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COMMENTS

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CRIMINAL LAW—INSANITY—THE AMERICAN LAW INSTITUTE FORMULATION AND ITS IMPLICATIONS FOR SOUTH CAROLINA*

The traditional majority definition of legal insanity is expressed in *McNaghten's Case*.[1] That venerable rule established in 1843 reduces the basic issue to the question of "whether the accused had a sufficient degree of reason to know that he was doing an act that was wrong." Many jurisdictions while essentially adhering to the *McNaghten* Rule have also theorized that the cognitive factors are not the only elements that may preclude inhibition; that even though cognition still obtains, mental disorder may produce a total incapacity for self-control. This irresistible impulse doctrine is primarily an inquiry as to whether, at the time of his criminal act, the accused suffered from a diseased mental condition which deprived him of the will to resist the insane impulse. It has been applied to supplement the basic *McNaghten* formula in those jurisdictions which recognize it.[2]

Dissatisfaction with the *McNaghten*-Irresistible Impulse Rule arose, and the search for alternatives dates back to 1954[3] and *Durham v. United States*,[4] the first open rejection of the *McNaghten*-Irresistible Impulse formula.[5] The supplanting rule adopted by the *Durham* court was the simple statement that "an

* United States v. Freeman, 357 F.2d 606 (2d Cir. 1966).

1. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843).

2. The primary importance of this rule has been as a supplement to *McNaghten*. See, *e.g.*, Sauer v. United States, 241 F.2d 640 (9th Cir. 1957); Commonwealth v. Chester, 337 Mass. 702, 150 N.E.2d 914 (1958); Thompson v. Virginia, 193 Va. 704, 70 S.E.2d 284 (1952).

3. Actually New Hampshire never adopted the *McNaghten* rule, and since State v. Peak, 49 N.H. 399 (1870), it has employed a product-type formula to which *Durham* has similarities.

4. 214 F.2d 862 (D.C. Cir. 1954).

5. As was stated in United States *ex. rel.* Smith v. Baldi, 192 F.2d 540, 567 (3d Cir. 1951) (dissent), the *McNaghten* Rule assumes " a logic-tight compartment in which the delusion holds sway leaving the balance of the mind intact." This is the basic objection to *McNaghten*. The human mind is an entity and cannot be broken into parts, one sane and the other insane. In focusing on the cognitive aspect of personality, *McNaghten* made no allowance for those who could distinguish good and bad, but could not control their behavior. This one-sided emphasis on the cognitive "straitjacketed" psychiatric testimony in that these experts were forced to answer the question whether the defendant could "know" right from wrong, and were unable to explain other symptoms which pointed to irresponsibility.

accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."[6] This rule avoided *McNaghten*'s excessive emphasis on the cognitive element of the personality, and it further allowed psychiatric experts to testify to all relevant information about a defendant, rather than to limited opinions about whether he knew right from wrong. "*Durham* was a right step in the wrong direction,"[7] however, for in its simplicity it had failed to define the key terms used—"disease," "defect" and "product." It was "couched as an abstract indefinite generality . . . whereas the [right-wrong] standard was a concrete proposition that laymen could apply."[8] This vagueness posed the threat that bewildered juries might abdicate their roles as the triers of fact in favor of the opinions of technically rather than legally oriented psychiatrists.

"Every court which . . . considered *Durham* . . . rejected it,"[9] and the American Law Institute chose in 1955 to adopt in its Model Penal Code a different rule, stating that:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.
>
> (2) The term mental disease or defect does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[10]

This rule has proved more acceptable than *Durham*. Since its formulation the Fifth[11] and Eighth[12] Circuits have paid lip service to the institute's efforts while adhering to the traditional *McNaghten* Rule, as supplemented by the irresistible impulse doctrine. The District of Columbia,[13] Third,[14] and Tenth[15] Cir-

6. Durham v. United States, 214 F.2d 862, 864 (D.C. Cir. 1954).
7. Blocker v. United States, 288 F.2d 853, 858 (D.C. Cir. 1961) (dissent).
8. United States v. Fielding, 148 F. Supp. 46, 52 (D.D.C. 1957).
9. Blocker v. United States, 288 F.2d 853, 866 (D.C. Cir. 1961).
10. MODEL PENAL CODE § 4.01 (Tent. Draft No. 4, 1955).
11. Carter v. United States, 325 F.2d 697 (5th Cir. 1963).
12. Carter v. United States, 332 F.2d 728 (8th Cir. 1964).
13. McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962).
14. United States v. Currens, 290 F.2d 751 (3d Cir. 1961).
15. Wion v. United States, 325 F.2d 420 (10th Cir. 1964).

cuits have altered their rules so as to closely conform to the Model Penal Code formula.[16]

In February of 1966 the Second Circuit, indicating that *McNaghten* and the previously applied alternatives had become outdated in the light of recent advances permeating the field of criminal psychology, in *United States v. Freeman*[17] became the first of the courts of appeal to accept the Model Penal Code definition of insanity without modification. *Durham* began the search for an alternative to the *McNaghten*-Irresistible Impulse Rule, and *Freeman* marks at least a temporary end to that search, for the rule it established appears to be the most feasible alternative yet provided.

The majority of our courts have thus far been hesitant to adopt any new ideas concerning the determination of insanity questions, principally because none of the alternatives yet provided have offered a reliable means of moving away from the old formula. *Durham* failed, and the partial applications of the code formula have not been truly significant. The impetus behind the movement for change has been scholastic rather than practical, and the reluctance to change undoubtedly reflects a distrust of formulas suggested by psychiatrists, who have not yet agreed among themselves upon an adequate definition of "mental disease." The Model Penal Code formula adopted in *Freeman* can solve this dilemma because its terminology bridges the gap between the time tested, but outdated, *McNaghten* Rule used in

16. The Tenth Circuit in *Wion* adopted in toto the Institute formula, but included a jury charge about defendants ability "to know what he was doing." (The Institute used "appreciate" to reflect that "knowledge" divorced from any appreciation of the import thereof is useless.) The District of Columbia Court achieved its similarity in the context of the *Durham* formula. It first required a critical relationship between the disease and the alleged act (Carter v. United States, 252 F.2d 608 [D.C. Cir. 1957]; Douglas v. United States, 239 F.2d 52 [D.C. Cir. 1956]) and, more importantly, defined "disease" and "defect" to include any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavioral controls. (McDonald v. United States, 312 F.2d 751 [D.C. Cir. 1962]). The Third Circuit in *Currens* adopted as its test only the "capacity to conform his conduct to the requirements of law" facet of the Institute test, probably in an attempt to be shed of *McNaghten*'s cognitive emphasis. The *Freeman* case points out, however, that *McNaghten* was faulty not in that it dwelt on the cognitive, but that it did so *exclusively*. It might be well to note that the Ninth Circuit is the only other circuit court to face squarely the issue of possible departure from the *McNaghten* rule. It held in Sauer v. United States, 241 F.2d 640 (9th Cir. 1964), that it would await the Supreme Court for change, feeling itself bound by that Court's precedent (See note 25 *infra*). It did go on record, however, as rejecting both the *Durham* and *Currens* rules. Whether that court avoided mention of the MODEL PENAL CODE formula because it felt that this might be the direction of future change is yet to be seen.

