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Denis G. Stack

University of Nebraska College of Law

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MUNICIPAL FAIR EMPLOYMENT PRACTICES IN NEBRASKA

The city of Omaha recently enacted an ordinance regulating fair employment practices.¹ By the ordinance, employers, employment agencies and labor organizations are prohibited from discriminating against employees, job applicants or members on the basis of race, color, creed or national origin.² The ordinance was the center of much controversy; the assistant city attorney stated that the city lacked the power to enact the ordinance³ and the city's leading newspaper opposed the law.⁴

I. F.E.P. AROUND THE NATION

Twenty states⁵ and over thirty-five cities⁶ currently have Fair Employment Practices legislation. The earliest enactment was in New York in 1945.⁷ Despite the relatively large number of enactments, there have been few cases testing the constitutionality of F.E.P.⁸

¹ Omaha, Neb. Municipal Code c. 14.04 (1962).

² *Ibid.*

³ Opinion of F. A. Brown, Assistant City Attorney, Jan. 31, 1962 (on file at the *Nebraska Law Review*). For the purpose of this comment, it is assumed that the ordinance has been carefully drafted to avoid problems of ambiguity, and further that it is internally sound and enacted in accordance with the procedure of the Omaha Charter.

⁴ Omaha World Herald, Editorial, Feb. 8, 1962.

⁵ ALASKA COMP. LAWS ANN. § 43-5-1 (1958); CAL. LABOR CODE § 1410; COLO. REV. STAT. ANN. § 81-19-1 (1953); CONN. GEN. STAT. ANN. § 31-122 (1960); DEL. CODE ANN. § 19-170 (Supp. 1960); ILL. ANN. STAT. c. 48, § 851 (Smith-Hurd Supp. 1961); IND. ANN. STAT. § 40-2307 (Supp. 1961); KAN. GEN. STAT. ANN. c. 44, § 1001 (Supp. 1959); MASS. GEN. LAWS ANN. c. 151b, § 1 (1958); MICH. STAT. ANN. § 17.458 (Rev. 1960); MICH. STAT. ANN. § 17.458 (Rev. 1960); MINN. STAT. ANN. § 363.01 (1957); N.J. STAT. ANN. § 18:25-12 (Supp. 1961); N.M. STAT. ANN. § 59-4-1 (1953); N.Y. EXECUTIVE LAW c. 18, § 290; OHIO REV. CODE ANN. § 659.010 (Supp. 1961); PA. STAT. ANN. tit. 43, § 951 (Supp. 1960); R.I. GEN. LAWS ANN. § 28-5-1 (1956); WASH. REV. CODE § 49.60.010 (Supp. 1958); Wis. Stat. Ann. § 111.31 (Supp. 1961).

⁶ Ferman, *Discrimination in Employment*, 6 N.Y.L.F. 59, 65 (1960). For examples of specific city ordinances, see GRAVES, FAIR EMPLOYMENT PRACTICE LEGISLATION IN THE UNITED STATES 204-14 (1951).

⁷ GREENBERG, RACE RELATIONS AND AMERICAN LAW 192 (1959).

⁸ Annot., 44 A.L.R.2d 1138 (1955); *Railway Mail Ass'n v. Corsi*, 326 U.S. 88 (1945); *City of Highland Park v. Fair Employment Practices Comm'n*, 364 Mich. 508, 111 N.W.2d 797, 800 (1961).

This is probably explained on the federal level by the Supreme Court's decision in the *Railway Mail* case.⁹ There, a labor organization attacked the New York statute,¹⁰ on the grounds that it violated due process of law and impaired contract rights. These contentions were dismissed by the court as a distortion of the policy of the fourteenth amendment which was adopted to prevent discrimination on the basis of race or color.¹¹ Although the applicability of the statute to employers and employment agencies was not at issue, this case is decisive of the general validity of F.E.P. under the federal constitution.

The constitutionality of F.E.P. has been tested in only one state.¹² A city attacked the validity of the Michigan statute on the ground of vagueness.¹³ The court found the act sufficiently clear so as to provide due process of law.¹⁴

A variety of reasons have been offered to explain the lack of attacks on F.E.P. in the state courts. Proponents of F.E.P. argue that such legislation inspires a spirit of co-operation among em-

⁹ *Railway Mail Ass'n v. Crosi*, *supra* note 8.

