency, it seems valid to conclude that the activities of the two seemingly disparate operations were related. This was the holding reached by the courts in *Wirtz v. Savannah Bank & Trust Co.*[19] and *Wirtz*

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17 S. REP. 145 at 41.

18 239 F. Supp. 613 (W.D. Okla. 1965).

19 362 F.2d 857 (5th Cir. 1966).

v. Columbian Mut. Life Ins. Co.[20] In addition, both courts held that the same factors used in considering whether the two activities were related also required the conclusion that these activities were performed for a common business purpose.[21] Therefore, since Savannah Bank & Trust Co. admitted having common control over both banking and leasing operations,[22] the court in the instant case properly found that the leasing and banking activities were parts of the same enterprise, since all three requirements for making this determination were present.

As reflected by the conflicting opinions of the *First National* and *Columbian* courts, the wording of the 1961 amendment is somewhat ambiguous.[23]

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20 246 F. Supp. 198 (W.D. Tenn. 1965).

21 See Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966); Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198, 202 (W.D. Tenn. 1965). The *Columbian Mutual* and *Savannah Bank* courts concluded that a common business purpose was present. Both courts based their conclusion on the very same factors which were relied on in determining "related activities," namely, business space, investment outlet, and future space. In effect, court interpretation of "related activities" and a "common business purpose" are synonymous.

22 One of the requirements of an enterprise is that the "related activity be performed either through unified operation or common control." 29 U.S.C. § 203(r) (1964). The legislative purpose in establishing this requirement was to exclude independent businessmen who own a franchise from being covered by the act. The purpose of the requirement is delineated in a report of the Committee on Labor and Public Welfare:

> The bill also contains provisions which should insure that a small local independent business, not in itself large enough to come within the new coverage, will not become subject to the act by being considered a part of a large enterprise with which it has business dealings.
>
> The definition of "enterprise" expressly makes it clear that a local retail or service establishment which is under independent ownership shall not be considered to be so operated and controlled as to be other than a separate enterprise because of a franchise, or group purchasing, or group advertising arrangement with other establishments or because the establishment leases premises from a person who also happens to lease premises to other retail or service establishments. For example, a retail establishment will not become part of an enterprise which operates a shopping center merely because it rents its establishment from the shopping center operator.

S. REP. 145 at 41-42.

The *First National* case stated that "common control" was present even though a "unified operation" may have been absent. The court believed common control was present since the bank owned and operated the Management Corporation. Wirtz v. First Nat'l Bank and Trust Co., 239 F. Supp. 613, 616 (W.D. Okla. 1965). In the *Columbian Mutual* case the court found the "common control" requirement since there was only one legal entity. Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198 (W.D. Tenn. 1965). The court in the instant case only mentioned "common control" since the bank admitted its presence. Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966).

23 *Compare* Wirtz v. First Nat'l Bank and Trust Co., 239 F. Supp. 613 (W.D. Okla. 1965) *with* Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198 (W.D. Tenn. 1965). This ambiguity exists despite the fact that the 1961 amendment was the result of long and careful studies. S. REP. 145 at 2.

This ambiguity is corroborated by the fact that the legislative history of the amendment seems indefinite as to exactly what constitutes a common business purpose, an establishment,[24] and a sale. Therefore, it appears as though Congress has drawn obscure boundaries within the terms of the bill, thus forcing the courts to determine these "requirements" on an *ad hoc* basis.[25] In light of this fact, it is submitted that the following changes would attain the broad coverage Congress desired:

(1) Change "annual gross of sales"[26] in section 203(k) to "annual gross

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24 The term "establishment" is undefined in the 1961 amendment. However previous courts have defined an "establishment" as used in other provisions of the act. Generally, the courts hold an establishment to be a distinct physical place of business. See, *e.g.*, A. H. Phillips Inc. v. Walling, 324 U.S. 490, 496 (1945) (warehouse employees held not exempt); Mitchell v. Gammill, 245 F.2d 207, 211 (5th Cir. 1957) (poultry business operated as single unit); McComb v. Wyandotte Furniture Co., 169 F.2d 766, 769 (8th Cir. 1948) (five stores held to be separate establishments). Since a definition of establishment was omitted from the 1961 amendments, the Department of Labor issued a bulletin which stated:

> As used in the Act, the term "establishment," which is not specifically defined therein, refers to a "distinct physical place of business" rather than to an "entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation . . . . This is the meaning of the term as used in sections 3(r), 3(s), 6(b), 7(h), 13(a) and 14 of the Act.

29 C.F.R. § 779.23 (1963).

The *Columbian Mutual* court held that the office building and the home office constituted not only an establishment, but also a functional unity. Wirtz v. Columbian Mut. Life Ins. Co., 246 F. Supp. 198 (W.D. Tenn. 1965). Some courts maintained that an indicia of an establishment is its functional unity. See Mitchell v. T. F. Taylor Fertilizer Works, 233 F.2d 284, 286 (5th Cir. 1956).

25 See A. B. Kirschbaum & Co. v. Walling, 316 U.S. 517, 523 (1942) (dictum). Unlike the Interstate Commerce Act, the FLSA contains no provision for an administrative commission to determine whether a particular employee is within the regulatory scope of the Act. Instead the courts themselves are required by the Act to make this evaluation on an *ad hoc* basis. Consequently, since the passage of the act in 1938, the courts, in determining whether an employee is actually engaged in interstate commerce, have been confronted with intricate problems of statutory interpretation. Mr. Justice Frankfurter articulates this lack of administrative commission comparable to that provided by the Interstate Commerce Act:

> In this task of construction, we are without the aid afforded by a preliminary administrative process for determining whether the particular situation is within the regulated area. Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations.

Ibid.

26 Arguments favoring a literal interpretation of "sale" have been rejected in light of the legislative history of the amendment. See Wirtz v. Columbian Mut. Life Ins. Co.,

volume of income from the business of such enterprise." Congress clearly did not desire to establish a narrow definition of sales since it intended to extend the coverage of the act.

(2) "Establishment" should be defined in section 203 as any distinct physical place of business or any functional unity. "Establishment" should be liberally construed so as to include any "establishment of an enterprise" which has employees engaged in commerce and meets the million dollar test.

(3) The concept of a "common business purpose" should be deleted from the amendment since it and related activities are really synonymous. However, the legislature should expressly exclude eleemosynary, religious, educational, and similar activities of nonprofit organizations from being classified an "enterprise."

(4) "Related activity" should be defined in section 203 as a firm which sustains or benefits another business. If the legislature defines what constitutes a "related activity," then the judiciary won't have to ascertain the meaning on the basis of past facts.

