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Executory Contracts to Convey the Homestead: A New Remedy

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NOTES

Executory Contracts To Convey the Homestead: A New Remedy

The plaintiff entered into a contract for the purchase of defendants' urban homestead. Defendants, husband and wife, later refused to convey this property in accordance with the executory written contract which each of them had signed. Plaintiff brought suit to compel specific performance of the contract for sale. On motion by both parties for summary judgment, the trial court held for the defendants and refused to compel specific performance. The court of civil appeals affirmed,[1] and writ of error was granted by the Texas Supreme Court. *Held, reversed*: Because of recent changes in Texas statutes, specific performance of an executory contract for the sale of a homestead will now lie as available under common law. *Allen v. Monk*, 505 S.W.2d 523 (Tex. 1974).

I. THE HOMESTEAD EXEMPTION

Texas was the first of the states to enact a homestead law protecting the family home from forced sale by creditors. Even before reaching statehood, the Republic of Texas enacted the first homestead law in 1839,[2] and a constitutional guarantee of such an exemption was provided in 1845.[3] Underlying homestead law was the desire to provide a home where the family could live which was secure against creditors' demands.[4]

As the homestead doctrine did not exist at common law, its basis must be found entirely in constitutional and statutory provisions.[5] In Texas, the first such constitutional provision[6] was broad and denied all the family's creditors the remedy of forced sale. The exemption was narrowed in 1869 to provide that those creditors who in some manner had contributed to the existence of the family homestead might force a sale of that property.[7] However, the creditors could recover only on the debts related to the property.[8]

1. Allen v. Monk, 498 S.W.2d 29 (Tex. Civ. App.—Austin 1973), *error granted.*
2. Act of Jan. 26, 1839, [1839] Laws of the Republic of Texas 125, 2 H. GAMMEL, LAWS OF TEXAS 125 (1898); *see* 2 E. OAKES, SPEER'S MARITAL RIGHTS IN TEXAS § 459, at 47 (4th ed. 1961); Thomas & Thomas, *Interpretive Commentary* to TEX. CONST. art. XVI, § 50 (1876).
3. TEX. CONST. art. VII, § 22 (1845).
4. Andrews v. Security Nat'l Bank, 121 Tex. 409, 417, 50 S.W.2d 253, 256 (1932).
5. Gann v. Montgomery, 210 S.W.2d 255 (Tex. Civ. App.—Fort Worth 1948), *error ref. n.r.e.*
6. TEX. CONST. art. VII, § 22 (1845). The protected homestead property was defined as either urban or rural. If urban, such property might be a "lot or lots in value not to exceed $2,000." A rural homestead was limited to 200 acres.
7. TEX. CONST. art. XII, § 15 (1869).
8. *Id.* This article also provided that the valuation of urban homesteads was not to include the value of improvements and was to be determined at the time of designation as the homestead.

Subsequently, in the original provisions of the Texas Constitution of 1876,[9] the place of business of the head of the family was included within the homestead protection.[10] These provisions were amended in 1973[11] to provide further that a single adult person, as well as a family,[12] may acquire a homestead exemption.

II. CONVEYANCE OF THE HOMESTEAD

Since 1845 the Texas constitution has contained provisions which require the wife's consent to any conveyance of the homestead by the husband.[13] These provisions were designed to protect the wife, and thus the family, from the loss of the homestead as a result of the husband's imprudent dealings. A married man was prohibited from selling the homestead, even if it was his separate property, "without the consent of the wife, given in a manner as may be prescribed by law."[14] In 1973 this protection was extended to require that neither spouse could sell or abandon the homestead without the consent of the other. Consequently, both the husband and wife are now protected from the other spouse's imprudent dealings with the homestead.[15]

Determination of the required form of the wife's consent was left to the legislature, and the statutory law pertaining to this question can be divided into two periods, prior to and after January 1, 1968. In the period prior to 1968 the required consent was evidenced by the wife's joinder in the conveyance, signing of the deed, and separate acknowledgment of it.[16] No acknowledgment could be taken from the wife without giving her a free opportunity to retract her joinder in the deed.[17] These requirements were

9. TEX. CONST. art. XVI, §§ 50-51 (1876).

10. In addition to protection from forced sales, in 1951 the homestead was exempted from ad valorem taxation up to a maximum of $3000, assessed taxable value. TEX. CONST. art. VIII, §§ 1-a, 1-b (1951).

11. TEX. CONST. art. XVI, §§ 50-51. The new provisions also increased the maximum value of urban homestead property to $10,000. Article VIII, §§ 1-a and 1-b of the Texas Constitution were also amended in 1973, but the tax exemption provided in 1951 was carried forward. *See* note 10 *supra*.

12. Traditionally, the homestead exemption was only available to a family unit. For this purpose, a family consisted of an independent head, either single or married, with persons dependent upon him. Tanton v. State Nat'l Bank, 125 Tex. 16, 79 S.W.2d 833 (1935); Woods v. Alvarado State Bank, 118 Tex. 586, 19 S.W.2d 35 (1929); Speer & Goodnight v. Sykes, 102 Tex. 451, 119 S.W. 86 (1909); *see* 2 E. OAKES, *supra* note 2, § 478.

13. TEX. CONST. art. VII, § 22 (1845); TEX. CONST. art. VII, § 22 (1861); TEX. CONST. art. VII, § 22 (1866); TEX. CONST. art. XII, § 15 (1869); TEX. CONST. art. XVI, § 50 (1876).

14. TEX. CONST. art. XVI, § 50 (1876).

15. TEX. CONST. art. XVI, § 50.

16. Ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898) (repealed 1967) (formerly TEX. REV. CIV. STAT. ANN. art. 1300 (1962)).

17. Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898) (repealed 1967). In addition to homestead conveyances, this statute, formerly TEX. REV. CIV. STAT. ANN. art. 6605 (1960), promulgated the required procedure for all acknowledgments taken from married women. Its requirements were as follows:

> No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it.

enacted by the legislature in order to protect married women from coercion by their husbands with respect to the sale of the family homestead.[18]

It was in this statutory climate that the leading case, *Jones v. Goff*,[19] was decided. In that case a husband and his wife had contracted to sell their homestead. The contract was signed by both, with the wife separately acknowledging the contract in the required manner.[20] When she later refused to convey, the court was unwilling to order specific performance of the contract, and stated:

> [T]he married woman's power to convey is derived from the statute, and the authority to make executory contracts to convey the homestead is not provided for by the statute and such contracts, therefore being made without authority, fall under the condemnation of [the constitution.] Such contracts as to the married woman are void and not enforcible [*sic*].[21]

Further, the court emphasized that the wife had a statutory right to retract her conveyance at the time of her acknowledgment and privy examination. This power to defeat the conveyance was apparently controlling on the question of whether the courts might order specific performance of a contract to convey a homestead.[22] *Jones* was consistently followed in Texas, and as a result no contract for the sale of a homestead was specifically enforceable.[23]

In 1921 the legislature enacted article 4618, the relevant part of which read: "The homestead whether the separate property of the husband or wife, or the community property of both shall not be disposed of except by the joint conveyance of both the husband and the wife . . . ."[24] Following the passage of this statute, the cases continued to hold that there could be no specific performance of a contract to convey the homestead.[25] One such case, *King v. Whatley*,[26] held that at any time before title had passed the wife might repudiate the contract to convey, and in such a situation the courts would not grant specific performance.

This view of executory contracts for the sale of a homestead was not without its difficulties. In order to protect the rights of the prospective purchaser, the courts established a rule making the husband liable for breach of the contract to convey when his wife refused to convey according to the contract.

An illustration of the form of the required acknowledgment was given in the Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898) (repealed 1967) (formerly TEX. REV. CIV. STAT. ANN. art. 6608 (1960)).

18. Cole v. Baumel, 62 Tex. 108, 111 (1884); Blume v. White, 111 S.W. 1066, 1068 (Tex. Civ. App. 1908).

19. 63 Tex. 248 (1885).

20. *See* note 17 *supra*.

21. 63 Tex. at 255.

22. *Id.* at 254, 255.

23. *See, e.g.*, Collett v. Harris, 229 S.W. 885, 887 (Tex. Civ. App.—Beaumont 1921); Fonda v. Colquitt, 165 S.W. 1195, 1196 (Tex. Civ. App.—Dallas 1914); Ley v. Hahn, 36 Tex. Civ. App. 208, 81 S.W. 354 (1904).

24. Ch. 130, § 1, [1921] Tex. Laws 251 (repealed 1967).

25. Williamson v. Lewis, 346 S.W.2d 957 (Tex. Civ. App.—Fort Worth 1961); Alexander v. Hanover Fire Ins. Co., 346 S.W.2d 667 (Tex. Civ. App.—Eastland 1961); Collett v. Harris, 229 S.W. 885 (Tex. Civ. App.—Beaumont 1921); 2 E. OAKES, *supra* note 2, § 503.

26. 236 S.W.2d 186 (Tex. Civ. App.—Eastland 1951), *error ref. n.r.e.*

The wife might repudiate the contract but be immune from any liability, while the husband was liable in damages.[27] The harshness of this rule was mitigated by allowing the purchaser only his out-of-pocket expenses plus interest.[28] When the vendor's breach was the result of bad faith, however, damages for the loss of his bargain were granted to the purchaser.[29] Somewhat anomalous results occurred, and the courts often strained to find the vendors in bad faith in order to compensate the purchaser.[30]

In 1963 the legislature adopted a number of measures in order to grant new rights to married women. The wife gained "sole management, control, and disposition" of her separate property,[31] and, to enable her to contract, sue, and be sued in her own name, a married woman was also given the status of a single woman with respect to her separate property and special community property.[32] The husband retained general control and disposition powers over the community property, including the wife's special community property.[33] Although these acts removed at least some of the disabilities of coverture, especially in the areas of the wife's legal capacity to contract and

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27. Goff v. Jones, 70 Tex. 572, 8 S.W. 525 (1888); Buehring v. Hudson, 219 S.W.2d 810 (Tex. Civ. App.—Galveston 1949), *error ref.*; Saulsbury v. Anderson, 39 S.W.2d 142 (Tex. Civ. App.—Amarillo 1931), *error dismissed*; Fonda v. Colquitt, 165 S.W. 1195 (Tex. Civ. App.—Dallas 1914). For a discussion of the issue on damages, see Nelson v. Jenkins, 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948), *error ref.*; 2 E. OAKES, *supra* note 2, § 580.

28. Nelson v. Jenkins, 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948), *error ref.*; Saulsbury v. Anderson, 39 S.W.2d 142 (Tex. Civ. App.—Amarillo 1931), *error dismissed*; Finley v. Messer, 9 S.W.2d 756 (Tex. Civ. App.—Waco 1927).

29. Buehring v. Hudson, 219 S.W.2d 810 (Tex. Civ. App.—Galveston 1949), *error ref.*; Menzies v. Blum, 218 S.W.2d 875 (Tex. Civ. App.—Austin 1949); Nelson v. Jenkins, 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948), *error ref.*

30. In Menzies v. Blum, 218 S.W.2d 875 (Tex. Civ. App.—Austin 1949), defendants refused to convey because they had not found another home. The court called this a "bad faith" refusal and allowed loss of bargain damages to the purchaser. *Cf.* Nelson v. Jenkins, 214 S.W.2d 140 (Tex. Civ. App.—El Paso 1948), where the court criticized the allowing of loss of bargain damages, but allowed them because the defendants had refused to convey, thinking the contract was a nullity.

31. Ch. 472, § 1, [1963] Tex. Laws 1188, *amending* ch. 219, § 1, [1961] Tex. Laws 446 (now TEX. FAM. CODE ANN. § 5.21 (Supp. 1973)). In this provision, separate property is defined as that property which is owned or claimed by one spouse before marriage; property acquired after marriage by gift, devise, or descent is also separate property. Such property of one spouse may be real or personal. Although for some time prior to 1963, married women had controlled their separate property, disposition of such property could only be made with the consent of the husband unless the married woman elected to have sole management, control, and disposition of her separate property and filed the proper statement of her intent.

The legislature also repealed art. 1299, which had required the husband's joinder and the wife's separate acknowledgment in any conveyance of the separate lands of the wife. Ch. 473, § 1, [1963] Tex. Laws 1189, *repealing* ch. 40, § 1, [1897] Tex. Laws 41, 10 H. GAMMEL, LAWS OF TEXAS 1095 (1898).

32. Ch. 472, § 6, [1963] TEX. LAWS 1189, *amending* ch. 499, § 2, [1937] Tex. Laws 1343 (subsequently amended 1967). Prior to 1963 this provision, formerly TEX. REV. CIV. STAT. ANN. art. 4626 (1960), had required that a married woman apply for feme sole status in order to be able to contract, sue, and be sued in her own name for mercantile or trading purposes. The 1963 amendment automatically gave all married women feme sole status.