17. 357 F.2d 606 (2d Cir. 1966).

the courts and the updated, but untested, theories of the legal laboratory. *Freeman* inculcates recent advances in insanity trials, primarily in its liberalization concerning the use of expert testimony, into a formula which is a clear statement in modern terms of the old *McNaghten* - Irresistible Impulse Rule. It achieves a clarity in definition of the issues which partial adoptions of the code have missed. The *Freeman* court recognized that the suggested test may require "futher emendation in the light of tomorrow's discoveries," but it has at least established a formula which can presently remedy the problem of reconciling past and present.

Freeman is basically an attempt to translate the traditional *McNaghten* (plus irresistible impulse) formula into modern terminology. The "substantial capacity" terminology was employed in order to eliminate black and white thinking. While the presence of *any* defect may not be sufficient to establish legal insanity, a finding of total incapacity may likewise be unnecessary. "Appreciate" replaced "know" because of the prevailing view that even though one might have intellectual awareness that his act is wrong, this can have little significance when divorced from appreciation of the moral or legal import of behavior. *Freeman* is also an attempt to provide for meaningful psychiatric testimony. Psychiatric testimony is approved when that testimony is based on "thorough" examination, with the provision that such testimony is to be admitted only as expert testimony, and not as legal pronouncement. With respect to this expanded use of psychiatric testimony, *Freeman* involves change from *McNaghten*, but the basic theory undergirding the Model Penal Code rule adopted therein is a restatement of the same elements—cognition and volition—which are the bases for the *McNaghten*-Irresistible Impulse Rule. This latter is the test used presently in many states and, previous to the post-1954 changes, all federal courts.

South Carolina's rule on insanity was basically formulated in 1898 by the Supreme Court's approval of a circuit court charge stating in part:

> [T]o relieve himself from responsibility . . . he must show that . . . by reason of a mental defect . . . at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable . . . . [I]f he is . . . capable of forming a correct judgment as to its being morally or legally wrong he is . . . responsible . . . . [T]he difficulty

> would be great . . . of establishing satisfactory proof whether an impulse was or was not uncontrollable.[18]

Many years and numerous cases[19] have seen no change, and in its most recent confrontations with the insanity problem the court in 1957 continued its repudiation of the irresistible impulse doctrine[20] and in 1961 reaffirmed loyalty to the *McNaghten* Rule.[21] *Bundy* was decided at a time when "the subject of the mind and its influence on the body is very difficult and obscure, even to the most learned," and a question arises as to whether recent progress on mental study has not so elucidated the insanity issue as to reveal fallacies in the rule adopted under that early decision. Revision seems to be necessary, and *Freeman* provides for the first time a means of properly accomplishing this end.

The adoption of *Freeman* in South Carolina would occasion a departure from our present rule, but change should involve fewer problems than at first seem apparent. Our courts presently employ rules of evidence sufficiently liberal to pose only minor problems in the adoption of *Freeman*'s provisions regarding expert testimony.[22] The most critical problem would be the lack of any volitional (irresistible impulse) clause within our rule.[23] Many courts have refused to accept the doctrine of irresistible impulse because of the difficulty involved in actually proving the existence of such impulses. *Freeman* meets this problem by requiring that the impulse be the result of a proved mental defect in the nature of an actual physical abnormality and not a mere tendency toward antisocial conduct.[24] While South Carolina has perhaps been wise in its nonrecognition of the vague irresistible impulse position, it cannot be doubted that valid irresistible impulse situations do occur. *Freeman* acknowledges that such volitional problems exist, and its formulation offers a precise and affirmative method of submitting them to a jury, which must in South Carolina stretch *McNaghten* in order that the irresponsible

18. State v. Bundy, 24 S.C. 439, 58 Am. Rep. 262 (1898).

19. *E.g.*, State v. Fuller, 229 S.C. 439, 93 S.E.2d 463 (1956); State v. Keller, 224 S.C. 257, 78 S.E.2d 373 (1953); State v. Gilstrap, 205 S.C. 412, 32 S.E.2d 163 (1944); State v. McGill, 191 S.C. 1, 3 S.E.2d 257 (1939); State v. Jackson, 87 S.C. 407, 69 S.E. 883 (1910).

20. State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).

21. State v. Thorne, 239 S.C. 164, 121 S.E.2d 623 (1961).

22. *Id.* at 170, 121 S.E.2d at 625.

23. State v. Allen, 231 S.C. 391, 98 S.E.2d 826 (1957).

24. MODEL PENAL CODE, § 4.01 (2) (Tent. Draft No. 4, 1955).

not be criminally incarcerated. Much of the uncertainty concerning the irresistible impulse idea has been removed, and it should be recognized that this new formulation offers a very real opportunity to improve the legal approach to insanity.

One further point concerning the prospective importance of *Freeman* should be noted. The adoption of an insanity rule based on its theory will present potential problems of crowded facilities in that it provides for compulsory incarceration of those who are adjudged insane, while present South Carolina law[25] makes such incarceration discretionary with the trial judge. The *Freeman* rule would increase the number of those sent to mental facilities for two reasons. Judges would be required to commit all individuals to appropriate facilities upon a finding of criminal insanity, and juries would be more willing to find an individual criminally insane if they were aware that the criminally insane are automatically incarcerated (that is, that those found not guilty by reason of insanity will not be set free). One of the most appealing advancements indicated in *Freeman* is that the criminally insane would be incarcerated in mental institutions rather than in penal facilities. The detention must last until rehabilitation is satisfactorily completed; therefore the possibility is eliminated that there will be the recidivism which might follow a short non-rehabilitative jail sentence.

The *Freeman* court could put no teeth into its compulsory detention requirement, for at present there is no federal law requiring such incarceration. The court was constrained to leave this matter of enforcement to the states until such a law could be effected. South Carolina is fortunate in having the legal framework by which to effect such incarceration, but our law providing for discretionary incarceration must be amended to make that incarceration mandatory. It would be possible to adopt the *Freeman* definition of insanity without initiating this program of compulsory detention, but to do so would rob the rule of one of its key points. Even if it is necessary to do this until our facilities are capable of handling an increased number of patients, however, the *Freeman* definition of insanity should be adopted.

Freeman has presented South Carolina and the majority of American jurisdictions with a workable alternative to the *McNaghten* Rule, and concurrently with the problem of whether change is proper at the present time. Favoring a change is the

25. S.C. CODE ANN. §§ 32-969, -970 (1962).

fact that under the perceptive eye of the Supreme Court[26] there is a growing trend in the courts toward the idea of a revision of insanity law. The decisions since *Durham* have muddied the water of the insanity problem, and our highest Court must soon act to clarify the issues. When a decision comes it is doubtful that *McNaghten* will be its basis for a preponderance of the recent Supreme Court decisions[27] provide liberal allowances for individual freedoms. A liberal insanity rule would be in keeping with this trend. A liberalization in the approach to legal determinations of insanity appears inevitable, and the only choice available to the states may well be whether to initiate the change or await it.

The issue is still in flux, and the ultimate solution to the problem may not yet exist. A better solution than *McNaghten* does now exist, however, and it deserves close consideration.