¹⁰ N.Y. Executive Law, c. 18 § 290 (The act prohibited exclusion from membership in a labor organization because of race, color, creed, etc.).

¹¹ *Railway Mail Ass'n v. Crosi*, 326 U.S. 88, 93-94 (1945).

¹² *City of Highland Park v. Fair Employment Practices Comm'n*, 364 Mich. 508, 111 N.W.2d 797, 799 (1961). There are cases that have questioned the manner in which the act was applied. *Draper v. Clark Dairy Inc.*, 17 Conn. Supp. 93 (1954); *Holland v. Edwards*, 307 N.Y. 38, 119 N.E.2d 581 (1954); *Ross v. Arbury*, 206 Misc. 74, 133 N.Y.S.2d 62 (Sup. Ct. 1954).

¹³ MICH. STAT. ANN. § 17.458 (Rev. 1960).

¹⁴ *City of Highland Park v. Fair Employment Practices Comm'n*, 364 Mich. 508, 111 N.W.2d 797, 799 (1961). While not considering the problem of vagueness in the paper, it may be worthwhile to compare the Michigan statute with the Omaha ordinance. The Omaha ordinance provides: (§ 14.04.030)

"It shall be an unfair employment practice:

1. For an employer, because of race, religion, creed, color, national origin or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual, or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

The Michigan statute provides: (§ 17.458)

"It shall be an unfair employment practice:

(A) For any employer, because of race, color, religion, national origin or ancestry of any individual, to refuse to hire or otherwise discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any other matter, directly or indirectly related to employment, except where based on a bona fide occupational qualification.

ployers, employees and agencies administering the laws, so that they accept the rulings of the agencies and do not resort to the courts.¹⁵ A contrary view suggests that there is little incentive to contest the acts, since where resistance to F.E.P. is highest, *i.e.*, professional, semi-professional and supervisory positions, evasion is easiest; while in low level jobs, the demand for labor lowers resistance and combines with the difficulty of evasion to deter a court test.¹⁶

Some statutes do not have enforcement provisions,¹⁷ which obviously means there would be no sanctions or court orders to appeal from. A further factor deterring court tests may be the fear of adverse publicity by those businesses which depend upon a minority group for part of their market. And, undoubtedly the decision of the Supreme Court in the case of *Railway Mail Ass'n v. Crosi*¹⁸ has had some effect upon the attitudes of people at the state level.

Any one or more of these factors may operate to discourage a court test of the Omaha ordinance, but since the city attorney has advised against the act,¹⁹ a test case may be in the offering.

II. F.E.P. IN NEBRASKA

Attempts to pass an F.E.P. act in the Nebraska Legislature have been unsuccessful.²⁰ However, there is little doubt that a state has the power to do this.²¹ Particular authority for this viewpoint is found in *Messenger v. State*.²² The court quashed an indictment under the Nebraska public accommodation statute,²³ but stated:²⁴

¹⁵ Annot., 44 A.L.R.2d 1138 (1955).

¹⁶ Avins, Book Review, 46 CALIF. L. REV. 146 (1958).

¹⁷ *Ross v. Ebert*, 275 Wis. 523, 82 N.W.2d 315 (1957) (Negro could not compel union to admit him under state F.E.P. act, since there were no enforcement provisions). This act has subsequently been amended to provide enforcement. See WIS. STAT. ANN. §§ 111.31, 111.36 (Supp. 1961). The Omaha ordinance § 14.04.060 provides for either a \$500 fine or six months in jail or both for violations.

¹⁸ 326 U.S. 88 (1945).

¹⁹ Opinion of F. A. Brown, Assistant City Attorney, Jan. 31, 1962, (on file at the *Nebraska Law Review*).

²⁰ Neb. Leg. Journal, 72d Sess. 1310 (1961); 69th Sess. 1429 (1959).

²¹ GREENBERG, RACE RELATIONS AND AMERICAN LAW 193 (1959).

²² 25 Neb. 674, 41 N.W. 638 (1889) (barber refused to cut Negro's hair) (indictment quashed for insufficiency).