33. Ch. 404, § 1, [1959] Tex. Laws 881 (repealed 1967). The wife's special community property consists of her personal earnings and the revenue from her separate property. While these classes of property are community property, they are called the wife's special community because of her power of management and control over them. *See* TEX. FAM. CODE ANN. § 5.22 (Supp. 1973).

her power of disposition of her separate property,[34] articles 1300,[35] 4618,[36] 6605,[37] and 6608[38] were retained, so that a homestead still could not be alienated except by joint conveyance of the spouses with the wife's separate acknowledgment.[39]

Effective January 1, 1968, the legislature repealed the statutes which had prescribed the separate acknowledgment[40] and right to retract[41] for the married woman. Further, the statutory requirement regarding conveyance of the homestead, whether it be separate or community property, was amended[42] to provide that "neither spouse may sell, convey, or encumber the homestead without the joinder of the other spouse."[43] In addition, the legislative provisions which became effective at that time extended the power of a married woman to manage, control, and dispose of community property. While the amendments of 1963 had given the wife the contractual capacities of a single woman with respect to her separate property and special community, and had made that property liable for her debts,[44] the Marital Property Act of 1967[45] placed control and disposition powers over community property in the wife's hands, thereby giving her an equal share in management of the community property. Thus, the 1967 enactments, which were substantially carried forward in the Texas Family Code,[46] by decreasing the husband's powers and correspondingly increasing those of the wife,[47] ended an era when the husband maintained sole power of disposition of community property. Though the question of whether specified performance would now lie for an executory

34. For a discussion of these statutory changes see Elston, *Statutory Changes Affecting the Power of a Married Woman To Deal with Her Separate and Special Community Property*, 28 TEX. B.J. 19 (1965); Smith, *Legislative Note; 1963 Amendments Affecting Married Women's Rights in Texas*, 18 SW. L.J. 70 (1964).

35. Ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898) (repealed 1967); *see* note 16 *supra*.

36. Ch. 130, § 1, [1921] Tex. Laws 251 (repealed 1967); *see* text accompanying note 24 *supra*.

37. Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898) (repealed 1967); *see* note 17 *supra* and accompanying text.

38. *Id.*

39. *See* notes 14-26 *supra* and accompanying text.

40. Ch. 309, § 6, [1967] Tex. Laws 741, *repealing* ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898); *see* note 16 *supra* and accompanying text.

41. Ch. 309, § 6, [1967] Tex. Laws 741, *repealing* Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898); *see* note 17 *supra* and accompanying text.

42. Ch. 309, § 1, [1967] Tex. Laws 735, 737, *amending* ch. 472, § 2, [1963] Tex. Laws 1188 (carried forward as TEX. FAM. CODE ANN. §§ 5.81-.86 (Supp. 1973)).

43. TEX. FAM. CODE ANN. § 5.81 (Supp. 1973).

44. Ch. 472, § 6, [1963] Tex. Laws 1189; *see* note 32 *supra* and accompanying text.

45. Ch. 309, §§ 1-6, [1967] Tex. Laws 735-41, *revising and amending* chapters 2 and 3, tit. 75, TEX. REV. CIV. STAT. (1925), including former arts. 4613-27.

46. TEX. FAM. CODE ANN. §§ 5.02, 5.22, 5.23, 5.25, 5.61 (Supp. 1973). *See* 13 TEX. REV. CIV. STAT. ANN. 145 (Supp. 1974) for a table showing the derivation of these statutes and their relation to sections of the Texas Family Code; *and see* McKnight, *Recodification and Reform of the Law of Husband and Wife*, 33 TEX. B.J. 34, 41-42 (1970).

47. Ch. 309, § 1, [1967] Tex. Laws 735, 738 (carried forward as TEX. FAM. CODE ANN. § 5.22 (Supp. 1973)). All the property which the wife would have owned if a single person (including but not limited to special community property) was placed under her sole management, control, and disposition. Further, if such property becomes mixed or combined with that of the husband, the spouses share joint management powers in the combined property. For an excellent discussion of control and management of community property, see Comment, *Section 5.22 of the Texas Family Code: Control and Management of the Marital Estate*, 27 SW. L.J. 837 (1973).

contract to convey a homestead had not been decided, at least one writer expected the doctrine of *Jones v. Goff*[48] to be overruled.[49]

III. ALLEN V. MONK

In *Allen v. Monk* the Texas Supreme Court interpreted the constitutional proscription against the husband's conveyance of the homestead without the consent of his wife "as prescribed by law."[50] The statutes, which were repealed in 1967, dealing with the wife's separate acknowledgment,[51] as well as the amendment of article 4618,[52] concerning conveyance of the homestead, apparently convinced the court that the required consent to a sale of the homestead might be manifested by the wife's joinder in an executory written contract for sale.[53] These changes terminated the wife's privilege of retracting her consent to the sale of the homestead until a separate acknowledgment of the deed was taken. The court concluded that this moved the only bar to compelling specific performance of the contract to convey.[54]

The supreme court held that the Texas Constitution does not on its face invalidate contracts to convey a homestead[55] and declined to overrule *Jones v. Goff*,[56] agreeing that under the then existing statutes the only permissible method of disposition of the homestead was by a present conveyance in which husband and wife joined.[57] The legislature's enactment in 1921 of article 4618, commanding that the homestead "shall not be disposed of except by joint conveyance of both the husband and the wife,"[58] sup-

48. 63 Tex. 248 (1885); *see* notes 19-23 *supra* and accompanying text.

49. Hudspeth, *The Matrimonial Property Act of 1967—Six Areas of Change*, 31 TEX. B.J. 477, 551 (1968).

50. TEX. CONST. art. XVI, § 50 (1876). This provision, which was in effect at the time of the making of the contract in this case, has since been amended effective Nov. 6, 1973. The amended § 50 now states that the owner or claimant of the property claimed as homestead may not "if married, sell or abandon the homestead without the consent of the other spouse, given in such manner as may be prescribed by law." Such an amendment was necessary, for under the prior constitutional provision and the recently revised statutes giving a married woman the power to dispose of her separate property without her husband's joinder, a married woman whose separate property was the family homestead might sell that property without the husband's consent. On the other hand, the constitution prohibited a married man from selling his separate property homestead without his wife's consent.

51. Ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898) (repealed 1967); Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898) (repealed 1967); *see* notes 40-41 *supra* and accompanying text.

52. Ch. 309, § 1, [1967] Tex. Laws 737, *amending* ch. 472, § 2, [1963] Tex. Laws 1188 (carried forward as TEX. FAM. CODE ANN. §§ 5.81-.86 (Supp. 1973)); *see* notes 42-43 *supra* and accompanying text.

53. 505 S.W.2d at 524-25.

54. *Id.* at 525.

55. Notwithstanding the language used by the supreme court in declaring a contract to convey a homestead void and unenforceable, in Jones v. Goff, 63 Tex. 248 (1885), it was held, in Goff v. Jones, 70 Tex. 572, 8 S.W. 525 (1888), that the husband's contract was not invalid and could be enforced against him when the homestead character of the property no longer existed. This case was a later suit by the same parties as in *Jones v. Goff*, with the purchaser seeking damages for breach of contract (enforcement of a title bond) rather than specific performance, which had already been denied.

56. 63 Tex. 248 (1885); *see* notes 19-23 *supra* and accompanying text.

57. 505 S.W.2d at 524-25; *see* notes 19-23 *supra* and accompanying text.

58. Ch. 130, § 1, [1921] Tex. Laws 251 (repealed 1967); *see* note 24 *supra* and accompanying text.

ported this view of the inadequacy of an executory contract to convey a homestead, but the amendment of article 4618 in 1967 eliminated the requirement of a joint conveyance.[59] The court interpreted the current statutes as calling only for the spouses to join in any disposition of the homestead.[60] The spouses might now dispose of at least the equitable title to the homestead by joining in a contract for sale, as opposed to the previous requirement of joinder in a deed.

The supreme court's decision in *Allen v. Monk* raises a number of questions. The court of civil appeals believed that article 4618 as amended in 1967[61] and as carried forward in section 5.81 of the Texas Family Code[62] was intended to extend to both spouses the right of preventing specific performance.[63] The appellant argued, however, and the Texas Supreme Court apparently agreed, that this was not consistent with the trend of the legislature's enactments in 1967 to remove the married woman's disabilities of coverture and to make the spouses equal in responsibility for property management and contractual obligations. It is difficult to believe that the legislature intended a lessening of the husband's contractual ability in order to achieve the desired equalization, since no language to that effect may be found in the statutes and since, on the contrary, article 4625 as amended in 1967[64] expressly states that all married persons "shall have the power and capacity of a single person of full age, including the capacity to contract . . . ." This language strongly indicates an intent to extend contractual ability rather than to limit it.

The supreme court did not take the same limited view of a sale of the homestead as did the court of civil appeals, which held that a sale "when applied to real property, can mean only a transfer of real estate by conveyance; for a contract to sell does not pass title."[65] In so holding, the court of civil appeals disregarded section 5.81[66] or, if not, held that the legislature included unnecessary and redundant wording by using the term "sell" along with "convey." The supreme court instead read the statute[67] in light of the common law and took the legislature's enactment to imply that once joinder

59. Ch. 309, § 1, [1967] Tex. Laws 737, *amending* ch. 472, § 2, [1963] Tex. Laws 1188 (carried forward as TEX. FAM. CODE ANN. §§ 5.81-.86 (Supp. 1973)); *see* notes 42-43 *supra* and accompanying text.

60. 505 S.W.2d at 525. The 1967 amendment of art. 4625 (carried forward as TEX. FAM. CODE ANN. § 4.03 (Supp. 1973)), giving married women the full power to contract, further impressed the court that specific performance of an executory contract to convey a homestead will now lie against a married woman who signs such a contract, just as this remedy was always available, under common law, in contracts to convey real property other than the homestead. *See* note 64 *infra* and accompanying text.

61. Ch. 309, § 1, [1967] Tex. Laws 737, *amending* ch. 472, § 2, [1963] Tex. Laws 1188 (carried forward as TEX. FAM. CODE ANN. §§ 5.81-.85 (Supp. 1973)); *see* notes 42-43 *supra* and accompanying text.

62. TEX. FAM. CODE ANN. § 5.81 (Supp. 1973).

63. Allen v. Monk, 498 S.W.2d 29, 31 (Tex. Civ. App.—Austin 1973).

64. Ch. 309, § 6, [1967] Tex. Laws 741, *amending* ch. 79, § 1, [1848] Tex. Laws 77, 3 H. GAMMEL, LAWS OF TEXAS 77 (1898) (carried forward as TEX. FAM. CODE ANN. § 4.03 (Supp. 1973)).

65. 498 S.W.2d at 31.

66. TEX. FAM. CODE ANN. § 5.81 (Supp. 1973); *see* notes 42-43 *supra* and accompanying text.

67. *Id.*

of the spouses in the sale had been made, the statute was satisfied.[68] Under this view, later joinder in the conveyance to effect transfer of legal title as called for in the sale contract may be compelled by the courts. The statutes no longer require that the only method for alienating the homestead is by joint conveyance of the spouses.[69] The supreme court's interpretation is the proper one since the Texas Constitution[70] and the statute[71] have been satisfied. If the wife joins in the contract of sale there has been no sale "without the consent of the wife."[72]

The question remains whether the holding in *Allen v. Monk* furthers the settled public policy of the state regarding homesteads. The basic purpose of the homestead laws is to hold secure for the family a place for a home and in this manner to serve the welfare of the state.[73] It cannot be said, however, that homestead property is inalienable, but only that it must be disposed of in strict compliance with the law. At the time of the making of the contract, the wording of the constitution was that the homestead might not be sold by the husband "without the consent of the wife."[74] The policy underlying this provision has been described in the following manner: "The object, purpose and intent of the [constitution] is to protect the wife in the homestead against the improvidence of the husband as well as the rapacity of the creditor."[75] At the time of *Jones v. Goff*[76] it was felt necessary that the wife's consent be shown by her joinder in any conveyance, her separate acknowledgment of the conveyance,[77] and her statement that she did not wish to retract the consent.[78] These provisions were considered protective of married women who might be coerced to join in a conveyance by their husbands. While this protection may well have been needed in the nineteenth century and possibly even during the early part of this century, in 1967, when the statutes requiring these protective measures were amended and repealed,[79] they were anachronistic. Women had gained new rights and responsibilities through progressive amendments to the state's laws in 1963[80] and again in 1967.[81]

The increasing sophistication of women has led to greater independence for married women from their husbands, as well as their liberation in other

68. 505 S.W.2d at 526.
69. *See* notes 42-43 *supra* and accompanying text.
70. TEX. CONST. art. XVI, § 50 (1876).
71. TEX. FAM. CODE ANN. § 5.81 (Supp. 1973).
72. *Id.*; *see* note 50 *supra.*
73. Andrews v. Security Nat'l Bank, 121 Tex. 409, 417, 50 S.W.2d 253, 256 (1932).
74. TEX. CONST. art. XVI, § 50 (1876); *see* note 50 *supra.*
75. Jones v. Goff, 63 Tex. 248, 254 (1885).
76. 63 Tex. 248 (1885).
77. Ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898) (repealed 1967); *see* note 16 *supra.*
78. Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898); *see* note 17 *supra.*
79. Ch. 309, § 6, [1967] Tex. Laws 741, *repealing* ch. 39, § 1, [1897] Tex. Laws 40, 10 H. GAMMEL, LAWS OF TEXAS 1094 (1898); Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898).
80. Ch. 472, §§ 1-7, [1963] Tex. Laws 1188-89; ch. 473, § 1, [1963] Tex. Laws 1189; *see* notes 31-39 *supra.*
81. Ch. 309, §§ 1-5, [1967] Tex. Laws 737-39; *see* notes 40-47 *supra.*

areas. Outdated requirements such as the privy acknowledgment[82] were often thought by both spouses to be over protective. Because of the conditions existing today, the holding of *Allen v. Monk* that a wife may bind herself through an executory contract to convey the homestead does not seem to contravene the public policy of the state with respect to the inviolability of the homestead, and because even greater progress for women can be foreseen in the future, it does not appear that this ruling will be one which will lead to undesirable results in the years to come.