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26. In spite of the influx of conflicting opinions since *Durham,* the United States Supreme Court has not yet chosen to clear the confusion with a definitive statement of what the law of insanity should be. In fact the Supreme Court last dealt extensively on the insanity problem in Matheson v. United States, 227 U.S. 540 (1913); Hotema v. United States, 186 U.S. 413 (1902), and the twin Davis cases, Davis v. United States (I), 160 U.S. 469 (1895); Davis v. United States (II), 165 U.S. 373 (1897). In these cases the Court gave approval to jury charges employing *McNaghten,* but the correctness of that rule as opposed to any other theory was not in issue. Subsequent cases are equally barren of direct challenge to *McNaghten.* (In Leland v. Oregon, 343 U.S. 790 [1952], the Court held that there was no due process requirement for the states to stop using the Right-Wrong test.) The ambiguity which has resulted has left different opinions as to whether the lower court can adopt views other than *McNaghten.* The Ninth Circuit in Sauer v. United States, 241 F.2d 640 (9th Cir. 1964), *cert. denied,* 354 U.S. 940 (1965), held that it could not act until the Supreme Court or Congress did so, but the Third Circuit in United States v. Currens, 290 F.2d 751 (3d Cir. 1961), the Tenth in Wion v. United States, 325 F.2d 420 (10th Cir. 1964), *cert. denied,* 377 U.S. 946 (1965), the District of Columbia in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), and the Second in United States v. Freeman, 357 F.2d 606 (2d Cir. 1966), have held that there is no compulsion on lower courts to use *McNaghten.* It is felt that the highest Court would have granted certiorari in some of the many cases which have reached it, if it wished to clear the muddy water. Perhaps, as has been suggested, the Supreme Court has not laid down a rule because it is motivated by a desire to see the issue discussed and developed on the lower levels before it makes a definitive statement.

27. *E.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Douglas v. California, 372 U.S. 353 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961); Sherman v. United States, 356 U.S. 369 (1958).

CRIMINAL PROCEDURE—INQUIRY INTO GUILTY PLEAS—RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE*

The Seventh Circuit case of *United States v. Rizzo*[1] brings to issue a problem that is not of novel impression, but is nevertheless in a state of some confusion to both the courts and the legal profession. That problem concerns the extent and depth to which a trial judge must question one accused of a criminal act in order to determine whether or not the accused understands the consequences of his plea of guilty before the court may accept such a plea.

The law is well settled in the federal courts by Rule 11 of the *Federal Rules of Criminal Procedure*,[2] and in the vast majority of state courts by either case or statute,[3] that a plea of guilty will not be accepted unless it is in fact voluntarily given, without coercion, intimidation or threats.

The problem, however, turns on two primary questions left unanswered: what is *voluntary*; and what is *awareness of the consequences*? The factors involved and their relative importance in arriving at a determination of voluntariness and awareness vary from jurisdiction to jurisdiction and from circuit to circuit. The Supreme Court has to this date refused certiorari to decide the above questions.

A. The Problem

In the *Rizzo* case, the United States Court of Appeals for the Seventh Circuit sustained the conviction of Vincent Michael Rizzo. Under the first count of a two-count indictment the defendant had been charged with the transportation of a stolen motor vehicle in interstate commerce in violation of a federal statute.[4] The second count charged bank robbery. At his arraign-

* United States v. Rizzo, 362 F.2d 97 (7th Cir. 1966).

1. 362 F.2d 97 (7th Cir. 1966).

2. "A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. . . ." FED. R. CRIM. P. 11.

3. See 22 C.J.S. *Criminal Law* § 423(2) (1961).

4. "Whoever transports in interstate or foreign commerce, a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000, or imprisoned not more than five years or both." 18 U.S.C. § 2312 (1950).

ment the defendant waived a formal reading of the indictment, and pleaded not guilty. The case was called for trial in the United States District Court at which time the government was granted its motion to dismiss Count II of the indictment. After a brief recess the defendant's counsel advised the court that the defendant wished to withdraw his plea of not guilty to Count I, and enter a plea of guilty.

Before acceptance of the guilty plea, the following colloquy took place between the court and the defendant:

> *COURT:* Well, Mr. Rizzo, are you satisfied with Mr. McDonald's [defense counsel] representation of you?
> *MR. RIZZO:* Yes, your Honor.
> *COURT:* And he has consulted you, and you have talked with him regarding your plea in this case?
> *MR. RIZZO:* Yes, your Honor.
> *COURT:* Has anybody made any promises to you of any kind as to what disposition will be made of this case upon your plea of guilty?
> *MR. RIZZO:* No, sir.
> *COURT:* And you enter this plea of guilty freely and voluntarily?
> *MR. RIZZO:* I do, Judge.
> *COURT:* Without any promises of any kind by the District Attorney, your lawyer, or anybody else, including this court?
> *MR. RIZZO:* That's right, your Honor.
> *COURT:* All right, it is this Court's duty to advise you that under your plea of guilty—and you do desire to enter a plea of guilty?
> *MR. RIZZO:* I do, your Honor.
> *COURT:* It is this Court's duty to advise you that under the plea of guilty, this Court has the power to impose a sentence of not to exceed five years in the penitentiary, or a fine not to exceed $10,000, or both.
>
> Knowing that, do you persist in your plea of guilty?
> *MR. RIZZO:* I do, your Honor.
> *COURT:* Now, in fairness to you, I want to tell you that Mr. McDonald did, with Mr. Brown [the Assistant U. S. Attorney], discuss the disposition of this case in the event a plea was entered, and I told Mr. McDonald, and I tell you, that what I will do in this case upon the disposition of the plea will depend upon the pre-sentence investigation.

> No promises were made, as to what the Court will do. Do you understand that fully?
> *MR. RIZZO:* Yes, your Honor.
> *COURT:* All right, and knowing that, do you persist in your plea of guilty?
> *MR. RIZZO:* Yes, I do, your Honor.
> *COURT:* All right, the plea will be accepted. There will be a finding of guilty.[5]

On his appeal the defendant contended that the trial court had violated rule 11[6] by acceptance of his guilty plea without a determination of his understanding of its consequences.

The circuit court's discussion of the record showed that:

> Rizzo had the benefit of consultation with his attorney respecting both his case and his plea; represented to the court that he had such consultation, and that he was satisfied with it; advised the court that no promises had been made to him in return for his plea of guilty, was advised of the possible maximum penalty which the court could impose on him under his plea of guilty; and that the court did not accept the plea summarily, but acted after conversation with, and observation of Rizzo, which put the court in a position to make an assessment of Rizzo's demeanor.[7]

From the circustances and facts revealed by its examination of the record, the court determined that the trial judge had informally satisfied the requirements of rule 11 before its acceptance of the defendant's plea of guilty.