²³ NEB. REV. STAT. § 20-101 (Supp. 1954).

²⁴ *Messenger v. State*, 25 Neb. 674, 41 N.W. 638 (1889). Generally such statutes have been upheld. See *Bob-ho Excursion Co. v. Michigan*, 333 U.S. 28 (1948). See also Annot., 49 A.L.R. 505 (1927).

"There is no doubt of the authority of the state to prevent discrimination against certain individuals or races because of their color or previous condition." Admittedly, this was dictum, but a reading of the case suggests that the court was laying down a caveat that the statute was enforceable. Thus, if the state can regulate discrimination in such things as hotels, trains and restaurants, then they should be able to regulate discrimination in employment. While a distinction can be drawn between places of public accommodation and employment, the distinction seems insignificant when opposed to the power of the state.

It is conceivable that municipal F.E.P. might be regarded by the Nebraska court as a violation of the equal protection of the law. This argument has apparently not been raised before.²⁵ The basic issue would be whether the persons affected by the law constitute a valid class. While this question is somewhat beyond the scope of this comment, it is suggested that the ordinance appears to be acceptable on this ground also.

III. VALIDITY OF ORDINANCES IN GENERAL

Even if legislation is constitutional on the state level, to be valid on the municipal level it must survive three basic tests: (1) the ordinance must not conflict with the state law, (2) the state cannot have pre-empted the field, and (3) the city must have the legislative power to enact the specific type of legislation.²⁶

A. CONFLICT WITH STATE LAW

The balancing of interests between the state and the city raises issues which are analogous to the state-federal constitutional problems of powers reserved to the states, those held concurrently, and those enumerated of the federal government. Thus, there will be areas in which the city has exclusive jurisdiction, others where the state will prevail, and still others where both city and state can act concurrently.

In Nebraska, a home rule city will prevail where an ordinance and state law conflict, if the conflict is over a matter of strictly local concern.²⁷ While the line between local and statewide concern is not always clear,²⁸ the regulation of conditions of employment and

²⁵ See text at notes 9 and 12 *supra*.

²⁶ Axelrod, *Home Rule*, 30 NEB. L. REV. 224 (1951).

²⁷ *Id.* at 225, 226, 234.

²⁸ *Id.* at 234; Winter, *Municipal Home Rule, A Program Report?*, 36 NEB. L. REV. 447, 459 (1957). The following have been held matters of local

labor seems to be of statewide concern. So, if there is a conflict between the Omaha ordinance and state law, the state law will prevail. It appears, however, that the ordinance merely extends the area covered by the existing statutes and does not conflict with them.²⁹

B. PRE-EMPTION BY THE STATE

The distinction between pre-emption by the state and conflict with state law is sometimes more form than substance. It has been said that pre-emption occurs when the state has *intended to occupy the field*.³⁰ When this happens, the ordinance must fail; but the courts have not consistently applied the rule.³¹

The Nebraska Legislature has legislated extensively in the field of labor, and there is strong evidence of an intent to occupy the field.³² But, the legislature has specifically refused to legislate on discrimination in labor except in a very limited area.³³ This raises the question of whether legislative silence should be construed as an intent to occupy the field.

There is dicta in the case of *Consumer's Coal Co. v. City of Lincoln*,³⁴ to the effect that the city can act so long as the state has

concern: paving of streets, *Sandell v. City of Omaha*, 115 Neb. 861, 215 N.W. 135 (1937); imposition of city taxes, *Eppley Hotels v. City of Lincoln*, 133 Neb. 550, 276 N.W. 196 (1937); extensions of water mains and assessments therefore, *Pester v. City of Grand Island*, 127 Neb. 440, 225 N.W. 923 (1934); issuance of bonds to finance a municipal airport, *State ex rel. Lincoln v. Johnson*, 117 Neb. 301, 220 N.W. 273 (1928). Matters of statewide concern were: eminent domain, *Nagle v. City of Grand Island*, 144 Neb. 67, 12 N.W.2d 540 (1943); fireman's pensions, *Oxberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942); regulation of surface transportation systems, *Omaha and C.B. St. Ry. v. City of Omaha*, 125 Neb. 825, 252 N.W. 407 (1934). Matters of mutual concern: gambling, *State ex. rel. Hunter v. Araho*, 137 Neb. 389, 289 N.W. 545 (1940); alcoholic beverages, *Bodkin v. State*, 132 Neb. 535, 272 N.W. 547 (1937).