According to Mr. Justice Burton the primary purpose of the FLSA "was to eliminate, as rapidly as practicable, substandard labor conditions throughout the Nation . . . ."[27] Unfortunately, the restrictive wording of the 1961 amendment seems to contradict this purpose as well as the expressed purpose of the amendment, which was to eliminate "fragmented" coverage[28] under the FLSA. Consequently, the danger is manifest that courts may construe the amendment conservatively and deny coverage as did the court in *First National.* To avoid this possibility legislative terminology should be formulated and promulgated which would insure that judicial determinations will henceforth effectuate the purpose of the act.[29]

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246 F. Supp. 198, 204 (W.D. Tenn. 1965) (investment income included under sale); Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857 (5th Cir. 1966) (leasing office is sale of space). *Contra,* Wirtz v. First Nat'l Bank and Trust Co., 239 F. Supp. 613, 618 (W.D. Okla. 1965). The *First National* court said,

> the section involved in this case calls for an annual gross volume of sales as distinguished from income from a business. It is believed that the common ordinary concept of sales was intended in § 203(k) and § 203(s)(3) and must be applied by the Court in this case. It cannot be considered that the rental of space in an office building constitutes sales as defined as in § 203(k) of the Act.

Id. at 618.

27 Powell v. United States Cartridge Co., 339 U.S. 497, 510 (1950).

28 S. REP. No. 145 at 31.

29 See Moffat, *The Legislative Process,* 24 CORNELL L.Q. 223, 231-33 (1939). In essence Moffat feels that the legislature is more suited to remedy a fault such as that which exists in the wording of the 1961 amendment since the legislature is more expedient, perceptive, and accurate than the courts. Furthermore, according to Moffat, the legislature is the superior fact finder and better represents the public view.

Limitation of Action—Tucker Act—Statute of Limitations Not Tolled During Pendency of Administrative Proceedings Required by "Disputes" Clause in Government Contract.—Appellant entered into contract with the Government to supply certain manufactured items. A dispute which arose over an alleged breach by the Government was submitted to the contracting officer and appeal was taken to the Armed Services Board of Contract Appeals pursuant to a standard "disputes" clause[1] in the contract. Upon an adverse determination by the administrative agency the manufacturer brought suit under the Tucker Act.[2] The district court granted the Government's motion for summary judgment holding the complaint barred by the six year statute of limitations[3] suspending the government's sovereign immunity notwithstanding appellant's institution of administrative proceedings within the statutory period.[4] On appeal,

1 Such a clause is required in government fixed-price supply contracts, 32 C.F.R. § 7.103-12 (1958). The clause in the instant case was as follows:

> Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive; provided that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

Crown Coat Front Co. v. United States, 363 F.2d 407, 408, n.2 (2d Cir. 1966), *petition for cert. granted*, 35 U.S.L. Week 3124 (U.S. Oct. 11, 1966) (No. 371).

2 Tucker Act, 28 U.S.C. § 1346(a) (1887), provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims of: . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

3 The Tucker Act was a comprehensive statute which included, among other provisions, a predecessor provision to the present 28 U.S.C. § 2401(a) (1964), which now reads:

> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

4 The final delivery of the products and presentation of the final invoice was made

held, affirmed. The Tucker Act's period of limitations is not tolled during the pendency of administrative proceedings required by the "disputes" clause in a Government contract.[5] Crown Coat Front Co. v. United States, 363 F.2d 407 (2d Cir. 1966) (5-to-4 decision), *petition for cert. granted,* 35 U.S.L. WEEK 3124 (U.S. Oct. 11, 1966) (No. 371).

Statutes of limitation are practical and pragmatic devices[6] to limit the time in which an action may be maintained.[7] In certain situations, however, other considerations may require that the running of the statute be tolled.[8] A distinction has been made between statutes which merely pre-

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on December 14, 1956. On October 4, 1961, appellant's counsel wrote the Contracting Officer and demanded a refund, which was denied; the ASBCA confirmed the Contracting Officer's decision on February 28, 1963. Appellant brought suit on July 31, 1963, five months after the ASBCA decision and over six years after performance under the contract.

5 The court also affirmed a holding by the district court that the cause of action arose at the time of breach and not when the claim was administratively disallowed. McMahon v. United States, 342 U.S. 25, *rehearing denied,* 342 U.S. 899 (1951), was cited as determinative of the issue. *McMahon* involved a claim by a seaman against the United States for injuries and maintenance and cure which had been administratively disallowed. Prior to this case the circuits had rendered conflicting decisions as to whether the date of the injury or the date of the disallowance of the claim commenced the period of limitation. *Compare* Thurston v. United States, 179 F.2d 514 (9th Cir. 1950), *with* Rodinciuc v. United States, 175 F.2d 479 (3rd Cir. 1949). The Supreme Court rejected both the contention that the seaman could not sue until disallowance and that he had no cause of action until then, holding that the period of limitation begins to run from the date of the injury, not from the time of disallowance. McMahon v. United States, *supra* at 27.

The Court of Claims, however, has refused to apply the above rationale to suits against the Government under the Tucker Act distinguishing *McMahon* as ". . . a Suits in Admiralty Act decision which itself rested on the particular history of that statute." Nager Elec. Co. v. United States, 368 F.2d 847, 863 (Ct. Cl. 1966). The court in *Nager,* on facts substantially similar to those of the instant case held that for matters required to be processed under a mandatory "disputes" provision, the judicial claim does not ripen so as to trigger limitations until the decision of the administrative board. *Id.* at 854; *accord,* Conn v. United States, 336 F.2d 1019 (Ct. Cl. 1966).

6 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314, *rehearing denied,* 325 U.S. 896 (1945).

7 Campbell v. Holt, 115 U.S. 620, 621, 623 (1885) (dictum). See, *e.g.,* United States v. Western Pac. R.R., 352 U.S. 59, 72 (1956) (dictum); Pan Am. Petroleum Corp. v. Orr, 319 F.2d 612, 616 (5th Cir. 1963) (dictum).

8 *E.g.,* Weller v. Dickinson, 314 F.2d 598, 601 (9th Cir. 1963) (dictum) (imprisonment of person in whom cause of action resides); Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949) (fraud); Osbourne v. United States, 164 F.2d 767 (2d Cir. 1947) (war); Nelson v. Browning, 391 S.W.2d 881 (Mo. 1965) (infancy); Livingston v. Meyers, 6 Ill. 2d 325, 129 N.E.2d 12 (1955) (physical absence of defendant). See generally Note, 63 HARV. L. REV. 1177 (1950).

