foment the prejudice which the system of segregation is designed to obviate.[24] Construction of separate higher institutions, which would entail expense alleged to be disproportionate to the limited number of Negro students on these levels. Of the three courses the first has been dismissed as an improper solution.[25] Rather than comply with the second,[26] it is likely that the states will seek to extend segregation to the professional schools.

In view of the traditional delicacy with which the Court has handled the problem of southern race relations, the instant decision represents a bold and laudable affirmation of Negro rights. The possibility of judicial action, however, is limited[27] and the far-reaching consequences claimed for the decision[28] are not to be expected. The principle of segregation is preserved. Aside from the limitation that equal facilities must be provided by and within the state, no hint is given that the court will further whittle the doctrine. In theory segregation is not inequality but the experience of educators is that segregation makes for inequality.[29] Skepticism therefore may be expressed whether the facilities furnished will as a practical matter equal the opportunities for acquiring a professional education on a liberal out-of-state scholarship plan.

Contracts—Acceptance—Course of Conduct as Such in Bilateral Contracts— [Federal].—The plaintiff was under contract to construct certain buildings in 140 days. Work was to begin by Nov. 28, 1932, with provisions for a daily penalty for delay. On Nov. 23, 1932, the defendant's agent submitted to the plaintiff a "quotation" embodying the terms upon which the steel company would supply material needed in the buildings. A revised quotation was given the plaintiff on Jan. 7, 1933. Both of these instruments provided that written approval of the "Home Office" of the steel company was needed before a binding agreement was effected. The steel company, on Jan. 21, 1933, sent the plaintiff certain drawings stamped with the notation that they did not constitute approval of the contract. On Jan. 28, 1933, the credit department

[24] See dissenting opinion of Justice McReynolds, 59 S. Ct. 232, 238 (1938).

[25] Cumming v. Board of Education, 175 U.S. 528 (1899). On the question of remedy in case the State neither permits Negroes to enter white schools set apart for whites, nor provides them separate facilities see Black v. Lenderman, 156 Ark. 476, 246 S.W. 876 (1923) where it was intimated that the proper remedy was mandamus to compel erection of separate schools. Such remedy was declared unavailable in the absence of a statute authorizing separate facilities in University of Maryland v. Murray, 169 Md. 478, 487, 182 Atl. 590, 594 (1936). *Cf.* Jones v. Board of Education, 90 Okla. 233, 217 Pac. 400 (1923).

[26] The respondent in the instant case contended that it was "contrary to the constitution, laws and public policy of the State to admit a Negro as a student in the University of Missouri." 59 S. Ct. 232, 233 (1938). See Ala. Const. art. 14, § 256; Ga. Const. art. 8, § 1; Mo. Const. 11 § 3; S.C. Const. art. 11, § 7; Tenn. Const. art. 11, § 12; Tex. Const. art. 7, § 7; W.Va. Const. art. 12, § 12.

[27] "The prejudice, if it exists, is not created by law, and probably cannot be changed by law." Ward v. Flood, 48 Cal. 36, 56 (1874).

[28] See 32 Time 20 (Dec. 26, 1938); 147 Nation 693 (Dec. 24, 1938).

[29] See Symposium, The Courts and the Negro Separate School, 4 J. of Negro Educ. 289–464 (1935); Thompson, Education of the Negro in the United States, 42 School and Society 625 (1935); Harris and Spero, The Negro Problem, 11 Enc. Soc. Sci. (1933); and note, Segregation in Educational Institutions, 82 U. Pa. L. Rev. 157 (1933).

of the steel company asked the plaintiff for a financial statement. The credit department, on Feb. 16, 1933, and again on Feb. 22, demanded that plaintiff pay a debt incurred under a previous contract, stating that the new agreement could not be submitted to the proper officials for approval until this had been done. On Mar. 3, 1933 the account was settled and on Mar. 20, 1933, the plaintiff was notified that the steel company rejected the contract. Although he immediately secured another subcontractor the plaintiff was more than fifty days late in finishing the buildings. *Held*, judgment for the plaintiff reversed and a new trial ordered with instructions to grant the defendant's request for a directed verdict. As a matter of law there was no acceptance of the plaintiff's offer. *Truscon Steel Co. v. Cooke.*[1]

The unfortunate decision in the instant case may be explained as a result of the failure of the majority of the court to perceive fully the issues raised. Although it is frequently stated as a general rule that an offeree's silence does not operate as assent, a slowly growing exception to such a broad statement is discernible.[2] Statements to the effect that certain circumstances will impose upon the offeree a duty to reply to offers made to him are plentiful.[3] It is submitted that, at best, such a formulation is misleading. Properly considered the problem is whether the offeree has engaged, throughout the entire transaction, in a course of conduct which, in the light of all of the circumstances, would justify a reasonable man in assuming that an intent to accept was manifested. Silence at a particular stage of the transaction is only one of the factors which may warrant such an inference.[4] Thus stated the rule would seem to be fully in accord with the objective theory of contracts[5] and resort to notions of estoppel[6] or duty to reply is unnecessary.