²⁹ NEB. REV. STAT. § 20-101 (Supp. 1960) (prohibits discrimination in places of public accommodation); NEB. REV. STAT. § 48-214 (Supp. 1960) (racial discrimination by collective bargaining agents prohibited); NEB. REV. STAT. § 48-215 (Supp. 1960) (racial discrimination by firms producing or distributing military and naval supplies is prohibited).

³⁰ *Axelrod, Home Rule*, 30 Neb. L. Rev. 224, 225 (1951) (Emphasis added).

³¹ *Ibid.*

³² NEB. REV. STAT. §§ 48-101-912 (Supp. 1960). See note 29 *supra*.

³³ NEB. LEG. JOURNAL, 72d Sess. 1310 (1961), 69th Sess. 1429 (1959); NEB. REV. STAT. § 48-214-15 (Supp. 1960). See note 29 *supra*.

³⁴ "It [the city] may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legisla-

not; but it is doubtful how far the court will apply this concept.³⁵ And, there is authority in the other states that legislative silence may be construed as pre-emption.³⁶

If the Nebraska court should follow this line of cases, it will force the city into a *cul de sac*, where the city cannot act while the state will not. It is suggested that this approach violates the basic philosophy of home rule and should not be followed.

C. MUNICIPAL LEGISLATIVE POWER

If the ordinance survives these first two tests, the problem remains whether the city has the power to enact the ordinance. Generally, municipal legislative power is derived from the state constitution and statutes.³⁷ In determining the scope of this power, Dillon's Rule is applied to the statutory or constitutional grant. By this Rule, the city's legislative power is limited to those powers expressly granted, necessarily or fairly implied, or essential to the declared objects and purposes of the municipality.³⁸

Theoretically, home rule frees the city from the narrow re-

tion, but upon which the state has not spoken, until it speaks." *Consumer's Coal Co. v. City of Lincoln*, 109 Neb. 51, 59, 189 N.W. 643, 646 (1922) (dictum).

³⁵ Winter, *Municipal Home Rule, A Progress Report?*, 36 NEB. L. REV. 447, 458 (1957).

³⁶ *Stephenson v. City of Palm Springs*, 52 Cal. 2d 407, 340 P.2d 1009 (1959); *Chovez v. Sargent*, 52 Cal. App. 2d 162, 329 P.2d 579 (1st Dist. 1958) (municipal right to work ordinances held invalid because state had pre-empted the field, despite no specific statutes); *City of Golden v. Ford*, 141 Colo. 472, 348 P.2d 951, 953 (1960) quoting with approval *Wilson v. Beville* 47 Cal. 2d 852, 306 P.2d 789 (1957) "[I]ts intent with regard to occupying the field to the exclusion of all local regulations is not to be measured alone by the language used, but by the whole purpose and scope of the legislative scheme."

The problem of silence and pre-emption exists on the state-federal level. A recent decision of questionable merit held that the Colorado F.E.P. statute was not applicable to a common carrier in interstate commerce because of pre-emption by the federal government. *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 368 P.2d 970 (Colo. 1962). The majority opinion overlooks the fact that the *Railway Mail* case, see text at notes 9, 10, 11 *supra*, held the New York law enforceable on a union working on a common carrier in interstate commerce. Further, the authorities cited by the majority were cases holding state laws which demanded segregation in interstate commerce unenforceable because of the fourteenth amendment.

³⁷ ANTEAU, *MUNICIPAL CORPORATION LAW* §§ 2.00-2.14, 3.00-3.36 (Supp. 1961); 2 McQUILLAN, *MUNICIPAL CORPORATIONS* § 10.09 (Supp. 1961).

³⁸ 2 McQUILLAN, *MUNICIPAL CORPORATIONS* § 10.09 (Supp. 1961).

straints of Dillon's Rule and the control of the state legislature.³⁹ Unfortunately, in Nebraska, the theory has seldom been put into practice.