The typical state statute of limitation contains a provision for tolling when the person in whom the cause of action resides is under a disability at the time the cause of action accrues. The legal disabilities usually provided for are infancy, insanity, and imprison-

scribe a limitation on existing rights[9] and statutes which prescribe limitations and also confer a cause of action.[10] It was formerly held in statutes of the latter variety that the time limitation was an inherent qualification of the right created[11] and as such an essential condition from which no deviation could be permitted.[12] This reasoning has been applied to suits involving waiver of sovereign immunity.[13] In such cases the time limitation is held to be a statutory restriction upon the jurisdiction of the court[14] and may not be tolled.[15] The Supreme Court, however, has recently dis-

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ment for a term less than life. Littell, *A Comparison of the Statutes of Limitations*, 21 IND. L.J. 23, 35 (1945); see *id.*, 39-41; Blume and Geage, *Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 974-78, 1003-04 (1951). For a compilation of the general provisions of state statutes of limitation, see Mix, *State Statutes of Limitation: Contrasted and Compared*, 3 ROCKY MT. L. REV. 106, 118-29 (1931); Segal, *Digest of Limitations in Personal Injury, Death, and Allied Actions*, 8 PRAC. LAW 71, 76-87 (1962).

9 A general statute of limitations extinguishes only the remedy and does not affect the right. Campbell v. Haverhill, 155 U.S. 610, 618 (1895) (dictum). A claim barred by such a statute ceases to be a legal obligation and becomes only a moral one, which the courts will not enforce. See *id.* at 620.

10 Bournias v. Atlantic Maritime Co., 220 F.2d 152, 155-56 (2d Cir. 1955); see Engle v. Davenport, 271 U.S. 33, 38-39 (1926); Frabutt v. New York C. & St. L. R.R., 84 F. Supp. 460, 464 (W.D. Pa. 1949).

The substantive-procedural dichotomy seems to have originated with the much relied on dictum of The Harrisburg, 119 U.S. 199, 214 (1886). Note, 72 YALE L.J. 600, 604 nn.40, 41 (1963). It is questionable whether the court intended the distinction to be extended beyond a conflict of laws application. *Id.* n.40. For the current conflict of laws formulation of this principle, see RESTATEMENT, CONFLICT OF LAWS § 605 (1934).

11 See, *e.g.*, Bell v. Wabash Ry., 58 F.2d 569, 571 (8th Cir. 1932); American R.R. v. Coronas, 230 Fed. 545, 546 (1st Cir. 1916); Eberhart v. United States, 204 Fed. 884, 890 (8th Cir. 1913) (concurring opinion). Judge Sandborn's statement in *Eberhart* is typical: "An act of Congress which at the same time and in itself authorizes or creates a new liability and prescribes the limitation thereof and of its enforcement, makes those limitations conditions of the liability itself." *Id.* at 891.

12 See, *e.g.*, Damiano v. Pennsylvania R.R., 161 F.2d 534 (3d Cir.), *cert. denied*, 332 U.S. 762 (1947); Pollen v. Ford Instrument Co., 108 F.2d 762, 763 (2d Cir. 1940). The *Damiano* court in referring to the time limitation enacted in the Federal Employers Liability Act said: "Such statutes may not be tolled after the manner of statutes of limitation, even for fraud or concealment by the defendant which prevent the plaintiff from bringing the action within time." Damiano v. Pennsylvania R.R., *supra* at 535. See generally, Annot., 15 A.L.R.2d 500 (1951).

13 *E.g.*, Sgambati v. United States, 172 F.2d 297, 298 (1957), *cert. denied*, 337 U.S. 938 (1949); see Finn v. United States, 123 U.S. 227, 232 (1887), *appeal dismissed*, 145 U.S. 658 (1892); Pacific-Atlantic S.S. Co. v. United States, 127 F. Supp. 931, 933 (D. Del. 1955).

14 *E.g.*, Kendall v. United States, 107 U.S. 123, 125 (1883); Isthmian S.S. Co. v. United States, 302 F.2d 69, 70 (2d Cir. 1962); Edwards v. United States, 163 F.2d 268, 269 (9th Cir. 1947).

15 Burch v. United States, 163 F. Supp. 476, 480 (E.D. Va.), *aff'd*, 261 F.2d 418 (4th Cir. 1958); see Soriano v. United States, 352 U.S. 270, 273 (1957); Sgambati v. United States, *supra* note 13. In *Soriano*, Mr. Justice Clark in referring to tolling by implication stated: "[T]his Court has long decided that limitations and conditions upon which the

credited the so-called "substantive" statute view[16] and indicated that the basic inquiry is whether congressional purpose is effectuated by tolling the statute in given circumstances.[17] Thus at least one circuit has held that the statute of limitations is tolled during the pendency of administrative proceedings required by a Government contract.[18]

An important question posed in the instant decision is whether Congress in the creation of the right of action meant to attach a condition which must be construed as absolute under all circumstances, in the absence of statutory exemption. This problem was at first resolved in favor of a strict construction allowing no exception by implication.[19] The reasoning advanced in support of such a result embodied the substantive statute concept, *i.e.*, that the remedy is a limitation on the right and that the statutory time-bar both removes the remedy and extinguishes the right.[20] This concept has, however, been discarded as a meaningful determinant of whether, or under what circumstances, the limitation period may be extended.[21]

A "jurisdictional" interpretation of the limitation provision where the suit involves waiver of sovereign immunity is often used, as in the principal case, to rationalize construction of the time-bar as an absolute condition.[22] However, upon close scrutiny it is readily apparent that this is merely another version of the substantive statute theory. The only difference between the two is that the remedy is said to condition the jurisdiction rather than the right of action. In any event this argument is unconvincing in

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Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." Soriano v. United States, *supra* at 276.

16 See Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231 (1959).

17 Burnett v. New York Cent. R.R., 380 U.S. 424, 427 (1965); *accord*, Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356 (1943).

18 Northern Metal Co. v. United States, 350 F.2d 833 (3d Cir. 1965); *accord*, Nager Elec. Co. v. United States, 368 F.2d 847 (Ct. Cl. 1966) (alternative holding); Conn v. United States, 366 F.2d 1019 (Ct. Cl. 1966) (alternative holding); *cf.* Kinman v. United States, 139 F. Supp. 925 (N.D. Cal. 1956). *Contra*, States Marine Corp. v. United States, 283 F.2d 776 (2d Cir. 1960); Gray v. United States, 124 Ct. Cl. 313 (1953). See generally Huffcut, *Statutes of Limitation and Disputes Clauses in Government Contracts*, PRAC. LAW, May 1962, P. 91.

19 It was first held that not even the fraud of the defendant could extend the statutory time. Damiano v. Pennsylvania R.R., 161 F.2d 534 (3d Cir.), *cert. denied*, 332 U.S. 762 (1947); Pollen v. Ford Instrument Co., 108 F.2d 762 (2d Cir. 1940).

20 See, *e.g.*, Peters v. Hanger, 134 Fed. 586, 588-89 (4th Cir. 1904); American R.R. v. Coronas, 230 Fed. 545 (1st Cir. 1916).

21 Burnett v. New York Cent. R.R., 380 U.S. 424, 426-27 (1965) (the distinction between substantive and procedural statutes of limitation does not determine whether or when the limitation period may be extended); *cf.* Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575, 579 (9th Cir. 1964); Kansas City, Mo. v. Federal Pac. Elec. Co., 310 F.2d 271, 283 (8th Cir. 1962).