IV. CONCLUSION

Although faced with a question of statutory law on which the legislative intent was far from clear, the court examined the trend of recent legislative enactments and made an attempt to decide this point in a way which could be reconciled with that trend. This decision is indicative of the willingness by the Supreme Court of Texas to expand the rights and responsibilities of married women unless the expansion is contrary to a statutory formulation. But for this attitude, stare decisis might easily have influenced the court to decide that, in the absence of clear legislative action to the contrary, such a long established rule[83] as the one that fell with this case should remain.

This view of a contract to convey a homestead is one which will create greater uniformity in the law of conveyances. No longer need a purchaser be surprised by the wife's refusal to join in a conveyance which she has contracted to provide. The court's position here should also prevent speculation by the vendors of a homestead with the obligation of a prospective purchaser by ending the somewhat anomalous features of homestead conveyancing. These aspects generally came about because the obligations of the various parties were not mutual. The homestead buyer was obligated to perform and even liable to face specific performance of his contract to purchase,[84] but the vendor-wife could lawfully refuse to convey.[85] The situation was open to abuse, and all except the wife were liable to fall subject to inequitable circumstances. These facets of homestead conveyancing are now ended. For the purpose of executory contracts to convey, the homestead, whether community property or the separate property of one spouse, may now be treated as any other property in which both spouses have an estate.

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82. Act of April 30, 1846, [1846] Tex. Laws 156, 2 H. GAMMEL, LAWS OF TEXAS 1462 (1898) (repealed 1967); *see* note 17 *supra*.

83. The decision in Jones v. Goff, 63 Tex. 248 (1885), had been consistently followed in Texas to deny specific performance of executory contracts for sale of homestead property. *See* notes 19-23 *supra* and accompanying text.

84. It has been held that tender of deed by husband and wife satisfies the requirement of mutuality. Townsend v. Milliken, 294 S.W. 938 (Tex. Civ. App.—Austin 1927), *aff'd*, 16 S.W.2d 259 (Tex. Comm'n App. 1929), *holding approved*.

85. *See* notes 19-23 *supra* and accompanying text.

Self-Help Repossession Under the UCC: Presence or Absence of State Action?

Plaintiffs executed security agreements, in order to obtain bank loans, giving the defendant banks a security interest in their motor vehicles. After plaintiffs failed to make the required installment payments, defendants without notice repossessed the vehicles through collection agencies. Plaintiffs brought separate suits in their respective district courts asserting that California Commercial Code §§ 9503 and 9504[1] violated due process of law in providing for repossession and disposition of collateral by a secured party without prior notice and hearing. The plaintiffs invoked federal jurisdiction on the grounds that summary repossession procedures constitute action taken "under color of state law" within the meaning of the fourteenth amendment of the United States Constitution.[2]

The district courts disagreed as to whether prejudgment self-help repossession of collateral involved sufficient state action to establish a federal cause of action. Both cases were appealed and they were joined for hearing before the Ninth Circuit. *Held*: The State of California is not so significantly involved in self-help repossession procedures undertaken by creditors under sections 9503 and 9504 to permit the court to find the "state action" required to establish a federal cause of action. *Adams v. Southern California First National Bank*, 492 F.2d 324 (9th Cir. 1973), *rev'g* 338 F. Supp. 614 (S.D. Cal. 1972); *Hampton v. Bank of California*, 492 F.2d 324 (9th Cir. 1973).

I. STATE ACTION

In order to state a cause of action involving a federal question[3] under the due process clause of the fourteenth amendment, it is necessary to find some significant state involvement in the defendant's activities.[4] Likewise, 42 U.S.C. § 1983 provides for judicial remedy where one is deprived of any

1. CAL. COMM. CODE § 9503 (West 1964) provides in part: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action." CAL. COMM. CODE § 9504 (West 1964) provides in part:

> (1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing . . . . (2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency . . . .

Section 9503 is identical to the UNIFORM COMMERCIAL CODE § 9-503. Section 9504 does not differ from UNIFORM COMMERCIAL CODE § 9-504 in any aspect relevant to this case.

2. 42 U.S.C. § 1983 (1970) and 28 U.S.C. § 1343 (1970).

3. 28 U.S.C. § 1331 (1970).

4. The state action concept was developed in cases brought under the equal protection clause of the fourteenth amendment. Shelley v. Kraemer, 334 U.S. 1 (1948); The Civil Rights Cases, 109 U.S. 3 (1883). While it is unclear that the same state action test used in equal protection cases applies to due process cases, the courts which have considered the question have applied the equal protection standard. *See, e.g.*, Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972).

constitutional or statutory right by any person acting "under color of state law."[5] The conduct of private individuals, "however discriminatory or wrongful," does not come within the purview of the sanctions of the fourteenth amendment or section 1983 if the state has in no way involved itself in the challenged activity.[6]

The modern doctrine of state action developed by the United States Supreme Court began with the case of *Shelley v. Kraemer*.[7] In that case the Court found that judicial enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the white race was state action and therefore violative of the fourteenth amendment.[8] The doctrine was further extended in *Burton v. Wilmington Parking Authority*,[9] where a restaurant which leased space in a parking facility owned by a state agency was held to have discriminated against blacks. State action was found even though the state had done nothing to encourage the wrongful action. The Supreme Court reasoned that the state had "elected to place its power, property and prestige behind the admitted discrimination"[10] and by its inaction had made itself a party to the refusal of service.[11] The Court concluded that the state had become a joint venturer in the enterprise and, therefore, shared in the discriminatory policies of the private concern.

Reitman v. Mulkey[12] has been viewed by many commentators as the greatest expansion of the state action doctrine.[13] In *Reitman* the Supreme Court affirmed a decision of the California Supreme Court[14] which had held unconstitutional an amendment to the California Constitution prohibiting the state from denying a private individual the right to sell property to whomever he chose.[15] The Supreme Court accepted the California court's finding that the effect of the amendment[16] would be to encourage and significantly involve

5. "Under color of state law" has been treated as the same thing as "state action" required under the fourteenth amendment. *See* United States v. Price, 383 U.S. 787, 794-95 n.7 (1966). *But see* Adickes v. S.H. Kress & Co., 398 U.S. 144, 210 (1970), where Justice Brennan in his dissent indicates that, at least in some cases, "under color of law" requires more involvement than "state action."

6. *See, e.g.*, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v. Kraemer, 334 U.S. 1 (1948).

7. Shelley v. Kraemer, 334 U.S. 1 (1948), *discussed in* Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203 (1949).

8. *Shelley* involved a willing seller and a willing buyer. No discrimination occurred until the court stepped in and enforced the restrictive covenant. Thus, the discrimination originated with state action. *Shelley* did not say that if there was a willing buyer but an unwilling seller that failure of a court to require the seller to sell was prohibited state action. In such a case the discrimination is private and has already occurred and the court is simply being neutral.

9. 365 U.S. 715 (1961). *See* Lewis, *Burton v. Wilmington Parking Authority—A Case Without Precedent*, 61 COLUM. L. REV. 1458 (1961).

10. 365 U.S. at 725.

11. *Id.*

12. 387 U.S. 369 (1967).

13. *See* Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

14. 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

15. Prior to the amendment, the California Legislature had enacted legislation which proscribed discrimination in real estate sales.

16. The California Supreme Court had gone to some length to assess the potential impact of the amendment on the California environment. The Supreme Court expressly approved this type of analysis saying that it is necessary for a court to "assess the poten-

the state in private racial discrimination.[17] Justice White's opinion for the Court contains broad language to the effect that the state's encouraging rather than commanding discrimination is sufficient to constitute state action.[18] However, the Court has not applied this reasoning to any case following *Reitman*,[19] and many commentators feel the decision was actually on much narrower grounds than the language of the decision indicates.[20]

In two recent decisions the Supreme Court has been less willing to find state action in private conduct. In *Evans v. Abney*[21] a private citizen had willed property to a city for use as a park on the condition that it be restricted to whites.[22] Neither the fact that state law at the time of the action permitted such a restriction nor the fact that the Georgia Supreme Court had interpreted the will as embodying a preference for termination[23] of the park rather than its integration was found to constitute state action since the Court found Georgia's trust laws to be "racially neutral."[24]

In one of the most recent state action cases, *Moose Lodge v. Irvis*,[25] a black guest of a club member was refused service at a private club's bar. State action was asserted on the grounds that the Pennsylvania Liquor Authority had issued a liquor license to the club. Despite the comprehensive regulation of the club liquor sales and the limitation on the number of licenses authorized, the Supreme Court held that the liquor regulations were not so directly related to the discrimination as to constitute state involvement in the actions of the club.[26] The Court in *Moose Lodge* declined to look at the impact of the regulations and simply held that the statutes and regulations governing the sale of liquor in no way overtly or covertly encouraged discrimi-

tial impact of official action in determining whether the state has significantly involved itself with invidious discriminations." 387 U.S. at 380.

17. *Id.* at 375-76.

18. *Id.*

19. Although a subsequent case presented almost the identical issue as in *Reitman*, Justice White, again writing for the majority, used much narrower language in finding significant state action. *See* Hunter v. Erickson, 393 U.S. 385 (1969).

20. *See* Black, *supra* note 13, at 82.

21. 396 U.S. 435 (1970).

22. The Supreme Court in Evans v. Newton, 382 U.S. 296 (1966), held that the public character of the park "requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." *Id.* at 302. On remand, the Georgia supreme court held that since the purpose for which the trust was created had become impossible, that the trust had become unenforceable and the property reverted to the estate. Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966), *aff'd sub nom.* Evans v. Abney, 396 U.S. 435 (1970).

23. The Court distinguished *Shelley v. Kraemer* in *Evans* on the basis that in *Shelley* state judicial action had affirmatively enforced a private scheme of discrimination, while the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, the loss of the park being shared equally by both white and Negro citizens. 396 U.S. at 445.

24. *Id.* at 444.

25. 407 U.S. 163 (1972); *see The Supreme Court 1971 Term*, 86 HARV. L. REV. 70-75 (1972).

26. Following the *Reitman* rationale, it would seem that in order to determine whether a state is "significantly involved" in the challenged conduct it is necessary to assess the potential impact of the action. Liquor licenses in Pennsylvania are issued on a complex quota system. The majority opinion neglects to mention the fact that the city in which the Moose Lodge was located has had its quota of licenses for many years. 407 U.S. at 182 (Douglas, J., dissenting). Blacks are thereby limited in the number of places at which they may obtain liquor and since clubs may sell liquor for longer hours than hotels and restaurants, the number of hours during which they can buy liquor is also limited. *Id.* at 182 n.3.

nation and therefore could not implicate the state in the discriminatory guest policies.[27] Further, by refusing to recognize the substantial economic benefit the state received from the licensing scheme, the Court substantially limited the factors which can be relied on to show joint participation in a discriminatory practice under the *Burton* rationale. *Burton* was distinguished on the grounds that in that case the restaurant was located on public land.[28]

While it is not clear what the Court would require today to constitute "significant state involvement" in private conduct, it would probably be necessary that the factual setting of the case indicated that the state compelled, participated in, or affirmatively fostered or encouraged the wrongful conduct.

II. CREDITORS' RIGHTS AND CONSTITUTIONAL LAW

Although constitutional and commercial law have not often come into conflict, the Supreme Court has formulated a due process doctrine which forbids states from recovering property from debtors who are allegedly in default without providing judicial safeguards to protect their interests. In 1969 the Supreme Court in *Sniadach v. Family Finance Corp.*[29] held that prejudgment garnishment procedures violated the due process requirements of the fourteenth amendment. Three years later, in *Fuentes v. Shevin*,[30] the Supreme Court made it clear that the due process requirements of notice and hearing must be accorded to a debtor before he is deprived of any significant property interest by the state.[31] However, *Mitchell v. W.T. Grant*,[32] the most recent Supreme Court decision on the subject, casts serious doubt upon the *Fuentes* requirement of notice and hearing before the taking of property. In that case the Court held constitutional a Louisiana sequestration statute which provided for no notice or hearing prior to the taking since the statute provided extensive "judicial control" of the repossession process.[33]

The due process requirements apply, however, only to the taking of pro-

27. This observation appears to be inconsistent with the language of Palmer v. Thompson, 403 U.S. 217, 224-25 (1971), in which the Court stated that discriminatory or evil intent by the state is not controlling—the actual effect of the state action is the determining factor under the fourteenth amendment.

28. 407 U.S. at 175.

29. 395 U.S. 337 (1969).

30. 407 U.S. 67 (1972).

31. *Id.* at 81-83; *see* Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 VA. L. REV. 355 (1973).

32. 94 S. Ct. 1895, 40 L. Ed. 2d 406 (1974).

33. The majority opinion distinguished *Fuentes* because the Florida and Pennsylvania statutes held unconstitutional in that case permitted the seller to repossess under a writ of replevin which was issued and carried out without judicial participation. The writ of sequestration in *Mitchell*, however, was issued by a judge. *Id.* at 1904, 40 L. Ed. 2d at 410. It is interesting to note, as did Justice Stewart in his dissenting opinion, that the provisions of the Louisiana statute are very similar to those held unconstitutional in *Fuentes* and that outside Orleans Parish, Louisiana, in which the *Mitchell* case arose, the writ is issued by a court clerk just as in *Fuentes*. *Id.* at 1912, 40 L. Ed. 2d at 428.

Mr. Justice Powell in concurring expressed his view that the Court in *Mitchell* has in fact withdrawn from the principles set forth in *Fuentes* so as to fairly overrule that case. *Id.* at 1908, 40 L. Ed. 2d at 423.