An examination of the cases indicates that the courts have generally failed to perceive the true foundation of the rule and as a result have been unduly hesitant in extending its scope. In only one situation is its application unquestionably recognized. Where the offeree has, on previous occasions, carried out his part of the agreement without communicating an express acceptance to the offeror, it has been held that a failure to reject an offer within a reasonable time will operate as assent.[7] While the inferential effect of prior dealings cannot be doubted, the emphasis which some authorities[8] have placed upon such circumstances seems, in view of the general principles outlined above, unwarranted and has, in at least one case, led to an unfortunate re-

[1] 98 F. (2d) 905 (C.C.A. 10th 1938).

[2] 1 Williston, Contracts § 91c (rev. ed. 1936).

[3] "The circumstances must be such as to impose upon the offeree a duty to speak if he is to be held bound to a contract by remaining mute." Wold v. League of the Cross, etc., 114 Cal. App. 474, 479, 300 Pac. 57, 60 (1931).

[4] "Silence does not often constitute assent but it may, coupled with other circumstances, have some weight in ascertaining the conclusion to be drawn from the acts of the party charged with having given the assent." Peirce Oil Corp. v. Gilmer Oil Co., 230 S.W. 1116, 1117 (Tex. Civ. App. 1921).

[5] 33 Harv. L. Rev. 595 (1920).

[6] See Lamborn v. Hardie Co., 1 F. (2d) 679 (C.C.A. 6th 1924).

[7] Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N.E. 495 (1893); Sioux Falls Adjustment Co. v. Pennsylvania Soo Oil Co., 53 S.D. 77, 220 N.W. 146 (1928).

[8] Rest., Contracts § 72 1(c) (1932).

sult. In *Excelsior Stove & Mfg. Co. v. Venturelli*[9] a purchaser returned to the seller certain stoves, bought for resale some two years earlier, with the request that a note given in payment be cancelled. The court held that payment of the freight charges and retention of the stoves from September to March, without replying to the offer, did not, in the absence of prior dealings of a similar sort, warrant an assumption that the proposal had been accepted.[10] The courts have generally been willing to extend the rule beyond the limits which this case indicates. Retention of money and notes given with an order for goods,[11] retention after an alternative offer of goods sent under the mistaken belief that an agreement for their purchase had been reached,[12] exercise of dominion consonant with ownership over chattels given on approval,[13] and the peculiar relationship of the parties[14] have all, when combined with a failure expressly to reject the offer, been held sufficient to constitute acceptance. Some courts have gone so far as to hold that sending out an agent to solicit offers is sufficient to warrant an offeror in believing that a failure to repudiate the agreement within a reasonable time is a manifestation of an intention to approve.[15] These cases have met with some disapproval[16] and the majority opinion in the cases involving insurance contracts is to the contrary.[17] There is, however, much in a situation like this which would warrant an inference that silence meant assent. The terms of the agreement are not the result of free bargaining, but are usually suggested by the agent. Since he is presumably acting in accord with instructions received from his principal, it seems reasonable for the person solicited to assume, in the absence of an express repudiation, that the agreement was approved. Such a line of argument would seem particularly applicable to the insurance situation and has been followed in a few cases.[18]

[9] 290 Ill. App. 502, 8 N.E. (2d) 702 (1937).

[10] Consider in connection with this case the well established doctrine that a creditor who accepts any payment given as full satisfaction of a disputed or unliquidated claim is bound thereby and any refusal to so regard it is inoperative. Rest., Contracts § 420 (Ill. Ann. 1936).

[11] Enterprise Mfg. Co. v. Campbell, 121 S.W. 1040 (Ky. 1909).

[12] Wheeler v. Klaholt, 178 Mass. 141, 59 N.E. 756 (1901). For a criticism of this case see 33 Harv. L. Rev. 595, 596 (1920).

[13] Ostman v. Lee, 91 Conn. 731, 101 Atl. 23 (1917).

[14] Laredo Nat'l Bank v. Gordon, 61 F. (2d) 906 (C.C.A. 5th 1932) (where a client asked a lawyer what fee he would accept should a settlement of the case be effected by the client).

[15] Peterson v. Graham-Brown Shoe Co., 210 S.W. 737 (Tex. Civ. App. 1919); Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S.W. 817 (1919); Hendrickson v. International Harvester Co., 100 Vt. 161, 135 Atl. 702 (1927). While the courts here appear to announce the broad rule, it should be noted that there are additional complicating factors in these cases.