22 See, *e.g.*, Soriano v. United States, 352 U.S. 270, 273 (1957); States Marine Corp. v. United States, 283 F.2d 776, 779 (2d Cir. 1960).

that it makes a narrow legalistic distinction between two types of statutes of limitation and assumes that by virtue of this distinction that one may be tolled while the other may not. Such an assumption seems conclusory at best.[23] The fact that the remedy conditions the jurisdiction does not explain why an extention of the remedy should not be allowed. Moreover, each type of statute, whether it is called procedural, substantive or jurisdictional still falls into the category of a statute of limitation. Since all statutes of limitation are based on essentially the same assumptions[24] they should be subject to similar interpretation.

The courts have, as a rule, been reluctant to read an exception into a statute of limitations unless required to do so by necessity.[25] The better reasoning would reject such an approach when the result would be unreasonable and plainly at variance with the policy of the legislation as a whole.[26] As in the construction of statutes generally, the aim in construing an enactment (by Congress) consenting to suit against the United States is to ascertain the legislative intent and give it effect.[27] This intention should be determined by examining the purposes and policies which underlie the limitation provision and the statute of which it is a part.[28]

The Tucker Act evinces a liberal purpose to provide for expeditious and orderly determination of claims against the Government and to relieve Congress of the necessity of considering a great number of private bills.[29] The legislative history demonstrates a satisfaction with the benefits of

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23 *Cf.* Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co., 326 F.2d 575, 579 (9th Cir. 1964). The court discusses the analogous substantive-procedural distinction and states that semantical distinctions unsupported by reason are not to be viewed with favor.

24 *Cf.* Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253, 256 (4th Cir. 1949).

25 See Amy v. Watertown, 130 U.S. 324 (1889) (dictum); Kilian v. Stackpole Sons, Inc., 98 F. Supp. 500, 505 (M.D. Pa. 1951) (dictum); Zahn v. Taylor, 7 Wis. 2d 60, 95 N.W.2d 771, 773 (1959) (dictum). Exceptions are usually implied only when access to the courts is physically prevented by war, Hangar v. Abbott, 73 U.S. (6 Wall.) 532 (1867); Osbourne v. United States, 164 F.2d 767, 769 (2d Cir. 1947); or by some means equally effective in preventing one from suing seasonably, such as fraud, Scarborough v. Atlantic Coast Line R.R., 178 F.2d 253 (4th Cir. 1949); Toran v. New York, N.H. & H. R.R., 108 F. Supp. 564, 565 (D. Mass. 1952). *But see* Williams v. United States, 228 F.2d 129 (4th Cir. 1955), *cert. denied*, 351 U.S. 986, *rehearing denied*, 352 U.S. 860 (1956). In *Williams*, the Court refused to suspend the time limitation for insanity.

26 *Cf.* United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (dictum), *rehearing denied*, 311 U.S. 724 (1940); United States v. Union Oil Co., 343 F.2d 29, 33 (9th Cir. 1965).

27 *Cf.* Burnett v. New York Cent. R.R., 380 U.S. 424, 426 (1965) (dictum); Midstate Horticultural Co. v. Pennsylvania R.R., 320 U.S. 356, 360 (1943) (dictum). See generally Comment, 14 J. PUB. L. 232 (1965).

28 Burnett v. New York Cent. R.R., *supra* note 27, at 427; see United States v. American Trucking Ass'ns, 310 U.S. 534, 542-43 (1940) (dictum).

29 See H.R. REP. No. 1077, 49th Cong., 1st Sess. 3-4 (1886) (Report by Mr. Tucker on the Tucker Bill).

previous legislation in this area[30] and a general feeling that such benefits could be made greater by extending the jurisdiction of the courts.[31] Recognizing the broad purpose of the bill and the general trend toward increasing the scope of waiver by the United States of its sovereign immunity from suit,[32] it seems inconsistent to dismiss the question of tolling upon an artificial categorization of the statute of limitation involved.

The rationale and policies behind statutes of limitation are based primarily on a concept of fairness to the defendant.[33] The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims eventually should prevail over the right to prosecute them.[34] A construction which permits tolling during administrative proceedings imposed by the Government would do no violence to the concepts behind the limitation provision and would serve to effectuate the liberal purpose of the Tucker Act.[35]

Certainly a decision such as *Northern Metal* is desirable from the standpoint of sound judicial administration and fairness to the parties involved.[36] On the other hand, it is questionable whether the courts ought to look beyond the language of the legislation to impose an unwritten condition merely to eliminate hardship on the plaintiff or inconvenience to the courts. The flaw in *Northern Metal* is not in abandoning the poorly reasoned traditional approach; rather it is in ignoring a workable, though admittedly less attractive, solution which remained within the terms of the statute. The protective suit[37] as an established device to achieve judicial review

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30 *Id.* at 3.

31 *Ibid.*

32 The broad lines of the trend in waiving the immunity of the United States from suit appear from the Court of Claims Act, 1855, 10 Stat. 612 (codified in scattered sections of 28 U.S.C.); Tucker Act, 1887, 24 Stat. 505 (codified in scattered sections of 28 U.S.C.); Patent Infringement Act of 1910, 35 U.S.C. § 68 (1964); Suits in Admiralty Act, 1920, 41 Stat. 525 (codified in scattered sections of 46 U.S.C.); Federal Tort Claims Act, ch. 753, 60 Stat. 842 (1946) (codified in scattered sections of 28 U.S.C.). For a comparable trend in waiver of sovereign immunity by state governments, see Shumate, *Tort Claims Against State Governments*, 9 LAW & CONTEMP. PROB. 242 (1942).

33 Northern Metal Co. v. United States, 350 F.2d 833, 838 (3d Cir. 1965) (dictum); *cf.* Railroad Telegraphers v. REA, 321 U.S. 342, 348-49 (1944).

34 *Id.* at 349.

35 It may be argued that the reasons for the existence of a limitation provision do not appear in the instant case. The appellant effectively gave the government notice by bringing its claim to the contracting officer within six years of accrual and the administrative proceeding had the effect of preserving all the relevant evidence. See the discussion of policies and purposes behind the limitation provision and Tucker Act in general as a reason for tolling the statute in this situation in the *Northern Metal Co.* case.

36 See Crown Coat Front Co. v. United States, 363 F.2d 407, 414, 415 (2d Cir. 1966) (dissenting opinion).

37 The protective suit requires the plaintiff to file suit in district court and obtain a

of an administrative determination without engrafting a new disability on the statute is neither clearly unreasonable nor plainly at variance with the policy of the legislation as a whole. It is for this reason, though unarticulated in its opinion, that the second circuit has probably achieved the correct result in the instant case.