B. Cases In Conflict—The Inquiry

Any accurate analysis of the problems to be encountered in the evolution of standardized procedures, by which courts may be guided in the acceptance of guilty pleas, must begin with a determination of the very ramifications of such a pleading. A plea of guilty is a formal criminal pleading[8] and leaves the court only to give judgment and sentence.[9] It is a confession of guilt made in a formal manner. It is an admission, or conclusive ad-

5. United States v. Rizzo, 362 F.2d 97, 99-100 (7th Cir. 1966).
6. *Supra,* note 2.
7. United States v. Rizzo, 362 F.2d 97, 100 (7th Cir. 1966).
8. Bankey v. Sanford, 74 F. Supp. 756 (D.Ga. 1948); Cooke v. Swope, 28 F. Supp. 492 (D.Wash. 1939).
9. *Ibid.*

mission or proof of guilt.[10] Except that it may be withdrawn and another plea substituted for it, a plea of guilty is equivalent to and is as binding as a conviction after a trial on the merits.[11] It has the legal effect of a verdict of guilty; therefore, it authorizes the imposition of the punishment prescribed by law. Accordingly, it leaves no issue for the jury.[12]

The examination and ruling on the guilty plea made by the district court in the *Rizzo* case may be said to be typical of that performed by most federal trial judges, and would seemingly satisfy most interpretations of rule 11.

It is generally recognized that while a court may not accept a plea of guilty without first determining that the plea is made voluntarily with an understanding of the nature of the charge, there is no particular form or ritual which must be adhered to in making this determination.[13] One case illustrative of this proposition is *United States v. Swaggerty*,[14] in which the court held that, "there need not be any particular ritual in order to comply with the Rule [Rule 11], that the trial court shall not accept a guilty plea without first determining that it is made voluntarily, and with understanding of the nature of the charges, and there may be *circumstances* from which it is evident that defendant has the requisite understanding."[15]

Swaggerty further held that, "the Rule did not require that explanation be made by the trial judge personally, and it is sufficient if defendant has requisite understanding from another."[16] It is suggested that *Rizzo*, decided eleven years later by the same circuit, flies into the face of the *Swaggerty* doctrine. The confusion is further intensified by the decision in *United States v. Davis*[17] which the same court cited as authority in reaching a seemingly conflicting result in *Swaggerty*. In *Davis*, the court

10. Maye v. Pescor, 162 F.2d 641 (8th Cir. 1947); Langston v. United States, 153 F.2d 840 (8th Cir. 1946); Bugg v. Hudspeth, 113 F.2d 260 (8th Cir. 1940).

11. Smith v. Rhay, 254 F.2d 306 (9th Cir. 1958); United States v. Fox, 130 F.2d 56 (3d Cir. 1942).

12. *Ibid.*

13. Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), *rev'd* 356 U.S. 26; United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955); Harris v. United States, 216 F.2d 953 (5th Cir. 1954); United States v. Davis, 212 F.2d 264 (7th Cir. 1954); Friedman v. United States, 200 F.2d 690 (8th Cir. 1952).

14. 218 F.2d 875 (7th Cir. 1955).

15. *Id.* at 879.

16. United States v. Swaggerty, 218 F.2d 875, 879 (7th Cir. 1955). See also Michener v. United States, 181 F.2d 911 (8th Cir. 1950).

17. 212 F.2d 264 (7th Cir. 1954).

held that a trial court shall not accept the plea of guilty without first determining that the plea is made voluntarily with an understanding of the nature and consequence of the charge. The rule is stated in mandatory language, and the court is not relieved of the duty which it imposes solely because the accused is represented by counsel of his choice.[18] In point with the *Davis* case, the Second Circuit's discussion in *United States v. Lester*[19] should be noted. The opinion of the majority in *Lester* interpreted rule 11 as requiring something more than a perfunctory examination by other court personnel or the prosecutor. Further, a mere standardized inquiry or the asking of several routine questions falls short of discharging the trial judge's obligation under the Federal Rules. Judge Waterman, in writing for the majority, discussed several general interrogatories necessary to adequately reach a decision regarding the admission of a plea of guilty. The court suggested that a discussion between the judge and the accused should include an investigation of the circumstances under which the plea is made; a showing by the defendant of familiarity with the crime alleged and awareness of the nature of the charges; the statutory offenses included within them; the range of allowable punishments thereunder; possible defenses to the charges and circumstances in mitigation. In addition it must be shown that the plea was not improperly induced by the prosecutor or the result of coercion or threats.[20]

In summary, the court stated that "such a determination may be made by a penetrating, and comprehensive examination of all the circumstances under which the plea is made."[21]

In accord with the *Lester* case, the Ninth Circuit in *Munich v. United States*[22] held that a defendant may understand the nature of the charge to which he is pleading guilty, without the plea being truly voluntary. The record of the *Munich* trial showed only that the defendant "understood the nature of his plea."[23] The appellate court reversed the conviction requiring that the record disclose "that the defendant understands the meaning of the charge, what acts are necessary to establish guilt and the consequences of pleading guilty."[24]

18. *Id.* at 267.
19. 247 F.2d 496 (2d Cir. 1957).
20. *Ibid.*
21. United States v. Lester, 247 F.2d 496, 500 (2d Cir. 1957).
22. 337 F.2d 356 (9th Cir. 1964).
23. *Id.* at 360.
24. Munich v. United States, 337 F.2d 356 (9th Cir. 1964).

It has been suggested "that a brief discussion with the defendant regarding the nature of the charges may normally be the simplest and most direct means of ascertaining the state of defendant's knowledge,"[25] before acceptance of a guilty plea.

The *Lester-Munich* position can not yet be said to be a panacea for rule 11. The requirement of inquiry, assuming that there is such, is still beset with controversy.

Illustrative of the contrast to *Lester-Munich* is the Tenth Circuit's case of *Nunley v. United States*.[26] In *Nunley*, the defendant had previously been convicted of four prior narcotic violations. On appeal of a subsequent conviction, the transcript of record showed that the defendant was advised of the nature of the charges and of the possible penalties. In response to a single question of the court as to whether he wanted to plead guilty, Nunley replied "plead guilty." The appellate court found that while no express determination was made, the guilty plea was entered voluntarily. It adequately appeared that the defendant knew the nature of the charges, was experienced in the ways of criminal proceedings and was well aware of the entire situation. His conviction was affirmed.[27]

The effect that defense counsel has on the trial judge's inquiry is a further source of confusion. In the *Swaggerty* case the duty seemed to be discharged by the retained attorney's statements that he had previously advised the defendant of the nature of the charge and possible consequences of a guilty plea.[28] In *United States v. Shepherd*,[29] it was held that the rule providing that the court shall not accept a plea of guilty without first determining that the plea is made voluntarily with an understanding of the nature of charge, imposes no obligation on a court to make such inquiry when the defendant is represented by counsel.[30]

It appears that on this point, *Swaggerty* and *Shepherd* represent a minority view. Such reliance on the defense attorney, who is in many cases court appointed, is unwarranted. It is an attempt to shift the positive duty of rule 11 from the court to the trial counsel, clearly in derogation of the congressional intent behind rule 11.