The Nebraska Constitution provides for home rule,⁴⁰ and in the leading Nebraska case, *Consumer's Coal Co. v. City of Lincoln*,⁴¹ the court held that a home rule charter could be construed as either a grant or limitation of power.⁴² By so doing, the court effectively emasculated home rule, since in the same opinion it stated that when a charter was construed as a grant of power, then the narrow restraints of Dillon's Rule would apply to the charter to determine the scope of the city's legislative power.⁴³ Of course, if the charter was a limitation of power, then the city would have all powers except those specifically prohibited.⁴⁴ However, no Nebraska case has been found in which the court has construed a charter as a limitation of power.

In the *Consumer's Coal* case, Lincoln passed an ordinance creating a municipal coal and wood yard in competition with private concerns. In holding the charter a grant of power, the court was apparently influenced by the following factors: the home rule charter was only a copy of the state legislative charter,⁴⁵ and the charter specified subjects upon which the city council could legislate.⁴⁶ Since the charter "defined" rather than "limited" the powers of the city, it could only be a grant of power and not a limitation.⁴⁷

Subsequent cases have added nothing but confusion to this explanation of what constituted a grant of power. A recent decision indicated that home rule charters are grants of power per se.⁴⁸ This would suggest that the holding in the *Consumer's Coal* case⁴⁹ that a charter might only be a limitation of power, is no longer the law.

³⁹ Winter, *Municipal Home Rule, A Progress Report?*, 36 NEB. L. REV. 447, 450, 451 (1957).

⁴⁰ NEB. CONST. art XI, § 5.

⁴¹ 109 Neb. 51, 189 N.W. 643 (1922).

⁴² *Id.* at 66, 189 N.W. at 649.

⁴³ *Id.* at 64-69, 189 N.W. at 649-50. This point was reaffirmed, *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 248, 207 N.W. 172, 174 (1926).

⁴⁴ *Ibid.*

⁴⁵ *Id.* at 55, 189 N.W. at 645.

⁴⁶ *Id.* at 68, 189 N.W. at 649.

⁴⁷ *Id.* at 68, 69, 189 N.W. 649, 650.

⁴⁸ *Philson v. City of Omaha*, 167 Neb. 360, 362, 93 N.W.2d 13, 15 (1952).

⁴⁹ *Consumer's Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

However, it seems that the court merely overstated its position, for the authority it relied on merely held that the 1922 Omaha Charter was a grant of power,⁵⁰ and further, the court in that instance was relying on the *Consumer's Coal* case and *Fallsdorf v. Grand Island*.⁵¹ The holding in these cases was that the specific charters under consideration were grants of power.⁵² Apparently then, *Consumer's Coal* is still the leading Nebraska case.

IV. OMAHA'S CHARTER-GRANT OR LIMITATION

With the above analysis in mind, it should be noted that the present Omaha Charter⁵³ was adopted pursuant to the home rule provision of the constitution,⁵⁴ and is a substantial change from the previous charter, which was a copy of the former legislative charter. Section 1.03 provides:⁵⁵

The city shall have all powers of local self government and home rule and *all other powers that it is possible for it to have* at the present and in the future under the constitution of the State of Nebraska. The city shall also have all powers that now are, or hereafter may be granted by the laws of the State of Nebraska. Except for powers expressly denied it by the charter, the city shall also have all powers granted or claimed by it in the Home Rule Charter of 1922, as amended, but the city shall not be limited to these powers. All powers shall be exercised in the manner prescribed herein, in such manner as shall be provided by ordinance.

Since the court suggests in the *Consumer's Coal* case that the most power a city could have would be under a charter which was a limitation of power,⁵⁶ and since the present Omaha Charter allocates all *possible* powers to the city, it would follow that this charter is a limitation of power.

However, the past decisions of the court indicate a predisposition towards construing charters as grants of power.⁵⁷ While the 1956 Omaha Charter does not make the mistake of "defining" powers in terms of police, health or general welfare, it does set out in broad categories the various duties of specific divisions of govern-

⁵⁰ *Wagner v. City of Omaha*, 156 Neb. 163, 166, 55 N.W.2d 490, 493 (1952).