Wills—Construction—Devise of Realty to Named Husband and Wife Constitutes Class Gift When Such Intent Is Impliedly Shown by Language of Will.—In an action brought for construction of a will,[1] the trial court held that the devise to a named husband and wife of certain realty in fee simple, and a life estate in other property, resulted in a half-interest to each, such that the wife's death prior to the death of the testatrix caused a lapse in the devise to her.[2] By the terms of the will the life estate was to expire at the deaths of the husband and wife, and the devisees were charged with the satisfaction of a mortgage upon the devised fee.[3] On appeal, *held*, reversed. When the language of a will indicates that the maker of the will looked upon the named devisees as a unit, the disposition

stay in any case where the question of time is important to the running of the statute of limitation while administrative appeal is pending. If the decision of the ASBCA proves unfavorable the plaintiff is already in court and can have a judicial determination of the issue.

For grounds upon which judicial review of administrative decision can be had, see 41 U.S.C. § 321 (1964), which provides that the decision is final and conclusive unless it is "fradulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

1 The Court of Ordinary in the county of the testator's domicile has exclusive probate jurisdiction in Georgia. Ga. Code Ann. § 113-603 (1933); Jackson v. Sapp, 210 Ga. 134, 135, 78 S.E.2d 23, 24 (1953); 1 Redfearn, Wills and Administration in Georgia § 113 (3d ed. 1965). But when construction of a will is involved, the Court of Ordinary, upon its own motion or the motion of one of the parties, must transfer the action to the Superior Court for determination of the proper construction before proceeding further. Ga. Code Ann. § 113-1423 (1965); Davis v. Davis, 94 Ga. App. 459, 462, 95 S.E.2d 42, 44 (1956).

2 The testatrix had not provided a residuary clause in the will, and under the trial court's construction an intestacy existed as to the wife's half-interest in the devise. See Ga. Code Ann. § 113-813 (1933); Collier v. Citizens & Southern Nat'l Bank, 206 Ga. 857, 59 S.E.2d 385 (1950); Snellings v. Downer, 193 Ga. 340, 344-45, 18 S.E.2d 531, 533-34 (1942). *But cf.* Ga. Code Ann. § 113-812 (1933). This section provides that living issue of a legatee who has predeceased his testator are substituted in the place of their ancestor, and no lapse occurs when the devise is absolute and without a remainder or other limitations. See also Lawson v. Hurt, 217 Ga. 827, 125 S.E.2d 480 (1962) (wife of testator sole legatee).

3 The devisees were referred to in the will as "George S. and Mrs. Mamie D. Crane" in several places. With regard to the life estate, the will provided that the remainder was to go to "The Lanier Home at their deaths." The obligation to satisfy the mortgage was approximately $4000 "which they will have to continue to pay off."

is to a class, and not to the several individuals comprising it. *Eppes v. Locklin*, 222 Ga. 86, 149 S.E.2d 148 (1966).

Since the intent of the testator governs testamentary disposition,[4] the courts will construe a will to give substance to the supposed intent of the testator[5] when expressed intent is absent. Generally, it is said that a gift to a class, as distinguished from a gift to the several individuals who comprise it, results when the beneficiaries of a devise form an entity or unit.[6]

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4 *E.g.*, Stegeman v. Smith, 67 Ill. App. 2d 451, 214 N.E.2d 597, 601 (1966); In the Matter of Foster, 411 P.2d 482, 484 (Sup. Ct. Nev. 1966); Stephens v. Stephens, 218 Ga. 671, 18 S.E.2d 208 (1963).

5 *E.g.*, In re Randall, 49 Cal. Rptr. 280, 282 (Ct. App. 1966); In the Matter of Harber, 99 Ariz. 323, 409 P.2d 31, 33 (1965); Giese v. Smith, 195 Kan. 607, 408 P.2d 687, 690 (1965); ATKINSON, WILLS § 146 (2d ed. 1953). What is often involved, however, is not the determination of what the testator actually thought, but what he would have thought had he considered the particular problem at issue. Roberts v. Trustees of Trust Fund for Town of Tamworth, 96 N.H. 223, 73 A.2d 119, 121 (1950) (dictum); 2 SCOTT, TRUSTS § 164.1 (1939).

Numerous canons of construction and interpretation have evolved from judicial consideration of wills. See generally ATKINSON, WILLS § 146 (2d ed. 1953); 4 PAGE, WILLS ch. 30 (Bowe-Parker ed. 1961); RESTATEMENT, PROPERTY §§ 241-48 (1940); Warren, *Interpretation of Wills—Recent Developments*, 49 HARV. L. REV. 689 (1936).

6 5 AMERICAN LAW OF PROPERTY § 22.4 (Casner ed. 1952). Whether in fact this "unit" can be considered a "class" depends on whether the testator was "group-minded" with respect to his beneficiaries. *Ibid.*

The *Restatement of Property* recognizes in addition to the above distinction three significant differences between the effects of a conveyance to single individuals and one to a class:

> (1) the effect of the death of one of the described group prior to the effective date of the conveyance containing the limitation; (2) the effect of the revocation by codicil of the interest which has been limited by a prior testamentary instrument to one of the described group; and (3) the ability of the group to acquire new members subsequent to the execution of the conveyance containing the limitation.

RESTATEMENT, PROPERTY, Introductory Note ch. 22, at 1445 (1940). The possibility of change in the number of beneficiaries is the crucial distinction, the *sine qua non*, between class gifts and gifts to individuals, and is the essence of the above enumeration. See *id.* § 279, comment *a*. Thus, the actual number included and the composition of the class are unknown at the time of the gift, but are to be determined at some future time, with the size of the share of each member to be determined usually by the number of members of the class at that time. Houston v. Harberger, 377 S.W.2d 673, 678 (Tex. Civ. App. 1964); Lichter v. Bletcher, 266 Minn. 326, 123 N.W.2d 612, 615 (1963). The formulation of this definition apparently originated with Jarman, 1 JARMAN, WILLS § 232 (6th Am. ed. 1893), and is adopted by Page, 4 PAGE, WILLS § 35.1 (Bowe-Parker ed. 1961). But this definition has been severely criticized. Cooley, *What Constitutes a Gift to a Class*, 49 HARV. L. REV. 903, 925-30 (1936). Cooley's major objection to the formulation is that it concerns itself with the mode of the gift, and not with the object; and that it presumes by statement the very issue to be determined by analysis of the evidence. *Id.* at 926, 927-28. He is also disturbed by the vagueness in such terms as "time of the gift" and "at some future time." *Id.* at 926. But, as Cooley indicates, the "time of the gift" can only refer to the time the will is made. *Ibid.*

Thus, the preferred construction is that the gift is to the individuals severally when they are specified by name in the will,[7] but to a class when the

It is interesting to note that in a more recent edition of Jarman's treatise, a reconsideration of this definition seems to have occurred, and more general definitional considerations are proposed, which are somewhat comparable to the position taken by the *Restatement of Property*. *Compare* 1 JARMAN, WILLS § 232 (6th Am. ed. 1893), *with* 1 JARMAN, WILLS 448-56 (Jennings-Harper ed. 1951); *compare* 1 JARMAN, WILLS 448-56 (Jennings-Harper ed. 1951), *with* RESTATEMENT, PROPERTY, Introductory Note ch. 22, at 1445 (1940). However, despite the criticism of the definition, it is generally applied in American courts and, despite its drawbacks, seems serviceable when not rigidly adhered to. See Lichter v. Bletcher, *supra*; Cooley, *supra* at 925 n.77.