25. United States v. Davis, 212 F.2d 264, 267 (7th Cir. 1954).
26. 294 F.2d 579 (10th Cir. 1961).
27. *Ibid.*
28. United States v. Swaggerty, 218 F.2d 875 (7th Cir. 1955).
29. 108 F. Supp. 721 (D. N.H. 1952).
30. *Ibid.*

The majority of the federal courts have shown that representation of a defendant by counsel does not in itself fulfill the requirement of the rule, but is a circumstance which may fairly be taken into account in determining the nature and extent of the inquiry to be made.[31]

C. Conclusion

Noting the fact that the burden of proof is normally on the defendant who moves to vacate sentence to prove his allegations, it is suggested that the requirements of due process require a searching and comprehensive examination by the court before accepting a plea of guilty. This seems to be especially true in light of *Miranda v. Arizona*,[32] where the Supreme Court served notice of the heavy burden upon the court where the protection of due process is involved.[33]

In order to effectuate the proper application of rule 11 of the *Federal Rules of Criminal Procedure*, the trial judge, before accepting a plea of guilty, should make an independent, extensive and searching investigation into the plea. The depth and degree of this inquiry should depend on the circumstances, facts, seriousness of the offense, demeanor of the accused, and the wealth of the court's past experience. Suggested guidelines may include:

(1) Is the plea a result in any way of threats, coercion, fear or force?

(2) Does the defendant show an awareness of the nature of the charge?

(3) Is the accused familiar with the offenses included within the charge?

(4) Is there a statement of possible maximum punishments?

(5) Are possible defenses suggested?

(6) Does the defendant have knowledge of the possible consequences of the plea?

(7) Is there a discussion of the acts necessary to establish guilt?

31 United States v Baysden, 326 F.2d 629 (4th Cir. 1964); United States v. Diggs, 304 F.2d 929 (6th Cir. 1962); Long v. United States, 290 F.2d 606 (9th Cir. 1961); Kennedy v. United States, 259 F.2d 883 (5th Cir. 1958).

32. 384 U.S. 436 (1966).

33. *Ibid.*

(8) Is the plea a recognition of guilt and an admission of the criminal act?

It is obvious that in view of the finality and conclusiveness of the plea of guilty, it should be treated with at least as much caution as attends the acceptance of a simple confession. It is inconceivable that any court could adopt any position which might possibly undermine the rights of a criminally accused in light of the fortification given to these rights by recent United States Supreme Court decisions.

H. SPENCER KING

LABOR LAW—INDIVIDUAL EMPLOYEE RIGHTS UNDER A COLLECTIVE BARGAINING AGREEMENT*

The relation of a collective bargaining representative to those whom it represents has long been a subject of controversy.[1] The United States Supreme Court in *Republic Steel Corp. v. Maddow*[2] evidenced its reluctance to suggest courses of action which might be available to an individual whose grievance has been refused process by his union. It stated that "[i]f the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available."[3]

The plight of an individual employee in this type of situation is further exemplified by *Belk v. Allied Aviation Serv. Co., Inc.*[4] where the court stated that, "[w]here his remedy lies when his union refuses to prosecute his claim, we leave to future cases as they arise."[5] The case of *Serra v. Pepsi-Cola Gen. Bottlers, Inc.*[6] has arisen and is unique in that it spells out the courses of action that the courts in *Belk* and *Republic Steel* refused to enumerate.

Serra involved an employee whose union refused to institute a contract grievance procedure on his behalf. The court held that the employee was entitled to bring an action against his employer under section 301 of the Labor Management Relations Act (LMRA).[7]

A. Exclusive Union Control Under the Bargaining Agreement

Recognition of the proposition that an employee should be allowed to sue his employer in his own right is to recognize that an individual employee has certain "vested interests" over which his union does not have exclusive control. There are, however, persuasive reasons supporting the argument for exclusive union control. Generally, the union is the party most experienced and qualified to prosecute a claim. Grievances settled with individuals would impair union prestige by tending to make it appear unnec-

* Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684 (N.D. Ill. 1965).

1. *Compare* Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956), *with* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362 (1962).

2. 379 U.S. 650 (1965).

3. *Id.* at 652.

4. 315 F.2d 513 (2d Cir. 1963).

5. *Id.* at 516.

6. 248 F. Supp. 684 (N.D. Ill. 1965).

7. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

essary or ineffective. Further, there is a need for an orderly and uniform method of processing grievances that will establish a framework within which the union and employer can operate with relative harmony. Most important, individual interests rarely exist independently of the collective interests involved. From the employer's viewpoint, vesting exclusive control in the union would simplify management's relation with its employees and settled grievances would have an appealing finality.

Vesting exclusive control in the union, however, may subordinate individual rights and may endanger satisfactory achievement of those ends which collective bargaining purports to protect. Union officials, in an effort to acquire a possible overall advantage for the majority, might be willing to "trade off" the claim of an individual. Because the grievance procedure is susceptible to abuse, union officials could single out minority groups for arbitrary treatment. In *Cortez v. Ford Motor Co.*,[8] for example, women were systematically laid off in violation of the seniority provision of the collective bargaining agreement. The union granted preference to male employees basing its disregard of the terms of the contract on the proposition that the affected jobs were too heavy for women.

> Beyond these dangers of malice, majority intolerance, or official insensitivity, there are less tangible but more pervasive values. One of the functions of collective bargaining is to replace vagrant discretion with governing rules. The individual, by his ability to insist that those general rules be observed, gains an assurance of fair and equal treatment and a sense of individual worth.[9]

If the union has exclusive control over grievance procedures and can bar access to any neutral tribunal, individual rights may well be denied.

B. Retention of Individual Employee Rights

Significant in the development of the law regarding the rights of an individual employee is the case of *Textile Workers v. Lincoln Mills*.[10] There the Supreme Court held that section 301(a)

8. 349 Mich. 108, 84 N.W.2d 523 (1957).

9. Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U.L. REV. 362, 394 (1962).

10. 353 U.S. 448 (1957).

of the LMRA[11] authorized the federal courts to fashion a body of federal law based upon the national labor policy. Having decided in *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*[12] that section 301(a) did not grant federal courts jurisdiction to hear individual complaints for breach of the collective bargaining agreement, the Court in *Smith v. Evening News Ass'n*[13] reversed itself and announced that the federal courts could take such jurisdiction. These decision set the stage for case-by-case determinations in the federal courts of the extent to which federal labor statutes prevent individual claims from being disregarded in favor of majority interests.

Retention of certain rights by the individual under a collective bargaining contract was emphatically demonstrated by the court in *Serra*. In enunciating existence of these rights, the court stated that federal statutory law provides for three possible courses of action which an aggrieved employee can seek to utilize.[14]

First, the proviso of section 9(a) of the LMRA[15] allows him to attempt to compel his employer to follow the contract grievance procedure. Second, he may bring action against his union for breach of the duty of fair representation. Third, he can bring an action against his employer under section 301(a) of the LMRA.[16]

After giving the majority union exclusive bargaining capacity, section 9(a) is qualified by a proviso stating that:

> [A]ny individual employee or a group of employees shall have the right to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.[17]

11. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).
12. 348 U.S. 437 (1955).
13. 371 U.S. 195 (1962).
14. Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684, 686 (N.D. Ill. 1965).
15. 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).
16. 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).
17. L.M.R.A. § 9(a), 61 Stat. 143 (1947), 29 U.S.C. § 159(a) (1958).