Even under *Mitchell*'s more limited due process requirements, however, it would seem almost certain that the Uniform Commercial Code self-help provisions could not pass constitutional muster, since no safeguards whatsoever exist to protect the interest of the debtor before or after the taking of the property.

perty by the state and not by private parties. Therefore, in the self-help creditors rights cases the applicability of the notice and hearing requirements of due process depends on whether the exercise of the creditor's remedy in issue can be attributed to the state so as to satisfy the state action requirement of the fourteenth amendment.

The first case challenging the constitutionality of the self-help repossession provisions of the UCC was *Adams v. Egley*,[34] wherein the federal district court, relying on *Reitman*,[35] held that the creditor's conduct in repossessing motor vehicles was unconstitutional. *Reitman* was interpreted as holding that where by law a state authorizes private conduct, there is fourteenth amendment state action. The court found the repossession by the creditors was authorized by the UCC provisions and was, therefore, within the fourteenth amendment's purview.[36] However, the federal district court in *Oller v. Bank of America*[37] specifically disagreed with the *Adams* court's reliance on *Reitman*, finding it inapplicable because it dealt with the area of racial discrimination and because the "considerations fundamental to extending federal jurisdiction to meet racial injustices are simply not present in the instant case."[38]

In *Boland v. Essex County Bank & Trust Co.*[39] a federal district court held that the Commonwealth of Massachusetts had "significantly encouraged" self-help repossession by enacting sections 9-503 and 9-504 of the UCC. The court reached this conclusion by giving substantial weight to the debtor's argument that the UCC provisions had changed the common law of Massachusetts by permitting repossession without an express agreement between the parties. Also, the adoption of these provisions abolished the election of remedies doctrine by allowing the secured party both to repossess his collateral and bring suit for a deficiency judgment. Other courts have reached the conclusion that state action does not exist where sections 9-503 and 9-504 have merely codified the common law right of repossession.[40]

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34. 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom.* Adams v. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973).

35. *See* notes 12-20 *supra* and accompanying text.

36. The Court stated:

> These Commercial Code sections set forth a state policy, and the security agreements upon which the instant actions rest, whose terms are authorized by the statute and which incorporate its provisions, are merely an embodiment of that policy. It is therefore apparent that the acts of repossession were made 'under color of state law' as required . . . and that the passage of §§ 9503 and 9504, which authorize such acts are sufficient state action to raise a federal question.

338 F. Supp. at 618.

The presence of a reference to the UCC provisions in the security agreements was noted by the court as an indication that the creditors were "persuaded or induced" to include repossession clauses in the security agreement by the fact that repossession was permitted by statute. *Id.* at 617.

37. 342 F. Supp. 21 (N.D. Cal. 1972).

38. *Id.* at 23.

39. 361 F. Supp. 917 (D. Mass. 1973).

40. In Messenger v. Sandy Motors, 121 N.J. Super. 1, 295 A.2d 402, 406 (1972), the court noted that, "codification of the practice of self-help repossession by the enactment of § 9-503 cannot so give that practice color of state law as to take it out of the private area and make it subject to the fourteenth amendment." *See also* Mayhugh v. Bill Allen Chevrolet, 371 F. Supp. 1 (W.D. Mo. 1973); Baker v. Keeble, 362 F. Supp. 355 (M.D. Ala. 1973). *But see* Clark, *Default, Repossession, Foreclosure and Defi-*

The majority of cases decided subsequent to *Oller* and *Adams* have agreed with the *Oller* rationale and have declined to find state action. However, few of the courts on either side of the issue have thoroughly analyzed the state involvement in light of the state action doctrine.

III. ADAMS V. SOUTHERN CALIFORNIA FIRST NATIONAL BANK

The Ninth Circuit's opinion in *Adams v. Southern California First National Bank*[41] is the most complete analysis of the state action issue in any of the self-help repossession cases to date.[42] In *Adams* the court considered and rejected every major argument by which action taken "under color of state law" could be found in the self-help repossession of collateral. The debtors in *Adams* sought to establish the presence of state action by relying basically on two forms of alleged state involvement: first, the state's enactment of sections 9503 and 9504 of the California Commercial Code; and second, the state's authorization and encouragement of the use of self-help repossessions through its regulatory activities.[43] In support of the second argument, the debtors pointed out the state's pervasive regulation of all aspects of motor vehicle installment contract sales,[44] the regulation of the repossession process itself,[45] the licensing of repossessors,[46] and the motor vehicle registration system which provided for clearing the title of repossessed vehicles in the creditor's name.[47]

The debtors relied upon *Reitman*[48] in arguing that California deliberately chose to follow a state policy of encouraging repossession and sale of collateral without a prior judicial hearing and that the enactment of sections 9503 and 9504[49] was the embodiment of that policy. The Ninth Circuit determined that *Reitman* was not controlling and distinguished it on two grounds. First, the court stated that in *Reitman* the state was involved to a far greater degree in the challenged conduct "because the proposed amendment had been initiated for the purpose of authorizing what had before been expressly prohibited, and if enacted would raise a barrier to the realization of a constitutional goal."[50] The court observed that in the self-help cases the enactment of the provisions of the UCC did not reverse the law as it had been prior

ciency: A Journey to the Underworld and a Proposed Solution, 51 ORE. L. REV. 302, 330 n.116a (1972).

41. 492 F.2d 324 (9th Cir. 1973).

42. Since *Adams* was decided the Courts of Appeals for the Second and Eighth Circuits have handed down decisions in similar cases. Both the Eighth Circuit's opinion in Bichel Optical Labs, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973), and the Second Circuit's in Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974), rely on the *Adams* decision in reaching the conclusion that self-help repossession does not involve sufficient state action to raise a federal cause of action.

43. 492 F.2d at 331-32.

44. CAL. CIV. CODE §§ 2981-84.4 (West Supp. 1974).

45. CAL. VEHICLE CODE § 28 (West 1971).

46. CAL. BUS. & PROF. CODE §§ 7500-90 (West 1964), *as amended*, (West Supp. 1974).

47. CAL. VEHICLE CODE §§ 5601, 9561 (West 1971).

48. 387 U.S. 369 (1967); *see* notes 12-20 *supra* and accompanying text.

49. CAL. COMM. CODE §§ 9503, 9504 (West 1964).

50. 492 F.2d at 332. Other courts have made similar statements. Johnson v. Associates Fin. Co., 365 F. Supp. 1380 (S.D. Ill. 1973); Kirksey v. Theilig, 351 F. Supp. 727 (D. Colo. 1972).

to the enactment of the Code.[51] Further, the court firmly rejected the argument that by merely putting existing private remedies into statutory form, the state significantly involved itself in the private conduct.[52] A contrary result would have been tantamount to destroying the distinction between private conduct and state action since almost every form of private conduct is "authorized" and therefore "encouraged" by some state legislative, executive, or judicial law.[53]

It is not entirely clear how important it was to the court's decision that the enactment of the UCC provisions did not change the common law of California.[54] However, the court's reasoning that the mere enactment of a statute authorizing certain conduct does not constitute state action would seem to apply equally well regardless of whether the statute enlarges the rights at common law or merely codifies those rights. The court's real distinction seems to be that the debtors in *Adams* were unable to show that California's "purpose" in enacting sections 9503 and 9504 was to deprive debtors of due process.[55] It had been shown in *Reitman* that the intent of the state was to encourage racial discrimination.

The second factor which the court stated as distinguishing *Reitman* was that it did not believe that the resolution of the state action question in commercial repossession cases ought to be governed by a case involving racial discrimination.[56] The court reasoned that while racial discrimination cases evidenced a pattern of intentional indirect circumvention of constitutional rights, the creditor's remedies were based on economically reasoned grounds and had been the topic of extensive research and legislative investigation.[57] Other than this statement, the court gave no reason for its belief that state involvement which would constitute state action in racial discrimination cases is a much broader standard than the standard for finding state action in other

51. 492 F.2d at 332. Before the adoption of § 9503, California followed a rule allowing parties to agree among themselves concerning their relative rights and duties in secured transactions. Thus, repossession clauses can be found in early pre-code chattel mortgages and conditional sales contracts. *See* Miller v. Stern, 34 Cal. 138 (1867); Meyer v. Gorham, 5 Cal. 323 (1855). Usually these security agreements also provided that the secured party was authorized to repossess the collateral upon default. *See* Johnson v. Kaeser, 196 Cal. 686, 239 P. 324 (1925); Holt Mfg. Co. v. Ewing, 109 Cal. 435, 42 P. 324 (1895).

52. 492 F.2d at 333.

53. *See* Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1096-1109 (1974).

54. At least one of the lower courts finding state action has relied on the fact that the enactment of the UCC provisions changed the common law, Boland v. Essex County Bank & Trust Co., 361 F. Supp. 917 (D. Mass. 1973); *see* note 39 *supra* and accompanying text.

55. 492 F.2d at 333. Judge Byre in his dissent argued that the important thing is not proving the subjective intent of the state, but rather to show that the effect of the statute is that creditors now rely on the statute for the basic right to repossess. *Id.* at 340.

56. *Id.* at 333. Several other cases have distinguished *Reitman* as a racial discrimination case. *E.g.*, Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Kirksey v. Theilig, 351 F. Supp. 721 (D. Colo. 1972); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972).

57. 492 F.2d at 333. *See* Dauer & Gilhool, *The Economics of Constitutionalized Repossession: A Critique for Professor Johnson, and a Partial Reply*, 47 S. CAL. L. REV. 116 (1973); Johnson, *Denial of Self-Help Repossession: An Economic Analysis*, 47 S. CAL. L. REV. 82 (1973).

types of cases. Although other federal courts have made this distinction,[58] only slight authority for this proposition appears in the decisions of the Supreme Court.[59] Despite the fourteenth amendment having a particular historical emphasis on preventing discriminatory treatment of blacks, the due process and equal protection clauses are aimed at limiting the ability of states to deal unfairly with their citizenry. Therefore, it would seem that the threshold question of whether there is significant state action should be governed by the same state action test regardless of the nature of the challenged conduct.

The second major basis upon which the debtors relied to establish state action was the "pervasive" regulation by the state.[60] In considering this argument the Ninth Circuit followed the reasoning of *Moose Lodge No. 107 v. Irvis*,[61] concluding that since none of California's regulations addressed the issue of when private repossession will be used or whether formal court action will be preferred, the state is not significantly involved in the creditor's decision to repossess.[62]

The court also examined a series of non-racial cases involving the utility service termination procedures of privately owned utility companies which were heavily regulated by the state.[63] The case which the court found controlling was *Lucas v. Wisconsin Power Co.*,[64] involving a utility company which could terminate service to a defaulting customer without entering the customer's land. Because the challenged activity of terminating service could be accomplished without the use of state authority, the court found no state action taken under "color of law," stating that "affirmative support must be significant, measured by its contribution to the effectiveness of defendant's conduct . . . ."[65]

The debtors argued that not only was the repossession process heavily regulated by the state, but the substance of the repossession activity was a service which would otherwise be performed by the state. In the "public function" cases, state action has been found where a service normally provided by the state was being provided by a private individual or organiza-

58. Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Bichel Optical Labs v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973); Pease v. Havelock Nat'l Bank, 351 F. Supp. 118 (D. Neb. 1972); Oller v. Bank of America, 342 F. Supp. 21 (N.D. Cal. 1972).

59. *See* James v. Valtierra, 402 U.S. 137, 140-41 (1971). This decision would seem to support the argument that the Court is separating out the rights of racial minorities for expansive constitutional protection.

60. *See* notes 43-47 *supra* and accompanying text.

61. 407 U.S. 163 (1972); *see* notes 25-28 *supra* and accompanying text.

62. 492 F.2d at 334.

63. The court felt these cases were particularly important since they dealt with the state action concept in a non-racial discrimination area.

64. 466 F.2d 638 (7th Cir. 1972), *cert. denied*, 409 U.S. 1114 (1973).

65. *Id.* at 656; *cf.* Palmer v. Columbia Gas, Inc., 479 F.2d 153 (6th Cir. 1973), where the Sixth Circuit concluded that since virtually every aspect of the utility company's operation was subject to regulation by the state or city and the state had given powers to the utility company not usually possessed by non-governmental authorities, that the state must be recognized as a joint participant with the company. The distinguishing factor between *Adams* and *Palmer* seems to be that in *Palmer* the company had been granted authority normally reserved to the state—the power to enter private land. The *Adams* court found no such extraordinary grant of authority to the creditors which contributed to the effectiveness of their conduct.

tion.[66] The debtors particularly relied on the approach taken by the Fifth Circuit in *Hall v. Garson*.[67] In that case the court held that a landlord's seizure of a tenant's property pursuant to authority given by a Texas statute[68] constituted action taken "under color of law" because the act of entering into another's home and seizing his property was the type of act characteristically performed by the state.[69] The *Adams* court found *Hall* distinguishable because in *Hall* the Texas statute vested the landlord with authority which had historically been a function of the state, while repossession has not traditionally been a state function, but rather a historically private remedy.[70]

It is debatable, however, whether the test of a "public function" is whether it was historically performed by the state or whether the nature of the activity is such that it falls within the type of conduct benefiting the public which the state was created to perform. A strong argument can be made that conflict resolution which is binding on the parties is a power belonging solely to the state and, therefore, any power to settle conflicting claims to property possessed by virtue of statute or common law is power delegated by the state.[71] Self-help repossession is certainly a form of settling conflicting claims.

IV. CONCLUSION

The debtors in the self-help cases have relied upon a broad range of state action theories which the Ninth Circuit clearly rejected in *Adams*. Since the Second and Eighth Circuits have ruled in accord with *Adams*[72] there is little room left to argue for a finding of state action in subsequent cases.