The difficulty first enumerated by the RESTATEMENT, PROPERTY, *supra*, in distinguishing class gifts from gifts to individuals concerns the death of one of the beneficiaries prior to the date the conveyance is to take effect. When the gift is determined to be to an individual, the death of the individual before the death of his testator results in a lapse in the devise to him, in the absence of an applicable lapse statute. See Lawes v. Lynch, 6 N.J. 1, 76 A.2d 885 (1950); 5 AMERICAN LAW OF PROPERTY § 22.4, at 252 (Casner ed. 1952). On the role played by lapse statutes, see generally 5 AMERICAN LAW OF PROPERTY §§ 21.26-21.30 (1952). But when the gift is determined to be to a class, the share of the predeceased beneficiary is shared by the remaining members of the class and there is no lapse. See, *e.g.*, In the Matter of Haney, 174 Cal. App. 2d 1, 344 P.2d 16 (1959); 5 AMERICAN LAW OF PROPERTY § 22.4, at 252 (Casner ed. 1952). In this respect a revocation of the interest of a beneficiary by codicil would have the same effect as if he had died prior to the date the conveyance took effect, with the disposition of his share being determined by the manner in which the court construed the gift. *Ibid.*

The ability of the group to change in number obviously means that the group may either increase or decrease. If the disposition is to "the children of B, deceased," for example, the class can only suffer diminution. If, however, B in the above example is still alive, the class membership is subject to either increase or decrease. See generally, RESTATEMENT, PROPERTY § 279 and comments (1940).

For general discussion of class gifts and the attendant problems, see 5 AMERICAN LAW OF PROPERTY § 22 (Casner ed. 1952); RESTATEMENT, PROPERTY ch. 22 (1940); Casner, *Class Gifts-Definitional Aspects*, 41 COLUM. L. REV. 1 (1941); Casner, *Class Gifts-Effect of Failure of Class Member to Survive the Testator*, 60 HARV. L. REV. 751 (1947); 41 MICH. L. REV. 749 (1943).

7 Peadro v. Peadro, 400 Ill. 482, 81 N.E.2d 192, 196 (1948) (dictum); 5 AMERICAN LAW OF PROPERTY § 22.5 (Casner ed. 1952); see, *e.g.*, Tabor v. National Bank of Commerce, 351 S.W.2d 126, 128 (Tex. Civ. App. 1961); Buffington v. Mason, 327 Mass. 195, 97 N.E.2d 538, 540 (1950). A provision that the named persons shall share and share alike, or the use of a similar provision, is often considered as supporting the gift-to-individuals construction. See, *e.g.*, Lawes v. Lynch, *supra* note 6, at 888; *In re* Hogarth's Estate, 155 Misc. 734, 279 N.Y. Supp. 189 (Surr. Ct. 1935); *cf.* Roberts v. Trustees of Trust Fund for Town of Tamworth, 96 N.H. 223, 73 A.2d 119, 122 (1950) (absence of provision supports class gift construction). Where particular portions or shares are separately and specifically assigned to the named individuals, the construction preference in favor of the individual gift construction is so strong as to be almost conclusive. See, *e.g.*, *In re* Bogardus' Will, 5 Misc. 2d 607, 164 N.Y.S.2d 485 (Surr. Ct. 1957); Buffington v. Mason, *supra* 11 at 540.

Even though named individuals are also referred to in general terms, such as a group indication of relationship to the testator or another, the constructive preference in favor of a gift-to-individuals is not overcome, in the absence of indications of contrary intent.

beneficiaries are designated by a group-term.[8] However, the construction preference that the gift is to the individual beneficiaries is not overcome by the inclusion of a group-term,[9] or the word "jointly,"[10] with the individual names. But contrary evidence of the testator's intent, such as a

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See Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660 (1961) (half-income from trust to named children); Young v. Whisler, 19 Ill. 2d 501, 167 N.E.2d 191 (1960) (two of four children named took all); Jorgenson v. Pioneer Trust Co., 198 Ore. 579, 258 P.2d 140 (1953) ("to my sons," thereafter named); *In re* Ford's Estate, 201 Misc. 198, 108 N.Y.S.2d 715 (Surr. Ct.), *aff'd without opinion*, 281 App. Div. 680, 117 N.Y.S.2d 484 (1951) (devise to testatrix's counsins); Liebhardt v. Avison, 123 Colo. 338, 229 P.2d 933 (1951) (devise to testator's nephews); In re Sullivan's Estate, 31 Cal. App. 2d 527, 88 P.2d 225 (1939) (devise to testator's named brothers and sisters).

When the beneficiaries are not named but mentioned by number and class designation, *e.g.*, "the seven children of X," the numerical specification is often held equivalent to naming, and class-gift construction fails. See, *e.g.*, Davis v. Mercantile Trust Co., 206 Md. 278, 111 A.2d 602 (Ct. App. 1955) (illegitimate child of nephew not included in bequest); Landrum v. National City Bank, 210 Ga. 316, 80 S.E.2d 300 (1954) (devise to "my three sisters"). *But see*, Adams v. Simpson, 358 Mo. 168, 213 S.W.2d 908 (1948) (enumeration disregarded to effectuate class gift construction); *cf.*, *In re* Ziegler's Estate, 356 Pa. 93, 51 A.2d 608 (1947) (class gift to "my six children" and their heirs).

[8] *E.g.*, In the Matter of Haney, 174 Cal. App. 2d 1, 344 P.2d 16, 23 (1959); *In re* Wood's Estate, 321 Pa. 497, 184 Atl. 13, 15 (1936); see 5 AMERICAN LAW OF PROPERTY § 22.9 (Casner ed. 1952). An indication by use of a group-term that certain persons are to be substituted for the primary taker in case of his death is usually held to be a class gift as to the substituted group. See, *e.g.*, Tiehen v. Hebenstreit, 152 Neb. 753, 42 N.W.2d 802 (1950) (to "children" of primary taker should he die); Smyth v. McKissick, 222 N.C. 644, 24 S.E.2d 621 (1943) (to children of deceased remainderman). As long as the grouping is natural, the nature of the group specified seems immaterial to the determination of whether a class gift was made. See Landrum v. National City Bank, 210 Ga. 316, 80 S.E.2d 300 (1954) ("to my nieces"); Cahill v. Cahill, 402 Ill. 416, 84 N.E.2d 380 (1949) (remainder to life tenant's "Heirs of Blood"); *In re* Taylor's Estate, 357 Pa. 120, 53 A.2d 136 (1947) (to "issue" in remainder); Martin v. Gray, 209 Ark. 841, 193 S.W.2d 485 (1946) (to brothers and sisters of testatrix and spouse); Hill v. Birmingham, 131 Conn. 174, 38 A.2d 604 (1944) (trust income to grandchildren); Ireland v. Hudson, 96 Colo. 240, 41 P.2d 237 (1935) (bequest to "employees" of corporation).