It has been argued that this proviso does not create any affirmative rights in the individual employer but that it merely provides that the employer's duty to bargain with the majority union is not violated if he chooses to hear and adjust grievances with individuals. Under this rationale, the proviso is only a qualification on the majority union's right to represent; therefore, the employer may lawfully agree with the union not to process individual grievances and may give the union the only legal right to initiate the grievance procedure.[18] Those opposing this restricted view of the proviso believe its language to be plain and its statutory history clear in giving to the employee an affirmative right to present grievances directly to the employer. This interpretation of the proviso would inevitably prevent the establishment of a contractual procedure under the collective bargaining agreement which would deprive the employee of his individual remedy.[19]

It would seem that this right of presentation would be worthless to an individual unless the courts supplement it by allowing him the right to compel arbitration after the presentation of his grievance. The courts, however, have tended to recognize that union control over the contract grievance procedure is an important prerogative and have apparently deprived the individual of any substantive relief under section 9(a).

Through a series of recent cases there has evolved a court-imposed condition precedent which must be found present before an individual may exercise the right of compelling his employer to arbitrate. In *Ostrofsky v. United Steelworkers*[20] only the union and the employer were given the right to demand arbitration under the collective bargaining agreement unless the employee could show that the union had breached its duty of fair representation. In another case, *Black-Clawson Co., Inc. v. International Ass'n of Mach.*,[21] the court would not allow an individual to prosecute a grievance or force his employer to arbitrate it after concluding that the terms of the collective bargaining agreement gave him no such right. In *Brandt v. United States Lines, Inc.*,[22] the court held that the terms of the collective bar-

18. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 621-24 (1956).

19. Summers, *supra* note 9.

20. 171 F. Supp. 782 (D. Md. 1959), *aff'd* 273 F.2d 614 (4th Cir. 1960), *cert. denied*, 363 U.S. 849 (1960).

21. 313 F.2d 179 (2d Cir. 1962).

22. 246 F. Supp. 982 (S.D.N.Y. 1964).

gaining agreement prevented an individual employee from being able to compel his employer to arbitrate in the absence of a showing that the union failed to represent him "adequately."[23]

Imposition of this requirement that the employee first show a breach of the duty of fair representation seems to have reduced the effectiveness of section 9(a) with regard to individuals, because such a showing is a difficult one for the employee to make.

Assuming that the individual can show that the union has breached its duty of fair representation, he is put to the option of either attempting to compel his employer to arbitrate or of bringing an action against his union for the breach. This latter choice is a course of action suggested by the court in *Serra.*

The individual employee's right to fair representation by his union was firmly established by *Steele v. Louisville & N.R.R.*,[24] where the Court compared the duty of the union to the duty of the legislature of a democracy. The union is subject to limitations on its power to represent its members, but is also under an affirmative duty to protect their rights equally. In *Hughes Tool Co. v. NLRB*[25] the court recognized that the duty of a union to process the meritorious grievance of an employee grows out of the union's duty of fair representation. It seems, however, that unless there is a clearly established case of union discrimination against the employee by its refusal to process his grievance, he will have difficulty in showing that the union has breached its duty of fair representation.[26] The difficulties attendant upon such a showing by an employee were emphasized by the Supreme Court in *Humphrey v. Moore*,[27] where it was determined that a union must have a broad range of discretion in determining whether a particular grievance has merit.[28] The Court stated further that the union should be allowed to sift out claims of questionable merit as well as those found to be wholly frivolous.[29] It was held that the union could not be guilty of breaching its duty of fair representation without some showing that it had acted with bad faith, hostility or discrimination toward the individual employee. Apparently, therefore, an individual employee cannot

23. *Id.* at 984.
24. 323 U.S. 192 (1944).
25. 147 F.2d 69 (5th Cir. 1945).
26. Comment, *Federal Protection of Individual Rights Under Labor Contracts,* 73 YALE L.J. 1215, 1219 (1964).
27. 375 U.S. 335 (1964).
28. *Id.* at 349.
29. *Ibid.*

bring an action against his union for breach of its duty of fair representation predicated upon a refusal to process his claim unless he can prove that the union acted in bad faith.

The third course of action suggested by the court in *Serra* is that an individual whose union has refused to process his grievance may bring action against his employer for breach of the collective bargaining agreement under section 301(a) of the LMRA.[30] In *Smith v. Evening News Ass'n*[31] the Supreme Court recognized that an individual may have standing to maintain an action under section 301 but refused to enumerate the circumstances under which such an action could be brought. It was established in *Republic Steel Co. v. Maddox*[32] that an individual can bring action under section 301 but that he must first "attempt" to use the contractual grievance procedure.[33] This exhaustion prerequisite encourages the use of the prescribed grievance procedure and recognizes that it is an integral part of the collective bargaining process. The court in *Serra* significantly treated the union's refusal to prosecute an individual's complaint as a satisfaction of the exhaustion requirement. Similarly, in *Fiore v. Associated Trans., Inc.*,[34] the court refused to require that an employee submit his claim to the grievance procedure upon an alleged failure of the union to prosecute his claim.

Application of the principles evolved through these cases indicates that an individual employee who alleges that his union has refused to prosecute his claim and that there has been a breach of the collective bargaining agreement, will be allowed to bring action against his employer under section 301(a) of the LMRA.

C. Relief for the Individual Employee

The courts have left unanswered the broader question of exactly *what relief* they would be willing to grant if after accepting jurisdiction they find that the collective bargaining agreement

30. 61 Stat. 156(a) (1947), 29 U.S.C. § 185(a) (1958). Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

31. 371 U.S. 195 (1962).
32. 379 U.S. 650 (1965).
33. *Id.* at 652.
34. 255 F. Supp. 596 (M.D. Pa. 1966).

has in fact been breached. In *Humphrey* the Supreme Court was not required to answer this question because the individual's claim was held to be unfounded. Further, most of the recent cases dealing with the rights of an individual under section 301 have only required that the courts decide whether the individual should be allowed to bring the action.[35] In the event, therefore, that the individual's claim is found to have merit, it is uncertain what protection the courts would provide.[36] It would seem that section 301(a) provides no definite protection to an individual employee, other than allowing the federal court to hear his case.

The court in *Serra* suggested three courses of action available to an individual whose union refuses to process his grievance.[37] The first, an attempt to compel the employer to arbitrate by presenting the grievance directly to him under section 9(a) of the LMRA, seems to require that the individual first be able to prove that the union refused to process in bad faith. The second, an action against the union for breaching its duty of fair representation, provides relief only where the employee can clearly show that the union acted unfairly or discriminated against him. This course of action is substantially weakened by the courts' refusal to restrict the union's discretionary power over "questionable" claims. The best alternative available to the individual alleging breach of the collective bargaining agreement and the union's refusal to prosecute his claim is to bring an action against his employer under section 301(a) of the LMRA. Even where the court finds a meritorious claim, however, the decisions have not clearly defined any method by which the individual employee may secure enforcement of his alleged rights.

The courts apparently recognize a distinct need for allowing flexibility between the employer and the union in dealing with borderline grievances as they arise. While such a recognition undoubtedly promotes labor-management stability, it may do so at the expense of an individual's grievance which his union has, in good faith, refused to process.

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35. *E.g.*, Doty v. Great Atl. & Pac. Tea Co., 362 F.2d 930 (6th Cir. 1966); Henderson v. Eastern Gas & Fuel Associates, 290 F.2d 677 (4th Cir. 1961); Salvatore v. Allied Chem. Corp., 238 F. Supp. 232 (S.D.W. Va. 1965).