However, the Ninth Circuit may be fairly criticized for its failure to consider the nature of the repossession activity in conjunction with the fact that the activity is heavily regulated. It is a fair inference to make from the state action cases that the more heavily regulated the activity, the more likely it is that the regulated enterprise is performing a function of the state. This would appear to be the one argument to which the *Adams* decision would be vulnerable to attack in another court.

Implicit in the *Adams* decision is a weighing of the interests involved and the finding that repossession is a respectable and economically desirable

66. *See, e.g.*, Evans v. Newton, 382 U.S. 296 (1966) (private trustees of a park found to be performing public function); Terry v. Adams, 345 U.S. 461 (1953) (state action found because Texas county political group performed state function in operating primary election); Smith v. Allwright, 321 U.S. 649 (1944) (Democratic Party held agent of state in primary elections).

67. 430 F.2d 430 (5th Cir. 1970).

68. Ch. 686, [1969] Tex. Laws 2008 (repealed 1973).

69. 430 F.2d at 439.

70. 492 F.2d at 336. There seems to be some disagreement as to whether or not self-help repossession is a historically sound principle of the common law. *See* Gibbs v. Titelman, 369 F. Supp. 38 (E.D. Pa. 1973); 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 574-78 (2d ed. 1898); 3 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY 278-88 (1906).

71. *See* Shirley v. State Nat'l Bank, 493 F.2d 739, 745 (2d Cir. 1974) (Kaufman, J., dissenting).

72. Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Bichel Optical Labs, Inc. v. Marquette Nat'l Bank, 487 F.2d 906 (8th Cir. 1973).

method of private ordering. For this reason the Ninth Circuit felt that there was no interest to be served in further expanding the state action doctrine.

Kathlyn Graves Farrar

Winters v. Cook: Effective Assistance of Counsel and the Waiver Doctrine

Winters, an eighteen-year-old black male, was indicted by the Grand Jury of Holmes County, Mississippi on the charge of murder. Winters had been slapped by Branch, a middle-aged white man, when Winters attempted to talk with a black girl employed in Branch's tavern. Infuriated by the slap, Winters left the tavern, obtained a shotgun, returned, and killed Branch. On the advice of counsel, Winters pleaded guilty to murder in order to avoid the risk of the death penalty. Unknown to Winters, blacks had been excluded from the grand jury list on a systematic basis.[1] Winters' counsel, aware of the discriminatory practice,[2] had used his refusal to raise the challenge to the racial composition of the grand jury as bargaining leverage to obtain the life sentence for Winters. Subsequent to his guilty plea, Winters petitioned for habeas corpus relief, initially in the state courts,[3] and later in the federal court,[4] alleging that his plea of guilty was not "knowingly and intelligently" entered. First, he was unaware of his right to challenge the exclusion of blacks from the jury list, and secondly, he was denied the effective assistance of counsel in violation of the sixth amendment.[5] A three-judge panel orignally agreed with Winters' contentions,[6] but a petition for rehearing en banc was granted. *Held, District Court affirmed*: Absent exceptional circumstances, which do not include claims of racial discrimination in grand jury selection procedures, the actions of counsel are imputed to his client, and a

1. Holmes County, Mississippi was approximately 70% black and 30% white. Winters' petition for relief alleged that no blacks or only a very small percentage had ever been on the jury list. Winters v. Cook, 489 F.2d 174, 183 (5th Cir. 1973) (Rives, J., dissenting).

2. *Id.* at 184 n.4, quoting from the language of the lower court decision in Winters v. Cook, 333 F. Supp. 1033 (N.D. Miss. 1971), which stated: ". . . Mr. Cawley was aware of petitioner's right to attack the exclusion of Negroes from the grand jury which indicted him and from the petit jury impaneled for the October term of the Circuit Court of Holmes County . . . ." *Id.* at 1038.

3. Winters' initial challenge was made in the state courts of Mississippi. The challenge was held to be without merit on the ground that Winters' counsel had waived the right to contest the grand jury selection process. The state court did not consider the adequacy of representation that Winters received. Winters v. State, 244 So. 2d 1 (Miss. 1971).

4. Winters' federal petition was filed in the District Court for the Northern District of Mississippi, but again it was held that the actions of counsel waived Winters' right to challenge his plea. Winters v. Cook, 333 F. Supp. 1033 (N.D. Miss. 1971). *See also* Winters v. Cook, 466 F.2d 1393 (5th Cir. 1973).

5. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

6. Winters v. Cook, 466 F.2d 1393 (5th Cir. 1973).

waiver by the attorney will bind the client. Furthermore, Winters' plea of guilty foreclosed an attack on the grand jury selection process on constitutional grounds. *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973).

I. DEVELOPMENT OF THE DOCTRINE OF WAIVER

The classic definition of the doctrine of waiver of a constitutional right was first enunciated in *Johnson v. Zerbst.*[7] In *Johnson* the defendant was charged with counterfeiting money. The defendant did not request the assistance of counsel and proceeded to conduct a defense *pro se*, but was convicted. He later attacked the conviction in federal court claiming that he was denied the assistance of counsel. The Supreme Court rejected the contention that Johnson's failure to make a timely request constituted a waiver of his right to counsel and held that "a waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[8] Since Johnson was not aware of his right to counsel, his acts could not have constituted a knowing and intelligent waiver.[9]

In *Fay v. Noia*[10] the Supreme Court retreated somewhat from the broad doctrine promulgated in *Johnson*. Although it reiterated its dependence upon the standards set out in *Johnson*, the Court also limited the scope of the waiver doctrine by implying that procedural rights were capable of classification into those which required personal participation, and those that could be waived by defendant's counsel.[11] The Court took judicial notice of the fact that legitimate reasons might exist for a defendant's waiver of all or part of his constitutional guarantees. It recognized that a defendant could use a constitutional challenge as a bargaining tool so as to achieve some tactical advantage,[12] and such use would still fall within the *Johnson* doctrine of a knowing and intelligent waiver.[13]

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7. 304 U.S. 458 (1938).

8. *Id.* at 464. The Court relied upon language in Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937), which stated that "[c]ourts indulge every reasonable presumption against waiver of fundamental rights . . ." and upon Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292, 307 (1937), where it stated that courts "do not presume acquiescence in the loss of fundamental rights."

9. 304 U.S. at 464.

10. 372 U.S. 391 (1963). In *Fay* the defendant sought a writ of habeas corpus claiming that he had been denied his rights under the fourteenth amendment because he was convicted on the basis of a coerced confession. The Court held that the defendant had waived his right to attack the validity of the confession since he had failed to raise the issue in the state court when he had full opportunity to do so.

11. The Court, however, did not define those rights that could be waived by the attorney. The opinion intimated that as long as the defendant was able to make the controlling choice, in the sense that he was able to exercise his rights in the adjudication process, the standards of *Johnson* would be satisfied. The Court further stated that "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Id.* at 439.

12. The Court held:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits . . . .

Id.

13. *Id.*

Following its decision in *Fay*, the Court, in *Henry v. Mississippi*,[14] reaffirmed its intention to hold some defendants to their strategic choices. The Court held that where a state procedural mechanism existed in the trial process that allowed the assertion of protected rights, a deliberate by-pass by counsel would bind the client, even though the decision was made without the knowledge of the client.[15] The decision of the Court gave express recognition to the notion of a dual concept of waiver. Those rights that were waived in the trial process without the knowledge of the defendant were binding absent a showing of "exceptional circumstances."[16]

It is well settled that a plea of guilty may constitute a waiver of several fundamental constitutional rights. A plea of guilty will, for example, result in a waiver of a defendant's right to a trial by jury,[17] his right to appeal,[18] his privilege against self-incrimination,[19] and his right to confront witnesses.[20] Courts have consistently held that a defendant's waiver by a plea of guilty must still meet the standards set out in *Johnson*; that is, a defendant's by-pass of state procedures must have been made "voluntarily after proper advice with full understanding of the consequences."[21] The essential element of the *Johnson* test is the knowledge that the defendant possesses concerning all the consequences of his plea. The object of the test is to ensure that the choice is truly voluntary, and it appears to rest upon whether or not the defendant was able to make a rational choice[22] from the totality of the circumstances.[23] These circumstances would include all the events leading up to the entry of the plea, such as inducements through plea bargaining, advice of counsel, gravity of the offense and ultimate punishment, and also a determination of

14. 379 U.S. 443 (1965). In *Henry* counsel failed to make a timely objection to the introduction of evidence obtained through an illegal search. The evidence ultimately resulted in the defendant's conviction. The trial record indicated that the attorney deliberately by-passed the objection to the introduction of the evidence, hoping to attack it on appeal in the federal courts.

15. *Id.* at 451.

16. The court relied upon the "exceptional circumstances" language used in Whitus v. Balkcom, 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964), which is discussed in note 38 *infra* and accompanying text. In *Henry* the Court stated: "Trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims." 397 U.S. at 451. The courts have never specifically defined "exceptional circumstances," but generally, they refer to those rights which guarantee the integrity of the criminal trial process itself, such as the right to a trial by jury, right to counsel, and the privilege against self-incrimination. In reality, these amount to threshold requirements that must be met in order to guarantee the due process requirements of the United States Constitution in criminal prosecutions. *Cf.* notes 17-20, 30 *infra.*

17. Patton v. United States, 281 U.S. 276 (1930).

18. Fay v. Noia, 372 U.S. 391 (1963).

19. Miranda v. Arizona, 384 U.S. 436 (1966).

20. Boykin v. Alabama, 395 U.S. 238 (1969). In this case, the Court expressly held that a plea of guilty waived a defendant's privilege against self-incrimination, right to a trial by jury, and right to confront witnesses against him.

21. Shelton v. United States, 292 F.2d 346, 347 (7th Cir. 1961), *cert. denied*, 369 U.S. 877 (1962), quoting from Kercheval v. United States, 274 U.S. 220, 223 (1927).

22. Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1398 (1970); *see, e.g.*, Gilmore v. California, 364 F.2d 916 (9th Cir. 1966). Rational choice has not meant that a criminal defendant had the option of choosing between a good and bad set of alternatives, but only that the criminal defendant was aware of the existence of alternatives, notwithstanding the fact that all of them may have been less than desirable.

23. Haynes v. Washington, 373 U.S. 503, 513 (1963); Leyra v. Denno, 347 U.S. 556, 558 (1954).

the presence of coercive elements and intimidation.[24] The Supreme Court, in *Brady v. United States*,[25] affirmed the concept of the traditional test which looks to the totality of the circumstances,[26] and also indicated that the requirement for knowledge did not dictate that every fact must be known to the defendant. Further, since the plea is a separate and intervening act, the plea will waive any minor irregularities in the process.[27]

II. Exceptional Circumstances and the Role of Counsel

The courts have long recognized the important role assumed by an attorney in the criminal process. In *Powell v. Alabama*[28] the black defendants, charged with a capital offense of rape, were not permitted the assistance of counsel. The Court reversed their conviction on the ground that due process required the assistance of counsel under these circumstances.[29] Subsequent to the decision in *Powell*, the courts have realized that a lay person, no matter how intelligent he may be, is not capable of conducting his own defense.[30] The result has been that defendants have been granted the right to counsel in all felony prosecutions,[31] and in misdemeanor prosecutions involving potential imprisonment.[32]

The Supreme Court has consistently held that a defendant's right to counsel would be an empty right if it did not include the right to effective assistance of counsel, and that the lack of such assistance violates due process requirements.[33] What the Court has not defined, however, is the level of

24. 373 U.S. at 513. *See also* Comment, *Criminal Procedure—Guilty Pleas*, 47 DENV. L.J. 540 (1970).

25. 397 U.S. 742 (1970). *See also* Parker v. North Carolina, 397 U.S. 790 (1970).

26. In *Brady* the Court rejected petitioner's argument that fear of the death penalty was inherently coercive, thereby rendering his guilty plea involuntary. The petitioner had relied upon United States v. Jackson, 390 U.S. 570 (1968), which declared unconstitutional the penalty provision of the Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1970). The Act provided for the death penalty if the defendant exercised his right to a trial by jury while providing for a maximum of life imprisonment if the defendant entered a guilty plea. The Court stated that a motivation to plead guilty so as to avoid the death penalty was not alone sufficient to set aside the plea, so long as it was knowingly and intelligently entered.

27. *See* Comment, *supra* note 24.

28. 287 U.S. 45 (1932).

29. The Court stated: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69.

30. Gideon v. Wainwright, 372 U.S. 335 (1963). Justice Black, delivering the opinion of the Court, quoted Powell v. Alabama, 287 U.S. 45, 69 (1932):

> Even the intelligent and educated layman has small and sometimes no skill in the science of the law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad . . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. . . . Without it [assistance of counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Id. at 344-46.

31. 372 U.S. at 335.