[16] 29 Yale L.J. 441 (1920); 75 U. of Pa. L. Rev. 674 (1927).

[17] Prosser, Delay in Acting on an Application for Insurance, 3 Univ. Chi. L. Rev. 39, 44 (1935) and cases cited. In addition to following the majority rule in Miller v. Illinois Life Ins. Co., 255 Ill. App. 586 (1930), the Illinois courts have refused to hold the insurance company liable on a tort theory, Bradley v. Federal Life Ins. Co., 295 Ill. 381, 129 N.E. 171 (1920).

[18] Preferred Acc. Ins. Co. v. Stone, 61 Kan. 48, 58 Pac. 986 (1899); Cloyd v. Republic Mut. Fire Ins. Co., 137 Kan. 869, 22 P. (2d) 431 (1933); See Robinson v. United States Benevolent Society, 132 Mich. 695, 94 N.W. 211 (1903). It should be noted that in each of these cases a first premium was paid to and retained by the agent.

From the foregoing discussion the decision in the principal case seems wrong. Not only was the offer solicited by the agent of the steel company, but the home office engaged in correspondence with the plaintiff which might have been interpreted to indicate that the only obstacle in the way of final approval was the settlement of the old account. Since the jury had decided that the circumstances warranted an inference of assent, the court should have permitted its verdict to stand.[19]

Family Relations—Wrongful Death—Action by Administrator of Estate of Minor Child against Unemancipated Brother—[Wisconsin].—An unemancipated minor, driving his father's automobile, negligently caused the death of his six year old brother. The special administrator of the estate of the deceased minor brought suit under the wrongful death statute[1] against the brother and the father's insurance company, on a liability policy which by statutory requirement[2] inured to the benefit of anyone driving the automobile with the owner's consent. The death statute making the parents beneficiaries limited recovery to those situations in which the deceased could have recovered had he survived. *Held*, recovery will not be denied because the suit is between members of a family, but since the father is precluded from benefiting because of an express clause in the policy, only the mother's share of the damages will be awarded. *Munsert v. Farmers Mutual Automobile Ins. Co.*[3]

The once uniformly established rule that no personal injury actions[4] could be maintained between members of a family is said to be predicated on the desirability of preserving parental authority and domestic tranquillity.[5] It seems obvious that in

[19] Cavanaugh v. D. W. Ranlet Co., 229 Mass. 366, 118 N.E. 650 (1918).

[1] Wis. Stats., 1937, § 331.03, 331.04.

[2] Wis. Stats., 1937, § 204.30, 204.33. [3] 281 N.W. 671 (Wis. 1938).

[4] Generally actions arising under wrongful death statutes involve the same principles since they are based upon the right of the deceased to have maintained an action for personal injuries had he survived: Emery v. Rochester Telephone Corp., 271 N.Y. 306, 3 N.E. (2d) 434 (1936); Pieczonka v. Pullman Co., 89 F. (2d) 353 (C.C.A. 2d 1937); Lynch v. Lynch, 195 Atl. 799 (Del. 1937).

[5] It is generally held that one spouse may not maintain a personal injury action against the other: Thompson v. Thompson, 218 U.S. 611 (1910); Aldrich v. Tracy, 222 Iowa 84, 269 N.W. 30 (1936); Anthony v. Anthony, 135 Me. 54, 188 Atl. 724 (1937); David v. David, 161 Md. 532, 157 Atl. 755 (1932) (wife barred from suing partnership of which husband was a member). A parent may not sue his minor child for personal injury: Duffy v. Duffy, 117 Pa. Super. 500, 178 Atl. 165 (1935); Turner v. Carter, 169 Tenn. 553, 89 S.W. (2d) 751 (1936); Cafaro v. Cafaro, 118 N.J.L. 123, 191 Atl. 472 (1937). And a minor child may not sue its parent: Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927); Luster v. Luster, 13 N.E. (2d) 438 (Mass. 1938). For the effect of emancipation and the reaching of majority see: Farrar v. Farrar, 41 Ga. App. 120, 152 S.E. 278 (1930); Goldstein v. Goldstein, 4 N.J. Misc. 711, 134 Atl. 184 (1926); McCurdy, Torts between Persons in Domestic Relation, 43 Harv. L. Rev. 1030 (1930); 18 Boston U.L. Rev. 468 (1938); 26 Geo. L.J. 139 (1937); 86 U. of Pa. L. Rev. 909 (1938).

Generally if a person is precluded from direct recovery for personal injury because he and the tortfeasor are members of a family group, he cannot recover from the employer of the tortfeasor: Maine v. James Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Emerson v. Western Seed & Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927).