36. See, Comment, *Federal Protection of Individual Rights Under Labor Contracts*, 73 YALE L.J. 1215, 1229 (1964).

37. Serra v. Pepsi-Cola Gen. Bottlers, Inc., 248 F. Supp. 684, 686 (N.D. Ill. 1965).

WILLS—DOCTRINE OF FACTS OF INDEPENDENT SIGNIFICANCE—VALIDITY OF DEVISE TO TRUSTEES UNDER THE WILL OF ANOTHER*

The doctrine of facts of independent significance is one of several principles applied by the courts to effectuate the intentions of a testator. The posture of the South Carolina Supreme Court concerning application of this doctrine to gifts to trustees under the will of another was rendered unclear in the recent decision of *South Carolina Nat'l Bank v. Copeland.*[1]

On September 8, 1963, Miss Sarah Linda Welch died leaving an estate valued at more than one million dollars. This fortune was amassed as the result of investments made for the decedent by her brother, Robert. On December 27, 1949, upon Robert's insistence, Sarah signed a will prepared by Robert's attorney. Article II of her will devised and bequeathed her estate to the trustees of the Houston Foundation if at the time of her death Robert were living. This foundation was a perpetual charitable trust which had been created by Robert's will in 1948 and funded by his 25 million dollar bequest to it. Article III of the will provided:

> If at the time of my death my said brother shall have died leaving a will, duly probated, by which property is devised and bequeathed to trustees for charitable purposes, then it is my will and I so direct that in lieu of the devise and bequeath contained in the preceding Article II all of said rest and residue of my property shall be devised and bequeathed to said trustees named in my said brother's will upon the same terms and conditions, for the same uses and purposes, and subject to the same limitations and restrictions as if the language in my said brother's will creating said trust and setting forth said terms and conditions, said uses and purposes and said limitations and restrictions, were copied at length herein with appropriate changes to make them a part of my will.[2]

One codicil, providing that all funds of the trust were to be used only in Texas, was executed by Robert prior to the execu-

* South Carolina Nat'l Bank v. Copeland, S.C. , 149 S.E.2d 615 (1966).

1. S.C. , 149 S.E.2d 615 (1966).
2. *Id.* at , 149 S.E.2d at 618.

tion of Sarah's will. It further provided that the trustees under his will did not have to use property willed to the trust by others exclusively in any particular state unless directed to do so. A perpetual inter vivos trust indenture was executed by Robert on December 1, 1949, transferring property to the trustees and reserving the power to name the trustees in his will. Subsequent to the execution of Sarah's will, Robert executed three codicils to his will which effected changes in the terms of and dispositions to the foundation trust. In the first he reserved the power to name the trustees of the foundation in his will. The second provided that the trustees of the inter vivos trust would be succeeded by persons named in his will upon probate of his will. The third codicil made substantial changes in the disposition of Robert's property, giving to individuals fifteen per cent of the estate formerly going to the trust. Robert died in 1952, and his will was admitted to probate.

The executor of Sarah's estate argued that she clearly intended to leave her estate to the trustees of the Texas trust and that Robert's will was an act of independent significance showing to whom the gift was made.[3] The South Carolina Supreme Court, declining to rule on the doctrine of facts of independent significance, held that Sarah's attempt to set up a South Carolina trust was void because the terms were not effectively declared; therefore, the estate was distributable as intestate property.

The Statute of Wills[4] requires that a will be attested and subscribed to in the presence of three witnesses. The purpose of the statute is to prevent fraud, duress and mistake.[5] Strictly interpreted the statute would exclude any writing not contained in the will itself. Since a strict interpretation would lead to the defeat of the testator's express intent, a number of exceptions to the rule have evolved. Exceptions allowing one will to be used in the interpretation of the will of another are based on the doctrines of power of appointment, incorporation by reference and facts of independent significance.[6]

The testator's will can be said to create a power of appointment in another to be exercised through the donee's will. It is not necessary to grant a power of appointment in those words;

3. The heirs at law contended that there was no valid will. The two cases were consolidated. The validity of the will was upheld.

4. S.C. CODE ANN. § 19-205 (1962).

5. 94 C.J.S. *Wills* § 183 (1956).

6. See PAGE, WILLS § 34.35 (3d ed. 1961).

all that is required is a power to dispose through a will,[7] or a gift to legatees or devisees under another's will.[8] The power of appointment fails if the donee of the power predeceases the testator.[9] At least one case,[10] however, has upheld a power of appointment even though the donee predeceased the testator, but the result would be better justified on the doctrine of facts of independent significance.[11] The failure of the power of appointment may cause the gift to fail totally,[12] or the gift may be saved on other theories.[13]

A paper may be incorporated into the testator's will provided that "it was in existence at the time of the execution of the will, is referred to as being in existence, and is identified by satisfactory proof as the paper referred to."[14] Whether the paper is executed or not, it becomes a part of the will.[15] All three conditions must be met in order that the doctrine apply. Thus a provision that gifts were to be distributed in accordance with directions in "a little book marked A on inside cover, which will be found with my will"[16] did not incorporate the book marked "A" because there was no evidence that the book was in existence at the time of the execution of the will. A gift to William Jennings Bryan was held invalid because the letter instructing the testator's wife to give the gift was not referred to as being in existence.[17] Identification of the document to be incorporated may be established by parol evidence,[18] but parol evidence cannot be used to change the character of the instrument referred to in the will.[19] In addition to these requirements, it is necessary to show

7. *E.g., In re* McCurdy's Estate, 197 Cal. 276, 240 Pac. 498 (1925).

8. *E.g., In re* Piffard's Estate, 111 N.Y. 410, 18 N.E. 718 (1888).

9. *In re* McCurdy's Estate, 197 Cal. 276, 240 Pac. 498 (1925); Curley v. Lynch, 206 Mass. 298, 92 N.E. 429 (1910); Condit v. De Hart 62 N.J.L. 78, 40 Atl. 776 (1898); *In re* Piffard's Estate, 111 N.Y. 410, 18 N.E. 718 (1888).

10. Murchison v. Wallace, 156 Va. 728, 159 S.E. 106 (1931).

11. See text at note 21 *infra.*

12. *E.g.,* Curley v. Lynch, 206 Mass. 289, 92 N.E. 429 (1910).

13. E.g., Condit v. De Hart, 62 N.J.L. 78, 40 Atl. 776 (1898).

14. ATKINSON, WILLS § 80 (2d ed. 1953); See, *e.g.,* Richardson v. Byrd, 166 S.C. 251, 164 S.E. 643 (1929).

15. *E.g.,* Richardson v. Byrd, 166 S.C. 251, 164 S.E. 643 (1929); Milledge v. Lamar, 4 Desaus. 617 (S.C. 1816).

16. Appeal of Sleeper, 129 Me. 194, 151 Atl. 150, 152 (1930).

17. Appeal of Bryan, 77 Conn. 240, 58 Atl. 748 (1904). In a subsequent appeal the letter was not allowed as a declaration of the trust upon which the money was bequeathed to the wife. Bryan v. Bigelow, 77 Conn. 604, 60 Atl. 266 (1905).

18. *E.g., In re* Estate of Hopper, 90 Neb. 622, 134 N.W. 237 (1912) (identity of deeds).