⁵¹ 138 Neb. 212, 292 N.W. 498 (1940).

⁵² *Id.* at 219, 292 N.W. at 602; *Consumer's Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

⁵³ Omaha, Neb. Municipal Charter of 1956 § 1.03 (Emphasis added).

⁵⁴ Neb. Const. art XI, § 5.

⁵⁵ Omaha, Neb. Municipal Charter of 1956, § 1.03.

⁵⁶ *Consumer's Coal Co. v. City of Lincoln*, 109 Neb. 51, 68-69, 189 N.W. 643, 649, 650 (1922).

⁵⁷ See text at notes 49-53 *supra*.

ment,⁵⁸ and little more than this was necessary in the *Consumer's Coal* case for the court to hold Lincoln's charter a grant of power.⁵⁹

It is suggested that the intent manifested by Section 1.03 of the Omaha Charter⁶⁰ should be implemented and the charter construed as a limitation of power. The language of the charter seems to require this and the *Consumer's Coal* case seems to permit it. Furthermore, the distinction between a grant and limitation of power has only served to allow the court to espouse the philosophy of home rule, while denying its practice in Nebraska, except in very narrow confines.

If the court should construe the charter as a limitation of power, it would follow that since there is no specific prohibition against F.E.P., then the ordinance is valid.

But, if in spite of the apparent intention of the framers of the charter, the court should construe the charter as a grant of power, then under the rule of the *Consumer's Coal* case,⁶¹ it would be necessary to apply Dillon's Rule to the charter to determine if the ordinance was within the scope of the city's power.⁶²

First, is the power expressly granted? Obviously, the charter does not specifically state that the city can regulate fair employment practices.⁶³ By the same token, the charter does not grant *any specific* power to the city. Thus the express grant of Section 1.03 is either so broad that it includes the power to legislate in the area, or all powers of the city must be determined by the second part of Dillon's Rule, *i.e.*, is the power fairly or necessarily implied.

Certainly Section 1.03 is broad enough to imply about anything, but in addition Section 4.04 states that the Human Relation Board shall:⁶⁴

- (1) Advise the Mayor and Council on all matters concerning the administration and enforcement of laws and ordinances prohibiting discrimination against persons because of race or political or religious opinions or affiliations.

It must be fairly implied that this section presupposes the existence of F.E.P. type ordinances and logically the existence of the ordi-

⁵⁸ Omaha, Neb. Municipal Charter of 1956, art. II, council; art. III, executive; art. IV, boards, commissions and authorities; art. V, finances; art. VI, personnel; art. VII, planning; art. VIII, miscellaneous.

⁵⁹ See text at note 47 *supra*.

⁶⁰ See text at note 56 *supra*.

⁶¹ See text at note 43 *supra*.

⁶² See text of Dillon's Rule at note 38 *supra*.

⁶³ Omaha, Neb. Municipal Charter of 1956, § 1.03.

⁶⁴ *Id.* § 4.04.

nances implies the power to pass such ordinances. On this ground alone, the ordinance should be valid.

But, perhaps additional support for the ordinance may be found under the third part of Dillon's Rule: Is the ordinance essential to the declared objects and purposes of the city? The well being of its citizenry is generally acknowledged as an object and purpose of government, and should be recognized as such, for the city of Omaha. And while this paper will not attempt to argue pro or con regarding the sociological aspects of racial discrimination in employment, it is suggested that F.E.P. will have beneficial effects in welfare of minority groups and through them will benefit the city as a whole. Thus, the ordinance may be valid under the third section of Dillon's Rule also.

V. CONCLUSION

F.E.P. has been held constitutional by those courts that have considered it, and the *Messenger* case ⁶⁵ suggests that it would be valid in Nebraska. There is no conflict between F.E.P. and existing statutes; and to say that the state has pre-empted the field by refusing to act, will merely subvert the concept of home rule and prevent Omaha from trying to solve one of its problems. Finally, whether the Omaha charter is a grant or limitation of power, it is suggested that the city has the power to enact such legislation.

Denis G. Stack, '63

⁶⁵ See text at note 22 *supra*.