The personal intimacy of the testator with the beneficiaries may be such as to set the beneficiaries apart from others, and has been relied on in support of a class gift construction. See, *e.g.*, Krog v. Hafka, 413 Ill. 290, 109 N.E.2d 213 (1952); Jennings v. Newman, 350 Mo. 276, 221 S.W.2d 487 (1949). The indicated purpose of the testator to exclude certain persons, who would take from the disposition if a partial intestacy occurred, has been somewhat relied upon in support of a class gift construction. See, *e.g.*, Strauss v. Strauss, 363 Ill. 442, 2 N.E.2d 699 (1936); *cf.* Holloway v. Burke, 336 Mo. 380, 79 S.W.2d 104 (1936). *But see*, Schoenberg v. Lodenhemper's Ex'rs, 314 Ky. 105, 234 S.W.2d 501 (1950); *In re* Penrose's Estate, 183 Misc. 226, 47 N.Y.S.2d 732 (Surr. Ct. 1944).

[9] Liberty Nat'l Bank v. Smoot, 135 F. Supp. 654, 657-58 (D.D.C. 1955); Black v. Gettys, 238 S.C. 167, 119 S.E.2d 660, 665 (1961); In the Matter of Estate of Conklin, 139 Cal. App. 2d 532, 293 P.2d 794 (1956); 5 AMERICAN LAW OF PROPERTY § 22.6 (Casner ed. 1952).

[10] *In re* Estate of Carter, 203 Iowa 603, 213 N.W. 392, 394 (1927); *cf.* Mustain v. Gardner, 203 Ill. 284, 67 N.E. 779 (1903) (use of "jointly" doesn't presume joint tenancy).

common scheme of disposition,[11] can overcome either construction preference.[12] And although the individually named beneficiaries may in fact exhaust the membership of a group or "class," such evidence has been held insufficient to overcome the construction preference that the gift is to the individuals separately.[13] This position is particularly strong when the beneficiaries are not members of a "natural" class.[14] Thus, where a testator devised one-thirtieth of his estate as personalty to two named individuals who were husband and wife, the court held that the couple took as tenants in common, such that the wife's death prior to that of the testator resulted in a lapse in the devise to her.[15]

In reaching its decision in the instant case, the court was of the impression that the manner in which the beneficiaries were specified in the will, *i.e.*, "George S. and Mamie D. Crane," indicated that the testator was describing all those who came within the class "Crane."[16] It is unclear

11 *Eg.*, Lichter v. Bletcher, 266 Minn. 326, 123 N.W.2d 612 (1963) (half of estate testatrix's relatives, half to husband's); Leo v. Armington, 74 R.I. 297, 60 A.2d 475 (1948) (class gift—from taker to named groups to charity); Old Colony Trust Co. v. Treadwell, 312 Mass. 214, 43 N.E.2d 777 (1942) (Class gift—three nieces take income after father's death).

12 The cases cited in notes 10 and 11 *supra* apply to overcoming the construction preference that the gift was to the individual beneficiaries. It is conceivable, however, that a testator could distribute his estate "to my children, and if any dies before me, his share will go to the residuary legatee," or otherwise to beneficiaries as a group, but with an indication that the share of a predeceased beneficiary was to lapse. In such a case the courts should have no trouble in finding that a gift to the individual beneficiaries, rather than to a class, resulted. Similarly, a devise "to my children, the older to take the meadowlands, while the younger is to have the remainder" would be analogous to the inclusion of a group term with the names of individuals (see note 10 *supra*), and should clearly be treated as a gift to the beneficiaries severally.

13 *E.g.*, Lee v. Foley, 224 Miss. 684, 80 So. 2d 765 (1955). The "natural grouping" in this case was that the beneficiaries were children of the testator. *Id.* at 766; *accord*, Church v. Gibson, 286 S.W.2d 91 (Ky. Ct. App. 1956). In *Church* the court held that a devise of a life estate to one of testator's cousins, with the remainder to vest in three other cousins and a fourth party of her children, if she predeceased the primary beneficiary, did not result in a class gift to a class as regards the remainder. *Ibid.* See also 5 AMERICAN LAW OF PROPERTY § 22.6 (Casner ed. 1952). *Contra*, *e.g.*, Shannon v. Eno, 120 Conn. 77, 179 Atl. 479 (1935); Thompson v. Martin, 281 Mass. 41, 183 N.E. 51 (1932). In *Shannon* the court considered that the presence of a gift over in the event of the death of one of the legatees tended to support the individual gift construction. *Ibid.*

14 See, *e.g.*, *In re* Seaman's Estate, 196 Misc. 202, 91 N.Y.S.2d 854 (Surr. Ct. 1949); Upton v. White, 92 N.H. 221, 29 A.2d 126 (1942).

15 Damron v. Mast, 121 N.J. Eq. 489, 191 Atl. 467 (1937).

16 Eppes v. Locklin, 222 Ga. 86, 89, 149 S.E.2d 148 (1966).

In holding that the devise was a class gift, the court probably took the only method apparently available to it to avoid an intestacy as there was no residuary clause in the will, Eppes v. Locklin, *supra* at 87, 149 S.E.2d at 150, and joint tenancies have been abolished in Georgia. GA. CODE ANN. § 85-1002 (1933). Any such simultaneous possession of property is to be treated as a tenancy in common. GA. CODE ANN. § 85-1001 (1933). Although

whether the court meant to stress the particular phraseology in so arguing, though it is difficult to see how this phraseology should be accorded more weight than "George S. Crane and Mamie D. Crane," or some other similar expression, since the naming of the beneficiaries in either manner should be construed as a gift to individuals under traditional notions.[17]

The instant court also emphasized the implications of the language by which the beneficiaries were made responsible for the mortgage on the devised fee: "they will have to continue to pay [it] off."[18] Although it has been held that an obligation imposed upon beneficiaries together entitles them to share mutually in the gift to which the obligation is attached,[19] the instant language, considered by itself, is as readily susceptible to an opposite interpretation. If the gift was indeed to the husband and wife as individuals, a *pro rata* responsibility for satisfaction of a part of the mortgage debt would be upon each. The word "they" could as readily be construed to favor this apportionment as a class gift construction.