19. *E.g.,* Daniel v. Tyler's Ex'r., 296 Ky. 808, 178 S.W.2d 411 (1944).

that the testator intended that the document be incorporated. Mere mention of a document does not show sufficient intent to incorporate.[20] Provisions for a gift to a trust set up by the testator are often said to incorporate the trust agreement by reference.[21] Especially where the trust is amendable, these cases should be considered under the doctrine of facts of independent significance.

The doctrine of facts of independent significance has long been recognized, although not under that specific designation. A gift to "the wife of my youngest son" will be upheld where the youngest son is unmarried at the time the will is executed.[22] A subsequent marriage is non-testamentary in nature and has significance apart from disposing of property under the will. The same reasoning is applied in cases involving contents of a house, box or other container.[23] The non-testamentary significance of the act can become minuscule as the court in *Hasting v. Bridge*[24] pointed out.

> It is manifest that such holdings give a testator a wide range of power to alter the destination of property passing under his will, without doing any testamentary act. If he had ten boxes numbered consecutively, and willed the contents of each to a different legatee, he could cut down or increase their respective takings at pleasure.[25]

Nevertheless, courts regularly uphold the validity of such bequests without consideration of the doctrine. In the case of a bequest of a "house and land together with all fixtures," the question is more likely to concern what things are included in the bequest than a consideration of whether or not the bequest itself is valid.[26]

The doctrine has been used to incorporate documents into a will where incorporation by reference fails. As early as 1857 an account book was referred to in order to determine the size of gifts under a testator's will.[27] A later court in *In re Piffard's*

20. First Nat'l Bank of Janesville v. Nelson, 355 F.2d 546 (7th Cir. 1966).
21. See generally Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust,* 50 MICH. L. REV. 33 (1951).
22. Knowles v. Knowles, 132 Ga. 806, 65 S.E. 128 (1909).
23. See generally Annot., 5 A.L.R.3d 466 (1966) for a collection of the "content" cases.
24. 86 N.H. 247, 166 Atl. 273 (1933).
25. *Id.* at , 166 Atl. at 274.
26. *E.g., In re* Falvey's Will, 15 App. Div. 2d 415, 224 N.Y.S.2d 899 (1962).
27. Langdon v. Astor's Ex'r., 16 N.Y. 9 (1857).

Estate[28] allowed a gift to pass to devisees and legatees under the will of the testator's daughter after recognizing that the gift could not be upheld on the theory of a power of appointment because the daughter had predeceased the testator. The will was nevertheless referred to for determining to whom the gift should pass. In *Leary v. Liberty Trust Co.*[29] a bequest to the estate of the testator's brother was upheld.

In none of these exemplary cases were the technical requirements for incorporation by reference or power of appointment met; however, the courts were unwilling to let the clear intention of the testator be frustrated by the technical requirements. The results are justified under the doctrine of facts of independent significance. In cases in which the will of a third person is involved, there is a sufficient guarantee against fraud because the third party's will must be witnessed in accordance with the Statute of Wills.[30] The theory was apparently relied upon to sustain the use of a clause in a third person's will where such a clause had no purpose except to designate the testator's legatees.[31] There the act had no non-testamentary significance, but the will of the testator was carried out.

Trust agreements have also been held to be exemplary of the types of documents which may have significance apart from their effect upon the disposition of the property devised or bequeathed by the will.[32] Problems arise both where the trust has no existing corpus and where the trust is amendable and revocable.[33] If the trust has no corpus, it may have the status of a "shell without a body,"[34] and gifts to it are said to be void because of lack of non-testamentary significance.[35] Where the trust is amendable, the problem is the determination of the testator's

28. 111 N.Y. 410, 18 N.E. 718 (1888).

29. 272 Mass. 1, 171 N.E. 828, 69 A.L.R. 1239 (1930). *Contra* Gardner v. Anderson, 114 Kan. 778, 227 Pac. 743 (1923), *aff'd* 116 Kan. 431, 227 Pac. 747 (1924), on grounds that an estate is not a person or legal entity capable of taking property.

30. RESTATEMENT, PROPERTY § 34(f) (1940).

31. Condit v. DeHart, 62 N.J.L. 78, 40 Atl. 776 (1898).

32. This is the test used by RESTATEMENT (SECOND), TRUSTS § 54 (1959) for use of trust agreement to identify beneficiaries of the trust and the purposes of the trust.

33. See Palmer, *Testamentary Disposition to the Trustee of an Inter Vivos Trust,* 50 MICH. L. REV. 33 (1951).

34. *E.g.,* Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919, 920 (1961).

35. See Palmer, *Testamentary Disposition to the Trustees of an Inter Vivos Trust,* 50 MICH. L. REV. 33 (1951).

intention. Did the testator intend to leave property to the trust as it existed at the time of the execution of the will or to the trust as amended at his death? This problem led the court in *President & Directors of Manhattan Co. v. Janowitz*[36] to reject the doctrine of facts of independent significance where the trust is revocable and amendable. Another court has said that the "testatrix beyond doubt intended . . . to add property to the trust as it existed at her death."[37] The result seems to be correct for a testator probably does desire his gift to go to the trust as it exists at his death.

In *South Carolina Nat'l Bank v. Copeland*,[38] Sarah's gift to the trust could be upheld only upon application of the doctrine of facts of independent significance. Robert predeceased Sarah; therefore, a power of appointment in Robert could never become effective. Incorporation by reference would be impossible without a relaxation of the general standards. Sarah's will did not refer to Robert's will then in existence, but rather to the one which would be probated. The probated will was substantially different from the will in existence at the time Sarah executed her will.

The court's reason for refusing to apply the doctrine of facts of independent significance is hazy at best. One of the cases cited by the court as expositive of the doctrine contains a similar gift.[39] There the gift was to go to the executor and trustees under the will of testatrix's husband. The gift was to be distributed "according to the terms and conditions of the will of my said husband."[40] The intention of the donor is insignificantly changed if she then adds to the gift above the words, "as if the language in my said husband's will were copied at length herein with appropriate changes to make them a part of my will."[41] It is true that the added language is an attempt at incorporation by reference, but the failure of the attempt does not change the intention of the donor. Since Robert's will was an act with significance independent of the disposition of Sarah's property,

36. 260 App. Div. 174, 21 N.Y.S.2d 232 (1940).

37. Canal Nat'l Bank v. Chapman, 157 Me. 309, 171 A.2d 919, 920 (1961).

38. S.C. , 149 S.E.2d 615 (1966).

39. *In re* Gregory's Estate, 70 So. 2d 903 (Fla. 1954).

40. *Id.* at 905. Compare the language of this gift with Article III of Sarah's will in text at footnote 1 *supra*.

41. This is the language used by the court in South Carolina Nat'l Bank v. Copeland, S.C. , 149 S.E.2d 615, 619 (1966), with "husbands" substituted for "brothers."

reference to it should have been allowed in determining to whom and for what purposes the gift in Sarah's will was given. Whether she intended to set up a South Carolina trust, as the court found, or to contribute to an existing Texas trust, as seems more likely, application of the doctrine of facts of independent significance would have allowed Robert's will to declare the terms of the trust. Because the court chose to dispose of the case in another manner, the fate of the doctrine of facts of independent significance as applied to gifts to trustees under the will of another must be decided at a later date in South Carolina.

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