32. Argersinger v. Hamlin, 407 U.S. 25 (1972).

33. Reece v. Georgia, 350 U.S. 85 (1955). Like Winters, the attack was on an improperly constituted grand jury which had systematically excluded blacks. The Court held that: "The effective assistance of counsel in such a case is a constitutional requirement of due process which no member of the union may disregard." *Id.* at 90. *See also* Glasser v. United States, 315 U.S. 60, 70 (1942), in which the Court held that a failure by courts to insure the appointment of effective counsel would be a denial of due process of law in violation of the fourteenth amendment. The Court reasoned that

competence required of an attorney in the criminal trial process.[34] This lack of an identifiable standard has become a more acute problem under the holdings of the Court in *Fay* and *Henry*. The criminal defendant, not normally versed in criminal procedure, must rely upon the advice of counsel in determining whether to pursue or to waive available avenues of defense. The right to effective assistance of counsel is one of a criminal defendant's most fundamental rights because "it affects his ability to assert other rights he may have."[35]

Under *Fay*, and more importantly, under *Henry*, a criminal defendant may attack the denial of a right waived by counsel without the defendant's knowledge only upon the showing of exceptional circumstances.[36] An example of the exceptional circumstances doctrine set forth in *Henry* was the issue of racial discrimination, and the resultant impact of this discrimination upon the attorney-client relationship, as between a black defendant and his white attorney. For many years, it was common practice for attorneys in the South to decline to challenge the racial composition of the jury systems, and the Fifth Circuit has taken judicial notice of that fact.[37] In *Whitus v. Balkcom*[38] the Fifth Circuit described the dilemma faced by black defendants charged with crimes in racially segregated and polarized communities. The defendants in this case had to choose either to challenge the jury selection process, thereby incurring the wrath of an all-white jury system, or to suffer deprivation of a trial by an impartially selected jury of their peers.[39] In *Whitus* the defendants attacked their conviction on the grounds that blacks were excluded from both the grand and petit juries which had indicted and convicted them.[40] The attorneys for the defendants were fully cognizant of this policy but did not advise the defendants of the practice or of their right to challenge it. The court held that a failure to object to the exclusion of blacks did not amount to a waiver by the defendants since they made "no

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ineffective counsel would prevent a criminal defendant from obtaining a fair hearing on the merits, and thereby constitute a denial of due process. *See also* Powell v. Alabama, 287 U.S. 45 (1932).

34. The only real standard of competency is discussed in McMann v. Richardson, 397 U.S. 759 (1970). The standard is phrased in the negative, only stating what does not constitute ineffective counsel. *See* note 44 *infra* and accompanying text.

35. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

36. 379 U.S. at 451.

37. In United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 82 (5th Cir.), *cert. denied*, 361 U.S. 850 (1959), the court, through Judge Rives stated: "As judges of a Circuit comprising six states of the deep South, we think it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries."

38. 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

39. The court, quoting the majority opinion in *Fay*, describes this dilemma as "the grisly, hard, Hobson's choice the state puts to Negro defendants when it systematically excludes Negroes from juries; white defendants are not subjected to this burden." *Id.* at 499, quoting from 372 U.S. at 440.

40. It is beyond the scope of this Note to discuss exhaustively the constitutional history of the Supreme Court's consideration of systematic exclusion of blacks from grand juries. However, it should be noted that the Court, for almost one hundred years, has held that this amounts to a denial of due process and equal protection of the law. *See, e.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Patton v. Mississippi, 332 U.S. 463 (1947); Pierre v. Louisiana, 306 U.S. 354 (1939); Norris v. Alabama, 294 U.S. 587 (1935); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Strauder v. West Virginia, 100 U.S. 303 (1889).

deliberate, meaningful waiver of their objection to systematic exclusion of Negroes from the juries."[41] In reaching this conclusion, the court emphasized the peculiar problems faced by black defendants, and implied that the courts in the Fifth Circuit would scrutinize more closely the actions of counsel who represent blacks, as opposed to whites.

Two recent cases have emphasized the role of the attorney in the waiver process. In *McMann v. Richardson*[42] the defendant pleaded guilty to murder and later attacked his conviction by seeking a writ of habeas corpus, claiming that he was denied the effective assistance of counsel because he was advised by his attorney to plead guilty even though the bulk of evidence against him was inadmissible. The Court stated that:

> Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought inadmissible in evidence depends as an initial matter, not whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.[43]

The Court in *McMann* refused to define a standard of competence required of attorneys in criminal representation; instead, it stated simply that it would not use hindsight to judge tactics and strategy of counsel that might be questionable from a legal standpoint.[44] In 1973 the Court, in *Tollett v. Henderson*,[45] reinforced its holdings in *Brady* and *McMann* by again emphasizing the significance of a plea of guilty. This plea amounts to an intervening circumstance that may cure irregularities in the criminal process that preceded it.[46] Under the ruling of the Court, a defendant may only attack a plea of guilty by showing that it was not voluntarily and intelligently made. In judging the caliber of advice the defendant received, the Court will not consider whether the advice was right or wrong, but only whether that advice was within the range of competence set forth in *McMann*.[47]

III. WINTERS v. COOK

In *Winters v. Cook*[48] the United States Court of Appeals for the Fifth Circuit, en banc, held that racial discrimination in grand jury selection procedures did not constitute one of the exceptional circumstances under *Henry*[49]

41. 333 F.2d at 509.
42. 397 U.S. 759 (1970).
43. *Id.* at 770-71.
44. The Court held: "A defendant's plea of guilty based upon reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." *Id.* at 770.
45. 411 U.S. 258 (1973). In *Tollett* neither the defendant nor his counsel knew of the systematic exclusion of blacks from the grand jury. Petitioner raised the attack upon his guilty plea twenty-five years after it was made.
46. "A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the plea." *Id.* at 267.
47. *Id.*
48. 489 F.2d 174 (5th Cir. 1973).
49. *See* note 16 *supra.*

even though the attorney waived the challenge to the selection process without the knowledge and acquiescence of the defendant.[50] The court rested its opinion on two separate grounds. First, the defendant was precluded from asserting his challenge to the racial composition of the grand jury by the waiver of his counsel, even though a grand jury selection process that excludes blacks had long been held to be a denial of due process of law.[51] Second, the court stated that Winters' plea of guilty operated as a break in the chain of events, and, as such, foreclosed his challenge to all prior procedural irregularities.[52] Winters' main contention on appeal was that his attorney had failed to advise him of the racial composition of the grand jury. This failure to advise prevented him from exercising a knowing and intelligent choice, and this alone rendered the assistance of counsel inadequate. In response to this, the court reiterated the position taken by the Supreme Court that an attorney could waive the rights of the accused in the name of trial strategy, and, absent a showing of exceptional circumstances, the defendant was bound by the acts of his counsel.[53] The fact that the defendant in *Winters* was not advised of the possibility of a constitutional objection to the racial composition of the grand jury would not be enough to bring his challenge within the doctrine outlined in *Henry*.[54]

The viability of the waiver by counsel rests upon his "good faith" attempts to represent his client,[55] and the court placed a great deal of emphasis on the fact that Winters was able to avoid the death penalty because of his attorney's actions.[56] As to the failure to advise, the court stated: "We refuse to enlarge the attorney's duty to include the responsibility to inform the defendant of every possible constitutional claim."[57] Judge Clark, who delivered the opinion of the court, noted that an enlargement of the responsibility of the attorney would have a debilitating effect on the trial process, since it would entail lengthy delays by forcing the judiciary to inquire into the defendant's knowledge of every constitutional claim.[58] The court set the standard of review by stating that in order for the conviction to be set aside the defendant must show fraud, gross incompetence or neglect on the part of the

50. 489 F.2d at 177.
51. *See* cases cited note 40 *supra*.
52. The court described the plea of guilty as a "complete bar to habeas relief grounded on grand jury discrimination." 489 F.2d at 180.
53. *Id.* The court relied upon the Supreme Court holdings in *Fay* and *Henry*. *See* notes 11 and 15 *supra* and accompanying text.
54. *See* note 14 *supra*.
55. 489 F.2d at 176.
56. The plea bargain between the defense attorney and prosecutor is emphasized by the majority: "Winters exchange of a lethal shotgun blast for a prior verbal insult and a fisticuff makes his lawyer's trade of a term of imprisonment which could be as short as ten years for the chance to gamble on the death sentence look like a sure thing." *Id.* at 183. The court ignores the reasonable analysis of the facts discussed by Judge Rives in his dissenting opinion which postulated that, if a white defendant had been exchanged for Winters, a likely possibility would have existed that Winters would have at most been charged and convicted of manslaughter. The racial attitudes in the community did not fit the "ideal" that the majority readily accepted. *Id.* at 184.
57. *Id.* at 177.
58. The court said that "it would be a futile command to require that a trial judge continually satisfy himself that the defendant was fully informed as to, and in complete accord with, his attorney's every action or inaction that involved any possible constitutional right." *Id.*

attorney, or that the right waived was so fundamental that only the defendant could waive it.[59] It was held that *Winters* satisfied none of these requirements since the range of competence demanded of an attorney, as promulgated in *McMann*,[60] was fully satisfied. The attorney, in waiving the objection to grand jury composition, had a "conscientious consideration of that course of action which would be best for his client."[61] Following the reasoning set out in *Tollett*,[62] the court further stated that the rights which were waived here by the acts of counsel were not so fundamental that Winters had to participate personally in the waiver.[63] Defendant's knowledge of every constitutional right was not required to make a plea of guilty a knowing and intelligent one,[64] and, since the right in question was not fundamental, the only requirement was that the scope of advice fall within the ambit of *McMann*, that of reasonably competent counsel.[65]

In dissenting opinions, Judges Rives[66] and Godbold[67] argued that the *Winters* case was a classic example of racial discrimination, and that Winters was indicted for murder primarily because he was black. Using different reasoning, they both criticized the majority's method of rationalizing away the Fifth Circuit's prior position of closely watching the relationships of white attorneys and black defendants. Judge Rives argued that the policy should still remain in effect, using *Winters* as a classic example to support this view.[68] Judge Godbold argued that overturning past policy affecting six states on the basis of one isolated case was not sound judicial policy.[69]

The opinion of the majority in *Winters* seemingly departed from its prior position of taking judicial notice of racial problems peculiar to the Fifth Circuit.[70] In addition, the reasoning process utilized by the majority in *Winters* was somewhat circular. While it dismissed outright the essence of Winters' claim of ineffective assistance of counsel, it then said that since Winters offered no evidence to show ineffective assistance of counsel, the court could only conclude that the actions of Winters' counsel came within the standards of *McMann*. Similarly, the court refused to assail the integrity of attorneys

59. *Id.* at 178.
60. *See* notes 42-44 *supra* and accompanying text.
61. 489 F.2d at 180.
62. *See* note 45 *supra.*
63. 489 F.2d at 179. The court reasoned that since case precedent did not describe the right to an impartially selected grand jury as so fundamental that a defendant must personally participate in its waiver, it obviously was not fundamental, no matter what the circumstances. *Id.* at 179-80.
64. The court stated that: "Where the attorney reached a more than arguably correct decision involving many complicated and uncertain variables, we will not impose a rule requiring that he inform his client as to the precise nature of each variable. A lawyer does not have to conduct a course in constitutional law for his client to validly discharge his position of trust." *Id.* at 181.
65. *See* note 44 *supra.*
66. 489 F.2d at 183.
67. *Id.* at 190.
68. *Id.* at 188.
69. *Id.* at 191.
70. The court, as a matter of practice, overruled the position previously taken in *Goldsby*: "The majority of the court *en banc* now announces that it does not consider such breach of trust by counsel to be so prevalent in any jurisdiction of this circuit that this court should, in the absence of proof, place all or even some lawyers in this circuit under the cloud of such an accusation." *Id.* at 178.

practicing with the Fifth Circuit without clear evidence of impropriety.[71]

The concept of waiver implies that waiver be made knowingly and intelligently a concept still viable under *Johnson v. Zerbst* and subsequent decisions. Assuming *arguendo* that objections to the composition of a grand jury can be waived without the participation of the accused in some circumstances, the majority failed to distinguish on its facts the instant case from *Tollett* and *Brady*, and to apply correctly the standard of competency set out in *McMann*. Here, the entire bargaining transaction between Winters' attorney and the prosecutor centered on the discriminatory selection process of the grand jury. This bargaining issue did not consist of a corollary constitutional issue which the majority thought an attorney should not be burdened with in advising his client. Unlike *Tollett*, the attorney in *Winters* knew of the practice of racial exclusion, and the use of this for leverage in his defense function was in fact the only strategic decision made by the attorney. The majority cites *Whitus* for the proposition that an objection to grand jury composition is not crucial to the rights of the accused, while ignoring the fact that in *Whitus* the defendants had a jury trial, and once the issue was before a petit jury, the role of the grand jury was necessarily diminished. In the instant case, the grand jury played a much more important role. It was the only link in the criminal process that Winters passed through from arrest to plea. The argument of the majority that Winters' counsel satisfied the standards of competency set out in *McMann* is incorrect for two reasons. First, Winters attorney did not advise his client of the very essence of his defense. *McMann* gave the attorney some leeway for error, but it did not confer a blanket of immunity upon him. The criminal defendant still has the right to challenge the quality of the representation he received, and the Court gave express recognition to the right to effective assistance of counsel. Second, *McMann* stands for the proposition that a court will not retrospectively question the tactics of the attorney if he has misjudged the legal question involved, or failed to anticipate a new trend in the law.[72] However, no such case existed in *Winters*. The attorney in *Winters* was aware of the long established legal doctrine that prohibited discrimination in grand jury selection, and a question of second guessing new policy was never applicable. The Court based its holding on the theory that the law is complex and in a state of constant flux, and to penalize the acts of an attorney, through the benefit of hindsight, would be most unfair, and would at the least raise the spectre of endless appeals. However, the Fifth Circuit significantly departs from its prior position of allowing the trial courts discretion in gauging the effectiveness of counsel.[73] Other circuits have decided the issues of competency on a case-by-case basis, recognizing that the solution to such is very

71. *Id.*
72. 397 U.S. at 771.
73. In Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971), the court, relying upon *McMann*, upheld a petitioner's claim that he was denied the effective assistance of counsel when the attorney coerced the defendant into waiving a challenge to the grand jury composition by pleading guilty. The court said: "We do not have before us a case of 'reasonably competent' advice which, with the benefit of hindsight, turned out to be mistaken." *Id.* at 1081.

complex and not capable of easy resolution.[74] *Winters* holds that the competency of counsel cannot be attacked without a showing of gross incompetence or neglect.