Thus, the only language in the will that somewhat supports the court's position is that which specifies that the life estate bequeathed to husband and wife passes to the remainderman "at their deaths."[20] As the court points out, the law favors a construction that avoids an intestacy;[21] the

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no specific mention of tenancies by the entirety is made in the statutes, the Supreme Court of Georgia has stated:

> (P)erhaps the statute of this state, which turned estates by joint tenancy into tenancy [*sic*] in common, may, by a liberal construction, as it abolished the doctrine of survivorship in such estates, be held also to extend to estates to husband and wife and to abolish survivorship in such estates as this, and thus to alter the English law as to this wife's interest as survivor in all this land. It does not in terms do so, but its spirit probably does, and so it has been intimated in some of the opinions of this court.

Parrott v. Edmundson, 64 Ga. 332, 335 (1879). The court in the instant case does not specifically address itself to this problem, but the outcome indicates that the court must have impliedly favored the reasoning in the *Parrott* case. See Eppes v. Locklin, *supra* at 88, 149 S.E.2d at 150.

17 See cases cited notes 7, 13, 14, 15 *supra.*

18 See Eppes v. Locklin, 222 Ga. 86, 88, 149 S.E.2d 148, 151 (1966).

19 Bolles v. Smith, 39 Conn. 217 (1872); see Chase v. Peckham, 17 R.I. 385, 22 Atl. 285 (1891). In the *Chase* case the bequest in a residuary clause was to six named nephews, share and share alike, but they were charged with settling the testator's debts, funeral expenses, and the expenses incurred through execution of the will. The court held that the obligation imposed was joint, thereby indicating the group-mindedness of the testator, such that the share of one of the class who predeceased the testator went into the residue.

The Georgia court cited *Chase* in the instant case, relying on the joint-obligation argument to support its class-gift construction. See Eppes v. Locklin, 222 Ga. 86, 89-90, 149 S.E.2d 148, 151 (1966).

20 *Id.* at 88, 149 S.E.2d at 151.

21 See *In re* Paulsen's Estate, 158 P.2d 186, 190 (Colo. 1945); 5 RESTATEMENT, PROPERTY § 243, comment to clause (a) (1940). This presumption against partial intestacy, however,

fact that the testatrix executed a will indicates a desire on her part to avoid intestacy. As the court reasoned, if the gift were devised to the husband and wife as individuals, the lapse of the wife's legacy when she predeceased the testatrix, would result in an intestacy as to her share in the life estate, since, according to the court, the remainderman could not take until the death of both the husband and wife.[22] Although it is unlikely that the testatrix intended or would favor such a result, it does not necessarily follow therefrom that "at their deaths" precludes any but a class gift construction. In much the same way that the language relative to the mortgage obligation was not inconsistent with a gift-to-individuals construction, "at their deaths" could be construed to mean that a half-interest passed to the remainderman at the death of the first beneficiary, with the enjoyment of only the second half being postponed till the death of the other party.

Even granting that the court's interpretation of "at their deaths" to mean strictly the death of both was correct, the aggregate evidence of a class gift is insufficient to overturn the traditional construction preference in favor of a gift-to-individuals. Though the court's attempt to avoid an intestacy regarding the wife's half-interest is laudable, the availability of a construction of "at their deaths" which would not have been inconsistent with a gift-to-individuals demonstrates the unfeasability of the court's rationale.

It is suggested, however, that the application of the traditional construction preference of a gift to named individuals is inappropriate when the beneficiaries are husband and wife. In the first place, it is probable that when a testator names a husband and wife together in a will as beneficiaries he is thinking of them as a unit. The average individual normally associates a husband with his wife in such a context, and *vice versa*, and in the absence of a showing of contrary intent, the construction preference in such cases should be in favor of a gift to the married unit.

Secondly, there is no convenient term to indicate the testator's group-mindedness in respect to a husband and wife. If, rather than using names, the testator were to devise to "my nephew and his wife," grouping is no more indicated than if the names were given. To make a bequest to "the A.B. Smith family," for example, would also be inadequate for this purpose, since it would be unclear whether the testator intended only the immediate members of the A.B. Smith family or intended the inclusion of collateral members. However, the phrase "the married couple, A.B. Smiths" would perhaps be sufficient. But even if there were no question of identifi-

is readily overcome when the court would have to construe a gift to named individuals as a class gift to avoid intestacy. See, *e.g.*, Damron v. Mast, 121 N.J.Eq. 489, 191 Atl. 467, 471-72 (1937) (dictum). See also Fass v. Blaty, 55 A.2d 458, 459 (N.J.Eq. 1937) (dictum).

22 Eppes v. Locklin, 222 Ga. 86, 88-89, 149 S.E.2d 148, 151 (1966).

cation, the phrase is so awkward that it probably would not occur to the testator. Furthermore, if the testator or his draftsman is aware of the legal problems inherent in a devise to husband and wife, the inclusion of a phrase indicating that the couple were to be treated as a class would be the logical and most probable way to avoid confusion. In the absence, then, of any likely term to effectively "group" a husband and wife, and considering the probability that the testator looked upon the couple as a unit, the intent of the testator is more likely followed by favoring a construction that treats the devise as a class gift.

Since constructions that allow joint-tenancies are generally in disfavor at the present time,[23] what is here suggested will achieve the same result as did tenancies by the entirety in those states where the testator's intent could in no other manner be effectuated. As with the construction preferences in other situations,[24] clear evidence of a contrary intent through a general scheme of disposition or language in the will[25] should overcome the preference that the gift was to an entity. Placement of the name of one spouse in one place in the will, while the name of the other is elsewhere mentioned, should be sufficient evidence to overcome the preference, since the concept of unity upon which the preference rests is thereby destroyed.

Though perhaps the husband-wife entity can not be considered a "class" in the traditional legal cognizance of that word, no reason of policy militates against a similar treatment by the courts in this limited instance. And though it is admittedly a legal fiction to designate the husband-wife entity as a "class," no confusion need result if the application of the suggested construction preference is properly limited by the courts. Seen in this light, then, the result reached by the Georgia court is consistent with the application of this construction preference. Thus, the court correctly ruled that the husband, as the surviving member of the class, received the portion of the devise that would have gone to his wife.

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23 RESTATEMENT, PROPERTY ch. 22, p. 1445 (1940). For a discussion of the earlier construction preferences at common law in regard to joint tenancies, tenancies by the entirety, and tenancies in common, see Damron v. Mast, 121 N.J.Eq. 489, 191 Atl. 467, 471 (1937). The court in *Damron* stated that the old English rule was that a bequest to husband and wife, whether of realty or personalty, was presumed to create a tenancy by the entirety, unless evidence of a contrary intent was shown. The court goes on to say, however, that under the current presumptions as they have evolved a tenancy by the entirety is still (1937) favored when the bequest is of realty; but when the legacy is one of personalty to a husband and wife, a construction that the gift created a tenancy in common is favored. *Ibid.*

24 See text accompanying notes 7, 8 and notes 7 and 8 *supra.*

25 See notes 11 and 12 *supra.*