One could say that the decision of the court in *Winters* is applicable only to cases adjudicated by pleas of guilt. However, the necessity of effective assistance of counsel is no less diminished because a defendant pleads guilty than when he chooses to contest the charges made against him, and, in fact, the need is probably greater since a defendant's rights are waived by the plea of guilty. The decision in the instant case is not justified by *McMann* nor rationalized by *Tollett*.

The doctrine of waiver has been troublesome to courts over the last thirty-five years, mainly because of the competing interests involved in the controversy. The courts have been attempting to accommodate the criminal defendant's right to equal protection and due process of law while at the same time satisfying the need of the criminal justice system for finality of judgments and judicial economy.[75] The accommodation amounts to a balancing of interests between these two separate and sometimes mutually exclusive concepts, with the waiver doctrine falling somewhere between the two in an ill defined area. The majority opinion in *Winters* places great emphasis on Winters' guilty plea, with the result that the court is able to "balance away" the claim of ineffective assistance of counsel.[76] Unfortunately, the court never really considered the logic of its reasoning, for implicit in its analysis is that the constitutional right to effective assistance of counsel is not absolute. A sliding scale now appears to exist whereby defendants are subject to differing definitions of ineffective assistance of counsel. Those who plead guilty must demonstrate gross incompetence or neglect, while those who obtain convictions through the trial process must only show incompetence.[77] In practical terms, the court appears to accept the guilty plea as determinative, without allowing real inquiry into the circumstances surrounding the entry of the plea. While paying lip service to *Johnson*, the court in reality has erected an almost insurmountable barrier to the criminal defendant who wishes to challenge a plea of guilty. Under the analysis of the majority the reasons for the entry of a plea of guilty are virtually irrelevant. This standard has

74. *See, e.g.*, United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973); *cf.* Allen v. Perini, 458 F.2d 233 (6th Cir. 1972); Jackson v. Cox, 435 F.2d 1089 (4th Cir. 1970); Shiflett v. Virginia, 433 F.2d 124 (4th Cir. 1970).

75. See Brady v. United States, 397 U.S. 742, 752 (1970).

76. Judge Godbold in his dissenting opinion described the analytical process used by the majority as a process of "confession and avoidance." 489 F.2d at 191. In effect, the majority opinion "weighed" the entry of the plea of guilty with the claim of ineffective assistance of counsel and misapplied the standard of *Tollett*. The entry of the plea of guilty in open court seems to have carried much more weight with the majority opinion than it was entitled to carry under *Tollett* and *Brady*, and as a result, it overbalanced the procedural irregularities caused by Winters' counsel. Absent the showing of gross incompetence, the guilty plea is determinative of the issue.

77. In United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973), Judge Bazelon developed the standards of competence required under *McMann*. He rejected the label of gross incompetence, stating that effective assistance of counsel "derives not only from the due process clause, but from the Sixth Amendment's 'more stringent requirements.'" *Id.* at 1202. He stated that *McMann* required "[that] a defendant is entitled to the reasonably competent assistance of an attorney . . . ." *Id.* Reasonably competent, although an elusive standard, is a much more stringent standard than that of the gross incompetence standard espoused by the majority opinion.

no basis in constitutional doctrine, and applied literally, means as a practical matter that sixth amendment rights are unenforceable.

IV. CONCLUSION

In *Winters* the Fifth Circuit appears to take a different approach to the problem of ineffective assistance of counsel than did the Supreme Court in *McMann*. Under the holding in *Winters* two differing standards of review of claims of ineffective assistance of counsel emerge. For those defendants who plead guilty to crime, a standard of gross incompetence or neglect must be met before a plea may be set aside, while a counterpart who goes through the trial process is subject to the guidelines of *McMann*, reasonably competent counsel.

Several distinguishing features of *Winters* may curtail its future impact in the Fifth Circuit. First, the plea of guilty obviously weighed heavily upon the result reached by the majority, and in fact, the decision to deny the petition of Winters appears to have been made on the basis of the plea of guilty with the court then backtracking to rationalize the decision on other grounds. Second, the court did not feel that discrimination in grand jury selection procedures was so fundamental that the accused must participate in the waiver of that defense. The facts alone may make the *Winters* decision easily distinguishable in the future, but Judge Clark's opinion bespeaks a judicial attitude in the Fifth Circuit which is largely unreceptive to a claim by a criminal defendant that he was denied the effective assistance of counsel. If the defendant has entered a plea of guilty his burden of proof under the *Winters* standard is almost insurmountable.

Perhaps the most significant feature of the decision of the majority in *Winters* is that it brings to an end the Fifth Circuit's past practice of judicially noting racial problems in the Deep South. The court now says that it will not consider racial problems in its consideration of cases involving criminal defendants, and in essence, no longer will the black defendant be given that extra benefit of the doubt.

Timothy R. McCormick

Zahn v. International Paper Co.: Meeting the Federal Jurisdictional Amount in Class Actions

International Paper Company discharged large amounts of inadequately treated waste into the waters of Vermont's Lake Champlain. Four lakeshore property owners, representing approximately 200 others, brought a class action under Federal Rule of Civil Procedure 23(b)(3)[1] against the company

1. FED. R. CIV. P. 23:
(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1)

for impairment of property rights. Federal jurisdiction was based on diversity of citizenship, the named plaintiffs each alleging monetary damages sufficient to satisfy the jurisdictional amount requirement of the diversity statute.[2] However, the district court refused to permit the case to proceed as a class action since the unnamed plaintiffs, each asserting separate and distinct claims, did not individually satisfy the requisite amount in controversy.[3] The United States Court of Appeals for the Second Circuit affirmed,[4] and the Supreme Court granted certiorari.[5] *Held, affirmed*: When class actions, under rule 23(b)(3), based on diversity of citizenship, involve plaintiffs with separate and distinct claims, each of the plaintiffs, whether named or unnamed, must individually satisfy the jurisdictional amount requirement. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

I. AGGREGATION OF CLAIMS TO MEET THE JURISDICTIONAL AMOUNT REQUIREMENT

The United States Constitution places no limitation on access to the federal courts based upon the amount in controversy. However, the Judiciary Act of 1789[6] and successive acts have required a minimum jurisdictional amount.[7] Various expressed purposes of this requirement have been to protect out-of-state litigants from the bias of local tribunals,[8] to protect the rightful independence of state governments,[9] to save litigants from the increased expense incident to trials in federal courts,[10] and to prevent overcrowding federal court dockets with cases involving small amounts.[11] The legislative history of the current statute indicates that the jurisdictional amount should be set "at a sum of money that will make jurisdiction available in all *substantial controversies* where other elements of Federal jurisdiction are present. The jurisdictional amount should not be so high as to convert the Federal Courts

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> the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

2. 28 U.S.C. § 1332a (1970). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs.

3. Zahn v. International Paper Co., 53 F.R.D. 430 (D. Vt. 1971).

4. Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972).

5. *Id., cert. granted*, 410 U.S. 925 (1973).

6. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

7. Originally, an amount in excess of $500 was required in actions based on diversity of citizenship. *Id.* Today, the amount in controversy must exceed $10,000. 28 U.S.C. § 1332(a) (1970).

8. H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 18-19 (2d ed. 1973). This rationale has lost much of its validity today due to the venue provisions of 28 U.S.C. § 1404(a) (1970).

9. *See, e.g.*, Healy v. Ratta, 292 U.S. 263 (1934).

10. *See, e.g.*, Chase v. Sheldon Roller-Mills Co., 56 F. 625 (N.D. Iowa 1893).

11. *Id.*

into courts of big business nor so low as to fritter away their time in the trial of petty controversies."[12]

Traditionally, plaintiffs uniting to enforce a single title or right in which they had a common or undivided interest were allowed to aggregate their claims to meet the jurisdictional amount.[13] However, multiple plaintiffs with separate and distinct claims had individually to satisfy the jurisdictional amount requirement.[14] This rule originated in 1832[15] and has continued as the accepted construction of the "matter in controversy" language of the controlling statutes.[16] If no claimant satisfies the minimum requirement, the suit must be dismissed;[17] if only some satisfy the requirement, those that do not must be dismissed.[18]

After the effective date of the Rules,[19] a question arose as to whether rule 23 was meant to change the traditional doctrine against aggregation of separate and distinct claims in federal class actions. In *Clark v. Paul Gray, Inc.*,[20] a joinder case which involved a class of plaintiffs and was decided after the promulgation of the Rules, the Supreme Court upheld the traditional concept forbidding aggregation. All plaintiffs were dismissed except the one who met the jurisdictional amount. This traditional reasoning was then reiterated in the federal courts when cases involving a class of plaintiffs were brought as class actions under rule 23.[21] In *Hackner v. Guaranty Trust Co.*[22] Judge Clark held that in "spurious"[23] class actions aggregation is improper and, further, that jurisdiction could not be supplied by adding plaintiffs who could support jurisdiction by individually meeting the amount.[24]

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12. S. REP. No. 1830, 85th Cong., 2d Sess. 3-4 (1958) (emphasis added). *See also id.* at 21; H.R. No. 1706, 85th Cong., 2d Sess. 3 (1958).

13. *See, e.g.*, Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Scott v. Frazier, 253 U.S. 243 (1920); Troy Bank v. C.A. Whitehead & Co., 222 U.S. 39 (1911).

14. *See* cases cited note 13 *supra.*

15. *Cf.* Oliver v. Alexander, 31 U.S. (6 Pet.) 349 (1832).

16. Today, the statute is 28 U.S.C. § 1332 (1970). For examples of the unbroken line of precedent interpreting the structure of the "matter in controversy" language, see Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Scott v. Frazier, 253 U.S. 243 (1920); Pinel v. Pinel, 240 U.S. 594 (1916); Rogers v. Hennepin County, 239 U.S. 621 (1916); Woodside v. Beckham, 216 U.S. 117 (1910); Waite v. Santa Cruz, 184 U.S. 302 (1902); Bernards Township v. Stebbins, 109 U.S. 341 (1883); Wheless v. St. Louis, 18 U.S. 379 (1851).

17. *See, e.g.*, Scott v. Frazier, 253 U.S. 243 (1920).

18. Clark v. Paul Gray, Inc., 306 U.S. 583 (1939); Stewart v. Dunham, 115 U.S. 61 (1885); Bernards Township v. Stebbins, 109 U.S. 341 (1883).

19. September 16, 1938. By Act of June 25, 1948, ch. 646, 62 Stat. 869, Congress enacted into positive law title 28, United States Code, entitled "Judicial Code and Judiciary."

20. 306 U.S. 583 (1939).

21. *See, e.g.*, Alfonso v. Hillsborough County Aviation Authority, 308 F.2d 724 (5th Cir. 1962); Troup v. McCart, 238 F.2d 289 (5th Cir. 1956); Hughes v. Encyclopaedia Britannica, 199 F.2d 295 (7th Cir. 1952); Ames v. Mengel Co., 190 F.2d 344 (2d Cir. 1951); Steele v. Guaranty Trust Co., 164 F.2d 387 (2d Cir. 1947).

22. 117 F.2d 95 (2d Cir. 1941).

23. Rule 23 divided class actions and labeled them as "true," "hybrid," or "spurious," depending on the nature of the claim asserted. The "true" category was defined as involving "joint, common, or secondary" rights. "Hybrid" and "spurious" class actions each involved several rights. If the several rights arose from a specific property or interest, the suit was termed "hybrid"; whereas if a common question of law or fact were involved, it was termed "spurious." *See* 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 562 (C. Wright ed. 1960); Wright, *Class Actions*, 47 F.R.D. 169, 175-77 (1969).

24. 117 F.2d at 98.

The categories of rule 23 (true, hybrid, and spurious) were ostensibly eliminated by the 1966 amendments as arbitrary and unworkable[25] and replaced by a more functional approach.[26] This new approach occasioned a division in the appellate courts as to whether the traditional interpretation of the "matter in controversy" had been changed by these amendments.[27] In the leading case of *Snyder v. Harris*,[28] where no plaintiff named or unnamed met the jurisdictional amount, the Supreme Court settled the controversy by adhering to the traditional rule against aggregation.[29] Justice Black, writing for the majority, traced the rule against aggregation to the early joinder case of *Pinel v. Pinel*,[30] where aggregation of separate and distinct claims was disallowed, and, relying heavily on *Clark v. Paul Gray, Inc.*,[31] concluded that just because the amendments had given "spurious" class actions the same effect as joinder provisions, there was no reason to treat them differently for purposes of aggregation.[32] The Court further refused to re-examine the construction of the "matter in controversy" language, as a reformulation would increase docket congestion and in other ways thwart the congressional intent manifested by the continued re-enactment of that language.[33] The Court held that rule 23 could not be found to effect a change in the definition of "matter in controversy" as to do so would put it in direct conflict with the command of rule 82 that "[t]hese rules shall not be construed to extend or limit jurisdiction in the United States District Courts . . . ."[34] Thus, in effect, the *Snyder* decision perpetuated the traditional categories of old rule 23, and, with them, the traditional rule against the aggregation of separate and distinct claims, for purposes of determining whether or not claimants may aggregate their claims to meet the jurisdictional amount.[35]

II. ZAHN V. INTERNATIONAL PAPER CO.

In *Zahn* the Court concluded that in a federal class action under rule 23(b)(3) where jurisdiction is based on diversity of citizenship, unnamed plaintiffs with claims which do not meet the jurisdictional amount may not be represented as a class by named plaintiffs whose claims do, individually,

25. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY (1954); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356 (1967).

26. *See* Wright, *supra* note 23, at 170.

27. The Court of Appeals for the Fifth Circuit held that there had been no change in the rule. Alvarez v. Pan Am. Life Ins. Co., 375 F.2d 992 (5th Cir.), *cert. denied*, 389 U.S. 827 (1967). The same result was reached in the Eighth Circuit in Snyder v. Harris, 390 F.2d 204 (8th Cir. 1968), but a contrary rule developed in the Tenth Circuit, Gas Serv. Co. v. Coburn, 389 F.2d 831 (10th Cir. 1968). The Court granted the petitions for certiorari in the latter two cases and decided them together. Snyder v. Harris, 394 U.S. 332 (1969).

28. 394 U.S. 332 (1969).

29. *Id.* at 336-37.

30. 240 U.S. 594 (1916).

31. 306 U.S. 583 (1939).

32. 394 U.S. 332, 337 (1969).

33. *Id.*

34. *Id.*

35. Lesch v. Chicago & Eastern Ill. R.R., 279 F. Supp. 908 (N.D. Ill. 1968), held that nothing in the 1966 amendments to rule 23 changed the judicial requirements of rule 82 and stated that the old rule 23 categories remain useful analytical tools when the requisite jurisdictional amount is in controversy.

meet the requirement. This result was consistent with an unbroken line of precedent forbidding the aggregation of separate and distinct claims.[36] The Court reasoned that it would be anomalous and unfair to require named plaintiffs to satisfy the jurisdictional amount while allowing unnamed plaintiffs redress in federal court without satisfying such a prerequisite.[37] This anomaly could be avoided only by disallowing jurisdiction or allowing all class action plaintiffs to aggregate their claims, thereby overruling the Court's prior interpretation of the "matter in controversy" language of the diversity statute. The latter alternative would require disregarding the assumed congressional intent manifested by a continual re-enactment of diversity statutes containing this language.[38] Therefore, in an apparent attempt to remain consistent with congressional intent, the Court applied the traditional concept by refusing to allow the aggregation of separate and distinct claims.

In further support of its position, the Court stated that had the advisory committee for the 1966 amendments entertained any thought of departing from the traditional approach to aggregation in class actions, there surely would have been some express statement of that intention.[39] This argument begs the issue. Even if an expression of intent could be found, the reasoning of the *Snyder* Court, relied upon by the *Zahn* majority, would render it impotent to effectuate any change. A departure from the traditional approach to aggregation would enlarge the jurisdiction of the federal courts by contravening the statutorily mandated requirements of the "matter in controversy" language of the diversity statute. Enlarging jurisdiction in this way is forbidden by rule 82.[40] It is this reasoning, unaffected by the intent of the advisory committee, which supports the majority's conclusion that absent some further congressional action there may be no change in the concept of aggregation.[41]

Justice Brennan, in his dissent, argued that two different approaches might have been used by the Court to grant jurisdiction. The first is a re-examination of the "matter in controversy" language of the diversity statute. Contradicting the opinion of the majority, Justice Brennan contended that the jurisdictional amount requirement is a terse statement of amount only. This statement expresses a broad directive which leaves the definition of the requirement to the judiciary.[42] Therefore, the definition of "amount in controversy" has not been legislatively determined but is open to judicial interpretation. In interpreting this language the Court should be evolutionary, remaining sensitive to demands of fairness and efficiency rather than following precedent no longer applicable to present needs.[43]

Justice Brennan's stand in favor of a re-examination of the statutory

36. 414 U.S. at 294 n.3; *see* notes 28-34 *supra* and accompanying text.
37. *Id.* at 300 n.9.
38. *Id.* at 301.
39. *Id.* at 302.
40. FED. R. CIV. P. 82 states in part: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."
41. 414 U.S. at 302.
42. *Id.* at 303-04 (Brennan, J., dissenting).
43. *Id.*

"amount in controversy" language as it applies to rule 23 is supported by three additional arguments. First, the object of rule 23(b)(3) class actions is "to get at the cases where a class action promises important advantages of economy of effort and uniformity of result without undue dilution of procedural safeguards for members of the class or for the opposing party."[44] Since these considerations motivated the creation of class actions in the first instance, they, rather than outworn categories which the 1966 amendments attempted to eliminate, should be used to decide the viability of class actions. Second, the stated legislative purpose in setting the present jurisdictional amount was to allow the federal courts to concern themselves only with substantial controversies.[45] The controversies involved in class actions are almost uniformly of substantial import and, other elements of federal jurisdiction being present, to disallow them in the *Zahn*-type situation seems contrary to legislative intent. Finally, the traditional aggregation concept creates relatively trivial distinctions. For example, if *Snyder* had been brought as a shareholders' derivative action, each shareholder would not have been required to satisfy the jurisdictional amount.[46] Also, if *Zahn* had been brought as an action to enjoin a nuisance,[47] jurisdiction would most likely have been granted.[48]

Moreover, even if one accedes to the extensive precedent denying aggregation, Justice Brennan pointed out that "[o]nce jurisdiction has attached to the 'action,' . . . the 'aggregation' rule has been but one of several ways to establish jurisdiction over additional claims and parties."[49] A second approach, which the Court might have used to establish jurisdiction, is the equally well-entrenched concept of ancillary jurisdiction.[50] By this concept, a case or controversy comes before a district court as an entirety. In disposing of the matter properly before it, the court acquires jurisdiction over those matters raised ancillary to the main controversy which would not have been within the court's jurisdiction had they been raised independently.[51] The concept is governed by policy considerations of fairness and efficiency[52] and

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44. Kaplan, *supra* note 25, at 390.

45. *See* note 12 *supra*, and accompanying text.

46. Moore & Wicker, *Federal Jurisdiction: A Proposal to Simplify the System To Meet the Needs of a Complex Society*, 1 FLA. ST. U.L. REV. 1, 13 (1973).

47. FED. R. CIV. P. 23(b)(2). This course of action was not available in *Zahn* as the pulp and paper plant had already ceased operation.

48. The majority of cases seeking to enjoin a nuisance interpret the amount in controversy to be the value of the right which the complainant seeks to protect. *See, e.g.*, American Smelting & Ref. Co. v. Godfrey, 158 F. 225 (8th Cir.), *cert. denied*, 207 U.S. 597 (1907); Bricklayers' Local No. 7 v. Bowen, 278 F. 271 (S.D. Tex. 1922). The accounting prayed for and the recovery of damages by the complainants have been considered merely incidental to the primary relief sought. Roland v. Jumer Creek Drainage Dist., 4 F.2d 719, 721 (S.D. Fla. 1925). *See also* Grand Rapids Furniture Co. v. Grand Rapids Furniture Co., 127 F.2d 245 (7th Cir. 1942).

49. 414 U.S. 291, 305 (1973).

50. *See, e.g.*, Hurn v. Oursler, 289 U.S. 238 (1933); Moore v. New York Cotton Exch., 270 U.S. 593 (1936); Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921); Freeman v. Howe, 65 U.S. (24 How.) 450 (1861).

51. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 9, at 19 (2d ed. 1970); 1 W. BARRON & A. HOLTZOFF, *supra* note 23, § 23.

52. *See* C. WRIGHT, *supra* note 51, § 9, at 21; H. HART & H. WECHSLER, *supra* note 8, at 1075-81; Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1963).

has traditionally overridden concerns with the federal workload in cases of impleaded third parties,[53] interpleaded parties,[54] compulsory counterclaims,[55] cross claims,[56] and intervention as a matter of right now provided for by rule 24(a).[57] Justice Brennan concluded that class actions are equally appropriate for such treatment.[58]

The use of ancillary jurisdiction in class actions finds support in the leading case of *Supreme Tribe of Ben-Hur v. Cauble*[59] where the Supreme Court extended federal jurisdiction to non-appearing members of a class, who, if originally joined, would have destroyed diversity jurisdiction. Justice Brennan found it difficult to understand why the practical approach taken by the court in *Ben-Hur* must be abandoned where the purely statutory "matter in controversy" requirement is concerned.

The majority's position becomes increasingly difficult to comprehend when one considers the extent to which the liberal joinder provisions of the Federal Rules have stimulated the growth of the doctrine of ancillary jurisdiction. Several federal courts have used the Rules to avoid problems involving lack of diversity of citizenship[60] and jurisdictional amount.[61] In recent joinder cases under rule 20, the aggregation doctrine, in light of the doctrine of ancillary jurisdiction, has not been used to limit jurisdiction.[62] These developments cast doubt on the present validity of relying on *Clark v. Paul Gray, Inc.*[63] and the argument that class actions should be treated no differently from other joinder cases in denying jurisdiction.

In ignoring the above approaches and arguments it appears that the Court in *Zahn*, as in *Snyder*, was motivated by an overriding concern with the federal workload. However, as Justice Brennan pointed out in his dissent, this objection applies to every exercise of ancillary jurisdiction.[64] Further, a denial of jurisdiction will impose an even heavier burden on the judiciary as a whole and also deny class members an opportunity to assert their claims since it leads to one of two alternative situations. If the state has a class action device, the availability of two forums may increase the overall judicial work load.

53. *See, e.g.*, Pennsylvania R.R. v. Erie Ave. Warehouse Co., 302 F.2d 843 (3d Cir. 1962). *See also* 1 J. MOORE, FEDERAL PRACTICE § 0.90[3] (2d ed. 1974) [hereinafter cited as MOORE]; *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 906 (1958).

54. *See, e.g.*, Walmac Co. v. Isaacs, 220 F.2d 108 (1st Cir. 1955). *See also Developments in the Law, supra* note 53, at 913.

55. *See, e.g.*, Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961); United Artists Corp. v. Masterpiece Prods., 221 F.2d 213 (2d Cir. 1955). *See also* 1 MOORE § 0.90.

56. *See, e.g.*, R.M. Smythe & Co. v. Chase Nat'l Bank, 291 F.2d 721 (2d Cir. 1961); Childress v. Cook, 245 F.2d 798 (5th Cir. 1957). *See also* 1 MOORE § 0.90.

57. *See, e.g.*, Phelps v. Oaks, 117 U.S. 236 (1886). *See also* 2 W. BARRON & A. HOLTZOFF, *supra* note 23, § 593.

58. "Class actions were born of necessity. The alternatives were joinder of the entire class, or redundant litigation of the common issues. The cost to the litigants and the drain on the resources of the judiciary resulting from either alternative would have been intolerable." 414 U.S. at 307. *See also* 3B MOORE §§ 23.02[1], 23.05 *passim*.

59. 255 U.S. 356 (1921).

60. *See, e.g.*, Formulabs, Inc. v. Hartley Pen Co., 318 F.2d 485 (9th Cir.), *cert. denied*, 375 U.S. 945 (1963); Dery v. Wyer, 265 F.2d 804 (2d Cir. 1959).

61. *See, e.g.*, Nelson v. Keefer, 451 F.2d 289 (3d Cir. 1971); Jacobson v. Atlantic City Hosp., 392 F.2d 149 (3d Cir. 1968).

62. *Id.*

63. 306 U.S. 583 (1939); *see* notes 20, 31, 32 *supra* and accompanying text.

64. 414 U.S. at 307-08.

Furthermore, if the plaintiffs are found to constitute "no appropriate class"[65] over which the court could exercise jurisdiction the common issues may have to be litigated separately "possibly enlarging the federal judiciary's burden, and ironically reversing the Court's apparent purpose."[66] Conversely, if the state has no class action device, the fact that many claims "are likely to be worthless because the cost of asserting them on a case-by-case basis will exceed their potential value—will do no judicial system credit."[67] Justice Brennan's argument is strengthened by recent pronouncements that the increased jurisdictional amount has not substantially affected the federal caseload.[68]

III. CONCLUSION

Contrary to the apparent intent of the advisory committee,[69] the 1966 amendments as interpreted by the Court in *Zahn*, restrict the use of rule 23, since in a rule 23(b)(3) action involving a multitude of plaintiffs it will be almost impossible to ascertain whether each meets the jurisdictional amount. It is unfortunate that the Court so chose to truncate the rights of these plaintiffs by resorting to outworn categories, which the 1966 amendments attempted to eliminate, and a concept of aggregation which ignores the fact that class actions are of substantial import involving essentially a single claim, the adjudication of which, if not allowed as a class action, will necessitate piecemeal litigation, inconsistent results, unfairness, and an ultimate waste of judicial time and effort. It is also unfortunate that the Court chose to ignore *Ben-Hur* and the growth of the concept of ancillary jurisdiction. In light of the considerable importance of class actions the *Zahn* Court's decision seems "both unwarranted and unwise."[70]

Josephine Jenkins

65. *Id.* at 308 n.10.
66. *Id.*
67. *Id.*
68. The late Chief Justice Warren has reported that while the increase from $3,000 to $10,000 in 1958 "did result in a temporary reduction in the filing of private civil cases, the net effect on the workload has been very slight." Warren, *Address to the American Law Institute*, 25 F.R.D. 213 (1960).
69. The *Zahn* ruling directly contravenes the actual expansive intent of the framers of the 1966 Amendments. *See* Wright, *supra* note 23; Kaplan, *supra* note 25.
70. 414 U.S. at 312.